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ARTICLES

INTERNET PIRACY OF LIVE SPORTS TELECASTS

MICHAEL J. MELLIS*

I. INTRODUCTION

Live sports telecast rights are a core asset of the world's premier amateur and professional sports leagues and organizations, often commanding significant rights fees from television network rights holders.¹ Sports organizations also utilize their live sports telecasts in team and league-owned pay television networks and interactive media businesses. These organizations and related stakeholders are therefore vulnerable to piracy of their live telecasts. Unfortunately, at a point in time when many Internet users are increasingly comfortable consuming video online,² a new global paradigm of online piracy of live sports telecasts is emerging with worrisome growth characteristics. This is irrespective of the fact that it is a particularly egregious

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1. The *Sports Business Journal* reported that as of their respective 2007 fiscal years, News Corporation's sports programming obligations over the life of its contracts were approximately \$17.1 billion and Walt Disney Corporation's was \$19.2 billion. Daniel Kaplan, *Nets' Bill for Sports on the Rise*, SPORTS BUS. J., Dec. 10, 2007, at 1.

2. The amount of web-based video provided over the Internet continues to increase significantly each year. In July 2006, 107 million Americans, three out of every five Internet users, viewed video online. In July 2006, about 60 percent of U.S. Internet users downloaded videos. More than 7 billion videos were downloaded that month.

Press Release, Fed. Comm'n Comm'n, FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report (Nov. 27, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.doc; see also Brian Stelter, *Serving Up Television Without the TV Set*, N.Y. TIMES, Mar. 10, 2008, at C1 ("[W]atching television episodes on a computer screen is now a common activity for millions of consumers.").

form of rights infringement. The purpose of this article is to examine the matter, which to date has received limited attention.

Part II of this article analyzes the Internet live sports telecast piracy problem. Two technologies enable it: unicast and streaming over peer-to-peer networks (SOP). SOP is showing signs of dominating digital piracy of live television programming of all types, including live sports telecasts. Parts III–V consider certain private and public sector responses to the problem. Part III analyzes anti-piracy litigation in this area and identifies likely aspects of foreseeable litigation. Because the Internet live sports telecast piracy problem largely occurs off-shore, with pirates engaging in “intellectual property arbitrage”³ among variances in laws and enforcement mechanisms of nations, Part IV discusses initiatives to promote international cooperation. Part V examines the emerging trend toward the development and adoption of counter-technologies to curb online content piracy generally and how it relates to online live telecast piracy.

II. THE INTERNET LIVE SPORTS TELECAST PIRACY PROBLEM

There are two technologies enabling online live sports telecast piracy: (1) unicast streaming and (2) streaming over peer-to-peer networks. Unicast streaming involves “one-to-one” distribution of a media stream from a central server to an end user’s computer, where it is converted through a media player into an audiovisual format.⁴ Streaming over peer-to-peer networks involves a media stream being passed through the Internet among network participants, rather than from a central server to an end user.⁵ In both cases, the technologies enable real-time retransmissions of live telecast signals on a worldwide basis.

Unicast streaming is the primary means for distribution of live video on the Internet. In 2007, NetResult, an intellectual property protection firm based in London, England, identified more than 370 unicast streaming websites engaged in the piracy of live sports telecasts.⁶ As will be discussed in Part III, several of these websites have been the target of anti-piracy lawsuits brought by sports and other live event organizations.

That said, signs are pointing toward the rise of SOP as the dominant driver

3. Pamela Samuelson, *Intellectual Property Arbitrage: How Foreign Rules Can Affect Domestic Protections*, 71 U. CHI. L. REV. 223, 223 (2004).

4. See Definition of Unicast, ZDNET.COM, <http://dictionary.zdnet.com/index.php?d=Unicast> (last visited Jan. 15, 2008).

5. See Definition of Peer-to-Peer Networks, ZDNET.COM, <http://dictionary.zdnet.com/definition/P2P+TV.html> (last visited Jan. 15, 2008).

6. Interviews with Christopher Stokes, President, NetResult (Nov. 26, 2007, & Jan. 18, 2008).

of online live sports piracy. This technology has come on strong in a short period of time. In September 2005, *The Wall Street Journal* identified the People's Republic of China as the "hotbed" of pirate services utilizing SOP technology, reporting that "a rising number of people are using [such services] to watch channels such as HBO, ESPN and MTV."⁷ SOP services now operate out of several countries, including China, South Korea,⁸ and the United States, and make available end user interfaces in languages including Chinese, English, and Korean. They routinely make hundreds of "channels" of live television network programming available from networks across the globe. Evidence indicates that in 2007, SOP services were used to pirate programming from the following U.S. networks: ABC, CBS, Comedy Central, ESPN, Fox, HBO, NBA TV, NBC, NFL Network, Nickelodeon, Spike TV, TBS, TNT, and a number of regional sports networks.

In these services, pirated sports and other live event telecasts typically are either retransmitted with the rest of the telecasters' programming or parsed out and identified separately on service "channels."⁹ According to NetResult, nineteen SOP services have been identified that enable live sports telecast piracy, and more than 300 sites leverage off them, either by embedding SOP service streams into their own websites or linking to them.¹⁰ Evidence indicates that in 2007, SOP services were used to pirate thousands of hours of live sports telecasts, including those of the following sports leagues and

7. Geoffrey A. Fowler & Sarah McBride, *Newest Export from China: Pirated Pay TV*, WALL ST. J., Sept. 2, 2005, at 131. According to Chinese government statistics, as of March 2007, China has the world's largest population of Internet users, with approximately 225 million, compared to the United States' 217 million. Loretta Chao, *China Web Use Takes Leap*, WALL ST. J., Mar. 14, 2008, at 3. China's Internet penetration rate is only 19%, compared to the United States' 69.7%. *Id.* The Chinese government recognizes a corresponding rise in online piracy. See, e.g., Ben Blanchard, *China Says Struggling to Control Online Piracy*, REUTERS.COM, Jan. 17, 2008, <http://www.reuters.com/article/internetNews/idUSPEK3665020080117?sp=true> (quoting Mr. Yan Xiaohong, Deputy Director of the National Copyright Administration, as stating: "Especially following the rapid development of Internet technology, online piracy cases have proliferated [in China], and the fight is far from over").

8. See Jon Herskovitz & Jessica Kim, *TV Sets a Turn-Off for South Korea's Youth*, REUTERS.COM, Nov. 15, 2007, <http://www.reuters.com/article/technologyNews/idUSN1421636520071115> ("[I]n South Korea, peer-to-peer video services have exploded. . . . The Internet is the distribution platform of choice and the content at [one's] fingertips is a dizzying array of pirated TV shows and movies.").

9. Many of these services also have an on-demand aspect, making available previously recorded television shows and movies. As BBC News reported in November 2006, "The pirating of popular TV shows is a growing problem for the TV industry An on-demand culture plus the growing speed and uptake of broadband are making TV the most pirated asset on the Internet" Jane Wakefield, *Millions Turn to Net for Pirate TV*, BBCNEWS.COM, Nov. 27, 2006, <http://news.bbc.co.uk/2/hi/technology/6151118.stm>.

10. Interviews with Christopher Stokes, *supra* note 6.

organizations: Association of Tennis Professionals Tour, Fédération Internationale de Football Association (FIFA), MLB, Minor League Baseball, National Association of Stock Car Auto Racing, National Basketball Association (NBA), National Collegiate Athletic Association (NCAA) basketball and football, National Football League (NFL), National Hockey League (NHL), Professional Golfers Association (PGA) Tour, Premier League, The Championships, Wimbledon, Union of European Football Associations (UEFA), and United States Tennis Association (USTA).

These services are open doors, permitting any type of programming to be distributed by anyone, without regard to copyright, trademark, signal, and related rights. The primary source of programming is from individuals who route signals from their home cable or satellite television accounts onto SOP networks. To do this, one only needs to have a personal computer equipped with a PC-TV tuner, an inexpensive piece of hardware that comes standard in many personal computers, broadband internet access, and an SOP service's "broadcast software" download from the service's website.

What accounts for the spread of SOP live sports piracy outward from China to a more international footing? A turning point might have been the 2006 FIFA World Cup, culminating with the July 9, 2006 final match of Italy versus France. This live sports event with tremendous international popularity, evidenced by a reported cumulative global television audience for the final match of more than 715 million viewers,¹¹ appears to have served as a sort of showcase for SOP sports piracy. *CNET* reported that "thousands" downloaded a particular SOP service player to watch matches.¹² As companion *CNET Asia* reported about that service:

Can't afford to fork out for local pay-per-view? . . . Though we doubt the legality of this site (smacks of allofmp3.com to us), it's one of the best kept World Cup secrets in the peer-to-peer world. Imagine live video streams of World Cup matches from ESPN? It's a budget soccer fan's dream come true.¹³

Later in 2006, *BBC News* reported that "[a]lmost all English Premiership matches are available to watch live and for free, as are other leagues and sports. The coverage, mainly from Chinese sport channels, is put on peer-to-

11. 2006 FIFA World Cup Broadcast Wider, Longer and Farther Than Ever Before, FIFA.COM, Feb. 6, 2007, <http://www.fifa.com/aboutfifa/marketingtv/news/newsid=111247.html>.

12. Greg Sandoval, . . . Another Napster?, CNETNEWS.COM, Oct. 24, 2006, http://www.news.com/...Another-Napster/2100-1025_3-6128775.html.

13. CNET ASIA, Audio Arsonist, 2006, http://asia.cnet.com/reviews/techbuzz/audio_arsonist/0,39041384,3936729800.htm.

peer applications and can be watched anywhere in the world.”¹⁴ By the end of 2007, a significant amount of U.S.-originated live sports telecasts had been pirated via Chinese-based SOP services.

SOP’s rise is also attributed to the fact that, again from the end-user’s perspective, word about where to find these rogue services, and how to use them to watch programming, has spread virally through message boards, blogs, and “guerilla” or “linking” websites. These websites provide programming schedules and links to pirated content, including television programming.¹⁵

In the United States, word has also percolated up through mass media outlets. For example, in late 2007, several NFL regular season game telecasts were carried on an exclusive basis by the NFL Network. Fans without either DirecTV or a cable television service carrying NFL Network could not watch them at home. In a November 29, 2007 discussion about the matter on WFAN Sports Radio 66 New York’s top-rated *Mike and the Mad Dog* sports talk show, a listener called in and described how he found a “probably illegal” website where users could watch NFL Network games for free on the Internet.¹⁶

Looking at the SOP piracy problem from an economic perspective, there are other signs pointing to growth. By utilizing peer-to-peer technology as the means for video retransmission and consumption, neither individual “broadcasters” nor end users typically bear any additional bandwidth cost. The prerequisites for end users are simply broadband service access and SOP service player downloads, and for “broadcasters” a PC-TV tuner card. SOP piracy, therefore, has the advantage of being able to scale up to accommodate audiences of material size without marginal cost to the parties involved. Audience capacity limits are addressed by making a pirated sports telecast available on multiple channels.¹⁷ In contrast, unicast streaming can scale up

14. Ian Youngs, *Illegal Net Sport Faces Crackdown*, BBCNEWS.COM, Nov. 29, 2006, <http://news.bbc.co.uk/1/hi/entertainment/6192264.stm>.

15. Kevin J. Delaney, *Threat for Big Media: Guerilla Video Sites*, WALL ST. J., Apr. 17, 2007, at A1. In 2007, the Motion Picture Association of America (MPAA), on behalf of its member movie studios, commenced three copyright infringement lawsuits against guerilla sites in Los Angeles, California federal district court: *Disney Enters. Inc. v. Showstash.com*, CV 07-4510 (C.D. Cal. filed Sept. 7, 2007); *Warner Bros. Entm’t v. PeekVid.com*, CV 07-4185 (C.D. Cal. filed June 26, 2007); *Universal City Studio Prod. v. YouTVPC.com*, CV 07-4181 (C.D. Cal. filed June 26, 2007). See also *Cooper v. Universal Music Austl. Proprietary Ltd.*, [2006] FCAFC 187 (operator of mp3s4free.net liable for infringement because the site was structured to allow Internet users to obtain easy access to copyrighted music files by means of links).

16. *Mike & the Mad Dog* (WFAN Sports Radio 66 radio broadcast Nov. 29, 2007) (on file with author).

17. Interviews with Christopher Stokes, *supra* note 6.

only with increasing streaming costs being borne by either or both parties. This is probably one reason why most SOP pirate services are available for free, while many unicast pirate services are available only on a pay basis.

That SOP pirate services do not charge end users does not mean they cannot generate revenue. Some services and guerilla sites appear to earn money through advertising and requests for donations. Advertising has been observed from service home pages, superimposed over a portion of the pirated content itself and before a content stream starts.

From a technological perspective, the "broadcasting" process is simple, and the proliferation of PC-TV tuner cards in personal computers makes it possible for many people to do it. Then there is the familiarity that millions of Internet users have with peer-to-peer technology and its capabilities. According to a recent estimate, as much as sixty to seventy percent of Internet traffic today involves peer-to-peer network activity.¹⁸

As is well known, peer-to-peer network file sharing supercharged the piracy of music, motion pictures, and other pre-recorded content. In 2005, the subject reached the U.S. Supreme Court after copyright infringement lawsuits brought by movie studios, recording companies, song writers, and music publishers against the Grokster and StreamCast peer-to-peer networks were consolidated. In *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*,¹⁹ a unanimous Court observed that "the probable scope of copyright infringement [through these networks] is staggering."²⁰ The *Grokster* Court referred to an MGM study finding that nearly ninety percent of files available for download through StreamCast's network were copyrighted works, and a study from another case determined that eighty-seven percent of files available for download through Napster's network were also subject to copyright protection.²¹ Said differently, "[a]s the facts of *Grokster* demonstrated, at least 50 million citizens have been seduced into copyright infringement—a civil wrong—by its ease and convenience using current technology."²²

The peer-to-peer piracy variant described in *Grokster* mainly harms copyright owners of pre-recorded audio and audiovisual content, e.g., movie studios and record companies. However, with its capability to transmit streaming media in real-time, SOP piracy brings into the fray sports leagues

18. In the Matter of Broadband Industry Practices, Comments of NBC Universal, No. 07-52 (F.C.C. July 16, 2007), available at <http://www.publicknowledge.org/node/1093>.

19. 545 U.S. 913 (2005).

20. *Id.* at 923.

21. *Id.* at 922 & n.5.

22. JAY DRATLER, CYBERLAW: INTELLECTUAL PROPERTY LAW IN THE DIGITAL MILLENNIUM, § 6.01[2] (2006).

and organizations and related stakeholders in the live sports telecasts value chain as adversely impacted stakeholders.

III. RESPONSES TO THE PROBLEM: ANTI-PIRACY LITIGATION

A. Introduction

One line of attack against intellectual property piracy, including online live sports telecast piracy, is litigation. As will be explained *infra*, sports and other live event organization plaintiffs are already responsible for much of the leading precedent in this area. Although claims in such lawsuits will vary depending on the facts and law to be applied, unicast and SOP pirate services should expect to be sued with increasing frequency by stakeholders, and found liable for copyright infringement, trademark infringement and dilution, interception of cable and satellite television service signals, and false advertising/unfair competition.²³

This type of litigation will be characterized by the dynamic, international nature of the problem itself. Stakeholders will need to look through a kaleidoscope of law and jurisdictional choices to optimize results. Consider, for example, the choices that would need to be evaluated prior to initiating litigation against a unicast or SOP pirate service with the following fact patterns:

Unicast Service (see *Cricket Australia v. Swan (Swan II)*,²⁴ *infra*):

Scotland: Location of service operator

Gibraltar: Location of service operator's corporation

Russia: Location of the service's servers hosting the pirated content

Australia: Location of sports organization piracy victim

Worldwide: Distribution

SOP Service:

China: Location of SOP service operator

Canada: Location of individual "broadcaster"

23. Courts have recognized that under similar circumstances, many infringement victims generally give preference to litigation against service providers or distributors, rather than uploaders and end users, for reasons including the "impracticability or futility of a copyright owner's suing a multitude of individual infringers." *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004). Another potential defendant is a broadband service provider through whose network the infringing materials travel. In the United States, Internet service provider liability for infringement of live sports telecast rights has not been adjudicated.

24. Order, *Cricket Austl. v. Swan (Swan II)*, ScotCS (Sess. Nov. 21, 2006) (R.G. Glennie).

United States: Location of sports organization piracy victim

The Netherlands: Location of guerrilla site

Worldwide: Distribution

In each example, the sports organization victim cannot sue the service provider in the victim's home country and expect a meaningful result unless the pirate service defendant has assets or physical presence there. The Internet's low barriers to entry and worldwide reach create a hospitable environment for pirates to exploit differences in national legal systems by setting up shop in countries where they perceive either the domestic laws and/or judicial institutions to be favorable. A consequence of this intellectual property arbitrage is that higher-protection rules and regimes of one country can be undermined by the lower-protection rules and regimes in another.²⁵ The low barriers to entry also make it possible for pirates to attempt to evade enforcement action by changing locations. An example is the Piratebay.org peer-to-peer site that in 2006 temporarily relocated its operations from Sweden to the Netherlands in response to Swedish police action.²⁶

B. Unicast Cases

Sports organizations and other live event rights holders have scored victories enforcing their copyright and related rights against unicast services. In these situations, the unauthorized retransmission of a live sports or event telecast is streamed directly from the unicast service provider's servers. As a result, these decisions generally involve direct liability for copyright infringement, bearing in mind that under the U.S. Copyright Act, live broadcasts of sports events are protected audiovisual works, provided that they are recorded simultaneously with their transmission.²⁷

25. Samuelson, *supra* note 3, at 223; Jane C. Ginsburg, *Copyright Use and Excuse on the Internet*, 24 COLUM.-VLA J.L. & ARTS 1, 44 (2000). This should be understood as a driver common to all forms of digital piracy, online live sports telecast piracy included. See, e.g., U.K. INTELLECTUAL PROP. OFFICE, INTELLECTUAL PROPERTY CRIME REPORT 2007, at 42 (2007), available at <http://www.ipo.gov.uk/ipcreport.pdf> ("Generally problem sites encountered are based and/or hosted overseas in territories where copyright legislation and/or enforcement are weaker than in the UK.").

26. *Pirate Movie Site Is Back in Action*, AUSTRALIAN IT, June 6, 2006, at 37. In early 2007, apparently in search of a new location outside the reach of any rule of law, Piratebay.org solicited donations to purchase Sealand, a World War II-era military platform off the coast of Great Britain, whose owner claims it to be a sovereign nation. Kelvin Chan, *A Virtual Island for a Virtual World*, GLOBE AND MAIL (Toronto, Can.), Jan. 18, 2007, at A13.

27. When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes "authorship." The further

i. iCraveTV

In late 1999, Canadian-based iCraveTV provided Internet users with the ability to watch live television programming from U.S. broadcast stations on a real-time basis. iCraveTV received the broadcast signals, digitized them, and then streamed them onto the Internet, where end users could view the content using media player software.²⁸ The service included easily circumvented restrictions designed to limit the site to a Canadian audience.²⁹ Two copyright and trademark infringement lawsuits were promptly launched in the United States, the first by a coalition of television networks and studios,³⁰ and the second by the NBA and the NFL.³¹ A third suit was launched in Canada by the Canadian Association of Broadcasters and a coalition of Canadian television networks.³²

In February 2000, the federal district court in Pittsburgh, Pennsylvania, temporarily enjoined iCraveTV's transmission of copyrighted programming in the United States. The court held that the plaintiffs in the two lawsuits, by then consolidated, were likely to prevail on their copyright and trademark infringement claims.³³ Personal jurisdiction was obtained because iCraveTV's

question to be considered is whether there has been a fixation. If the images and sounds to be broadcast are first recorded (on a video tape, fil [sic], etc.) and then transmitted, the recorded work would be considered a "motion picture" subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. If the program content is transmitted live to the public while being recorded at the same time, the case would be treated the same; the copyright owner would not be forced to rely on common law rather than statutory rights in proceeding against an infringing user of the live broadcast. Thus, assuming it is copyrightable—as a "motion picture" or "sound recording," for example—the content of a live transmission . . . should be regarded as fixed and should be accorded statutory protection if it is being recorded simultaneously with its transmission.

H.R. REP. NO. 94-1476, at 52-53 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659; see also Nat'l Football League v. PrimeTime 24 Joint Venture, 211 F.3d 10, 13 (2d Cir. 2000); Balt. Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 668 (7th Cir. 1986).

28. Michael A. Geist, *iCraveTV and the New Rules of Internet Broadcasting*, 23 U. ARK. LITTLE ROCK L. REV. 223, 225 (2000).

29. *Id.* at 225-26.

30. Twentieth Century Fox Film Co. v. iCraveTV, 2000 U.S. Dist. LEXIS 1091 (W.D. Pa. Jan. 21, 2000).

31. Nat'l Football League v. iCraveTV, 2000 WL 64016397 (W.D. Pa. Jan. 21, 2000).

32. Notice of Application, Canadian Broad. Corp. v. TVRadionow Corp., (Super. Ct. of Justice, Toronto, Can., Jan. 31, 2000), available at http://www.cab-acr.ca/english/media/news/00/case_icravetv.shtm; see also Danistan Saverimuthu, *The Regulation of New Media Broadcasting in Canada Post-iCraveTV.com*, 19 J. MARSHALL J. COMPUTER & INFO. L. 331, 333 & n.6 (2001).

33. Twentieth Century Fox Film Corp. v. iCraveTV, No. Civ. A. 00-121, 2000 WL 255989 (W.D. Pa. Feb. 8, 2000).

advertising sales occurred out of a Pittsburgh office and two iCraveTV executives resided in the Western District of Pennsylvania.³⁴

The court found sufficient nexus to the United States, including receipt of iCraveTV's pirated transmissions in the United States, to apply the U.S. Copyright and Lanham Acts to the defendants' activities.³⁵ Thus, although the infringing activities originated in Canada, the court held that the plaintiffs' exclusive public performance rights, codified in 17 U.S.C. § 106(4), were infringed by unauthorized "inbound" streaming of the live sports telecasts from Canada to U.S. end users.³⁶ The court also held that the plaintiffs were likely to succeed in their trademark infringement claims, which arose because the iCraveTV service included uses of plaintiffs' trademarks, including NBA and NFL trademarks.

iCraveTV is an important precedent for sports organization victims and related parties. Since most unicast and SOP pirate services are available to U.S. end users, *iCraveTV* has utility if jurisdiction can be obtained in the United States. *iCraveTV* makes it clear that only a portion of the infringing activities need to occur in the United States for the U.S. Copyright and Lanham Acts to apply.

1. *National Football League v. PrimeTime 24 Joint Venture*³⁷

Although it did not involve unicast streaming, the U.S. Court of Appeals for the Second Circuit's subsequent decision in *PrimeTime 24* should be noted because it reinforces the *iCraveTV* result. In *PrimeTime 24*, the Second Circuit held that the U.S. Copyright Act applies to unauthorized "outbound" retransmissions of copyrighted material originating from U.S. broadcasters, even if those retransmissions were directed to locations outside the United States.³⁸ In *PrimeTime 24*, the defendants captured live NFL game telecasts in the United States, retransmitted them to Canada, and distributed them without the NFL's authorization via a pay satellite television service available only in Canada.³⁹ Relying in part on *iCraveTV*, the Second Circuit held that the U.S. Copyright Act applies to any "step in the process by which a protected work wends its way to its audience" occurring in the United States.⁴⁰

34. Complaint, Nat'l Football League v. TVRadioNow Corp., 2000 WL 34016397, ¶ 3 (W.D. Pa. filed Jan. 20, 2000); Ginsburg, *supra* note 25, at 42.

35. Ginsburg, *supra* note 25, at 42.

36. *iCraveTV*, 2000 WL 255989, at *3.

37. 211 F.3d 10 (2d. Cir. 2000).

38. *Id.* at 13.

39. *Id.* at 10-11.

40. *Id.* at 13 (quoting *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759

In *iCraveTV* and *PrimeTime 24*, the defendants attempted to engage in intellectual property arbitrage by maintaining that their activities were compliant with Canadian law, and thus could not be found liable in the United States. The potential anomaly between Canadian and U.S. law prompted Canada to revise its laws toward harmonization.⁴¹

ii. *Live Nation Motor Sports, Inc. v. Davis*⁴²

In *Live Nation*, a live event promoter was granted summary judgment on a copyright claim alleging that the defendant website, without authorization, streamed the live free audio webcast from another website of the promoter's motorcycle races. The defendant admitted to providing an audio webcast of the races, but argued that the stream was distributed for free by the event promoter on its website. The court rejected this argument, relying on *PrimeTime 24*.⁴³

iii. *Cricket Australia v. Swan (Swan I)*⁴⁴

In *Swan I*, Cricket Australia and its Australian telecast rightsholder, Nine Network, sued in Edinburgh, Scotland, alleging copyright infringement in violation of the Copyright, Designs & Patents Act 1988 ("UK Copyright Act") against defendants who had been selling streams of Nine Network's live telecasts of 2006 VB Series cricket matches on the Cricketon.tv website. Matches were scheduled during January and February 2006. In June 2006, the court issued a decree against "infringing the copyright in the coverage of the cricket matches included in the VB Series . . . to be filmed by Nine Network . . . in any manner whatever and, in particular, by . . . broadcast or streaming (live or otherwise) of the [remaining VB Series matches] on the internet on any website"⁴⁵

iv. *Cricket Australia v. Swan (Swan II)*⁴⁶

In *Swan II*, the plaintiffs returned to court against the same defendants, plus a new one, in order to enjoin the unauthorized live streaming of the 2006

(S.D.N.Y. 1988)).

41. An Act to Amend the Copyright Act, 2002 S.C., ch. 26 (Can.); John Borland, *Canada Blocks Free Net TV*, CNETNEWS.COM, Jan. 17, 2003, <http://www.news.com/2100-1023-981254.html>.

42. *LiveNation Motor Sports, Inc. v. Davis*, 2007 WL 79311 (N.D. Tex. Jan. 9, 2007).

43. *Id.* at *4.

44. *Order, Cricket Austl. v. Swan (Swan I)*, ScotCS (Sess. Feb. 3, 2006) (R.G. McEwan).

45. *Id.*

46. *Order, Cricket Austl. v. Swan (Swan II)*, ScotCS (Sess. Nov. 21, 2006) (R.G. Glennie).

Ashes Series cricket matches from the Cricketon.tv website. Matches were scheduled to start in late November, and plaintiffs saw advertisements about their upcoming availability on the Cricketon.tv and Livesportson.tv websites. The court issued a decree similar to the one it had previously issued with respect to the VB Series matches.⁴⁷

The new defendant, Best Hosting, hosted the websites. Located in Moscow, Russia, Best Hosting claimed that it could not be found liable because Russian Federation law did not prohibit its activities.⁴⁸ *Swan II* is, therefore, another example of intellectual property arbitrage being played out, this time in an Edinburgh, Scotland court, rather than in a Pittsburgh, Pennsylvania court, as happened in *iCraveTV*, or in a New York, New York court, as happened in *PrimeTime 24*.

v. *Union des Ass'n Européennes de Football v. Briscomb*⁴⁹

In *Briscomb*, claimants UEFA and British Sky Broadcasting Group sued in London, England, alleging copyright infringement in violation of the UK Copyright Act against defendants who had been selling live streams of UEFA Champions League matches as telecast by BSkyB and ITV on Sportingstreams.com and related websites.⁵⁰ The claimants identified sixteen matches that were pirated.⁵¹ The court granted summary judgment in favor of the claimants based on “evidence of a good many live matches having been the subject of what are claimed to be infringing dissemination and copying by the defendants.”⁵²

vi. *Football Ass'n Premier League Ltd. v. Ayiotis*⁵³ & *Football Ass'n Premier League Ltd. v. Sayward*⁵⁴

In 2007 the Premier League started two similar copyright infringement lawsuits pending in London, England, alleging unicast piracy of various soccer match telecasts from websites with self-explanatory names such as *freelivefootball.co.uk* and *freepremierleague.com*.⁵⁵ On February 20, 2008, in

47. *Id.*

48. Condescence Supporting Summons, ¶ 10, *Swan II*, ScotCS (Sess. Nov. 21, 2006).

49. *Union of European Football Ass'ns v. Briscomb*, [2006] EWHC (Ch) 1268 (Eng.).

50. *Id.*

51. *Id.* ¶ 5.

52. *Id.*

53. *Football Ass'n Premier League Ltd. v. Ayiotis*, [2007] EWHC (Ch) 01572 (Eng.).

54. *Football Ass'n Premier League Ltd. v. Sayward*, [2007] EWHC (Ch) 01574 (Eng.).

55. *Ayiotis*, [2007] EWHC (Ch) 01572 (Eng.); *Sayward*, [2007] EWHC (Ch) 01574 (Eng.).

Sayward, the court granted judgment in favor of the Premier League, among other things restraining the defendants from “[o]rganising the provision of or providing the transmission or stream over the internet to any third party of any televised footage of any English Premier League football match.”⁵⁶

C. SOP Cases

In the United States, unauthorized peer-to-peer movie and music file sharing services have generally been held to be liable for copyright infringement under secondary liability principles, including theories of contributory and vicarious liability.⁵⁷ The leading secondary liability decisions, including *Grokster*, should support findings of secondary liability under the U.S. Copyright Act for SOP service providers described in this article.⁵⁸

In *Grokster*, the Supreme Court described secondary liability as follows: “One infringes contributorily by intentionally inducing or encouraging direct infringement and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.”⁵⁹ A non-exhaustive—and by no means necessary—list of reasons why secondary liability should attach to the SOP services described in this article is as follows: they have

Premier League has a domestic Saturday afternoon telecast blackout intended to protect live attendance. In both lawsuits, Premier League alleges a “detrimental effect on attendances, ticket sales and revenues” as a result of defendants’ alleged end-run around the blackout. Amended Particulars of Claim, ¶ 62(b), *Football Ass’n Premier League Ltd. v. Ayiotis*, [2007] EWHC (Ch) 01572 (Eng.); Particulars of Claim, ¶ 60(b), *Football Ass’n Premier League Ltd. v. Sayward*, [2007] EWHC (Ch) 01574 (Eng.). These allegations are notable because blackouts are common in many professional sports organization telecast rights schemes.

56. Order of Feb. 20, 2008, ¶ 2.1, *Sayward*, [2007] EWHC (Ch) 01574 (Eng.).

57. See DRATLER, *supra* note 22, § 5A.03.

58. See also *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Prospective decisions in the consolidated copyright infringement cases brought against Google’s YouTube subsidiary could also potentially inform the secondary liability federal common law. *Football Ass’n Premier League Ltd. v. YouTube, Inc.*, No. 07-CV-3582 (S.D.N.Y. filed May 4, 2007); *Viacom Int’l, Inc. v. YouTube Inc.*, No. 07-CV-02103 (S.D.N.Y. filed Mar. 19, 2007). These lawsuits generally concern the availability of video clips of television programming on the YouTube service, having been uploaded to its servers by individual Internet users. YouTube is defending itself against liability in part by invoking the “safe harbors” of the Digital Millennium Copyright Act (DMCA), which are available under certain circumstances to statutorily-defined “online service provider[s].” Online Copyright Infringement Liability Limitation Act, Title II of the DMCA, 17 U.S.C. § 512 (2005). The defendant peer-to-peer file sharing services in *Aimster* and *Napster* raised DMCA defenses and failed. *Aimster*, 334 F.3d at 655; *A&M Records*, 239 F.3d at 1025; see also DRATLER, *supra* note 22, § 6.03 (DMCA’s safe harbors are inapplicable to peer-to-peer technology).

59. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (internal citations omitted); see also *Perfect 10*, 508 F.3d at 1146.

actual knowledge of and encourage infringements by providing detailed programming directories, often with the look and feel of television guides. These directories are typically presented in terms of the television network and sports organization associated with a telecast, like the music indexes and directories provided by the Napster, Aimster, and Grokster peer-to-peer services.⁶⁰ These inducements fall squarely within *Grokster's* holding that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."⁶¹ They financially gain from their activities by placing advertising near or on top of the telecast streams or by charging a fee to access the service.⁶² Finally, successful rights enforcement encounters with several SOP services makes it clear they have the right and ability to prevent infringements using "simple measures to prevent . . . damage to . . . copyrighted works . . .," again consistent with principles of secondary liability.⁶³

There are only two known lawsuits involving SOP piracy of live television programming. This is probably a reflection of the fact that SOP piracy is relatively new, as compared to unicast piracy. They are as follows:

i. *Premier Fernsehen v. Cybersky TV*⁶⁴

In late 2004, a German court issued an injunction in a copyright infringement lawsuit brought by pay-per-view broadcaster Premier Fernsehen GmbH & Co. KG against the developer and distributor of "Cybersky" peer-to-peer service software.⁶⁵ The injunction prohibited distribution of the software as long as it enabled peer-to-peer re-streaming of encrypted content from pay television providers.⁶⁶ On appeal, the Hamburg, Germany High Regional Court decided that a ban on the software was not warranted.⁶⁷ However, the court stated that the defendant was liable for copyright infringement because the software and service were advertised as a way to end-run plaintiff's pay

60. *A&M Records*, 239 F.3d at 1020-22; *Aimster*, 334 F.3d at 646; *Grokster*, 545 U.S. at 921.

61. *Grokster*, 545 U.S. at 936-37.

62. *Id.* at 937.

63. *Perfect 10*, 508 F.3d at 1172 (quoting *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1375 (N.D. Cal. 1995)); DRATLER, *supra* note 22, § 5A.03[1].

64. *Germany: Software to Re-stream TV Programs Infringes Copyrights, Court Says*, BNA WORLD INTELL. PROP. REP., Apr. 1, 2006.

65. *Id.*

66. *Id.*

67. *Id.*

programming.⁶⁸

ii. *Premier League v. Moffat*⁶⁹

In June 2007, the Premier League commenced a copyright infringement lawsuit in London, England, alleging that defendant James McKeown operates *premiershiplive.net*, a subscription website offering access to pirated Premier League match telecasts distributed via peer-to-peer networks, including one operated out of China.⁷⁰

D. Other Claims

i. Communications Act

To the extent that a defendant assists others in receiving, without authorization, television programming provided by U.S. cable or satellite services, that defendant may violate various provisions of the U.S. Communications Act.⁷¹ These rights are generally enforced by cable and satellite television operators, but under certain circumstances, standing exists for entities with proprietary rights in the intercepted communication.⁷²

ii. Subscription Service Terms/Computer Fraud and Abuse Act

A subscriber to an online streaming media subscription service might be able to re-encode a stream and forward it to a pirate service. This would likely be in violation of standard subscription service terms and, if so, enforceable as a breach of them. This conduct may also violate the U.S. Computer Fraud and Abuse Act because an unauthorized access of a computer is involved, with intent to defraud.⁷³

E. Government Enforcement

Some of the above-described legal claims have civil and/or criminal government enforcement counterparts. For example, certain violations of the

68. *Id.*

69. *Football Ass'n Premier League Ltd. v. McKeown*, [2007] EWCA (Ch) 01573 (Eng.).

70. *Id.*

71. *See* 47 U.S.C. §§ 553, 605 (2006).

72. *See, e.g., Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986) (NFL is an aggrieved party pursuant to § 605 for piracy of NFL game telecasts); *Home Box Office v. Carlim, Inc.*, 838 F. Supp. 432 (E.D. Mo. 1993).

73. 18 U.S.C. § 1030(a)(4) (2006).

U.S. Copyright, Communications, and Computer Fraud and Abuse Acts are criminalized in the U.S. Code and enforced by the U.S. Department of Justice.⁷⁴

IV. IMPROVING INTERNATIONAL COOPERATION

As described *supra*, intellectual property arbitrage enables online sports telecast piracy. Initiatives to reduce this phenomenon are therefore becoming a part of the strategy to combat this type of piracy.

Within the United States, there are public and private sector initiatives to encourage and maintain effective intellectual property rights protection and enforcement worldwide. However, knowledge about this new digital piracy paradigm within the intellectual property rights community is limited. For example, it is not specifically identified in the 2007 analyses of worldwide intellectual property rights infringement conducted by either the Office of the U.S. Trade Representative (USTR) or the United Kingdom Intellectual Property Office.⁷⁵ Proactive efforts to improve knowledge about the problem

74. Copyright Act, 17 U.S.C. § 506(a) (2006); 18 U.S.C. § 2319 (2006); Communications Act, 47 U.S.C. § 501 (2006); Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(2) (2006); *accord* U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS, PROSECUTING INTELLECTUAL PROPERTY CRIMES (2006), *available at* <http://www.usdoj.gov/criminal/cybercrime/ipmanual/ipma2006.pdf>.

75. Pursuant to the Trade Act of 1974, as amended by the Omnibus Trade and Competitiveness Act of 1988 and Uruguay Round Agreements Act (enacted in 1994) ("Special 301"), the USTR conducts an annual review of the global state of intellectual property rights protection and enforcement and identifies countries where particular problems exist. China is currently on USTR's "Priority Watch List." OFFICE OF THE U.S. TRADE REP., 2007 SPECIAL 301 REPORT 18-21 (2007), *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/2007_Special_301_Review/asset_upload_file230_11122.pdf; U.K. INTELLECTUAL PROP. OFFICE, *supra* note 25; OFFICE OF THE U.S. TRADE REP., 2007 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE (2007), *available at* http://www.ustr.gov/assets/Document_Library/Reports_Publications/2007/asset_upload_file625_13692.pdf. In February 2007, MLB, MLBAM, NBA, NCAA, NFL, and NHL Enterprises (the licensing arm of the NHL) (the "Sports Coalition") submitted a joint letter to the USTR in response to its requests for comments about its 2008 Special 301 Report. Letter from Michael J. Mellis, Senior Vice President and General Counsel of MLBAM, to Jennifer Choe Graves, Director for Intellectual Property and Innovation and Chair of the Special 301 Committee, Office of the U.S. Trade Representative (Feb. 11, 2008), *available at* http://www.ustr.gov/assets/Trade_Sectors/Intellectual_Property/Special_301_Public_Submissions_2008/asset_upload_file441_14500.pdf. The Sports Coalition's letter requested that the USTR consider the problem of Internet piracy of live sports telecasts in formulating the 2008 Special 301 Report, and it recommended that resolution of the problem become a stated goal of U.S. trade policy. *Id.* A February 2008 Special 301 Report letter to USTR submitted by the Cable and Satellite Broadcasting Association of Asia referred to: "entire bouquets of [pirated] pay-TV channels Member companies have found numerous instances of pirate streaming of US-based channels, including HBO, ESPN, Discovery, CNN, the Disney Channel and Cartoon Network" Letter from the Cable and Satellite Broadcasting Association of Asia to the Office of the U.S. Trade Representative (Feb. 11, 2008), *available at* http://www.ustr.gov/assets/Trade_Sectors/Intellectual_Property/Special_301_Public_

include participation of the two coalitions of sports leagues and organizations in the process concerning the World Intellectual Property Organization's Standing Committee on Copyright and Related Rights (SCCR) proposed Treaty for the Protection of Broadcast Organizations (Broadcast Treaty) and are described *infra*. Another is the Coalition Against Online Video Piracy (CAOVP), a group of sports organizations, entertainment companies, telecasters, and trade associations concerned about online video piracy.⁷⁶ CAOVP's website states:

From Internet sites and services, television channels from all over the world are available without authorization from rights holders, in disregard of fundamental copyright and broadcast rights. The Coalition operates as a forum through which organizations can share information, resources, experiences and strategies to stop this new breed of intellectual property rights piracy.⁷⁷

CAOVP's membership includes over thirty premier professional and amateur sports organizations based in Australia, Europe, and North America.⁷⁸

Within the U.S. public sector, intellectual property rights protection and enforcement is a part of U.S. trade policy. The USTR attempts to negotiate free trade agreements "which contain intellectual property chapters that establish strong protections for copyrights, patents, and trademarks, as well as rules for enforcement."⁷⁹ In the United States–Korea Free Trade Agreement (USKFTA), which became effective on June 30, 2007, online video piracy is addressed in a way that would appear to embrace the live telecast piracy variant; however, as stated *supra*, USTR has not yet identified online piracy of live television programming as a specific problem. In a confirmation letter

Submissions_2008/asset_upload_file329_14481.pdf.

76. The author represents MLBAM at CAOVP.

77. Coalition Against Online Video Piracy, <http://www.caovp.com> (last visited Feb. 21, 2008).

78. Sports organization members include: 6 Nations Rugby, Australian Football League, Amateur Swimming Association, Australian Rugby League, Bundesliga, Cricket Australia, England and Wales Cricket Board, Premier League, European Professional Football Leagues, European Tour, Fédération Française de Tennis, FIFA, Lawn Tennis Association, The Football Association, The Football League, Formula 1, International Association of Athletics Federations, International Cricket Council, International Federation of Horseracing Authorities, International Rugby Board, International Tennis Federation, Ligue de Football Professionnel, London Marathon, MLB, MLBAM, Major League Soccer, NBA, NCAA, NFL, NHL, PGA Tour Australasia, Rugby Football League, Rugby Football Union, Ryder Cup, Scottish Premier League, Scottish Rugby, Tennis Australia, le Tour de France, UEFA, the Wimbledon Championships, Women's National Basketball Association (WNBA), World Marathon Majors, and World Snooker Association. *Id.*

79. OFFICE OF THE U.S. TRADE REP., *supra* note 75, at 4.

entitled "Online Piracy Protection," made a part of USKFTA, the United States and Korea agreed on "the objective of shutting down Internet sites that permit the unauthorized downloading (and other forms of piracy) of copyright works . . . and providing for more effective enforcement of intellectual property rights on the Internet, including in particular with regard to peer-to-peer . . . services."⁸⁰

Another approach toward improving international cooperation is through multilateral treaties with provisions that would create either new or better tailored international remedies. A recent example within the realm of online telecast piracy is the proposed Broadcast Treaty, which is an effort to update the 1961 Rome Convention on the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations. The most recent version, discussed at the June 2007 SCCR meeting in Geneva, Switzerland, would grant broadcasting organizations the "exclusive right of authorizing the retransmission of their broadcasts," which would cover Internet retransmissions.⁸¹ In the U.S. delegation's June 19, 2007 statement about the Broadcast Treaty to SCCR, the United States identified the need for international law to be developed that "includes protection for broadcasters against the unauthorized simultaneous retransmission of their signals over the Internet. A major threat to broadcasters arises when someone places their signal on the Internet without permission."⁸²

In 2007, sports organizations participated in the Broadcast Treaty process through two WIPO-accredited non-governmental organizations. One is the Coalition of Sports Organizations (Sports Coalition).⁸³ In its request to WIPO to be accredited, the Sports Coalition said this about online piracy of its sports telecasts:

The members of the Sports Coalition license the rights to broadcast and retransmit broadcasts of thousands of live sports events each year, as well as highlights of those events. The Sports Coalition seeks to safeguard the value of these rights by

80. Letter from Hyun Chong Kim, Minister for Trade, to Susan C. Schwab, U.S. Trade Rep. (June 30, 2007), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/asset_upload_file631_12740.pdf?ht=.

81. *Non-paper on the WIPO Treaty on the Protection of Broadcasting Organizations*, Apr. 20, 2007, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=77333.

82. Unofficial Transcript of the U.S. Delegations' Remarks, United States Intervention to WIPO Plenary (Casting Negotiations), June 20, 2006, <http://lists.essential.org/pipermail/a2k/2007-June/002409.html>.

83. Consisting of: Canadian Football League, Ladies' PGA, MLB, MLBAM, NBA, WNBA, NCAA, NFL, NHL, PGA, PGA Tour, and USTA. The author attended the June 2007 SCCR session on behalf of the Sports Coalition.

advocating for the passage of international treaties and domestic legislation that protect and do not impair these contract rights and obligations, and that provide adequate private remedies against those who pirate licensed broadcasts of sports events . . .

Sports organizations, including Sports Coalition members, are also heavily affected by piracy, including the unauthorized retransmission over the Internet and other media of their copyrighted programs contained in the broadcast signals that are the subject of the proposed Treaty. Combating signal piracy in all its forms, including piracy of sports event telecasts, has been described as one of the major objectives of the proposed Treaty. Sports Coalition members are one of the major groups of rightsholders that will be affected by efforts to address such piracy through the proposed Treaty.⁸⁴

The second is the Sports Rights Owners Coalition (SROC).⁸⁵ In its request to WIPO to be accredited, SROC said this about online piracy of its sports telecasts: “[SROC] seeks . . . effective protection for their rights under law . . . [including] prevent[ing] the theft of sports events broadcasts by pirates”⁸⁶

The proposed Broadcast Treaty was discussed without resolution at the June 2007 SCCR meeting. The process is reported to be at a standstill because of the failure to reach consensus on basic issues.⁸⁷ Regardless, this or any

84. WORLD INTELLECTUAL PROP. ORG., SECOND SPECIAL SESSION OF THE STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS, ACCREDITATION OF CERTAIN NON-GOVERNMENTAL ORGANIZATIONS, JUNE 18-22, 2007 (2007), *available at* http://www.wipo.int/edocs/mdocs/scct/en/scct_s2/scct_s2_2.pdf. It should be noted that the Sports Coalition objected to the proposed Broadcast Treaty to the extent it would affect the traditional contractual and other rights of sports organizations in the broadcasts. *Id.*

85. Consisting of: 6 Nations Rugby, Australian Football League, Amateur Swimming Association, Australian Rugby, Bundesliga, Cricket Australia, England and Wales Cricket Board, Premier League, European Professional Football Leagues, European Tour, Fédération Française de Tennis, FIFA, The Football Association, Football Data Co., Ltd., The Football League, Formula 1, International Association of Athletics Federations, International Cricket Council, International Federation of Horseracing Authorities, International Rugby Board, International Tennis Federation, Ligue Football de Professionnel, London Marathon, Lawn Tennis Association, PGA Tour Australasia, Rugby Football Union, Ryder Cup, Scottish Premier League, Scottish Rugby, Tennis Australia, le Tour de France, UEFA, the Wimbledon Championships, World Marathon Majors, and World Snooker Association.

86. WORLD INTELLECTUAL PROP. ORG., *supra* note 84.

87. Monika Ermert, *Broadcasting Treaty: Council of Europe Picks Up Where WIPO Left Off*, INTELL. PROP. WATCH, Dec. 10, 2007, <http://www.ip-watch.org/weblog/index.php?p=864&print=1> (reporting that the Council of Europe is considering whether to work on its own similar convention because of this situation); *Broadcasting Groups Lament Failure of Treaty Talks, Warn of Bypassing*

other relevant treaty would need to be ratified by a country with either deficient laws or enforcement mechanisms in order to have potential utility. And even then, in the absence of effective implementation by a signatory country, remedies may be available only through government action.⁸⁸

These are significant hurdles to overcome, suggesting that sports organizations and other stakeholders will need to have a long-term strategy in order to help promote effective laws and enforcement mechanisms. Depending on the severity of the problem in the future, sports organizations may need to consider deeper collaborations and resource commitments, perhaps analogous to the establishment in 1992 of The Coalition to Advance the Protection of Sports logos (CAPS) by the Collegiate Licensing Company, MLB Properties, Inc., NBA Properties, Inc., NFL Properties LLC, and NHL Enterprises, L.P. CAPS addresses common trademark protection and enforcement matters.

V. COUNTER-TECHNOLOGIES

An emerging general trend toward better protection of intellectual property and related rights online involves the development and use of counter-technologies—such as watermarking, fingerprinting, and filtering—for the purpose of curbing online content piracy. In response to perceived market opportunities, venture capital is flowing into start-up ventures aiming at developing them.⁸⁹ Private sector stakeholders such as the International Federation of the Phonographic Industry,⁹⁰ MPAA,⁹¹ and NBC Universal⁹²

WIPO, BNA WORLD INTELL. PROP. REPORT, Sept. 2007, <http://www.hostref4.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=BNAL:10.1048/Enu> (reporting on points of disagreement at SCRR).

88. A current example is USTR's pursuit of remedies in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) against the People's Republic of China for the alleged failure to give adequate protection to certain intellectual property rights and enforce those rights adequately. Press Release, Office of the U.S. Trade Representative, United States Requests WTO Panel in Case Challenging Deficiencies in China's Intellectual Property Rights Laws (Aug. 13, 2007), available at http://www.ustr.gov/Document_Library/Press_Releases/2007/August/United_States_Requests_WTO_Panel_in_Case_Challenging_Deficiencies_in_Chinas_Intellectual_Property_Rights_Laws.html.

89. See, e.g., Kevin J. Delaney, *Copyright Tool Will Scan Web for Violations*, WALL ST. J., Dec. 18, 2006, at B1 (about Attributor Corporation); Michael Liedtke, *Audible Magic Emerging as Top Copyright Cop in Digital Revolution*, POST-GAZETTE.COM, Apr. 1, 2007, <http://www.post-gazette.com/pg/07091/772887-96.stm> (about Audible Magic, Inc.); Dionne Searcey, *AT&T Investment in Antipiracy Firm May Aid Video Push*, WALL ST. J., Nov. 14, 2007, at B3 (about Vobile, Inc.); see also Stephanie Kang, *Nielsen to Be Video Cop*, WALL ST. J., Dec. 5, 2007, at B3 (about Nielsen/Digimarc joint venture).

90. See, e.g., Press Release, Int'l Fed'n of the Phonographic Indus., International Recording Industry Welcomes Groundbreaking Agreement in France to Help in the Fight Against Internet Piracy

are publicly embracing them as elements of their digital anti-piracy strategies. In the public sector, the French government recently brokered a multi-party "Agreement for the Development and Protection of Cultural Works and Programmes on New Networks," ("France Agreement") advocating its testing and adoption at both individual content and Internet service provider levels.⁹³

In order to better describe this emerging trend, the France Agreement and other indicators are discussed *infra*, organized in terms of individual content and Internet service providers. The general trend is then considered in terms of the rise of the type of online piracy examined in this article.

A. Content Service Providers

Courts in the United States and elsewhere have ordered defendant peer-to-peer services to filter for unauthorized music files when fashioning injunctive relief in copyright infringement lawsuits.⁹⁴ Notably, late last year, following the Supreme Court's remand in *Grokster*, the district court issued a permanent injunction against defendant Streamcast's Morpheus peer-to-peer service that included a duty to filter.⁹⁵ Recognizing that filtering technology is both "evolving" and "highly technical," the court appointed a special master to assist in matters, including selection of an appropriate "filtering regimen," and retained the right to amend the injunction in light of future developments in the field.⁹⁶

In October 2007, YouTube announced the "beta" launch of its "Video

(Nov. 23, 2007), available at http://www.ifpi.org/content/section_news/20071123.html.

91. See, e.g., *Web 2.0 Companies Turning to Tech to Combat Infringement*, Panelists Say, 2 BNA ELEC. COMMERCE & LAW 884 (2007); In the Matter of Broadband Industry Practices, WC Docket No. 07-52, Comment of Motion Picture Association of America, June 15, 2007; Peter Burrows, *Pirate-Proofing Hollywood*, BUS. WEEK, June 11, 2007, at 58.

92. See Comments of NBC Universal, Inc., *supra* note 18.

93. Ben Hall, *France Proposes to Cut-Off Persistent Internet Pirates*, FIN. TIMES, Nov. 23, 2007, <http://search.ft.com/ftArticle?queryText=Sarkozy+fnac&y=0&aje=true&x=0&id=071123000098&ct=0>; Unofficial English translation of Nov. 25, 2007 Agreement for the Development and Protection of Cultural Works and Programmes on New Networks, (on file with author) (a list of signatories is available at <http://www.culture.gouv.fr/culture/actualites/conferen/albanel/organisationssignataires.pdf>).

94. Universal Music Austl. Proprietary Ltd. v. Sharman License Holdings Ltd. (2005) F.C.A. 1242; Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F. Supp. 2d 1197 (C.D. Cal. 2007); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001), *aff'd*, 284 F.3d 1091 (9th Cir. 2002). But cf. Buma & Stemra/Kazaa, Gerechtshof [Hof] [Court of Appeal], Amsterdam, Mar. 28, 2002 (Neth.), available at http://www.solv.nl/rechtspraak_docs/KaZaA%20v.%20Buma%20Stemra%20-%20Court%20of%20Appeals%2028%20March%202002.pdf (rejecting plaintiff's proposal that defendant's Kazaa peer-to-peer music service should filter).

95. *Grokster*, 518 F. Supp. 2d at 1241.

96. *Id.* at 1239-40.

Identification” filtering technology designed to locate and block copyright-infringing video clips on its service.⁹⁷ That same month, a group of media and Internet companies, including News Corporation, owner of the MySpace social networking site, issued voluntary “Principles for User Generated Content Services,” which called for implementing “effective content identification technology . . . with the goal of eliminating from their services all infringing user-uploaded audio and video content for which [c]opyright [o]wners have provided [r]eference [m]aterial.”⁹⁸

And, in the November 2007 France Agreement, French online content services have been called on to

[e]xtend in the short term the effective filtering and fingerprinting and watermarking technologies, notably by establishing with them the acceptable fingerprinting technologies together with the catalogues of fingerprinting sources that the rightholders should help to create; [and to] define the conditions within which these technologies will be systematically implemented.⁹⁹

B. Internet Service Providers

At the Internet service provider level, in June 2007, a Belgian court ordered defendant ISP Scarlet to “end violations of copyright, by rendering impossible all transmission or reception by P2P software of electronic files containing musical works from the [plaintiff’s music] catalogue.” The court ordered Scarlet to do this by selecting among technical measures identified by a court-appointed special panel.¹⁰⁰

97. Peter Burrows, *Ma Bell, the Web’s New Gatekeeper*, BUS. WEEK, Nov. 19, 2007, at 38-39; see also YouTube Video Identification Beta, YOUTUBE.COM, http://www.youtube.com/t/video_id_about (last visited Mar. 12, 2008).

98. Principles for User Generated Content Services, <http://www.ugcprinciples.com> (last visited Feb. 24, 2008).

99. See Hall, *supra* note 93; Press Release, *supra* note 90; Unofficial English translation of Nov. 25, 2007 Agreement for the Development and Protection of Cultural Works and Programmes on New Networks, *supra* note 93.

100. *Brussels Court Orders ISP to Filter Access to P2P Sites*, BNA WORLD INTELL. PROP. REP., Aug. 1, 2007. There are also instances where courts have ordered an Internet service provider to block access to a specific website or service. See, e.g., Ehud Kenan, *Internet Providers Ordered to Block File Sharing Website*, YNETNEWS.COM, Mar. 6, 2008, <http://www.ynetnews.com/articles/0,7340,L-3515275,00.html> (reporting that in late February 2008, a Haifa, Israel court “ordered the three largest internet service providers in Israel to block access to the Israeli file-sharing site httpshare, this following a petition levied by the 12 largest record companies in Israel”); John Oates, *AllofMP3 Hit by Danish Court Ruling*, THEREGISTER.CO.UK, Oct. 26, 2006,

AT&T, the largest U.S. Internet service provider, is reported to be considering a network-wide content-recognition system for the purpose of curbing the unauthorized distribution of copyrighted works.¹⁰¹ And, returning to the France Agreement, Internet service providers have been called on to

[w]ithin a maximum period of 24 months following the signature of the present agreement, to cooperate with the rightholders on the ways to test filtering technologies which are available but which deserve more preliminary in-depth research. They also undertake to apply them if the results prove convincing and if their general application proves technically and financially realistic. . . .¹⁰²

Another development emerged in October 2007, when Comcast, the second largest U.S. Internet service provider, disclosed that “[d]uring periods of heavy peer-to-peer congestion, which can degrade the experience for all customers, we use several network management technologies that, when necessary, enable us to delay—not block—some peer-to-peer traffic.”¹⁰³ Comcast says on its website: “Peer-to-peer activity consumes a disproportionately large amount of network resources, and therefore poses the biggest challenge to maintaining a good broadband experience for all users, including the overwhelming majority of our customers who do not use peer-to-peer applications.”¹⁰⁴ In response to Comcast’s disclosures, a consumer class action lawsuit started in California state court¹⁰⁵ and two petitions were filed with the FCC, one seeking a declaratory ruling that Comcast’s practices violate FCC rules and another asking for the establishment of rules governing broadband network management practices.¹⁰⁶ In January 2008, the FCC

http://www.theregister.co.uk/2006/10/26/itnueski_banned (reporting that a Copenhagen, Denmark court ruled that an Internet service provider must block access to the Allof MP3.com website).

101. Searcey, *supra* note 89; Burrows, *supra* note 97, at 38; see also Anne Broache, *Verizon: We Don’t Want to Play Copyright Cop on Our Network*, CNetNEWS.COM, Jan. 30, 2008, http://www.news.com/8301-10784_3-9861402-7.html.

102. Unofficial English translation of Nov. 25, 2007 Agreement for the Development and Protection of Cultural Works and Programmes on New Networks, *supra* note 93.

103. Peter Svensson, *Comcast Admits Delaying Some Traffic*, MSNBC.COM, Oct. 23, 2007, <http://msnbc.msn.com/id/2144566>.

104. FAQ, *Is My Peer-to-Peer Activity Going to Be Impacted by Comcast?*, COMCAST.NET, <http://www.comcast.net/help/faq/index.jsp?faq=Hot118986> (last visited Jan. 29, 2008).

105. Complaint, *Hart v. Comcast of Alameda, Inc.*, No. 07355993 (Cal. Sup. filed Nov. 13, 2007).

106. Petition for Declaratory Ruling, In the Matter of Free Press, WC Docket No. 07-52 (filed Nov. 1, 2007); Petition to Establish Rules Governing Network Management Practices by Broadband Network Operators, In the Matter of Vuze, Inc., WC Docket No. 07-52 (filed Nov. 14, 2007), available at <http://www.publicknowledge.org/pdf/vuze-petition-20071114.pdf>. As a reference point

solicited public comments about the matter.¹⁰⁷

Asserting that peer-to-peer networks are online content piracy hotspots, NBC Universal had earlier in 2007 made the argument to the FCC that peer-to-peer traffic management technologies can have an “incidental” effect on the general problem and ought to be mandated by the FCC for that reason.¹⁰⁸ It is, however, unknown whether Comcast’s specific traffic management technologies have had any impact on the specific problem of live sports telecasts piracy over peer-to-peer networks.

C. The Trend and Internet Piracy of Live Sports Telecasts

What bearing these developments specifically have for the problem of Internet piracy of live sports telecasts online piracy is unclear. This is principally because the focus of counter-technologies to date has been on more mature forms of unauthorized pre-recorded content piracy. There is no demonstrated technological fix to stop the comparatively recent rise of live telecast piracy over SOP, although there are preliminary suggestions that already developed counter-technologies could be adapted for that purpose.¹⁰⁹

Even if a live telecast piracy counter-technology were to become available at the individual content service provider level, the provider would need to cooperate in its deployment. Deployment would likely involve a process culminating in the provider’s blocking of the unauthorized telecast stream identified by a filter. There is little reason to think that most of the service providers described in this article would cooperate. As the recidivism in the *Cricket Australia* cases demonstrates, the value proposition in that type of enterprise derives from the pirated content itself. So the utility of any future counter-technology for live online telecast piracy is therefore more likely to be realized through court orders than voluntary adoption.

As for content filtering at the Internet service provider level, there is scant information available about AT&T’s plans other than statements of preliminary and general interest,¹¹⁰ and no information about whether any

on this topic, see Amy E. Bivins, *Internet Companies, Policy Groups Say Comcast Violates FCC’s Neutrality Principles*, BNA E-COMMERCE LAW DAILY, Feb. 22, 2008, at A11.

107. Press Release, Fed. Comm’n Comm’n, Comment Sought on Petition for Declaratory Ruling Regarding Internet Management Policies (Jan. 14, 2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-08-91A1.doc.

108. Comments of NBC Universal, Inc., *supra* note 18.

109. See, e.g., DIGITAL WATERMARKING ALLIANCE, DIGITAL WATERMARKING TECHNOLOGIES: APPLICATIONS IN P2P NETWORKS 10, http://www.digitalwatermarkingalliance.org/docs/dcia_whitepaper_p2p.pdf (last visited Mar. 12, 2007).

110. See Brad Stone, *AT&T and Other I.S.P.’s May Be Getting Ready to Filter*, NYTIMES.COM, Jan. 8, 2008, <http://bits.blogs.nytimes.com/2008/01/08/att-and-other-isps-may-be-getting-ready-to>

technology that AT&T is considering would or could have any impact on live telecast piracy. That network-wide approaches are in their early-stages of development is reinforced by how the broadband service provider provisions in the France Agreement are qualified. The France Agreement calls for testing of such technologies that “deserve more preliminary in-depth research,” and application of them “if the results prove convincing and if their general application proves technically and financially realistic.”¹¹¹

Considered together, these recent developments show the beginnings of a trend toward technologically-driven responses to counter the technologically-driven problem of online content piracy. Its evolution will likely continue to be as international and dynamic in scope as the problem itself.¹¹² With the focus of content owners, developers, individual content providers, Internet service providers, courts, and governments on other more mature forms of online content piracy, what this trend might mean for the Internet piracy of live sports telecasts is unclear. However, for victim sports organizations and others harmed by live telecast piracy, the directional potential of the trend is such that it deserves to be closely watched.

VI. CONCLUSION

Internet piracy of live sports telecasts is a growing problem that will demand greater attention from sports organizations and others in the surrounding global media business sector. An unfortunate convergence of circumstances is propelling it forward: readily available SOP technology; millions of Internet end users who by now are comfortable with consuming video online and using peer-to-peer networks; intellectual property arbitrage opportunities across national borders; and the worldwide popularity of the world’s top amateur and professional live sports events.

To respond effectively against this new digital piracy paradigm, victim sports organizations and related stakeholders will need to pursue a broad

filter (quoting James Cicconi, AT&T’s Senior Vice President, External and Legal Affairs, as follows: “We are very interested in a technology based solution and we think a network-based solution is the optimal way to approach this We recognize we are not there yet but there are a lot of promising technologies. But we are having an open discussion with a number of content companies . . . to try to explore various technologies that are out there.”).

111. Unofficial English translation of Nov. 25, 2007 Agreement for the Development and Protection of Cultural Works and Programmes on New Networks, *supra* note 93.

112. Public policy issues surrounding this trend are beyond the scope of this article. As a reference point on this topic, see Saul Hansell, *Bits Debate: Should Internet Providers Block Copyrighted Works?*, NYTIMES.COM, Jan. 15, 2008, <http://bits.blogs.nytimes.com/2008/01/15/bits-debate-should-internet-providers-block-copyrighted-works>, featuring a debate between Rick Cotton, General Counsel of NBC Universal, and Tim Wu, Professor, Columbia Law School, about Internet service provider counter-technologies.

strategy of education and outreach to the intellectual property rights community, anti-piracy rights enforcement and litigation, and international cooperation initiatives. They will also need to closely monitor the emerging general trend toward technologically-driven responses to the problem.