

DMCA: Professional Sports Leagues' Answer to Protecting Their Broadcasting Rights Against Illegal Streaming

Stephanie N. Horner

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment and Sports Law Commons](#)

Repository Citation

Stephanie N. Horner, *DMCA: Professional Sports Leagues' Answer to Protecting Their Broadcasting Rights Against Illegal Streaming*, 24 Marq. Sports L. Rev. 435 (2014)
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol24/iss2/5>

This Comment is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

COMMENTS

DMCA: PROFESSIONAL SPORTS LEAGUES' ANSWER TO PROTECTING THEIR BROADCASTING RIGHTS AGAINST ILLEGAL STREAMING

STEPHANIE N. HORNER*

I. INTRODUCTION

Broadcasting rights of live games are extremely valuable to professional sports leagues because they produce a significant amount of revenue.¹ For example, beginning in 2014, Major League Baseball (MLB) will receive \$12.4 billion annually from its television broadcasting contracts with FOX, TBS, and ESPN.² These broadcasting rights are not limited to television broadcasts; they extend to broadcasts over all mediums. Recently, the rights associated with broadcasting over the Internet have been most significant. There has been a trend of unauthorized websites streaming live games on the Internet.³ These websites should cause great concern for professional sports leagues because they could decrease the overall value of the broadcasting rights associated with live games. If fans switch to watching games on these illegal websites, the

* Stephanie N. Horner will graduate from Marquette in May 2014 earning a J.D., M.B.A in Sports Management, and a Certificate in Sports Law from the National Sports Law Institute. Stephanie is a 2010 graduate of the University of British Columbia, where she earned a Bachelor of Commerce, majoring in marketing. Stephanie currently serves as the Editor-in-Chief of the *Marquette Sports Law Review*, while also interning with Milwaukee Brewers and Andresen & Associates, PC. Additionally, during her three years at Marquette, Stephanie interned with the Charlotte Bobcats, the National Labor Relations Board, the Wisconsin Court of Appeals, and the National Sports Law Institute. Stephanie would like to thank her family and friends for their support during her time in law school and all those who helped with and contribute to this Comment, especially Professors Paul Anderson and Bruce Boyden.

1. See Michael J. Mellis, *Internet Piracy of Live Sports Telecasts*, 18 MARQ. SPORTS L. REV. 259, 259 (2008).

2. Mark Newman, *MLB Reaches Eight-Year Agreement with FOX, Turner Sports*, MLB.COM (Oct. 2, 2012), http://mlb.mlb.com/news/article.jsp?ymd=20121002&content_id=39362362&vkey=news_mlb&c_id=mlb.

3. For specific examples of unauthorized websites, see *Top 10 Websites for Free Sports Streaming Online*, BUTTERBLOG (May 22, 2012), <http://blog.buttermouth.com/2012/05/top-10-web-sites-to-sports-streaming.html>.

viewership on the legal channels could drop significantly. And if viewership drops, the television networks may be unwilling to pay as much for broadcasting contracts in the future, in turn, decreasing professional sports leagues' revenue.⁴

This phenomenon of free, illegal alternatives has already been seen in and hurt the music and movie industries.⁵ Instead of buying legal CDs or DVDs/Blu-Rays, consumers are downloading free, illegal digital copies from the Internet. This trend has resulted in significant loss of revenue for both the music and movie industries.⁶ Considering the value of the rights associated with broadcasting live games, professional sports leagues must ensure they do not endure a similar fate. Professional sports leagues must take action to fully protect their broadcasting rights over every medium—including the Internet.

This Comment examines how professional sports leagues can protect their broadcasting rights and ensure they alone reap the benefits from their exclusive rights. Part II introduces the emerging market for broadcasting live sporting events online and the problems associated with unauthorized websites streaming those broadcasts to the public for free. Part III specifies the general rights and protections associated with broadcasting live games that are granted to professional sports leagues. Finally, Part IV outlines possible actions that leagues could take against a variety of parties to stop the unauthorized websites from broadcasting their games online, concluding with the best short-term solution.

II. CURRENT TREND TO VIEW LIVE GAMES ONLINE

In an age where the Internet is so prevalent, users have become more technologically savvy and able to access the Internet almost anywhere on a variety of devices.⁷ As a result, the content displayed online reaches a very large audience in real time. Professional sports leagues should be able to capitalize on this new online market by controlling and receiving the benefits associated with broadcasting their games online. However, technology has rapidly evolved and individuals are now able to post and upload content to the Internet with relative ease,⁸ resulting in many unauthorized websites streaming

4. *See infra* Part II.

5. *See generally* *What Is Online Piracy?*, RIAA, http://www.riaa.com/physicalpiracy.php?content_selector=What-is-Online-Piracy (last visited Apr. 19, 2014); *Why Copyright Matters*, MOTION PICTURE ASS'N AM., <http://www.mpa.org/contentprotection/faq> (last visited Mar. 29, 2014).

6. *Id.*

7. *See* Bari Solomon, Comment, *Friend or Foe? The Impact of Technology on Professional Sports*, 20 COMM'LAW CONSPECTUS 253, 253 (2011).

8. *See id.* at 253.

broadcasts of live sporting events.⁹

Professional sports leagues have already realized the value of broadcasting sporting events online—some more than others. In particular, MLB created MLB Advanced Media (MLBAM) to deal with and capitalize on all of MLB's Internet and interactive media ventures.¹⁰ MLBAM created MLB.TV, which allows fans to watch live broadcasts of MLB games on their computers,¹¹ and the At Bat mobile app, which displays games and other features on various mobile devices.¹² In 2012, over 2.2 million people subscribed to either At Bat or MLB.TV,¹³ and about \$250 million in revenue was generated from content subscriptions alone for MLBAM.¹⁴ For the 2013 season, MLB charged \$19.99/year for At Bat or \$19.99–\$24.99/month and \$94.99–\$114.99/year for MLB.TV,¹⁵ demonstrating the present market for streaming live games online and the need for professional sports leagues to act now to protect their rights from illegal alternatives.

The music and movie industries have already experienced the harm that illegal alternatives can cause.¹⁶ Illegal downloading of music and movies became mainstream with the creation of peer-to-peer file-sharing services (i.e. Napster) in the late 1990s and early 2000s.¹⁷ These file-sharing services allowed users to exchange music and movie files for free, which severely harmed the music and movie industries, and, as a result, sales for legally purchased music and movies significantly decreased.¹⁸ The Institute of Policy Innovation estimated in 2007 that the music industry alone experiences a loss of over \$12.5 billion annually due to consumers choosing illegal alternatives to purchase music.¹⁹ By 2012, the music industry had syet to fully recover, as

9. See Mellis, *supra* note 1, at 259. See generally *Top 10 Websites for Free Sports Streaming Online*, *supra* note 3.

10. *MLB Advanced Media*, MLB.COM: CAREERS, <http://mlb.mlb.com/careers/index.jsp?loc=mlbam> (last visited Apr. 19, 2014).

11. *Watch Live Baseball Online, Stream MLB Games with MLB.TV*, MLB.COM: SUBSCRIPTIONS, <http://mlb.mlb.com/mlb/subscriptions/index.jsp> (last visited Mar. 2, 2013).

12. *At Bat*, MLB.COM: MOBILE, <http://mlb.mlb.com/mobile/atbat/> (last visited May 2, 2013).

13. Chuck Salter, *MLB Advanced Media's Bob Bowman Is Playing Digital Hardball. And He's Winning.*, FAST COMPANY (Mar. 19, 2012), <http://www.fastcompany.com/1822802/mlb-advanced-medias-bob-bowman-playing-digital-hardball-and-hes-winning>.

14. KCBear, *Highlights from a Talk by MLB Advanced Media CEO Robert Bowman*, ROYALS REVIEW (Mar. 4, 2013), <http://www.royalsreview.com/2013/3/4/4065274/highlights-from-a-talk-by-mlb-advanced-media-ceo-robert-bowman>.

15. *Watch Live Baseball Online, Stream MLB Games with MLB.TV*, *supra* note 11.

16. See generally *What Is Online Piracy?*, *supra* note 5; *Why Copyright Matters*, *supra* note 5.

17. See, e.g., *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011, 1017 (9th Cir. 2001).

18. *Id.*

19. STEPHEN E. SIWEK, INST. FOR POLICY INNOVATION, *THE TRUE COST OF SOUND RECORDING*

2012 was the first year it produced an increase in revenue in over a decade—and that increase was a mere 0.3%.²⁰ This decrease in revenue is not due to a decrease in demand for music; it is due, at least in part, to the existence of illegal alternatives.²¹ This demonstrates that if there is a free convenient alternative, at least some users will take it—even if it is illegal.²²

In the sports context, users are digitally capturing live television broadcasts of sporting events and streaming them online in real time for no fee to viewers.²³ There are many individual users uploading unauthorized streams online, but of greatest concern for professional sports leagues are the websites providing viewers with an index of links to the illegal streams in a central location. These indexing websites do not create or upload the streams directly;²⁴ instead, they provide a centralized location where they categorize the broadcasts by sport and event, which allows views easier access o the illegally streamed broadcasts.²⁵ These websites operate in a manner similar to the old music file-sharing services, and consequently, could cause similar harms to the professional sports leagues' rights if nothing is done.²⁶

One of the largest indexing websites is FirstRow Sports.²⁷ In April 2013 alone, approximately 9.98 million unique users visited FirstRow Sports, and it is estimated that FirstRow Sports generates between \$8.2 million and \$14.5 million in annual revenue.²⁸ Although they do not directly upload the illegal

PIRACY TO THE U.S. ECONOMY, POLICY REPORT 188, at 1, 12 (2007).

20. *World Music Revenue Inches Upward Despite Online Piracy*, CBC NEWS, <http://www.cbc.ca/news/technology/story/2013/02/26/music-digital-revenue.html> (last updated Feb. 26, 2013).

21. See Dianne Nice, *We're Still Downloading Music, Just Not Always Paying for It*, GLOBE & MAIL, <http://www.theglobeandmail.com/community/digital-lab/were-still-downloading-music-just-not-always-paying-for-it/article9256288/> (last updated Mar. 4, 2013) (a recent survey performed by The Globe and Mail, a prominent Canadian newspaper, found that 59% of its over 400 readers surveyed stated they had downloaded free music from illegal sources).

22. See generally SIWEK, *supra* note 19, at 12 (demonstrating that users of pirated broadcasts accounted for \$12.5 billion in losses in 2007); *Why Copyright Matters*, *supra* note 5.

23. For examples, see *Top 10 Websites for Free Sports Streaming Online*, *supra* note 3.

24. *E.g.*, *Football Ass'n Premier League Ltd. v. British Sky Broad. Ltd.*, [2013] EWHC (Ch) 2058, [14] (Eng.).

25. *Id.* at [15].

26. See generally *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011, 1017 (9th Cir. 2001).

27. See *Football Ass'n Premier League Ltd.*, [2013] EWHC (Ch) 2058, at [17]. See generally *FirstRow Sports*, FIRSTROW LIVE FOOTBALL STREAM, <http://gofirstrowus.eu> (last visited Apr. 18, 2014).

28. *Football Ass'n Premier League Ltd.*, [2013] EWHC (Ch) 2058, [17]; Ryan W. Neal, *FirstRow Sports Banned in UK: Sports Streaming Website Defeated by English Premier League*, INT'L BUS. TIMES (July 17, 2013), <http://www.ibtimes.com/firstrow-sports-banned-uk-sports-streaming-website-defeated-english-premier-league-1350621>. However, FirstRow Sports denies this amount; instead it claims FirstRow Sports only generates about \$110,000 in annual revenue. Neal, *supra*.

streams online, FirstRow Sports makes them more accessible to the general public and furthers the problem.²⁹ Specifically,

FirstRow aggregates together a large number of streams from a variety of streamers, indexes them for the convenience of the user and provides a simple link for the user to click on in order to access a specific stream. It is true that the technical effect of clicking on the link is to direct the stream from [a third party] site to the user's computer, but even so the stream is presented in a frame provided by FirstRow.³⁰

As the owner of the broadcasting rights associated with their live games, professional sports leagues are entitled to exclusively benefit from broadcasting their games online.³¹ If the leagues do not take action to shut down the websites streaming their games illegally, the number of paying users using legal outlets, like MLB.TV, could decrease, which would decrease leagues' overall revenue. The U.S. Government has taken action in the past to combat these illegal websites, but its attempts have been sporadic and have not had a lasting impact.³² Thus, all professional sports leagues should be concerned with stopping these illegal streams on a more consistent basis to avoid the fate of the music and movie industries and ensure they receive all the exclusive benefits granted to them as broadcast owners.

III. RIGHTS ASSOCIATED WITH BROADCASTING GAMES

The ability to control the broadcasts of live games is, and always has been, extremely important due to the high amount of revenue associated.³³ However, before the rights and protections associated with sport broadcasts could be determined, the ownership of a live sports broadcast—whether it be the team, players, television networks, or leagues—had to be established.³⁴ This issue was first addressed in *Pittsburgh Athletic Co. v. KQV Broadcasting Co.* in 1938.³⁵

29. *Football Ass'n Premier League Ltd.*, [2013] EWCA (Ch) 2058, [42].

30. *Id.*

31. See discussion *infra* Part III.

32. See Ernesto, *Seized Sports Streaming Site Makes a Blazing Comeback*, TORRENTFREAK (Feb. 3, 2012), <http://torrentfreak.com/seized-sports-streaming-site-makes-a-blazing-comeback-120203/>.

33. GLENN, M. WONG, *ESSENTIALS OF SPORTS LAW* 708, 710 (4th ed. 2010).

34. *Id.* at 710.

35. 24 F. Supp. 490 (W.D. Pa. 1938).

A. Owner of Sports Broadcasts

In *Pittsburgh Athletic Co.*, the owner of the Pittsburgh Pirates, Pittsburgh Athletic, sold the exclusive right to broadcast baseball games played by the Pirates at Forbes Field to General Mills, Inc.³⁶ Another broadcasting company, KQV Broadcasting, was aware of the exclusive contract, but was still intent on producing its own broadcasts of the Pirates' games.³⁷ KQV Broadcasting placed employees outside Forbes Field to observe and give their own play-by-play accounts of the games, which accounts were broadcasted on KQV Broadcasting's radio station.³⁸ In response, Pittsburgh Athletic sought an injunction to prevent KQV Broadcasting from broadcasting the accounts of the Pirates' games on its radio station.³⁹ The court granted the injunction and stated that the home team, as creator of the game and controller of the field where it was played, had the exclusive right to disseminate home games.⁴⁰ By broadcasting its own play-by-play observations of Pirates games, the court found that KQV Broadcasting interfered with Pittsburgh Athletic's inherent rights.⁴¹ The court reasoned that Pittsburgh Athletic had greatly invested in creating its home baseball games, and that it had a "legitimate right to capitalize on the value" of those games by selling the exclusive broadcasting rights without interference.⁴²

B. Rights of Sports Broadcast Owners

Pittsburgh Athletic Co. established the ownership of a sports broadcast, but the extent and practical application remained unclear. Today it is clear that sports broadcasts are protected by the U.S. Copyright Act,⁴³ but it was not until 1997, in *NBA v. Motorola, Inc.*,⁴⁴ the court declared that copyright protection.

In *Motorola, Inc.*, Motorola created the SportsTrax paging device, which displayed statistical information from live National Basketball Association (NBA) games in real time.⁴⁵ The NBA asserted a variety of claims to obtain injunctive relief; relevant to this Comment is the claim relating to copyright

36. *Id.* at 492.

37. *Id.*

38. *Id.*

39. *Id.* at 491.

40. *Id.* at 492.

41. *Id.*

42. *Id.*

43. *See generally* Copyright Act of 1976, 17 U.S.C. §§ 101–06 (2012).

44. 105 F.3d 841 (2d Cir. 1997).

45. *Id.* at 843.

infringement.⁴⁶ The court denied the NBA's claim for copyright infringement against Motorola, but of greater significance, the court established a bright-line rule as to when copyright protections would be awarded.⁴⁷ The court in *Motorola, Inc.* made it clear that only the broadcasts of the games, not the underlying games themselves, were entitled to copyright protections.⁴⁸

The Copyright Act provides protection for "original works of authorship,"⁴⁹ and the court in *Motorola, Inc.* reasoned that Congress clearly intended for the broadcasts of live games to be protected by the Act because Congress had stated, "there is little doubt that what the cameramen and the director are doing [in creating live broadcasts] constitutes 'authorship,'" when it originally considered the Act.⁵⁰ In contrast, the court explained that live games were not authored because, unlike movies or television programs, sporting events did not follow a script and may "result in wholly unanticipated occurrences."⁵¹ Thus, unlike broadcasts, the underlying games are not "authored," and consequently, not protected by the Copyright Act.⁵²

The court in *Motorola, Inc.* further explained that there is a significant difference between reproducing the facts and reproducing the expression of games, as the "fact/expression dichotomy" [was] a bedrock principle of copyright law," and that "[n]o author may copyright facts or ideas. The copyright is limited to those aspects of the work—termed 'expression'—that display the stamp of the author's originality."⁵³ Thus, only the created broadcasts themselves are protected by the Copyright Act, not the mere description of the game.⁵⁴ As a result, the court found that Motorola was not liable for copyright infringement because the SportsTrax paging device "reproduced only facts from the broadcast, not the expression or description of the game that constitutes the broadcast."⁵⁵

46. *Id.* at 844.

47. *Id.* at 847.

48. *Id.*

49. 17 U.S.C. § 102(a) (2012).

50. *Motorola, Inc.*, 105 F.3d at 847 (quoting H.R. REP. NO. 94-1476, at 52 (1976), reprinted in 1976 U.S.C.C.A.N. at 5665).

51. *Id.* at 846.

52. For other examples of the courts addressing the issue of authorship and copyright ownership in broadcasting live sporting events, see *Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 378 (D.C. Cir. 1982), and *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 668 (7th Cir. 1986).

53. *Motorola, Inc.*, 105 F.3d at 847 (quoting *Feist Pub'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991)).

54. *Id.*

55. *Id.*

C. Utilizing Sports Broadcasting Rights

Moving forward from *Pittsburgh Athletic Co.* and *Motorola, Inc.*, professional sports teams owned the broadcasting rights for games played at home, but they could only capitalize on those rights if the broadcasts were created. In practice, teams simply form contractual agreements with television networks, which grant those networks the right to broadcast their games.⁵⁶ Then, once the networks create a broadcast, that broadcast becomes protected, and via contract, teams are entitled to exclusive rights provided by the Copyright Act.⁵⁷

To obtain the most lucrative television contracts league-wide, teams need to pool their broadcasting rights to allow leagues to negotiate with television networks for a large nation-wide package of games to increase their overall bargaining power.⁵⁸ If teams were required to negotiate all television contracts individually for their own home games, the disparity between the large and small market teams would only increase.⁵⁹ This disparity has already been displayed when teams have been left to use only their own resources in obtaining their regional television agreements. For example, the current Los Angeles Dodgers regional broadcast agreement generates approximately \$280 million in revenue annually;⁶⁰ whereas, the Milwaukee Brewers only receive approximately \$21 million annually from their regional television contract.⁶¹ If professional sports leagues do not offset this great disparity, their overall revenue would decrease and allow only a few teams to strive financially.⁶²

Professional sports leagues need competitive balance on the field among their teams to operate—meaning each team must have a legitimate chance to win.⁶³ If only a few teams were highly profitable, those teams could attract and

56. MATTHEW J. MITTEN, *SPORTS LAW IN THE UNITED STATES* 194 (2011). See also *e.g.* *NFL v. Insight Telecomms. Corp.*, 158 F. Supp. 2d 124, 128 (D. Mass. 2001) (“The NFL owns the copyright in all regular season and post-season NFL game telecasts, as confirmed by the League’s contracts with the networks.”).

57. See *Motorola, Inc.*, 105 F.3d at 847. All copyright owners are awarded six exclusive rights: (1) to reproduce and (2) prepare derivative works of the copyrighted material; (3) to distribute, (4) perform, and (5) display the copyrighted materials publicly; as well as, (6) control the performance of digital audio transmission of the copyrighted material. 17 U.S.C. § 106 (2012).

58. WONG, *supra* note 33, at 714.

59. See H.R. REP. NO. 87-1178, at 3 (1961).

60. See Bob Wolfley, *Brewers’ TV Contract Among Lowest in Major Leagues*, JSONLINE (Mar. 30, 2013), <http://www.jsonline.com/blogs/sports/200738381.html>. The \$280 million does not include the amount taken by the league through revenue sharing. *Id.* After the revenue sharing amount is excluded, the Dodgers still receive \$188 million annually. *Id.*

61. *Id.*

62. See H.R. REP. NO. 87-1178, at 3.

63. See James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After*

retain the best players, and consequently, dominate the league on the field.⁶⁴ This would lead to predictable outcomes and decreased fan interest, which could force some of the non-profitable teams out of the leagues.⁶⁵ This result would not be beneficial for anyone—not even the large market teams. Consequently, leagues combat this in a variety of ways, with pooling their teams’ broadcasting rights as one solution.

Spreading the wealth by pooling broadcasting rights requires multiple teams acting together, which manipulates the market for television contracts. Antitrust laws prohibit concerted actions that restrain trade or commerce,⁶⁶ and by pooling broadcasting rights, teams act in a concerted manner that restrains commerce because television contracts are created at a higher value (or lower in some cases) than would be seen in a free market.⁶⁷ Consequently, pooling rights would seemingly violate antitrust laws.

Congress responded to this specific problem of pooling broadcasting rights by enacting the Sports Broadcasting Act of 1961.⁶⁸ Understanding the unique features of professional sports leagues and the need for competitive balance within those leagues, Congress created a narrow exemption from antitrust law to allow professional sports leagues to pool the broadcasting rights of their teams.⁶⁹ This exemption allows leagues to negotiate television packages as a whole, and consequently, ensures they are fully able to exercise their broadcasting rights on a national level, without the worry of antitrust violations.⁷⁰ However, there is one very important limitation to this exemption—it only applies to “sponsored telecasting.”⁷¹

Sponsored telecasting is not explicitly defined in the Sports Broadcasting Act, but it has been narrowly interpreted by courts as only including free network broadcasting and specifically excluding other “non-exempt channels of distribution such as cable television, pay-per-view, and satellite television networks.”⁷² Although not expressed, it follows that broadcasts over the

American Needle, 21 MARQ. SPORTS L. REV. 517, 520–22 (2011).

64. *Id.* at 520–23.

65. *Id.* at 520–22.

66. Sherman Act, 15 U.S.C. § 1 (2012).

67. *See* McKeown, *supra* note 63, at 520–21.

68. 15 U.S.C. §§ 1291–95 (2012).

69. U.S. Football League v. NFL, 842 F.2d 1335, 1347 (2d Cir.1988); *see also* H.R. REP. NO. 87-1178, at 3 (1961).

70. *See* WONG, *supra* note 33, at 708, 714.

71. 15 U.S.C. § 1291.

72. Kingray, Inc. v. NBA, 188 F. Supp. 2d 1177, 1183 (S.D. Cal. 2002); *see also* Shaw v. Dallas Cowboys Football Club, Ltd., 172 F.3d 299, 302 (3d Cir. 1999); Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motions to Dismiss the Complaints, at 19–20, Laumann v. NHL, 907

Internet would also not be exempt, since the Internet is not a free network broadcasting distribution channel.⁷³ Consequently, without the exemption from the Sports Broadcasting Act, leagues could be liable for antitrust violations for pooling their teams' broadcasting rights for games online.⁷⁴

Leagues can successfully defend antitrust actions in a variety of ways; however, an antitrust claim is outside the scope of and irrelevant to this Comment. The issue of pooling broadcasting rights is merely addressed here to demonstrate how leagues use their teams' rights in practice. In the worst-case scenario, where leagues are unable to defend an antitrust claim, the teams will still be the owners of their home game broadcasts and be able to contract with the networks individually. Consequently, whether leagues pool broadcasting rights or the teams act individually, the analysis and argument regarding online broadcasting rights in this Comment will apply. But, for ease and consistency, this Comment will proceed under the assumption that leagues are able to and will continue to pool their teams' broadcasting rights.

D. Streaming Sports Broadcasts

When professional sports leagues pool their teams' broadcasting rights, the leagues become the collective owners and receive the rights and protections awarded by the Copyright Act.⁷⁵ One of the rights granted by Copyright Act is the exclusive right to "perform the copyrighted work publically," which is defined as, "transmit[ing] or otherwise communicat[ing] . . . by any means of any device."⁷⁶ In practice, this means that broadcasting rights apply to all mediums—even the Internet.

It has been well established that broadcasts over traditional mediums, such as television and radio, receive copyright protection. The Seventh Circuit, in *Wisconsin Interscholastic Athletic Ass'n v. Gannett Co.*, further confirmed that streaming was considered a "broadcast" for copyright purposes and should receive the same protections as broadcasts on traditional mediums.⁷⁷

In *Wisconsin Interscholastic Athletic Ass'n*, the Wisconsin Interscholastic Athletic Association (WIAA) granted the exclusive right to broadcast its games

F.Supp.2d 465 (S.D. N.Y. 2012) (Nos. 12-CV-1817, 12-CV-3704) [hereinafter Laumann Opposition Brief].

73. Laumann Opposition Brief, *supra* note 72, at 19–20.

74. The antitrust issue regarding pooling broadcasting rights online is currently being battled in the courts. *See generally* Laumann, 907 F. Supp. 2d 465.

75. *See* WONG, *supra* note 33, at 708.

76. Copyright Act of 1976, 17 U.S.C. §§ 101, 106(4) (2012) (emphasis added).

77. *Wis. Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614, 622 (7th Cir. 2011).

via online streaming to American–HiFi.⁷⁸ Disregarding that exclusive contract, a newspaper streamed WIAA games on its own website without consulting, obtaining consent of, or paying a fee to the WIAA.⁷⁹ The WIAA responded by suing the newspaper, claiming that the newspaper violated its right to grant exclusive licenses.⁸⁰ The court agreed and upheld the contracts, reasoning that although streams were not traditional broadcasting channels, there was “no meaningful distinction between the online setting and more traditional media” and that the websites merely functioned as online channels.⁸¹

Other recent cases involving online copyright infringement contemplate services that charge a fee to either watch television broadcasts live (including sports) or record them for later viewing.⁸² In all of these cases, the concept of streaming being a broadcast is conceded.⁸³ Instead, all the plaintiffs argue that their performance (their streaming of the broadcast) is not “public” because they only send the broadcasts to individual subscribers, and therefore, they are not infringing.⁸⁴ The courts remain split on the issue of what is considered “public,”⁸⁵ but what is clear and significant to this Comment is that broadcasts streamed online are awarded the same protections as broadcasts through television or radio.

This Comment seeks to find a solution for professional sports leagues to stop unauthorized websites from indexing and providing the general public with easy access to free illegal broadcasts. Unlike with the recent cases, these indexing websites do not require a subscription or login to view broadcasts, essentially allowing access to anyone with an Internet connection.⁸⁶ The argument cannot be made that performance is private, and thus, the unresolved issue of what constitutes “public,” with regard to a public performance of

78. *Id.* at 615.

79. *Id.*

80. *Id.* at 616.

81. *Id.* at 622.

82. *E.g.*, *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. 2013); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008); *Fox Television Stations v. BarryDriller Content Sys.*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012); *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012); *Hearst Stations, Inc. v. Aereo, Inc.*, No. 13-11649-NMG, 2013 WL 5604284 (D. Mass. Oct. 8, 2013); *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758(RMC), 2013 WL 4763414 (D.C. Cir.. Sept. 5, 2013).

83. *E.g.*, *WNET Thirteen*, 712 F.3d at 690; *Cartoon Network LP*, 536 F.3d at 136; *BarryDriller Content Sys.*, 915 F. Supp. 2d at 1143; *Am. Broad. Cos., Inc.*, 874 F. Supp. 2d at 385; *Hearst Stations, Inc.*, 2013 WL 4763414, at *6; *FilmOn X LLC*, 2013 WL 4763414, at *6.

84. *Id.*

85. *Id.*

86. *Football Ass’n Premier League Ltd. v. British Sky Broad. Ltd.*, [2013] EWHC (Ch) 2058, [15], [44] (Eng.).

copyrighted material, is irrelevant here.

IV. POTENTIAL CLAIMS TO PROTECT BROADCASTING RIGHTS

For a right to be valuable, it must be enforceable. As owners of the broadcasting rights of their games, professional sports leagues are able to enforce their rights through claims against variety of possible defendants, but all options stem from the basic claim of copyright infringement.

A. *Direct Copyright Infringement Against the Individuals Uploading the Unauthorized Streams*

Direct copyright infringement occurs when someone directly violates one of the exclusive rights awarded to copyright owners.⁸⁷ To successfully prove a claim of direct copyright infringement, plaintiffs must show: (1) they own the allegedly infringing material; and (2) at least one of their exclusive rights has been violated.⁸⁸

First, it is well established that professional sports leagues own the right to broadcast their own games and the broadcasts created are awarded copyright protections. In terms of the second element of copyright infringement, as described in the previous section, broadcasting rights extend to transmission over all mediums, including streaming online. Consequently, when unauthorized individuals upload and stream broadcasts of live games online for anyone with an Internet connection to view, those individuals are violating the leagues' exclusive right to perform the copyrighted work publicly, and thus, leagues likely have a viable claim of direct copyright infringement against them.⁸⁹

1. Case Law Supporting the Assertion that Streaming Unauthorized Broadcasts Constitutes Copyright Infringement

The following three cases support the conclusion that streaming copyrighted broadcasts online, without authorization, would constitute copyright infringement by the individual uploaders.

i. *Twentieth Century Fox v. iCraveTV*

In *Twentieth Century Fox Film Corp. v. iCraveTV*, the Canadian-based iCraveTV converted U.S. broadcasts of various television programs and live

87. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

88. *Id.*

89. See Copyright Act of 1976, 17 U.S.C. §§ 101–06 (2012).

sporting events into computerized data and streamed them over the Internet.⁹⁰ To protect their assets, the various television networks sued iCraveTV for copyright infringement.⁹¹ In granting an injunction, the court found that the television networks would likely succeed in their copyright infringement claim because iCraveTV violated the networks' exclusive "rights to perform their works publicly and authorize others to do so."⁹² The court reasoned that iCraveTV transmitted performances publicly by "streaming" copyrighted works over the Internet.⁹³

ii. *NFL v. PrimeTime 24 Joint Venture*

Although *NFL v. PrimeTime 24 Joint Venture*⁹⁴ was not a case of streaming directly, it should be mentioned because it further confirmed the reasoning set forth in *iCraveTV*.⁹⁵ In *PrimeTime 24 Joint Venture*, the court found that PrimeTime infringed the National Football League's (NFL) copyrights when it retransmitted NFL games, via Satellite, to Canada.⁹⁶

Without obtaining permission, PrimeTime captured the U.S. broadcasts of NFL games and uploaded them to a satellite for transmission to Canada.⁹⁷ PrimeTime argued that public performance occurred only when the viewers watched the broadcasts in Canada, not when it uploaded the broadcast, and thus, they only had to abide by Canadian copyright laws.⁹⁸ However, the court disagreed, holding that Congress intended for the Copyright Act to apply to "each step in the process by which a protected work wends its way to its audience."⁹⁹ Accordingly, the court found that uploading and transmitting the copyrighted broadcasts of live NFL games constituted a "step in the process" by which the games wend their way to the viewers.¹⁰⁰ Consequently, PrimeTime publicly performed the NFL's copyrighted material and infringed its copyrights.¹⁰¹

90. Nos. Civ.A. 00-121, Civ.A. 00-120, 2000 WL 255989, at *2 (W.D. Pa. Feb. 8, 2000).

91. *See id.* at *1.

92. *Id.* at *7 (citing 17 U.S.C. §§ 106, 510(a) (2012)).

93. *Id.*

94. 211 F.3d 10, 11 (2d Cir. 2000).

95. Mellis, *supra* note 1, at 268.

96. *PrimeTime 24 Joint Venture*, 211 F.3d at 11, 13.

97. *Id.* at 11–12.

98. *Id.* at 12.

99. *Id.* at 13 (quoting *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752, 759 (S.D. N.Y. 1988)).

100. *Id.*

101. *Id.*

iii. *Live Nation Motor Sports v. Davis*

In *Live Nation Motor Sports, Inc. v. Davis*, the court elected to follow the reasoning of *PrimeTime 24 Joint Venture* in determining the appropriate copyright protections for streaming live sports broadcasts online.¹⁰² In *Live Nation Motor Sports, Inc.*, Davis streamed live broadcasts of motorcycle races, produced by SFX Motor Sports, on his own website.¹⁰³ As owner of the broadcasts, SFX Motor Sports sued Davis for copyright infringement.¹⁰⁴ Following reasoning set in *PrimeTime 24 Joint Venture*, the court found that Davis' streams were unauthorized and that providing those streams on his website amounted to a "step in the process" to performing the copyrighted work publicly.¹⁰⁵ Thus, the court held that Davis, by streaming unauthorized broadcasts on his website, violated SFX Motor Sports' copyrights.¹⁰⁶

2. The Problem for Professional Sports Leagues

In the previous three examples, the defendants directly uploaded the games and committed the infringing activity. However, the websites of current concern for professional sports leagues are the websites indexing the illegal streams uploaded by third party individuals. There are two steps involved to get the illegal broadcasts to its viewers.¹⁰⁷ First, individuals upload and stream the television broadcast of a game online.¹⁰⁸ Second, websites index and categorize the various individual streams, which provide viewers easier accessibility to the streams.¹⁰⁹ In addition to providing an index of the various unauthorized streams, the websites create specific tabs for each sport and categorize each stream accordingly.¹¹⁰

Professional sports leagues likely have a viable claim of direct copyright infringement against the individuals who upload and stream the live games without consent, but the benefits may not outweigh the costs. Initially, there can be a problem identifying the individual infringer because of the lack of requirements and ease of falsifying identifying information when creating a

102. No. 3:06-CV-276-L, 2007 WL 79311, at *3-4 (N.D. Tex. Jan. 9, 2007).

103. *Id.* at *1.

104. *Id.*

105. *Id.* at *3-4.

106. *Id.* at *5.

107. See *Football Ass'n Premier League Ltd. v. British Sky Broad. Ltd.*, [2013] EWHC (Ch) 2058, [15] (Eng.); Carson S. Walker, Comment, *A La Carte Television: A Solution to Online Piracy?*, 20 COMM'LAW CONSPECTUS 471, 479 (2012).

108. *Football Ass'n Premier League Ltd.*, [2013] EWHC (Ch) 2058, [15].

109. *Id.*

110. *Id.*

website, uploading a video, etc.¹¹¹ Courts have been willing to aid in the identification process by requiring Internet Service Providers (ISPs) to reveal the infringing users' identifying information, but the procedures can be time consuming and very costly.¹¹² Even with a successful claim, the problem may not be resolved because as one stream shuts down, many more will just pop up in its place.¹¹³ Consequently, although professional sports leagues want to protect their broadcasting rights, pursuing claims against the individual streamers is not their best option. A better solution is to go after the websites that index and categorize the unauthorized streams.

B. Secondary Liability Against the Websites Indexing the Unauthorized Streams

The Copyright Act does not expressly impute liability to one for the infringing activity of another, but the common law doctrine of secondary liability does.¹¹⁴ Under the doctrine of secondary liability, a third party may be held liable for another's infringement if certain criteria are met.¹¹⁵ This doctrine allows professional sports leagues to attack the websites indexing and providing access to the illegal streams, even though the websites are not the ones directly uploading and streaming the games.

One of the first actions addressing secondary liability in the entertainment context was *Sony Corp. of America v. Universal Studios, Inc.*¹¹⁶ In *Sony*, various movie studios claimed that by manufacturing VCRs, which allowed users to make infringing copies of television broadcasts, Sony violated their rights under the Copyright Act.¹¹⁷ The U.S. Supreme Court disagreed, holding that Sony was not liable because its VCRs were "capable of substantial noninfringing uses."¹¹⁸

The Court, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, further clarified the standard set in *Sony*, stating, "*Sony* barred secondary liability based

111. See, e.g., *Voltage Pictures, LLC v. Vazquez*, 277 F.R.D. 28 (D.C. Cir. 2011); *Voltage Pictures, LLC v. Does 1-5,000*, 818 F. Supp. 2d 28 (D.C. Cir. 2011).

112. See, e.g., *id.*

113. See Kevin J. Delaney, *Free Viewing—Threat for Big Media: Guerrilla Video Sites; New Mexico Duo Offer Broad TV, Film Menu and Evade Shutdown*, WSJ.COM, <http://online.wsj.com/news/articles/SB117677446088572146> (last updated Apr. 17, 2007).

114. See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Sony Corp. of Am. v. Universal Studios, Inc.*, 464 U.S. 417 (1984); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001).

115. *Id.*

116. 464 U.S. 417 (1984).

117. *Id.* at 419–20.

118. *Id.* at 456.

on presuming or imputing intent to cause infringement solely from the design or distribution of a product capable of substantial lawful use.”¹¹⁹ In plain language, *Sony* only barred the presumption of guilt in secondary liability cases; it did not change the theory itself.¹²⁰ Although there is no presumption of guilt, when there is clear evidence that a party goes beyond mere distribution of possible infringing content to causing and profiting from the infringing activities, secondary liability will be imputed upon that party.¹²¹

Since the doctrine of secondary liability is a common law creation, it has evolved over time. Today, secondary liability can be imputed under two claims: (i) contributory infringement; or (ii) vicarious infringement.¹²² Contributory infringement occurs when “one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”¹²³ Whereas, vicarious infringement occurs when one “profit[s] from direct infringement while declining to exercise a right to stop or limit it.”¹²⁴

Both contributory and vicarious infringement claims have been applied to infringing content online and the principles set forth in those cases can be used in a professional sports league’s claim against the indexing websites.

1. Contributory Infringement

To successfully prove a claim of contributory infringement, a plaintiff must prove the defendant: (1) knew of the infringing activity; and (2) induced, caused, or materially contributed to the infringing activity.¹²⁵

In *A&M Records, Inc. v. Napster, Inc.*, Napster created software that facilitated the sharing of music files between users by providing a searchable index of available songs from other users and a central place for users to exchange and download those music files.¹²⁶ The court held that Napster was

119. *Grokster, Ltd.*, 545 U.S. at 933.

120. *See id.* at 934.

121. *Id.* at 941.

122. *See generally Grokster, Ltd.*, 545 U.S. 913; *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971).

123. *Gershwin Publ’g Corp.*, 443 F.2d at 1162; *see also Bridgeport Music, Inc. v. WM Music Corp.*, 508 F.3d 394, 398 (6th Cir. 2007) (citing *Bridgeport Music, Inc. v. Rhyme Syndicate Music*, 376 F.3d 615, 621 (6th Cir. 2004)); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996) (quoting *Gershwin Publ’g Corp.*, 443 F.2d at 1162).

124. *Grokster, Ltd.*, 545 U.S. at 930.

125. *Gershwin Publ’g Corp.*, 443 F.2d at 1162; *see also Bridgeport Music, Inc.*, 508 F.3d at 398 (citing *Rhyme Syndicate Music*, 376 F.3d at 621); *Fonovisa, Inc.*, 76 F.3d at 264 (quoting *Gershwin Publ’g Corp.*, 443 F.2d at 1162).

126. *Napster, Inc.*, 239 F.3d at 1011.

liable for contributory infringement because it knew of and materially contributed to the infringing activity.¹²⁷ The court rested on the fact that Napster had actual knowledge that infringing music files existed in its index and that index made it easier for users to find and download the infringing music files.¹²⁸ The court found that by providing users easier access to the infringing music files and the ability to download those infringing files, Napster materially contributed to the infringement.¹²⁹

After the demise of Napster, other services attempted to claim the market—one that grabbed national attention was Grokster.¹³⁰ Grokster tried to avoid the fate of Napster by not relying on a centralized server to store the files.¹³¹ Grokster did not mediate the exchange of files; it only supplied users with software, which allowed them to share files directly.¹³² However, the U.S. Supreme Court still found Grokster liable for contributory infringement.¹³³ The Court declared, “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.”¹³⁴ The Court found that Grokster intentionally facilitated the infringing activities because it marketed itself as a replacement for Napster, it failed to develop filtering tools to diminish the infringing activity, and it profited substantially from the infringing activity.¹³⁵

Another case establishing rules regarding copyrights online is *Perfect 10, Inc. v. Amazon.com, Inc.*, which discussed websites providing “links” to other copyrighted materials.¹³⁶ In *Perfect 10, Inc.*, Perfect 10 claimed that Google’s image search engine infringed its copyrights.¹³⁷ Google’s image search engine displayed copyrighted images, but the actual images were not kept on Google’s servers.¹³⁸ Instead, Google only displayed the images that an infringing third party had already uploaded to its own websites.¹³⁹ In this case, no supporting evidence was present, but the court stated that Google could still be contributory

127. *Id.* at 1022.

128. *Id.*

129. *Id.*

130. *See, e.g.*, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

131. *See id.* at 919–20.

132. *Id.*

133. *Id.* at 919.

134. *Id.*

135. *Id.* at 939–40.

136. 508 F.3d 1146, 1157 (9th Cir. 2007).

137. *Id.*

138. *Id.* at 1156.

139. *See id.*

liable if it knew of the infringing images displayed by its index and failed to take simple measures to prevent further damage.¹⁴⁰ Thus, even though the infringement has already occurred, one can still be liable for contributory infringement if it knowingly furthers the infringing activity.

2. Vicarious Infringement

Secondary liability can also be imputed through vicarious infringement. To successfully prove a claim of vicarious infringement, a plaintiff must prove a defendant: (1) profited from the infringing activity; and (2) failed to stop or limit the infringing activity.¹⁴¹

In *Napster, Inc.*, the court held that, in addition to contributory infringement, Napster was also liable for vicarious infringement based on three reasons.¹⁴² First, Napster had control over the infringing activity because it controlled who had access to the service and created the central index that catalogued all the music files.¹⁴³ Second, Napster failed to remove the infringing files from the index.¹⁴⁴ Finally, Napster directly benefited financially from the infringing activity.¹⁴⁵ The court explained that when the availability of infringing material is the basis for a business model, financial benefits automatically exist.¹⁴⁶

In *Grokster*, the Court did not address the claim for vicarious infringement because it had already found the defendant was liable for contributory infringement.¹⁴⁷

In *Perfect 10*, the court found that Google was not liable for vicarious infringement.¹⁴⁸ The court explained that unlike in *Napster*, where Napster required registration and had the ability to remove infringing files from its index, Google could not stop the infringing activity from occurring because third parties were directly uploading the images online.¹⁴⁹ Instead, Google

140. *Id.* at 1172. The case was later remanded and the injunction for contributory infringement was denied for other reasons. *See generally* *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976 (9th Cir. 2011).

141. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005).

142. *See* *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 n.9 (2005).

148. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1157, 1174–75 (9th Cir. 2007).

149. *Id.* at 1174.

merely displayed the copyrighted images.¹⁵⁰ The court reasoned that because Google lacked control over the infringing activity, it was not liable for vicarious infringement.¹⁵¹

3. Applying the Doctrine of Secondary Liability to Indexing Websites

To attack the websites indexing unauthorized streams of sports broadcasts, professional sports leagues may proceed by imputing secondary liability through a claim of contributory infringement. On the other hand, it is unlikely that the leagues have a viable claim of vicarious infringement.

i. The Viable Claim—Contributory Infringement

The leagues will likely succeed with a claim of contributory infringement because they can prove that indexing websites knew of and materially contributed to the infringing act of streaming game without proper consent.

First, knowledge of the infringing activity can be imputed to these indexing websites due to their active involvement in displaying the illegal streams online. Anyone who has seen a game has heard the disclaimers made by all professional sports leagues during every broadcast that clearly state rebroadcasting or retransmitting without consent is illegal.¹⁵² For example, the MLB specifically states during every broadcast that “[a]ny rebroadcast, retransmission, or account of this game, without the express written consent of Major League Baseball, is prohibited.”¹⁵³ The indexing websites have control over the content displayed on their websites and how it is categorized. These websites receive links to streams from individuals, and subsequently categorize and post those received links under various tabs in their index.¹⁵⁴ The tabs specify the sport and links for each game falling within that sport are grouped together under a title the websites create (i.e. 19:00 Los Angeles Lakers vs. Miami Heat) with the leagues’ logo.¹⁵⁵ Based on the level of involvement and control, knowledge of the infringement can be imputed to the websites because if the websites can classify sporting events, it is reasonable to assume that they have seen a sports broadcast and are aware of the leagues’ disclaimers. The websites clearly do

150. *See id.*

151. *Id.* at 1174–75.

152. Jon Bois, *Baseball Fan Has Some Fun with MLB Disclaimer*, SBNATION.COM (Sept. 3, 2009), <http://www.sbnation.com/2009/9/3/1014384/baseball-fan-has-some-fun-with-mlb>.

153. *Id.*

154. *Football Ass’n Premier League Ltd. v. British Sky Broad. Ltd.*, [2013] EWHC (Ch) 2058, [15] (Eng.).

155. *E.g.*, *FirstRow Sports*, *supra* note 27.

not have consent from the leagues; thus, it follows that the knowledge of infringement should be imputed to the indexing websites.

Second, the indexing websites materially contribute to the infringing acts because they are actively involved in displaying the illegal streams online. In creating the tabs and categorizing the games within their index, the websites' actions are analogous to those defendants in *Napster, Inc.* and *Grokster, Ltd.*¹⁵⁶ These indexing websites make it easier for users to find the illegal streams and their knowledge that a large percentage, if not all, of its streams are infringing,¹⁵⁷ displays their objective to foster infringement.¹⁵⁸ Consequently, it follows that the indexing websites have and continue to materially contribute to the infringing activity. Although an argument could be made that the websites do not contribute to the infringing activity because the infringement has already occurred, *Perfect 10, Inc.* already established that one could materially contribute to infringement by furthering infringing activity that is already available.¹⁵⁹ Thus, professional sports leagues will likely succeed with a claim of contributory infringement against the indexing websites.

ii. The Unlikely Claim—Vicarious Infringement

In contrast, professional sports leagues are not likely to succeed with a claim of vicarious infringement against the indexing websites because although the websites have control over what is displayed on their websites, they do not have the requisite control over the individual streams—meaning they cannot stop the infringement from occurring. Liability for vicarious infringement is imputed when one profits from another's infringement, while failing to stop or limit it.¹⁶⁰ The indexing websites clearly profit from the infringing activity, as FirstRow Sports is estimated to earn approximately \$8.2 million to \$14.5 million in annual revenue from advertising.¹⁶¹ However, profit from the infringing is only one of the required elements. To impute vicarious infringement, one must also be able to stop or limit the infringement;¹⁶² and this is where the claim against the indexing websites fails for the leagues.

Requiring one to stop the infringement implies that one has the ability to

156. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 921 (2005); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

157. *See Football Ass'n Premier League Ltd.*, [2013] EWHC (Ch) 2058, [16].

158. *Cf. Grokster, Ltd.*, 545 U.S. at 939 (a music file sharing service found to foster infringement); *Napster, Inc.*, 239 F.3d at 1022 (a music file sharing service found to facilitate infringement).

159. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1157, 1172 (9th Cir. 2007).

160. *Grokster, Ltd.*, 545 U.S. at 930.

161. Neal, *supra* note 28.

162. *Grokster, Ltd.*, 545 U.S. at 930.

control the infringement.¹⁶³ The indexing websites at issue here, unlike in *Napster, Inc.*, do not require its users to register and provide personal information.¹⁶⁴ Instead, the indexing websites are more analogous to Google's image search, seen in *Perfect 10, Inc.*, because the websites have no power over the individual streamers.¹⁶⁵ The websites merely require individuals provide a link to the stream to submit games.¹⁶⁶ Consequently, the websites can only limit their own furtherance of the infringing streams by taking the streams off their own websites; they cannot stop the infringing activity all together. Thus, due to the websites' lack of control, professional sports leagues would likely be unsuccessful with a claim of vicarious infringement.

4. The Problem of the International Defendant

Although professional sports leagues have a viable claim for contributory infringement, bringing a claim and enforcing a judgment will be challenging because the indexing websites are generally located outside the United States.¹⁶⁷ To bring a claim in the United States, a court must have jurisdiction over the parties. This does not require the defendant be physically present in the United States, but it does require that the defendant has "minimum contacts"¹⁶⁸ or a "substantial connection"¹⁶⁹ with the United States. When addressing personal jurisdiction over the Internet specifically, a federal district court stated, "the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."¹⁷⁰ The Fourth Circuit further explained,

If we were to conclude as a general principle that a person's act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every State.¹⁷¹

163. *See id.*

164. *Compare* Football Ass'n Premier League Ltd. v. British Sky Broad. Ltd, [2013] EWHC (Ch) 2058, [15], [44] (Eng.) *with* *Perfect 10, Inc.*, 508 F.3d at 1157, 1172.

165. *Football Ass'n Premier League Ltd.*, [2013] EWHC (Ch) 2058 [15].

166. *See id.*

167. *See* Ernesto, *supra* note 32.

168. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

169. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

170. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

171. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002).

It is not likely that the professional sports leagues would be able to establish personal jurisdiction over the indexing websites because their owners and servers are located outside the United States.¹⁷² In addition, the websites do not directly target or interact with users in the United States, as they stream all sports (not just American sports) and there is no mention of targeting the United States specifically.¹⁷³

Because of the lack of jurisdiction, it would be difficult to pursue a claim against the indexing websites directly. Instead, it may be more beneficial for the professional sports leagues to attack the ISPs, which provide Internet services to American customers and are based in the United States. With the U.S. ISPs, bringing a claim and enforcing a judgment within the United States would not be an issue because they reside and operate in the country, and thus, are subject to U.S. laws.

C. DMCA Take Down Notices to U.S. ISPs

Professional sports leagues can likely use the Digital Millennium Copyright Act (DMCA) to require U.S. ISPs to take down the indexing websites in the United States. The DMCA was enacted to preserve copyright protections on the Internet, while providing immunity from copyright infringement to passive service providers.¹⁷⁴ The immunity frees service providers that do not have knowledge of infringement from liability.¹⁷⁵ However, if a service provider has knowledge of an infringing activity by a third party, on or through the use of its service, it must take the infringing content down or it will not receive the DMCA immunity.¹⁷⁶ Specifically, section 512(c)(1) of the DMCA provides that the immunity only applies if the service provider:

- (A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;
- (ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or
- (iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the

172. See Ernesto, *supra* note 32.

173. See *id.*

174. Perfect 10, Inc. v. CCBill, LLC, 340 F. Supp. 2d 1077, 1086 (C.D. Cal 2004), *aff'd in part, rev'd in part*, 488 F.3d 1102 (9th Cir. 2007).

175. *Id.*

176. See *id.*

material;

- (B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and
- (C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.¹⁷⁷

Of significance, subsection 512(c)(1)(C) provides that if copyright owners follow the requirements when notifying the service provider of the infringement, knowledge will be imputed to the service provider.¹⁷⁸ Consequently, this subsection 512(c)(1)(C) forces the service provider to either take down the infringing content or lose its DMCA immunity. For a notification to comply with the DMCA, the following requirements, provided by section 512(c)(3)(A), must be included:

- (i) A physical or electronic signature . . . of the owner of an exclusive right that is allegedly infringed.
- (ii) Identification of the copyrighted work claimed to have been infringed
- (iii) Identification of the material that is claimed to be infringing . . . that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
- (iv) Information reasonably sufficient to permit the service provider to contact the [owner]
- (v) A statement that the [owner] has a good faith belief that use of the material . . . is not authorized
- (vi) A statement that the information in the notification is accurate, and under penalty of perjury¹⁷⁹

Professional sports leagues can comply with these requirements without much burden, as it has already been established that they are owners of the games and the games can be easily identified.

The immunity of DMCA applies to and can be used as leverage against the websites, where the infringement occurs, or the ISPs, which provides the

177. 17 U.S.C. § 512(c)(1)(A)–(C) (2012).

178. *See id.* § 512(c)(1)(C), (3)(B); *Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1107 (W.D. Wash. 2004).

179. 17 U.S.C. § 512(c)(3)(A).

Internet service (and access to the websites) to customers. After professional sports leagues send proper notification, if the website or ISP fail to take down the infringing content, the DMCA immunity is lost and they could be liable for copyright infringement.

1. Passive Websites

In *Viacom International, Inc. v. YouTube, Inc.*, the copyright holders attacked the website, YouTube directly.¹⁸⁰ In *YouTube, Inc.*, evidence demonstrated that nearly 75–80% of videos streamed on YouTube contained copyrighted material, but the court found that fact alone did not automatically impute knowledge of the infringement to YouTube.¹⁸¹ Instead, the court remanded the case because it concluded that there was sufficient evidence that a reasonable juror could find that YouTube had knowledge; however, the court stipulated that the jury must actually find that YouTube had knowledge of specific instances of infringement to be disqualified from the DMCA immunity.¹⁸² The court explained that service providers must have knowledge of specific instances of infringement on their website, not just knowledge that there is infringing material generally, because section 512(m) of the DMCA explicitly states that a service provider is not required to actively monitor its service for infringing activity.¹⁸³

However, the websites indexing illegal sports broadcasts differ from YouTube. As described earlier, these websites create sport-specific tabs and categorize games under those tabs within their index.¹⁸⁴ Unlike YouTube, whose users can post videos directly to YouTube, these websites filter submissions, by deciding what content to put on their websites and where to position that content.¹⁸⁵ Further, there is no need to impute knowledge because these websites have actual knowledge.¹⁸⁶ Consequently, because of their active involvement in displaying the illegal streams, a court would likely find that these websites had knowledge of the infringement. Thus, if professional sports leagues follow the DMCA notification requirements, the websites would be required to take down the infringing content. The problem is this action has the same effect as directly pursuing a claim of secondary liability—these websites

180. 676 F.3d 19, 25–26 (2d Cir. 2012).

181. *Id.* at 32–33.

182. *Id.* at 26, 34.

183. *See id.* at 35.

184. *See Football Ass'n Premier League Ltd. v. British Sky Broad. Ltd.*, [2013] EWHC (Ch) 2058, [15] (Eng.).

185. *Id.* at [16].

186. *See supra* Part IV(B)(3)(i).

cannot be reached with U.S. laws.¹⁸⁷ The DMCA, like the Copyright Act, is a U.S. law, and thus, cannot extend to claims outside of U.S. jurisdiction.¹⁸⁸ Instead the professional sports leagues should use the DMCA to attack ISPs based in the United States.

2. U.S. ISPs

Unlike the foreign indexing websites, U.S. ISPs are subject to U.S. laws, and consequently, are likely to comply to avoid liability.¹⁸⁹ To avoid liability and receive the DMCA immunity, ISPs are required “to remove, or disable access to,” the infringing material after receiving a proper DMCA take-down notice,¹⁹⁰ which in practice can be done by blocking specific content, individual pages on the website, or the entire website.¹⁹¹

Further, there is no real incentive for the ISPs not to comply with the DMCA take down notices because if they comply, they are not only protected from liability for the infringement, but they are also protected from any retaliatory claims from the blocked websites. Section 512 (g)(1) provides that as long as the ISP gives notice to the websites of the take-down and responds to any counter notification from the websites, the ISP

shall not be liable to any person for any claim based on the [ISP]’s good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, *regardless of whether the material or activity is ultimately determined to be infringing.*¹⁹²

Consequently, to protect themselves from all liability ISPs are likely to comply with a take down, at least until they receive a counter claim from the blocked websites.

In general, a blocked website can respond to an ISP’s take-down with a counter notification that the blocked content is not infringing and should be restored.¹⁹³ However, the counter-notice must include a statement that the

187. See *supra* Part IV(B)(4).

188. *Id.*

189. See generally Nicholas Wells, *Using a DMCA Takedown Notice for an Online Copyright Infringement*, WELLS IP LAW, <http://www.wellsiplaw.com/using-a-dmca-takedown-notice-for-an-online-copyright-infringement/> (last visited Apr. 18, 2014).

190. 17 U.S.C. § 512(c)(1)(C) (2012).

191. See, e.g., *A Guide to YouTube Removals*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/issues/intellectual-property/guide-to-youtube-removals> (last visited Apr. 18, 2014).

192. 17 U.S.C. § 512(g) (emphasis added).

193. See *id.* § 512(g)(3).

website consents to jurisdiction if the copyright owner proceeds with a copyright infringement claim.¹⁹⁴

In applying this to professional sports, it is unlikely that the foreign indexing websites would send a counter-notice because by responding, the websites would voluntarily waive personal jurisdiction, and consequently, subject themselves to U.S. courts.¹⁹⁵ At this point, without a personal jurisdiction issue, leagues could proceed with a secondary liability claim against the websites themselves (described above),¹⁹⁶ which would likely be successful. Because of the unfavorable consequences, the websites will probably not fight the ISPs with a counter-notice. Instead they would just move the website to a new domain name. Therein lies the problem—they can simply move the website to a new address.¹⁹⁷

The problem with the Internet is that it is extremely dynamic and changes instantly, which can leave the courts slow to catch up.¹⁹⁸ Fortunately, with the DMCA, professional sports leagues do not need to get the courts involved to get relief. The first DMCA notice will take time to draft and ensure all the requirements are met. However, when subsequent notifications are required after the websites move, the leagues can use the first notice as a form document, in which they merely need to make simple changes (i.e., change the new domain name).

ISPs are not responsible for monitoring their service to determine if the blocked websites have moved,¹⁹⁹ but this seems like a task that is not too burdensome and could be done by professional sports leagues quite easily. The indexing websites are created to make the individual streams easier to find.²⁰⁰ Consequently, for the websites to exist, users must be able to find these websites fairly easily, which also means professional sports leagues will be able to do the same. The leagues can designate someone already within their organization to perform simple periodic searches online, which does not require new personnel, new skills, an abundance of time, or large costs. Whenever they find a new website, the leagues can create the DMCA notice easily from their form and the ISPs can take down the new website quickly.

194. *Id.* § 512 (g)(3)(D); *A Guide to YouTube Removals*, *supra* note 191.

195. *See id.*

196. *See supra* Part IV(B)(3)(iv).

197. *E.g.*, Ernesto, *supra* note 32 (after 307 domain names were seized, new replacements quickly appeared).

198. *See id.*

199. 17 U.S.C. § 512(m)(1); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 35 (2d Cir. 2012).

200. *Football Ass'n Premier League Ltd. v. British Sky Broad. Ltd.*, [2013] EWHC (Ch) 2058, [42] (Eng.).

D. International Collaborative Action

The problem of illegal streaming of sports broadcasts does not only harm U.S. professional leagues, it also harms professional leagues in Europe. In 2013, the Barclays Premier League, the English professional soccer league, achieved a victory in its steps to stop indexing websites and protect its copyrights.²⁰¹

In *Football Association Premier League Ltd. v. British Sky Broadcasting Ltd.*, the High Court of England granted the Premier League an injunction against the six major ISPs within the country, which required the ISPs to block the indexing website FirstRow Sports.²⁰² English copyright laws are similar to those in the United States and require ISPs “to block or at least impede access by their customers to a website” that the ISP knows displays infringing content.²⁰³ The High Court found that FirstRow Sports infringed on the Premier Leagues’ copyrights and that because the Premier League notified the ISPs of this infringement, the ISPs were required to block FirstRow Sports.²⁰⁴ The High Court had addressed copyrights over the Internet prior to *Football Association Premier League Ltd.*, but only regarding peer-to-peer file-sharing like Napster and Grokster.²⁰⁵ However, *Football Association Premier League Ltd.* was the first case in England to address the issue of streaming sports broadcasts.²⁰⁶

This case is mentioned to demonstrate that the problem of streaming of sports broadcasts illegally is an international concern and as technologies evolve, so must the laws. Beyond U.S. laws, something needs to be done to enforce copyrights internationally in a way that is actually effective. The DMCA provides professional sports leagues with protections in the United States, but beyond this jurisdiction leagues are left to deal with the laws of the countries where the websites they seek to block are located. Moving forward, the U.S. Government needs to step in and work with other countries to create a more uniform system to deal with copyrights over the Internet, because this is an international problem that also reaches other industries (i.e., music, movies, etc.).

V. CONCLUSION

Broadcasting rights of live games are extremely valuable to professional

201. *See generally id.*

202. *Id.* at [1], [60].

203. *Id.*

204. *Id.* at [52], [56], [60].

205. *Id.* at [3]–[6].

206. *See id.* at [6].

sports leagues, and those rights apply to broadcasts on any medium—including the Internet. Recently, many fans have begun to watch games online, establishing that there is a market for leagues to capitalize on. MLB has lead the way with its Internet and advanced media ventures, and its success should prove as an excellent example of the potential benefits for other leagues. However, there are many websites supplying illegal alternatives for viewers to watch live games for free, which could decrease all leagues' future revenue. Consequently, due to the extreme value associated with their broadcasting rights, professional sports leagues must take action to protect those rights and ensure they do not diminish in the future.

Of greatest concern for the professional sports leagues are not the individuals uploading and streaming the sports broadcasts, but instead the websites indexing and categorizing those individual streams. The individual streamers are committing copyright infringement; however, pursuing claims against thousands of individuals is not feasible. A claim directly against the websites indexing the individual streams is also not feasible because they are located outside the United States. A better solution is to attack and stop the indexing websites by sending a DMCA take-down notice to U.S. ISPs, who will likely comply to ensure liability for the infringement is not imputed upon them. Professional sports leagues will be able to use DMCA take-down notices to remove infringing content, but it will require that leagues continuously search and monitor the Internet to ensure that the websites do not pop back just operate under a new domain name. The DMCA take-down notices give the leagues the best short-term solution.

Leagues should not be required to monitor and file take down notices every time a new website is created. Additionally, this problem of illegal streaming extends beyond the United States. To find a long-term solution and address the larger international issue, the U.S. Government needs to take collaborative action with other countries to find a more permanent international solution. For now, at least professional sports leagues can use DMCA take down notices to require ISPs to take immediate steps to stop the current infringement before it is too late and the leagues are severely harmed.