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FAIR USE OF FOUL BALLS: MAJOR LEAGUE BASEBALL ADVANCED MEDIA AND ITS COUNTERPRODUCTIVE TAKEDOWN NOTICES TO FANS*

ANDREW RISSLER**

I. INTRODUCTION

In the ever-evolving age of social media, Major League Baseball Advanced Media's (MLBAM) policy of issuing Digital Millennium Copyright Act (DMCA) takedown notices to users who post copyrighted content on social media platforms such as Twitter, Facebook, YouTube, Vine, and other platforms is certainly within its rights as a copyright holder. However, the policy may potentially harm Major League Baseball's (MLB) efforts to attract young fans to the sport by limiting their ability to share their experiences through social media.

Based in New York City, MLBAM, a limited partnership of the club owners of MLB, is the interactive branch of the league that oversees its Internet activities.¹ The company operates the official website for the league and the thirty "MLB club websites via MLB.com, which draws four million hits per day."² "The site offers news, standings, statistics, and schedules, and subscribers have access to live audio and video broadcasts of most games."³

Throughout the online baseball community, MLBAM is notorious for aggressively seeking removal of items such as Graphics Interchange Format (GIF)⁴ images, Vines, and other short-form video and audio content under its

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1. Stephen Battaglio, *At MLB Advanced Media There Is a Push to Stay Ahead in the Streaming Arena*, L.A. TIMES (Sept. 30, 2015), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-advanced-media-20150930-story.html>.

2. RONALD B. WOODS, *SOCIAL ISSUES IN SPORT* 94 (3d ed. 2016).

3. Anteneh Belayneh, *Top 10 Richest Sports Brands in the World*, *THE RICHEST* (Apr. 7, 2014), <http://www.therichest.com/sports/top-10-richest-sports-brands-in-the-world/>.

4. While there is some debate as to the pronunciation of "GIF," the author of this Article is a

rights in the DMCA. MLBAM has also been aggressive in attempts to remove content that it does not necessarily own the copyright to, often those shot by fans in the stands at games and uploaded to Twitter, YouTube, and other blogs. There is no dispute that MLBAM rightfully owns the copyright to the broadcast content in question that is shared online. It is also uncontested that MLBAM has the legal right to force the removal of infringing content from the Internet. However, just because MLBAM *can* rightfully and legally issue notices to remove its copyrighted content, *should* it?

MLB's broadcasting rights are incredibly valuable; the league generates \$12.4 billion annually from its television broadcasting contracts with FOX, TBS, and ESPN.⁵ Thus, it is entirely understandable that MLB and MLBAM would want to be extremely vigilant in cracking down on those who stream or otherwise make available entire copyrighted broadcasts through unauthorized means. However, the images, GIFs, and Vines at issue here are relatively insignificant in that there is no threat of diminishing the value of MLB's lucrative broadcasting rights. Simply put, a GIF is a series of images that are compressed together to form a short, continuously looping animation,⁶ and a Vine is a quick, six-second video that is shared via a mobile phone application.⁷ MLB and MLBAM were at the forefront in making their broadcasts available online by creating MLB.TV,⁸ which makes it even more curious as to why MLB and MLBAM are not embracing a forward-thinking view of permitting small uses of their copyrighted content on social media.

This Article will suggest that, while MLBAM has the right to request that its copyrighted content be removed from unauthorized platforms, it is not required to do so to preserve its copyrights. Further, the copyright infringement MLB alleges may not actually constitute copyright infringement if the use of the material is protected as fair use. Finally, this Article will suggest that MLB may benefit from a marketing standpoint by taking a more relaxed approach to its content being shared online, and MLBAM should consider a less aggressive policy in issuing DMCA takedown notices to take advantage of the new media environment, attract new fans, and encourage them to share their experiences of watching baseball online.

proponent of pronouncing "GIF" with a hard G. See Aaron Bazinet, *How to Really Pronounce GIF*, HOW TO REALLY PRONOUNCE GIF, <http://howtoreallypronouncegif.com> (last visited Dec. 15, 2016).

5. Stephanie N. Horner, Comment, *DMCA: Professional Sports Leagues' Answer to Protecting Their Broadcasting Rights Against Illegal Streaming*, 24 MARQ. SPORTS L. REV. 435, 435 (2014).

6. Margaret Rouse, *What Is Animated GIF (Graphics Interchange Format)?*, WHAT IS, <http://searchsoa.techtarget.com/definition/animated-GIF> (last visited Dec. 15, 2016).

7. Max Knoblauch, *The Beginner's Guide to Vine*, MASHABLE (Dec. 11, 2013), <http://mashable.com/2013/12/11/vine-beginners-guide/#.oCYRQsBPEqP>.

8. See Horner, *supra* note 5, at 437.

II. DIGITAL MILLENNIUM COPYRIGHT ACT

The DMCA is a United States copyright law that implements two 1996 treaties of the World Intellectual Property Organization.⁹ It criminalizes production and dissemination of technology, devices, or services intended to circumvent measures that control access to copyrighted works (commonly known as digital rights management or DRM).¹⁰ It also criminalizes the act of circumventing an access control, regardless of whether or not there is actual infringement of copyright itself.¹¹ In addition, the DMCA heightens the penalties for copyright infringement on the Internet.¹² Passed on October 12, 1998, by a unanimous vote in the United States Senate and signed into law by President Bill Clinton on October 28, 1998, the DMCA amended Title 17 of the United States Code to extend the reach of copyright, while limiting the liability of the providers of online services for copyright infringement by their users.¹³ In short, the DMCA “addresses the rights and obligations of owners of copyrighted material who believe their rights under U.S. copyright law have been infringed, particularly but not limited to, on the Internet.”¹⁴

DMCA Title II, the Online Copyright Infringement Liability Limitation Act (OCILLA), creates a “safe harbor” for Internet service providers (ISPs) against copyright infringement liability, provided they meet specific requirements.¹⁵ ISPs must qualify for and adhere to certain prescribed safe harbor guidelines and promptly block access to alleged infringing material (or remove such material from their systems) when they receive notification of an infringement claim from a copyright holder or the copyright holder’s agent.¹⁶ OCILLA includes a counter-notification provision that offers ISPs a safe harbor from liability to a user when that user claims that the material in question is not, in fact, infringing.¹⁷

For example, when a copyright holder, such as MLBAM, discovers that its material is being used on a social media website (or ISP), such as Twitter, the copyright holder notifies the ISP of the infringing content. Once the ISP has

9. U.S. COPYRIGHT OFFICE, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY 1 (1998), <http://www.copyright.gov/legislation/dmca.pdf>.

10. *Id.* at 2.

11. *Id.* at 6.

12. *Id.* at 2.

13. *Id.* at 1.

14. *What Is DMCA?*, DMCA, <https://www.dmca.com/Solutions/view.aspx?ID=712f28a5-93f2-467b-ba92-3d58c8345a32&?r=sol08a2> (last visited Dec. 15, 2016).

15. *See* Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512 (2016).

16. § 512(c)(1)(C).

17. § 512(g)(3).

received the notification from the copyright holder that there is infringing content on their website, the ISP then has the duty to inform the infringing user of the infringement and remove the content from the website. Typically, the removed content is replaced with an image that states: “Media not displayed: This image has been removed in response to a report from the copyright holder,” or something in a similar vein.¹⁸ In addition, a website may implement its own policies, such as suspending users who have posted infringing content from using the site.¹⁹

It is important to note that, due to the “safe harbor” provision in DMCA Title II, ISPs like Twitter, YouTube, and other social media platforms are not liable for hosting infringing material so long as they act expeditiously to remove the infringing material once they have been notified of it.²⁰ The ISPs have no duty to monitor their websites for infringing content posted by their users.²¹ In *Viacom International Inc. v. YouTube, Inc.*, the court held that YouTube was not liable for copyright infringement by its users.²² This is primarily because there was no evidence that YouTube encouraged or induced its users to submit infringing videos, nor evidence that YouTube provided users with detailed instructions about what content to upload or edited user content, “prescreened submissions for quality, steered users to infringing videos, or otherwise interacted with infringing users to a point where it might be said to have participated in their infringing activity.”²³

Section 512(c)(1) of the DMCA provides that the immunity applies if the service provider (1) “does not have actual knowledge that the material . . . on the system or network is infringing,” or “upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;” (2) “does not receive a financial benefit directly attributable to the infringing activity”; and (3) “upon notification of claimed infringement . . . responds expeditiously to remove, or disable access to, the material that is claimed to be infringing.”²⁴

Subsection 512(c)(1)(C) implies that if copyright owners follow the requirements when notifying the service provider of the infringement, then the

18. Jeff Sullivan (@based_ball), TWITTER (Sept. 21, 2015, 3:31 PM), https://twitter.com/based_ball/status/646059204084563968.

19. *Copyright Policy*, TWITTER HELP CTR., <https://support.twitter.com/articles/15795?lang=en> (last visited Dec. 15, 2016).

20. Katharine Trendacosta, *Why Twitter Can and Will Make GIFs Disappear*, 109 (Oct. 14, 2015), <http://io9.gizmodo.com/why-twitter-can-and-will-make-gifs-disappear-1736397280>.

21. *See id.*

22. *Viacom Int’l Inc. v. YouTube, Inc.*, 940 F. Supp. 2d 110, 123 (S.D.N.Y. 2013).

23. *Id.* at 121.

24. Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512(c)(1)(A)–(C) (2016).

service provider would acquire de facto actual knowledge that the material is infringing.²⁵ Section 512(c)(1)(C) thus forces the service provider to either take down the infringing content or lose its DMCA immunity. For a takedown 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 accurate²⁶

The immunity applies to and may be leveraged against the websites where the infringement occurs and the ISPs, which provide the Internet service to customers.²⁷ If the ISP fails to remove the infringing content once a proper notification has been received, then the DMCA immunity is lost and the ISP may be found liable for copyright infringement.

There have been concerns about use of the DMCA affecting “fair use” protections in copyright law since it was passed in 1998.²⁸ The Electronic Frontier Foundation argued, “In practice, the anti-circumvention provisions have been used to stifle a wide array of legitimate activities, rather than to stop copyright infringement.”²⁹ These activities include chilling free expression and scientific research, jeopardizing fair use, impeding competition and innovation,

25. See § 512(c)(1)(C).

26. § 512(c)(3)(A)(i)–(vi).

27. Horner, *supra* note 5, at 457–58.

28. See generally Steve P. Calandrillo & Ewa M. Davison, *The Dangers of the Digital Millennium Copyright Act: Much Ado About Nothing?*, 50 WM. & MARY L. REV. 349 (2008).

29. FRED VON LOHMANN, UNINTENDED CONSEQUENCES: TWELVE YEARS UNDER THE DMCA 1 (2010), https://www.eff.org/files/eff-unintended-consequences-12-years_0.pdf.

and interfering with computer intrusion laws.³⁰ Further, there are concerns that the DMCA unfairly favors large corporations (like MLB) who have the resources to track down potential infringement on the Internet.³¹ Users often do not have the resources available to file counter-notifications or may acquiesce to the large corporation in fear of a lengthy, expensive lawsuit.³² “In theory, the DMCA is supposed to balance the rights of the copyright holders,” service providers, and users.³³ However, as explained on the technology blog io9:

Corporations have the resources to employ people to trawl the internet and send complaints for whatever they find. Those resources also mean that the service providers are far more frightened of an angry entertainment giant than of an upset user. The way the DMCA is written makes filing complaints much easier than filing counterclaims, which is the only way to stop your work from being taken down. And doing *that* requires surrendering all contact information, agreeing to the jurisdiction of a federal court in the event of a lawsuit, and taking an oath under penalty of perjury that you weren't infringing. It's a really intimidating step.³⁴

MLBAM's use of the DMCA to restrict the use of images, GIFs, and Vines is an illustration of at least some of these concerns, and that MLBAM has used DMCA takedown notices in ways that may jeopardize fair use.

III. MLBAM'S RIGHTS AND DUTIES UNDER THE DMCA

There is no dispute that MLBAM has a valid copyright in the game broadcasts from its broadcast partners through the Copyright Act of 1976.³⁵ The Copyright Act provides protection for “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”³⁶ MLB and MLBAM also dutifully notify fans during broadcasts that they are watching copyrighted content, as

30. *Id.* at 1–2.

31. *See* Trendacosta, *supra* note 20.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See generally* Copyright Act of 1976, 17 U.S.C. §§ 101–810 (2016).

36. § 102.

anyone who has watched any amount of baseball on television has undoubtedly heard some variation of these words uttered by Vin Scully, Bob Uecker, Joe Buck, among others. Notice of the copyrighted nature of the broadcast is often stated: “This copyrighted telecast is presented by authority of the Office of the Commissioner of Baseball. It may not be reproduced or retransmitted in any form, and the accounts and descriptions of this game may not be disseminated without [the] express written consent [of Major League Baseball].”³⁷

The broadcasts are audiovisual works that are original works of authorship that are fixed (via video recording) in a tangible medium of expression.³⁸ MLBAM, therefore, has the right to request removal of content that infringes its copyrights via the DMCA.³⁹ Further, the district court held in *Morris Communications Corp. v. PGA Tour, Inc.* that leagues or promoters have a right to limit media access to their product.⁴⁰ However, as held in *NBA v. Motorola, Inc.*, the actual basketball games themselves are not original works of authorship, and facts of the games cannot be copyrighted, only the broadcasts.⁴¹ The Second Circuit held that a provider of instant statistics’ “unauthorized usage of real-time game accounts does not constitute copyright infringement.”⁴² Federal copyright law does not protect the actual NBA basketball games, which are the source of the information created, “because athletic events and performances do not constitute ‘original works of authorship’ under the 1976 Copyright Act.”⁴³

One reason that MLBAM acts as aggressively as it does in issuing DMCA takedown notices is out of fear of losing its copyrights through copyright abandonment. However, MLBAM is not required to issue takedown notices for copyright infringements to maintain its copyrights.⁴⁴ The Copyright Act of 1976 completely eliminated the requirement of notice on the part of the copyright holder, and there is no requirement in the DMCA to issue a takedown

37. Kirk Biglione, *Warning: Those Copyright Warnings May Not Be Entirely Accurate*, MEDIALOPER (Aug. 2, 2007), <http://medialoper.com/warning-those-copyright-warnings-may-not-be-entirely-accurate/>.

38. 17 U.S.C. § 102.

39. § 512.

40. *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 235 F. Supp. 2d 1269, 1282–83 (M.D. Fla. 2002).

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

42. Matthew J. Mitten, *A Triple Play for the Public Domain: Delaware Lottery to Motorola to C.B.C.*, 11 CHAP. L. REV. 569, 571 (2008) (citing *Motorola, Inc.*, 105 F.3d at 847).

43. *Id.*

44. Matt Goldman, *MLB Strikes Out in Marketing Baseball*, SB NATION: BEYOND THE BOX SCORE (Sept. 26, 2015, 11:08 AM), http://www.beyondtheboxscore.com/2015/9/26/9401185/mlbam-gifs-vines-snapchat-social-media-marketing-baseball-mlb?utm_campaign=beyondtheboxscore&utm_content=chorus&utm_medium=social&utm_source=twitter.

notice for every violation to maintain a copyright.⁴⁵ As explained by Larry Silverman, an attorney and adjunct professor of sports law at the University of Pittsburgh, in an interview with the baseball blog *Beyond the Box Score*:

Well again, if you're asking me from a legal standpoint, they are not obligated to send out a DMCA notice every time somebody posts copyrighted material. There could be an argument at some point that they waived their claim, but I don't think that's the case frankly. So I don't think there are any legal ramifications if they don't send a takedown notice. It's not as if you lose your copyright. The whole idea of having copyrighted material is that you own it, and if others use it, they have to license it from you and pay a small fee. But you don't lose your right if you don't send down a takedown notice.⁴⁶

IV. WHY IS MLBAM SO PROTECTIVE OF ITS CONTENT?

So if there is no risk of losing its copyright, why does MLBAM go after Internet users that utilize its copyrighted material so aggressively? Each time MLBAM decides that someone is unfairly and illegally using its content and chooses to issue a DMCA takedown notice, it is intentionally making it more difficult for its fans to enjoy and interact with their game. At a time when baseball is eager for new and young fans, MLBAM should not want to stop its customers from enjoying and consuming its products in the way that they prefer, yet MLBAM continues to act in a way that may be against its own best interests.

For example, in 2015, the Los Angeles Dodgers, on behalf of MLB, approached a fan and told him that he could no longer film from his seat inside of Dodger Stadium.⁴⁷ The fan, known on YouTube as “Dodgerfilms,” had been filming Dodgers games from his seat for many years, and would edit and post his films, including commentary from him and his friends, to YouTube after each game.⁴⁸ While the Dodgers and MLB were within their legal rights to ask Dodgerfilms to stop, Dodgerfilms’ channel on YouTube had become very popular among Dodgers and baseball fans.⁴⁹ The YouTube channel had been in

45. JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 153 (3d ed. 2010).

46. Goldman, *supra* note 44 (emphasis in original).

47. Jack McNeil, *The End of Dodgerfilms?*, BASEBALL ESSENTIAL (July 11, 2015), <http://www.baseballessential.com/news/2015/07/11/end-dodgerfilms>.

48. *Id.*

49. *See e.g., id.*; *see also Fan Who Filmed Himself Catching Home Runs at Dodger Stadium Asked To Stop*, FOX SPORTS (July 7, 2015), <http://www.foxsports.com/mlb/story/fan-who-filmed-himself->

existence for many years, but it was not until Dodgerfilms gained national attention when he managed to film himself catching a home run ball during a game that MLB and the Dodgers took notice, and asked him to stop.⁵⁰ The result was a large outcry in the baseball Internet community, spawning the hashtag #SaveDodgerFilms on Twitter and Instagram.⁵¹ Thus, while MLB and the Dodgers were within their rights to request that Dodgerfilms stop filming within Dodger Stadium, the result was a minor public relations headache that was neither necessary nor worth it.

However, the primary copyright battle in recent years has been between MLBAM and Internet users who post GIFs and other short form video images to Twitter. In 2015, the Seattle Mariners-oriented blog *Lookout Landing* documented what happened to contributor Jose Rivera when MLBAM decided to issue takedown notices to Twitter over Rivera's use of GIFs on the site:

Earlier this afternoon, our very own Jose Rivera—champion [GIF]-erator and skilled new media artist extraordinaire—received an email informing him that his Twitter account would be suspended due to a DMCA complaint from MLB Advanced Media. It was far from the first time something like this has happened to someone involved in the propagation of MLB-owned baseball content on the internets [sic], and it will be far from the last.⁵²

GIFs are commonly used as a medium for humorous effect and are an incredibly popular way to communicate via images on the Internet—and Twitter in particular. One or more images or video sources can be edited, rearranged, or combined to create an absurd juxtaposition, to create the opposite effect intended by the creator of the original work, or emphasize and exaggerate a minor detail.⁵³

Twitter's platform only allows users to communicate in tweets that are made up of 140 characters or less. This limitation makes it difficult to only use words

catching-home-runs-at-dodger-stadium-asked-to-stop-070715.

50. *Fan Who Filmed Himself Catching Home Runs at Dodger Stadium Asked to Stop*, *supra* note 49.

51. McNeil, *supra* note 47.

52. Matthias Ellis, *GIFs, Twitter Suspensions, and Social Media: An Open Letter to MLB Advanced Media*, SB NATION: LOOKOUT LANDING (July 6, 2015, 5:55 PM), <http://www.lookoutlanding.com/2015/7/6/8903285/gifs-twitter-suspensions-and-social-media-an-open-letter-to-mlb>.

53. See Mihir Patkar, *GIFs, the Language of the Web: Their History, Culture, and Future*, MAKEUSEOF (Jan. 27, 2015), <http://www.makeuseof.com/tag/gifs-language-internet-history-culture-art-future/>.

when trying to paint a scene and provide a nuanced commentary on the game without using several tweets. Users who provide commentary generally enjoy using GIFs to illustrate what they are tweeting about—the quick, short nature of a GIF allows a user on Twitter to read another user’s commentary and quickly see which moment or play that the commentary refers to—without using up a user’s character limit in a tweet.

The copyright issue arises when the images that are used to create a GIF are lifted from a copyrighted broadcast. There are several baseball fans and bloggers who create GIFs from images acquired from copyrighted broadcasts that are streamed online. These fans and bloggers generally create GIFs to quickly highlight and comment on outstanding plays, historic moments, or bloopers that occur during the course of a baseball game. An example is provided by the baseball blog *Beyond the Box Score*:

On[] July 23rd, Alex Rodriguez slid into home plate in an unconventional manner, which our own Nick Stellini decided to share with the world. In his own words, “it [the GIF] quickly and unexpectedly went viral, including getting tweeted by the AOL Sports Twitter account, while giving me credit for it.”⁵⁴

The use of Twitter, and by extension, GIFs, has allowed baseball fans to connect with each other all over the world, and essentially watch and comment on games together as they are happening.⁵⁵ The use of GIFs is not intended to replace watching a live broadcast of a game, but merely to share excitement (or, disappointment, as is often the case) with other fans in an instantaneous manner.

MLB does have its own Twitter account devoted to just GIFs,⁵⁶ but it does not have the capacity or wherewithal to react and publish GIFs as quickly as the average user can.⁵⁷ It is impossible for @MLBGIFs to tweet out every image or video that fans want to see because MLBAM and its agents simply cannot know what will be interesting or relevant to everyone online. Further, @MLBGIFs’ turnaround time on its official GIFs is often at least several minutes: “[b]y the time an official clip is out there, the Internet has [likely] already moved on to the next viral moment.”⁵⁸

54. Goldman, *supra* note 44.

55. *Id.*

56. MLB GIFS (@MLBGIFs), TWITTER, https://twitter.com/MLBGIFs?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (last visited Dec. 15, 2016).

57. Goldman, *supra* note 44.

58. Jesse Spector, *MLB Should See GIFs and Vines as the Free Publicity That They Are*, SPORTING NEWS (Oct. 26, 2015), <http://www.sportingnews.com/mlb-news/4659329-world-series-2015-mets->

MLBAM's primary motivations for seeking removal of copyrighted material appear to be for controlling its product and driving traffic to MLB.com for content that is supported by advertising revenue.⁵⁹ As explored in the *Berkeley Technology Law Journal*,

With each advance in communications technology, those who sell commercially valuable information can convey their product more rapidly or conveniently. Recently, for example, the Internet has enabled users to distribute and sell information very widely at a negligible marginal cost to the distributor. This advance, like others before it, has attracted free riders who seek to appropriate the content of others' communications, and sell it for their own profit. Not surprisingly, content providers have often sought relief from such opportunists. Copyright law provides a remedy in some circumstances, but because copyright protection does not extend to certain types of subject matter, content providers must often turn to broader equitable doctrines such as the misappropriation branch of unfair competition.⁶⁰

However, in protecting page hits and advertising revenue, MLBAM and MLB may be doing more harm than good when it comes to effectively engaging with new, younger fans and sustaining the long-term viability of their brand.⁶¹ MLB and MLBAM would certainly like to drive traffic to their own websites for commentary and reporting, but using copyright law to shut down fans engaging in discussions about their product is not a legally or commercially viable way to achieve that goal.

Instead of focusing on the relatively small amount of revenue that may be lost, MLB and MLBAM should view the use of their copyrighted material on social media as an opportunity to reach a wider and younger fan base globally. By trying to shut down as many uses of copyrighted material as possible, MLB and MLBAM are sabotaging their best opportunity to reach the demographics of fans that they so desperately covet in competition with the NBA, NFL, NHL, and every other entertainment option for the attention of a younger generation. *The Washington Post* notes that the average viewer of ESPN's NBA broadcasts

royals-gif-vine-nfl-deadspin-suspended-sb-nation-rob-manfred-nhl-mlbam.

59. Goldman, *supra* note 44.

60. Nicholas Khadder, *National Basketball Association v. Motorola, Inc.*, 13 BERKELEY TECH. L.J. 3, 3 (1998) (footnotes omitted).

61. Goldman, *supra* note 44.

is thirty-seven years old—ten years younger than the NFL’s average viewer, and a whole sixteen years younger than MLB’s.⁶² Video clips like Vines that are widely shared on social media generate new interest in the sport, particularly among the younger demographics that MLB covets.⁶³

Instead, MLB should take a cue from the NBA, whose marketing strategy seems to embrace the changes embodied by the new frontier of social media and view it as an ally and an asset. Unlike other professional sports, the NBA has proven to be incredibly popular on newer social media platforms.⁶⁴ For example, when searching for professional sports league tags on Vine, results show “just under 100,000 . . . with the tag NBA,” in comparison to “fewer than 50,000 have been posted with the tag NFL” and less than “15,000 with the tag MLB.”⁶⁵ The NBA focuses its efforts on shutting down unauthorized full rebroadcasts of its content rather than chasing down every little image that may pop up and potentially frustrate its fans: “We have always believed that fans sharing highlights via social media is a great way to drive interest and excitement in the NBA Our enforcement efforts are not aimed at fans, but rather are focused on the unauthorized live streaming of our games.”⁶⁶

“By allowing fans to do what they please with highlight clips, [the NBA has] essentially turned every fan with a social media account into an active member of one of the largest marketing groups that any sports organization has.”⁶⁷ “MLBAM does not track down every tweet or every account that posts a [GIF] of something baseball related” most likely because it simply does not have the necessary resources.⁶⁸ Yet, MLBAM intervenes when a GIF or Vine that includes copyrighted material becomes incredibly popular.⁶⁹ “At this point, taking down something popular [and] something that . . . spread[s] enjoyment of the [sport] is not in MLB’s best interests.”⁷⁰

To MLB’s credit, Commissioner Rob Manfred addressed this issue before the 2015 World Series, stating:

62. Roberto A. Ferdman, *What the NBA Gets That the Other Big Sports Leagues Don’t*, WASH. POST (Apr. 6, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/04/06/what-the-nba-gets-that-the-other-big-sports-leagues-dont/>.

63. *Id.*

64. *Id.*

65. *Id.*

66. Steven Perlberg, *Deadspin and SB Nation Are Back Tweeting Football GIFs*, WALL STREET J. (Oct. 20, 2015), <http://www.wsj.com/articles/deadspin-and-sb-nation-are-back-tweeting-football-gifs-1445357918>.

67. Goldman, *supra* note 44.

68. *Id.*

69. *Id.*

70. *Id.*

I do think that it's important for baseball to be available on as many platforms as possible. And I think what we try to do is strike a realistic balance between protecting what we regard to be very valuable intellectual property rights on the one hand with allowing fans to use as many platforms as possible. Do we always get that right? No. Are we still feeling our way through that process? Yes.⁷¹

Further, MLB and the social media platform Snapchat recently announced "Snapchat Day," in which Major League players will be allowed to use their mobile phones in the dugout during spring training games to engage with fans over Snapchat.⁷² This is a major step forward in MLB's embracing of social media, but the issues surrounding fan use of copyrighted material persist.

V. ARE USERS WHO POST CONTENT PROTECTED BY FAIR USE?

There is the issue of whether or not posting copyrighted content that is in dispute constitutes fair use under 17 U.S.C. § 107.⁷³ Under § 107, there is a limitation on exclusive rights of copyrights if the copyrighted work is being used for the purposes of criticism, comment, news reporting, teaching, scholarship, or research.⁷⁴

"'Fair use' is a crucial element in American copyright law—the principle that the public is entitled, without having to ask permission, to use copyrighted works in ways that do not unduly interfere with the copyright owner's market for a work."⁷⁵ For example, using a recording device to record a television program to watch later constitutes a personal, noncommercial use—a fair use.⁷⁶

MLBAM must consider fair use before sending DMCA takedown notices.⁷⁷ In *Lenz v. Universal Music Corp.*, the Ninth Circuit rejected the copyright holder's DMCA takedown notice defense because there was a "question of fact as to whether Universal considered the defense of copyright

71. Spector, *supra* note 58.

72. Cameron DaSilva, *MLB Allowing Players to Use Smartphones During Games on 'Snapchat Day'*, FOX SPORTS (Mar. 4, 2016), <http://www.foxsports.com/mlb/story/mlb-snapchat-day-during-games-march-11-030416>.

73. 17 U.S.C. § 107 (2016).

74. *Id.*

75. VON LOHMANN, *supra* note 29, at 9.

76. *Id.*

77. Trendacosta, *supra* note 20.

fair use before requesting the takedown.”⁷⁸ In *Lenz*, an Internet user uploaded a twenty-nine-second home video to YouTube that showed her children dancing to the song “Let’s Go Crazy” by Prince.⁷⁹ “Universal sent a takedown notice to YouTube that requested the video’s removal from the website pursuant to DMCA, claiming that the video constituted infringement of the copyrighted music.”⁸⁰ Subsequently, the user filed suit, “arguing that Universal’s review procedures failed to explicitly consider whether her use of the music constituted fair use.”⁸¹ The user argued that Universal’s inadequate review procedures amounted to a “knowing, material misrepresentation under 17 U.S.C. § 512(f)[,] [which allows for the recovery of damages against copyright owners that wrongfully request copyrighted content to be removed].”⁸²

“The Ninth Circuit held that the DMCA ‘requires copyright holders to consider fair use before sending a takedown request, raising a triable issue as to whether the copyright holder . . . formed a subjective good faith belief that the use was not authorized by law.’”⁸³ This means, “[a] copyright holder cannot assert that a use is not authorized by law . . . unless the copyright holder holds a subjective good faith belief that the use is not fair use.”⁸⁴ After *Lenz*, MLBAM could be found liable for wrongful DMCA takedown requests of copyrighted content,⁸⁵ and thus, must seriously reconsider its use of DMCA takedown notices because the creation of GIFs using images from its copyrighted broadcasts would likely be seen as a fair use of its copyrighted material.

In October 2015, the NFL similarly began issuing DMCA takedown notices to prominent sports blogs *Deadspin* and *SB Nation* over their use of GIFs.⁸⁶ In response, Twitter suspended the accounts of the two sites, creating a minor uproar in the sports Internet community.⁸⁷ However, as soon as the accounts were restored, both *Deadspin* and *SB Nation* resumed creating and posting GIFs, arguing that their actions constituted fair use for editorial purposes, as the images “compl[ied] with the law that lets news outlets to use copyrighted

78. *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1129 (9th Cir. 2015); Rochelle D. Alpert & Stephanie L. Hall, *Consideration of Fair Use Before Sending a DMCA Takedown*, NAT’L L. REV. (Oct. 14, 2015), <http://www.natlawreview.com/article/consideration-fair-use-sending-dmca-takedown>.

79. *Lenz*, 801 F.3d at 1129.

80. Alpert & Hall, *supra* note 78.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Perlberg, *supra* note 66.

87. *See id.*

materials in their reporting.”⁸⁸ *Deadspin’s* Editor-in-Chief, Tim Marchman, told the *Wall Street Journal*: “We think that GIF-ing plays is pure, constitutionally-protected speech . . . We’ll do what we’ve been doing, using materials in ways that are consistent with the law and common sense.”⁸⁹

As of October 2015, the editors of *Deadspin* and *SB Nation* are prepared to defend their use of GIFs in court,⁹⁰ and should have a strong case, as the actions of the users posting images and short video clips to social media sites would likely be protected as fair use under 17 U.S.C. § 107.⁹¹ These posts are generally used to either comment or report on what has happened during a game. The use of the images is not a retransmission or rebroadcast of the copyrighted telecasts, but merely an illustration to support commentary about something that has taken place during a game, often extraordinary or unusual. MLB and MLBAM would not have exclusive rights to copyrighted telecasts in this context so long as the material in question is used for commenting and reporting, and not commercial purposes.⁹² There are several factors to consider in determining whether the use of a work is a fair use:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.⁹³

Stewart, in the *Journal on Telecommunications & High Technology Law*, describes the Supreme Court’s four factors and notes that these four factors are rooted in an “equitable rule of reason” and are therefore not exclusive.⁹⁴ Each

88. *Id.*

89. *Id.*

90. Andrew Bucholtz, *As Deadspin and SB Nation Return to GIFs and Prepare for a Possible Legal Fight, Others Back Off*, AWFUL ANNOUNCING (Oct. 21, 2015, 3:10 PM), <http://awfulannouncing.com/2015/as-deadspin-and-sb-nation-return-to-gifs-and-prepare-for-a-possible-legal-fight-others-back-off.html>.

91. *See generally* 17 U.S.C. § 107 (2016).

92. *Id.*

93. *Id.*

94. Daxton R. “Chip” Stewart, *Can I Use This Photo I Found on Facebook? Applying Copyright Law and Fair Use Analysis to Photographs on Social Networking Sites Republished for News Reporting*

factor is to be analyzed and the results must be weighed against each other.⁹⁵

1) *The Purpose and Character of the Use*

An important part of analyzing the purpose and character of the use is whether the user has used the material in a different or “transformative” way from the copyright holder. Under the first of the four § 107 factors—purpose and character of the use—the inquiry focuses on “whether the new work merely ‘supersedes the objects’ of the original creation,” or “whether and to what extent the new work is ‘transformative.’”⁹⁶ To be transformative, the user must have altered the original work with new expression, meaning, or message.⁹⁷ The more transformative the new work is, the more likely it is that there will be a finding of fair use.⁹⁸ Criticism or commentary of a work, by its nature, adds something new to the material. Further, using a clip or a GIF to highlight and share something noteworthy is different than showing the whole event.

Here, the purpose of posting nearly all of the images or video clips in question is for purposes of commentary or reporting. The use of the images in creating and sharing GIFs is almost certainly not of a commercial nature. There is no practical way for users to monetize the creation of GIFs on Twitter. GIFs are created with the intention of highlighting extraordinary or humorous events that occur during a baseball telecast. Sometimes, the events that are depicted are not ones that would be normally shown in a traditional highlight package or featured on MLB.com. For example, a popular use of GIFs is to highlight the facial reactions of players after extraordinary or unusual plays. These reactions would not normally be able to be easily referenced without the use of GIFs because they are not typically shown on highlight reels. The use of GIFs allows users to share and comment on these often humorous moments with each other. It is very unlikely that a court would find that creating and sharing GIFs would constitute a commercial use of MLBAM’s copyrighted material.

2) *The Nature of the Copyrighted Work*

The copyrighted work in question is the television broadcasts of MLB games. As discussed earlier in this Article, MLBAM can only hold the copyright to the broadcasts, not the actual game, results, or statistics themselves.

Purposes, 10 J. TELECOMM. & HIGH TECH. L. 93, 100 (2012).

95. *Id.*

96. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

97. *Id.*

98. *Id.*

There is no dispute that MLB and MLBAM own a valid copyright in the audio and visual representations of their product.

However, while the creation of GIFs does utilize images that are legally owned by MLB and MLBAM, the images are of games to which no copyright can be legally held. The images in question are of actual, factual events, and not necessarily of original creation. This would likely favor a user because there is not much creativity or originality in how MLB and MLBAM present its product, even though the user is using copyrighted images of these factual events.

2) *The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work As a Whole*

The amount of the copyrighted work used in these instances is almost always very small. By design, a video clip hosted on Vine can only be six seconds long.⁹⁹ Six seconds is a very small amount of a broadcast that generally lasts up to three hours. One Vine created out of a three-hour broadcast would almost certainly qualify as “de minimis” infringement of a copyright.¹⁰⁰

A GIF also, by nature, uses a very small amount of the broadcast as a whole. For a GIF to be effective, it must be able to load quickly so that it can be viewed. If too many images are used to create a GIF, then the file size becomes too large and other users cannot load it for viewing.¹⁰¹ As a result, GIFs are usually no longer than a few seconds long. Therefore, by their very nature, it is impossible for a GIF or a Vine to be able to constitute a substantial portion of the copyrighted work as a whole.

3) *The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work*

There is no question that the copyrighted broadcasts in question are very valuable to MLBAM. Again, the league generates “\$12.4 billion annually from its television broadcasting contracts with FOX, TBS, and ESPN.”¹⁰²

However, there is no evidence that the posting of images, GIFs, Vines, and the like have any impact on the market or value of MLBAM’s copyrighted broadcasts. It would be very unlikely that any fan interested in watching a

99. Knoblauch, *supra* note 7.

100. See Rick Sanders, *A Requiem for a Lawsuit Signifying Nothing: De Minimis and Fair Use*, IP BREAKDOWN (July 25, 2013), <http://ipbreakdown.com/blog/a-requiem-for-a-lawsuit-signifying-nothing-de-minimis-and-fair-use-a-requiem-for-a-lawsuit-signifying-nothing-de-minimis-and-fair-use/>.

101. *Posting Photos or GIFs on Twitter*, TWITTER HELP CTR., <https://support.twitter.com/articles/20156423> (last visited Dec. 15, 2016).

102. Horner, *supra* note 5.

baseball game would rather watch a few six-second long clips from the game than the game itself. If a fan is only interested in highlights from the game, then there are several other platforms that make use of the copyrighted material to provide to fans. The posting of this copyrighted material by fans is meant to enhance enjoyment of a broadcast, not to replace the broadcast entirely, and allows fans to connect all over the world while simultaneously watching the same game.

Thus, the creation and sharing of GIFs on Twitter is likely to constitute fair use. Again, while it is unlikely that MLBAM would receive a counter notification or be forced to defend its takedown notice in court, MLBAM's DMCA takedown notices would likely be found invalid by a court if MLBAM does not consider fair use when issuing the notifications.

VI. HOW MLB AND MLBAM SHOULD PROCEED

As illustrated by *Lenz*, MLBAM would likely find its DMCA takedown notices are invalid if they do not consider fair use when issuing them. MLBAM should incorporate a process of review before proceeding with a request to confirm its copyright ownership and infringement of the copyright. MLBAM should also document this review process to show that it has considered and analyzed the factors of fair use before issuing notices. Taking a hard look at whether or not the use of its copyrighted broadcasts constitutes fair use would likely result in MLBAM issuing much fewer takedown notices.

However, the court in *Lenz* noted that “a copyright holder’s consideration of fair use need not be searching or intensive,” and a copyright holder could conceivably use something as simple as a computer algorithm to determine if there is fair use.¹⁰³ For example, *The New York Times* noted that the NFL utilized an outside company that used software to find copyright infringement.¹⁰⁴ That company filed more than one thousand DMCA notices on behalf of the NFL during the 2015 season to social media platforms like Twitter demanding the removal of clips—many of which are GIFs—that violate the league’s copyright.¹⁰⁵ Thus, MLBAM may not necessarily *need* to follow these recommendations to comply with the law, but it would likely help to restore goodwill among its GIF-creating fans.

Perhaps more importantly, MLBAM should look into a much more nuanced

103. *Lenz v. Universal Music Corp.*, 801 F.3d 1126, 1135 (9th Cir. 2015).

104. Richard Sandomir, *N.F.L. Flags Unauthorized Video Sharing*, N.Y. TIMES (Oct. 14, 2015), http://www.nytimes.com/2015/10/15/sports/football/nfl-gifs-video-sharing-twitter.html?smid=tw-ny-tmedia&smtyp=cur&_r=0.

105. *Id.*

approach toward DMCA takedown notices for very practical reasons. As discussed *supra*, MLB needs to engage a wider and younger audience to keep up with other professional sports leagues and entertainment options.

MLB should be concerned about losing its connection with young social media users, and not just because baseball is a game with a rich history that has been handed down from one generation to the next. Today's young social media users are tomorrow's consumers with spending power. If younger social media users "are turning away from baseball now, there will be fewer adults to buy tickets, merchandise, and cable-TV packages in the future."¹⁰⁶ If MLB is not using MLBAM to connect with a younger fan base, then MLB and baseball will continue to fall further behind in popularity globally.

MLB is missing out on a tremendous opportunity to let fans market baseball across the globe for no cost. As of January 2015, nineteen percent of the entire U.S. adult population was on Twitter.¹⁰⁷ When a user tweets out a GIF, it allows other users all over the world to share in a baseball moment. Perhaps the best part of Twitter "is that each follower is a potential link to an entirely new set of people."¹⁰⁸ As illustrated by *Beyond the Box Score*, when MLBAM had baseball writer Jeff Sullivan's tweet removed via a DMCA takedown notice, Sullivan had over 22,000 followers that created 38,134 total impressions, "a number that undoubtedly would have grown had MLBAM not removed the [GIF] from his tweet."¹⁰⁹

By going after fans and bloggers who utilize MLBAM's images to create GIFs, MLB risks alienating its fans and most ardent supporters, as well as handicapping its efforts to attract new, younger fans to the game. MLBAM has the right to protect its copyright, but it may be doing so at the peril of its own business. MLB should take advantage of the free marketing and goodwill that would be created by relaxing its policies on copyright infringement. MLBAM's revenues for 2016 are projected to reach between \$1.1 and \$1.2 billion.¹¹⁰ In addition to advertising revenue from copyrighted broadcasts, MLBAM has expanded to the point where it generates a substantial amount of revenue by providing infrastructure to the streaming services of HBO, WWE, and the

106. Wendy Thurm, *Major League Baseball Reaches for Its Stars*, NEW YORKER (Apr. 9, 2015), <http://www.newyorker.com/news/sporting-scene/major-league-baseball-reaches-for-its-stars>.

107. MAEVE DUGGAN ET AL., SOCIAL MEDIA UPDATE 2014, at 6 (2015), http://www.pewinternet.org/files/2015/01/PI_SocialMediaUpdate20144.pdf.

108. Goldman, *supra* note 44.

109. *Id.*

110. Maury Brown, *2016 MLB Advanced Media Revenues Projected to Reach \$1.1-\$1.2 Billion*, FORBES (Mar. 3, 2016), <http://www.forbes.com/sites/maurybrown/2016/03/03/mlb-advanced-media-projected-revenues-to-be-1-1-1-2-billion-in-2016/#51287c247236>.

NHL.¹¹¹ Thus, it is unlikely that these record revenues would be substantially affected by the proliferation of GIFs, and in this case it is against MLBAM's best interests to so vigorously protect its copyright claims, regardless of whether creating and sharing GIFs constitutes fair use or not. MLB should take the lead of the NBA and focus its resources on preventing more substantial copyright infringement, such as unauthorized streaming and retransmission of its full broadcasts, rather than chase after each small and relatively insignificant instance of infringement to better engage modern and younger fans with baseball.

VII. CONCLUSION

MLB and MLBAM certainly have the right to attempt to terminate use of their copyrighted material online, but in pursuing such action, they are doing more harm than good to the value of their brand.¹¹² At a time when MLB desperately covets fans in the demographic that primarily uses social media,¹¹³ MLBAM does not need to issue DMCA notices to protect its copyrights. MLBAM does not have the exclusive right to use its copyrighted material in this context because the way fans on the Internet are using the material is protected under fair use.

In addition to not needing to issue DMCA requests to protect its copyrighted material, MLBAM does not have a strong case of infringement because of fair use. Almost all of the uses of MLBAM's copyrighted broadcasts that are available on social media networks would most likely be categorized as fair use. There is no substantial retransmission or reproduction of the broadcasts for commercial use, and it would be unwise for MLB and MLBAM to pursue litigation against their fans that use small parts of broadcasts to comment on them online.

Therefore, MLB and MLBAM should seriously reconsider their stances on images, GIFs, and Vines that make use of their copyrighted material. Their legal stance on the issue of infringement is shaky due to fair use, but more importantly, they need to consider the best and easiest ways for their product to be seen by as many eyeballs as possible. Relaxing their policies on issuing DMCA takedown notices would go a long way to ensuring that fans old and new remain engaged and excited about Major League Baseball.

111. *Id.*

112. Goldman, *supra* note 44.

113. *See* Thurm, *supra* note 106.