

## Sports and the First Amendment: UFC Is the Latest Challenger

Jason J. Cruz

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



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

---

### Repository Citation

Jason J. Cruz, *Sports and the First Amendment: UFC Is the Latest Challenger*, 27 Marq. Sports L. Rev. 355 (2017)  
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol27/iss2/5>

This Article 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](mailto:megan.obrien@marquette.edu).

# SPORTS AND THE FIRST AMENDMENT: UFC IS THE LATEST CHALLENGER

JASON J. CRUZ\*

## INTRODUCTION

Live streaming of sports content is on the horizon as more consumers are becoming comfortable with using devices other than television to watch games.

The National Football League (NFL) and Twitter announced a deal that will allow the social media company to stream ten Thursday night NFL games during the 2016 season.<sup>1</sup> The total cost for the social media company is \$10 million.<sup>2</sup>

Despite skepticism from stock analysts, Twitter believes the deal will spur growth.<sup>3</sup> The company hopes that the deal will attract new users and expand its content beyond its core demographic. According to the NFL, the deal will provide “live streaming video of *Thursday Night Football* without authentication to the over 800 Million registered and non-registered users worldwide on the Twitter platform on mobile phones, tablets, PCs[,] and

---

\* Jason Cruz owns and operates Cruz Law, PLLC in Seattle, Washington where he practices in the areas of business, copyrights and trademarks. In addition, he is Editor-in-Chief of MMApayout.com, a web site dedicated to the legal and business aspects of combat sports. Cruz attended the University of Washington where he earned a Bachelor of Arts in History and then his law degree. He also has a Master of Arts in Journalism from the University of Southern California. Cruz would like to thank his children, Jacob and Cooper, and his wife Carol for their unwavering support. He would also like to thank his black lab, Ricky, for keeping him company while writing.

1. Alina Selyukh, *Twitter Wins NFL Deal to Stream 2016 Thursday Night Football*, NPR (Apr. 5, 2016), <http://www.npr.org/sections/thetwo-way/2016/04/05/473099436/twitter-wins-nfl-deal-to-stream-2016-thursday-night-football>.

2. Schott Soshnick, Sarah Frier & Scott Maritz, *Twitter Gets NFL Thursday Night Games for a Bargain Price*, BLOOMBERG (Apr. 5, 2016), <http://www.bloomberg.com/news/articles/2016-04-05/twitter-said-to-win-nfl-deal-for-thursday-night-streaming-rights>. In 2017, Amazon.com paid five times the amount to broadcast ten Thursday night NFL games behind a paywall for “Amazon Prime” members. See Peter Kafka, *Amazon Will Stream Thursday Night NFL Games This Year*, RECODE (Apr. 4, 2017), <https://www.recode.net/2017/4/4/15184100/nfl-amazon-football-games-thursday-streaming-watch-live-prime-twitter>.

3. Jennifer Booton, *Twitter NFL Deal Shredded by Another Analyst*, MARKETWATCH (Apr. 7, 2016), <http://www.marketwatch.com/story/twitter-nfl-deal-shredded-by-another-analyst-2016-04-07>.

connected TVs.”<sup>4</sup>

The NFL is not the only sport going to Twitter for streaming. The Wimbledon Tennis Championships streamed with the company this past summer.<sup>5</sup> The streaming of the tennis matches gave social media users a first glimpse of what watching sports on Twitter would look like.<sup>6</sup> The major difference between Wimbledon and the NFL on Twitter is that the social media company does not have the digital streaming rights to tennis and, thus, did not air live content. This differs from the anticipated NFL package which should air live events. Further, in July 2016, the Pac-12 Conference announced a wide-ranging deal with Twitter to live stream at least 150 games in the first year of the deal.<sup>7</sup> However, the sports that are intended to be streamed are “non-revenue generating sports.” Swimming, volleyball, and soccer are examples. The deal does not include football or basketball.

At the time of this writing, it is unknown whether the NFL-Twitter arrangement will be successful. However, one might expect that with the Twitter deal, the enforcement of NFL copyright on the social media website will be enforced much more than it currently is policed. We have all seen the “Vines” and “GIFs” of interceptions, great catches, and touchdowns immediately after they occur. But, one would surmise that with the new NFL-Twitter deal in place, there will be fewer freelancers posting NFL content on Twitter without the express written consent of the NFL or Twitter.

The Twitter deal and the anticipated enforcement of NFL copyright highlights a question of whether the First Amendment applies to sports. This question was challenged by a mixed martial arts (MMA) company, the Ultimate Fighting Championships (UFC), in a lawsuit against the State of New York. Although the question remains pending since the lawsuit was resolved, the issue regarding First Amendment application to sports remains.

This article will discuss the UFC’s lawsuit against the State of New York, the subsequent appeal regarding the application of First Amendment rights to the sport of MMA, the background of First Amendment application to sport, and its aftermath after the resolution. It will look at the latest technology and

---

4. *National Football League and Twitter Announce Streaming Partnership for Thursday Night Football*, NFL COMM., <https://nflcommunications.com/Pages/National-Football-League-and-Twitter-Announce-Streaming-Partnership-for-Thursday-Night-Football.aspx> (last visited May 15, 2017).

5. Kurt Wagner, *Here’s What Live Sports Look Like on Twitter*, RECODE (July 6, 2016), <http://www.recode.net/2016/7/6/12104722/twitter-live-stream-wimbledon-nfl>.

6. *Id.*

7. Alex Schiffer, *Twitter Strikes Deal to Live Stream Pac-12 Sports*, L.A. TIMES (July 14, 2016), <http://www.latimes.com/business/technology/la-fi-tn-twitter-pac-12-20160714-snap-story.html>.

evaluate the future impact of such technology versus proprietary interests in sports.

#### UFC FILES A LAWSUIT AGAINST NEW YORK

When the New York Assembly voted to legalize professional MMA in the state of New York, it was the end of a long, costly road for supporters of MMA.<sup>8</sup> Governor Andrew Cuomo's signing of the bill into law came with much fanfare, especially from the UFC, as it had lobbied for years in Albany, and across the state, to influence lawmakers to support a bill that would make New York the final state in the Union to legalize the sport.<sup>9</sup> But, before the bill became law, the company filed a lawsuit seeking to legalize the sport in the state.

In November 2011, Zuffa, LLC (Zuffa), the owners of the UFC, filed a lawsuit against the State of New York citing that its law prohibiting professional MMA in the state was unconstitutional.<sup>10</sup> The lawsuit sought to overturn the New York law prohibiting professional MMA in the state.<sup>11</sup> Although the lawsuit was dismissed by the trial court, the appeal before the Second Circuit Court of Appeals attempted to provide guidance as to whether the First Amendment extends to sports.<sup>12</sup>

While New York has since passed a law which allows MMA within the state, the curious question of how the First Amendment may extend to coverage of sports is still an unknown.

#### BACKGROUND OF THE LAWSUIT

Until recently, New York was the only state in the Union that prohibited

---

8. Richard Sandomir & Ken Belson, *Ultimate Fighting Championship Ends a Long Odyssey to Legalization*, N.Y. TIMES (July 16, 2016), [http://www.nytimes.com/2016/07/17/sports/ultimate-fighting-championship-ends-a-long-odyssey-to-legalization.html?\\_r=0](http://www.nytimes.com/2016/07/17/sports/ultimate-fighting-championship-ends-a-long-odyssey-to-legalization.html?_r=0).

9. Chuck Mindenhall, *Gov. Andrew Cuomo Signs Bill for MMA in New York, UFC 205 Planned for MSG on Nov. 12*, MMA FIGHTING (Apr. 14, 2016) <http://www.mmafighting.com/2016/4/14/11431018/gov-andrew-cuomo-signs-bill-for-mma-in-new-york-first-event-planned>.

10. *Jones v. Schneiderman*, 888 F. Supp. 2d 421, 422 (S.D.N.Y. 2012).

11. The New York ban does not include amateur MMA. Thus, amateur MMA is legal but unregulated which leads to unsavory consequences. See Jim Genia, *HIV, Hepatitis C, and More: New York's Amateur MMA Scene Is a Disaster*, DEADSPIN (May 21, 2014), <http://deadspin.com/hiv-hepatitis-c-and-more-new-yorks-amateur-mma-scene-1578988576>.

12. The New York State Assembly recently passed a bill to legalize MMA in the state of New York. Zolan Kanno-Youngs & Erica Orden, *New York to Legalize Mixed Martial Arts*, WALL STREET J., Mar. 23, 2016, at A13.

the sport of MMA.<sup>13</sup> While most states regulate MMA through state athletic commissions or other state-run regulatory bodies, New York's law banned professional MMA matches despite the fact that the practice of MMA may occur at training facilities and gyms within the state.<sup>14</sup>

In its original complaint, Zuffa, along with a number of its contracted fighters and other plaintiffs, alleged injury from New York's law prohibiting professional MMA in the state.<sup>15</sup> One of its causes of action against the State of New York was that the existing New York law violated a fighter's First Amendment rights. The First Amendment provision protects actual speech as well as "expressive" and "symbolic" conduct.<sup>16</sup>

New York argued, in its Motion to Dismiss, that Zuffa had to show that the proscribed activity (here, live MMA) is either speech or expressive conduct and that the First Amendment applies to it.<sup>17</sup> New York asserted that First

Amendment protection extends "only to conduct that is inherently expressive of a particularized message that is highly likely to be understood by those viewing it."<sup>18</sup> New York claimed that MMA was not expressive conduct and was undeserving of First Amendment protection.

New York further stated that "[c]ompetitive sports are generally not protected by the First Amendment."<sup>19</sup> Based on the cases cited by New York in its moving papers, it makes the logical conclusion that sports have never been recognized as expressive conduct protected by the First Amendment.<sup>20</sup>

---

13. *Id.*

14. See N.Y. Sports Law § 8905-a (McKinney 1997), *repealed by* 2016 N.Y. Sess. Laws S. 5949-A (McKinney).

15. See *Jones*, 888 F. Supp. 2d at 422.

16. *Zalewska v. County of Sullivan*, 316 F.3d 314, 319 (2d Cir. 2003).

17. Defendant Schneiderman's Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint at 6, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 1:11-cv-08215) [hereinafter Motion to Dismiss].

18. *Id.* at 6–7 (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

19. *Id.* at 7 (citing *Maloney v. Cuomo*, 470 F. Supp. 2d 205, 212–13 (E.D.N.Y. 2007), *aff'd* 554 F.3d 56 (2d Cir. 2009), *vacated on other grounds*, 561 U.S. 1040 (2010); *Equity in Athletics, Inc. v. Dep't of Educ.*, 504 F. Supp. 2d 88, 111 (W.D. Va. 2007), *aff'd* 291 F. App'x. 517 (4th Cir. 2008), *cert. denied*, 556 U.S. 1127 (2009); *Fighting Finest, Inc. v. Bratton*, 898 F. Supp. 192, 195 (S.D.N.Y. 1995), *aff'd on other grounds*, 95 F.3d 224 (2d Cir. 1996); *SEG Sports Corp v. Paterson*, No. 97 Civ. 712 (MGC), 1998 WL 230993 at \*4 (S.D.N.Y. May 5, 1998); *Justice v. NCAA*, 577 F. Supp. 356, 374 (D. Ariz. 1983); *Top Rank, Inc. v. Fla. State Boxing Comm'n*, 837 So. 2d 496, 500 (Fla. Dist. Ct. App. 2003)).

20. See *id.* (citing *Maloney v. Cuomo*, 470 F. Supp. 2d 205, 212–13 (E.D.N.Y. 2007), *aff'd* 554

Regardless of the “message” claimed by Zuffa, MMA should not be afforded free speech protection. New York distinguished Zuffa’s reliance on the U.S. Supreme Court’s ruling in *Brown v. Entertainment Merchants Ass’n* as misguided. The ruling, asserted by New York, differed from the case at bar as *Brown* dealt with violent messages found in video games. Thus, it claimed that the ruling addressed *depictions* of violence and similarly the argument that “fake sports” (professional wrestling), fake interactive adventures (video games), and fake reality (reality television) could be afforded First Amendment protection. But, MMA is real.

New York highlighted the distinction of depiction versus the reality of the sport of MMA as it argued that MMA could not receive the same protection.<sup>21</sup> Attorneys for the state cited that the Supreme Court ruling in *Brown* analogized the restriction on violent video games with communicated ideas such as “books, plays, and movies . . . through many familiar literary devices (such as characters, dialogue, plot, and music)” as well as through their distinctive interactive features.<sup>22</sup> Thus, Zuffa incorrectly asserted that banning MMA because of its supposed violent message was unconstitutional.<sup>23</sup> Per New York’s argument, Zuffa’s reliance on the *Brown* decision was incorrect.

On the other side, Zuffa argued that conduct clearly undertaken for expressive purposes, such as to engage or entertain an audience, is deemed to be inherently expressive.<sup>24</sup> While Zuffa conceded that New York may regulate live MMA, the regulations must be consistent with the demands of the First Amendment.<sup>25</sup> Zuffa asserted a critical distinction between banning conduct in all circumstances and conduct when it is specifically entertaining a live

---

F.3d 56 (2d Cir. 2009), *vacated on other grounds*, 561 U.S. 1040 (2010); *Equity in Athletics, Inc. v. Dep’t of Educ.*, 504 F. Supp. 2d 88, 111 (W.D. Va. 2007), *aff’d* 291 F. App’x. 517 (4th Cir. 2008), *cert. denied*, 556 U.S. 1127 (2009); *Fighting Finest, Inc. v. Bratton*, 898 F. Supp. 192, 195 (S.D.N.Y. 1995), *aff’d on other grounds*, 95 F.3d 224 (2d Cir. 1996); *SEG Sports Corp v. Paterson*, No. 97 Civ. 712 (MGC), 1998 WL 230993 at \*4 (S.D.N.Y. May 5, 1998); *Justice v. NCAA*, 577 F. Supp. 356, 374 (D. Ariz. 1983); *Top Rank, Inc. v. Fla. State Boxing Comm’n*, 837 So. 2d 496, 500 (Fla. Dist. Ct. App. 2003)).

21. *Id.* at 9. New York goes as far as to utilize the UFC’s trademark slogan, “As Real As It Gets,” in exhibiting the difference between fantasy and reality. *Id.*

22. *Id.* at 9; *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011).

23. *See* First Amended Complaint at 80, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 1:11-cv-08215).

24. Defendant Schneiderman’s Reply Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint at 1, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 1:11-cv-08215).

25. Plaintiffs’ Opposition to Defendant’s Motion to Dismiss the Amended Complaint at 9, *Jones v. Schneiderman*, 888 F. Supp. 2d 421 (S.D.N.Y. 2012) (No. 1:11-cv-08215) (citing *Miller v. South Bend*, 904 F.2d 1081, 1097, 1099 (7th Cir. 1990) (Posner, J., concurring)).

audience.<sup>26</sup> The New York law banning MMA clearly addressed conduct before a live audience while leaving alone the practice of MMA within the state.

The trial court was not persuaded by Zuffa's arguments in favor of First Amendment protection. Judge Kimba Wood, of the Southern District of New York, determined that professional MMA matches and exhibitions are not protected free speech and dismissed Zuffa's claim.<sup>27</sup> Judge Wood determined that while MMA may be expressive conduct, it did not pass the test for constitutional protection as outlined in *Texas v. Johnson*.<sup>28</sup> Although the court did not conclude that sport could not be protected by the First Amendment, it sided with New York in holding that the expressive conduct must have a "particularized message" that could be discerned by the audience. The court did not find a "plausible contention" that an audience would understand the message a fighter conveyed when he fought in front of an audience.<sup>29</sup> It held that competitive conduct such as MMA "stands in sharp contrast to the public performances that courts have found communicate an expressive message."<sup>30</sup>

Implicit in the district court ruling is the apprehension of allowing sports to have First Amendment protection. The basic difference between performances in theatre that, in general, are protected by the First Amendment, as opposed to sport, is the fact that the former includes a predetermined ending whereas sport does not. Allowance of First Amendment protection in theatre presupposes an intent to convey a particularized message, but assumes that athletic endeavors do not.

Another takeaway from Judge Wood's opinion was that expressive conduct, when applied to art, presumes that the audience viewing it understands its message. In the alternative, the district court's dismissal of Zuffa's First Amendment claim indicates that an athlete competing at a sporting event in front of a live audience is not communicating a message. Furthermore, even if one might conclude that an athlete intends to communicate a message, there is not a likelihood it can be understood by the audience.

---

26. *Id.* at 10.

27. *Jones v. Schneiderman*, 974 F. Supp. 2d 322, 327 (S.D.N.Y. 2013).

28. In *Texas v. Johnson*, 491 U.S. 397, 404 (1989), the U.S. Supreme Court determined that conduct entitled to constitutional protection must be "sufficiently imbued with elements of communication." This would require at a minimum, (1) "an intent to convey a particularized message" along with (2) a great likelihood "that the message would be understood by those who viewed it." *Id.* at 404; see *Jones*, 974 F. Supp. 2d at 333–36.

29. See *Jones*, 974 F. Supp. 2d at 333–34.

30. *Id.* at 334.

Finally, one would presume from the decision that the court would not take into consideration ancillary expressive activities occurring during the audience-oriented event. Activities such as a fighter's entrance prior to his fight in which he may carry a flag or other symbol of his background, the music that plays during his or her walkout, and/or any celebration that may occur post-fight are not considered when applying an analysis as to whether it is deserving of free speech considerations. One might argue that these pre- and post-match activities would aid in interpreting the "particularized message" the athlete is attempting to convey with the audience. The omission of the overall live entertainment experience from the legal analysis forecloses the argument that the ancillary activities would help the viewer determine the message being conveyed.

The entire lawsuit was subsequently dismissed by the trial court and Zuffa filed an appeal with the Second Circuit in the spring of 2015.<sup>31</sup> The UFC retained former United States Solicitor General Paul Clement to spearhead the appeal of the lawsuit.<sup>32</sup>

#### APPEAL BY ZUFFA

On August 4, 2015, Clement filed the appellate brief in support of Zuffa. Its two key legal issues focused on the UFC's First Amendment claim and the vagueness of the statute prohibiting professional MMA in the state.<sup>33</sup>

With respect to the trial court's dismissal of the First Amendment claim, Clement argued, on behalf of Zuffa, that the query posed by the trial court was flawed as it asked whether MMA was "inherently expressive when *not* part of a live performance."<sup>34</sup> However, Zuffa contended that the question should have been whether the conduct the state prohibited is entitled to First Amendment protection.<sup>35</sup> Zuffa argued that live entertainment, including live MMA, was presumptively entitled to First Amendment protection. "[T]he very fact

---

31. Notice of Appeal to the United States Court of Appeals for the Second Circuit at 1, *Jones v. Schneiderman*, (No. 1:11-cv-08215-KMW-GWG) (2d Cir. Apr. 21, 2015).

32. *Former U.S. Solicitor General Paul Clement to Represent UFC in Appeal of New York's MMA Ban*, UFC (Apr. 21, 2015), <http://www.ufc.com/news/Former-United-States-Solicitor-General-Paul-Clement-to-Represent-UFC?id=>.

33. The article focuses on the First Amendment claim brought by Zuffa in its appeal to the Second Circuit Court of Appeals and will not address Zuffa's appeal based on its claim that the New York law banning MMA is unconstitutionally vague. *Id.*

34. Brief for Plaintiffs-Appellants at 20, *Jones v. Schneiderman*, (No. 15-1280) (2d Cir. Aug. 4, 2015).

35. *Id.* at 20.

that conduct is undertaken before an audience can convert something that might not otherwise be considered First Amendment activity into inherently expressive conduct protected by the Free Speech Clause,” argued Clement on behalf of the MMA promotion.<sup>36</sup> Here, the restricted conduct is live MMA before an audience and that should have been the court’s starting point to determine whether it was entitled to First Amendment protection.

MMA performed in front of a live audience “typically suffices to imbue it with communicative elements that implicate core First Amendment concerns.”<sup>37</sup> While the government may prohibit or regulate conduct which may have an incidental effect on the ability to perform before an audience, it may not prohibit lawful conduct because it is performed in front of an audience.<sup>38</sup> Here, the legislative history behind the ban is based on a “negative message” about violence and that it “sends the wrong message to [] youth.”<sup>39</sup> Thus, New York’s ban on MMA events in front of audiences was not incidental to the regulation, but intentional.

Even if one were to evaluate the ban based on the judicial review established by courts, it would not pass muster. The complete ban on live professional MMA in the state does not reflect a “narrowly tailored” regulation.<sup>40</sup> Moreover, the ban does not provide for ample opportunities of communication.<sup>41</sup> Instead, New York’s statute institutes a blanket ban of MMA before a live audience. Zuffa contends that with the U.S. Supreme Court’s decisions in *United States v. Stevens* and *Brown*, live MMA is entitled to First Amendment protection. In *Stevens* and *Brown*, the U.S. Supreme Court held that “speech about violence” (*Brown*) does not fall outside of the First Amendment and even “depictions of animal cruelty” (*Stevens*) are not outside the reach of First Amendment protection.<sup>42</sup> Contrary to New York’s view about *Brown*, Zuffa maintained that the case supports its contention that even messaging about violence can be protected by the First Amendment. Hence, regardless of the message conveyed by live MMA, it would and should be protected by the First Amendment.

---

36. *Id.* at 23.

37. *Id.*

38. *Id.* at 24.

39. *Id.* at 26–27.

40. *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968).

41. *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).

42. *United States v. Stevens*, 559 U.S. 460, 469, 472 (2010); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011).

In response, the State of New York focused on the violent aspect of MMA when it argued that the First Amendment did not protect violence.<sup>43</sup> While it admitted that reading, watching, and talking about MMA was legal, engaging in “actual violence” was prohibited.<sup>44</sup> It sought out the legislative history in contending that the laws prohibiting MMA focused on the violent conduct rather than a prohibition on speech or depictions of violence. This violence was clearly a governmental interest that could be regulated.

In reply, the UFC attacked the notion that the State of New York sought to muzzle the expressive elements of MMA in the state only in front of audiences while not addressing the fact that the practice of MMA could take place within the state. The appellants asserted its argument that the restrictive law focused on the circumstances which would likely demand an audience. Here it alluded to the involvement of professionals, a paid audience, and venues that sell alcohol.

It is worth pointing out that, in its reply to New York’s opposition, the UFC argued that New York’s view of a “majority of sports” is that they lack “any expressive value at all.” But the UFC compared the “tradition of sports, including feats of combat, as a form of entertainment rivals that of dramatic plays.”<sup>45</sup>

#### RELEVANCY TO OTHER SPORTS

The First Amendment claim made by Zuffa may have had sports leagues and their media partners taking note due to the possibility that live sports could be protected by the First Amendment. As a result, they would be concerned with the dissemination of their content for two major reasons.

First, there is the protection of their intellectual property. In instances like Periscope, the uncertainty of the advancement of technology may have the collective eyes of the NFL, the NBA, the NHL, MLB, and other leagues. Periscope, the Twitter-owned, live streaming application, allows users to post live video for others to watch online. Periscope touts over 10 million user accounts.<sup>46</sup> The Android version of this application, Meerkat, is also popular,

---

43. Defendant Schneiderman’s Reply Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint, *supra* note 24, at 3; *see* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982).

44. Defendant Schneiderman’s Reply Memorandum of Law in Support of His Motion to Dismiss the First Amended Complaint, *supra* note 24, at 9.

45. Reply Brief for Plaintiffs-Appellants at 14, *Jones v. Schneiderman*, (No. 15-1280) (2d Cir. Nov. 23, 2015).

46. *Periscope Is Winning the Live Streaming Video Competition*, USA TODAY (Aug. 13, 2015), <http://www.usatoday.com/videos/tech/2015/08/13/31598781/>.

although not as widely used. Almost immediately, users realized that they could post videos at sporting events and point their phones at shows they were watching on television.

The fight between Floyd Mayweather and Manny Pacquiao in May 2015 was the first major event which showed the potential issues with these phone applications.<sup>47</sup> Instead of paying the \$100 pay-per-view (PPV) price charged by cable and satellite distributors, people looked to the internet finding people who filmed their TV sets using Periscope, which allowed them to stream the fight to others online for free. Although the quality of the filming is far inferior to actually purchasing the PPV broadcast, for some, it did not matter. One Periscope feed streaming the fight drew 10,000 viewers.<sup>48</sup> It would not be far-fetched to believe that the future of live streaming applications could have better picture capabilities. How many more people would attempt to view a PPV through live streaming rather than paying their cable or satellite provider if the picture quality was better? This would pose a bigger question for PPV distributors and the events they support.

Secondly, for those reporting on sports, real-time video is a new issue still being fleshed out. Golf reporter Stephanie Wie had her media credentials revoked by the PGA Tour after she posted a video clip of a practice round on Periscope.<sup>49</sup> The PGA Tour indicated that she violated its media policy.<sup>50</sup> The Chief Marketing Officer of the PGA Tour, Ty Votaw, accused Wie of “stealing[.]” indicating that the PGA Tour owned the rights.<sup>51</sup> Votaw told GOLF.com, “If every reporter was allowed to post videos or engage in other prohibited acts we wouldn’t have the ability to enter into exclusive relationships or merchandize content.”<sup>52</sup> Wie’s revocation of her press credentials for the 2015 season was a culmination of issues, according to the PGA Tour, as she was previously disciplined for posting a video of a Tiger Woods’ practice

---

47. Arjun Kharpal, *Mayweather-Pacquiao: Live-Streaming App Periscope ‘Won by Knockout,’* CNBC (May 4, 2015), <http://www.cnbc.com/2015/05/04/mayweather-pacquiao-live-streaming-app-periscope-won-by-knockout.html>.

48. Zolan V Kanno-Youngs, *Sports League Keeping an Eye on Periscope, Meerkat*, USA TODAY (Aug. 24, 2015), <http://www.usatoday.com/story/sports/2015/08/24/periscope-meerkat-live-streaming-floyd-mayweather-manny-pacquiao/32295201/>.

49. Alan Shipnuck, *PGA Tur Revokes Stephanie Wei’s Credentials*, GOLF (May 2, 2015), <http://www.golf.com/tour-and-news/pga-tour-revokes-stephanie-weis-credentials>.

50. Taylor Soper, *Meet the Golf Reporter Who Was Suspended for Using Periscope on the Course*, GEEKWIRE (June 17, 2015), <http://www.geekwire.com/2015/meet-the-golf-reporter-who-was-suspended-for-using-periscope-on-the-course/>.

51. Shipnuck, *supra* note 49.

52. *Id.*

session using social media.<sup>53</sup> She obliged the PGA Tour in taking down the Woods video. In her defense, she claimed that the use of Periscope helps promote PGA Tour events.<sup>54</sup>

Notably, PGA of America, a different entity from the PGA Tour, allowed Wie to use Periscope during its practice rounds for the PGA Championship at Whistling Straits.<sup>55</sup> This appears a new strategy on the part of the organization in evaluating the utility of the technology for eventual monetization of its product. With Wie's use of Periscope, she needed to comply with the PGA of America's media guidelines.<sup>56</sup>

During the UFC's biggest event of 2015, July's UFC 189 in Las Vegas, a reporter using Periscope during media week—to give his followers a sense of the enormity of the event—was told by public relations staff to stop using it.<sup>57</sup> Later, it was indicated, via Twitter, that the UFC would allow Periscope, but not during actual events.<sup>58</sup> Still, it is not clear if an actual policy is in place as efforts to contact the UFC were not returned.

Notably, freelance boxing analyst Mike Ochoa used Periscope at the Mayweather-Pacquiao fight and was never told to stop by anyone at the event.<sup>59</sup> In combat sports, regional promotions allow reporters to use Periscope at pre-fight events, such as fighter weigh-ins. In an effort to draw more eyes to their product, organizations also use Periscope to air content on their own account.

Votaw is not the only sports executive to believe that leagues and networks own sports content. ESPN President John Skipper told *Sports Business Daily's* John Ourand, "It would be really nice if our friends in the [Silicon] Valley would quit hiding behind the idea that they don't have to be engaged in the protection of intellectual property."<sup>60</sup> He added, "Intellectual property is

---

53. *Id.*

54. Soper, *supra* note 50.

55. Stephanie Wie (@StephanieWei), TWITTER (Aug. 11, 2015, 8:23 AM), <https://twitter.com/StephanieWei/status/631123733999165440>.

56. *Id.*

57. Marc Raimondi (@marc\_raimondi), TWITTER (July 8, 2015, 2:24 PM), [https://twitter.com/marc\\_raimondi/status/618893331255263232](https://twitter.com/marc_raimondi/status/618893331255263232).

58. Marc Raimondi (@marc\_raimondi) TWITTER (July 8 2015, 4:19 PM), [https://twitter.com/marc\\_raimondi/status/618922491033944065](https://twitter.com/marc_raimondi/status/618922491033944065).

59. Kanno-Youngs, *supra* note 48.

60. John Ourand, *Why the Big Media Companies Have Periscope on Their Radar*, SPORTSBUSINESS J. (May 25, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/05/25/Media/Sports-Media.aspx>.

important to our economy and to our culture and should be protected.”<sup>61</sup> Ourand points out that media companies are concerned with protecting their revenue streams, including cable affiliate fees and ad revenue.<sup>62</sup> During the first quarter of 2015, U.S. pay-tv businesses lost 31,000 customers.<sup>63</sup> The surge of over-the-top platforms and internet offerings, such as Netflix and Hulu as well as stand-alone models like HBO.com, are starting to gain traction while traditional subscription television is experiencing a retraction of business. In the not too distant future, media companies could see live streaming as another competitor to its industry.

The technological advances of providing real-time information to the public can lead to a variety of pros and cons. The thirst for up-to-the-second information about every nuanced detail regarding a viewer’s favorite team or player may entice fans. Media companies that pay gigantic rights fees to air games and/or events might be undercut by new technology like Periscope. Also, sports leagues are looking at a variety of ways to monetize its data for use in fantasy sports and, potentially, gambling. Adam Silver’s op-ed piece in *The New York Times* in November 2014 regarding the regulation of gambling may be foreshadowing for the future of sports.<sup>64</sup> But the use of this technology will need to be balanced against the possibility of “courtsiding,” a gambling method in which real-time data is transmitted prior to sports books obtaining it to calibrate its odds and wagers.<sup>65</sup> “Courtsiding” is a relatively new phenomenon that remains fixed in the realm of tennis. But, with the constant expansion of gambling and daily fantasy games, which rely on quick data, this method of data harvesting might find new footholds in other sports.

---

61. *Id.*

62. *Id.*

63. Todd Spangler, *Cord-Cutting Alert: Pay-TV Business Declines for First Time During Q1*, VARIETY (May 11, 2015), <http://variety.com/2015/biz/news/cord-cutting-alert-pay-tv-business-declines-for-first-time-in-q1-1201492308/>.

64. Adam Silver, *N.B.A. Commissioner Adam Silver: Allowing Gambling on Pro Games*, N.Y. TIMES (Nov. 13, 2014), <http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>.

65. Greg Bishop & John Martin, *Tennis’s New Concern: Data Harvesting*, N.Y. TIMES (Jan. 21, 2014), <http://www.nytimes.com/2014/01/22/sports/tennis/tennis-new-concern-data-harvesting.html>.

PROPERTY RIGHTS OF SPORTS AND ITS INFORMATION—A VIEW OF THE  
LEGAL LANDSCAPE

In evaluating the proprietary interests of sports and “real-time” information in relation to First Amendment rights, there are several cases which address the situation.

The U.S. Supreme Court decided whether a news organization could broadcast an individual’s entire performance without prior consent. In *Zacchini v. Scripps-Howard Broadcasting Co.*,<sup>66</sup> the U.S. Supreme Court held that the First and Fourteenth Amendments were not a shield to the news media from civil liability.<sup>67</sup> In *Zacchini*, a performer sued the operator of a local Ohio

television station for airing a fifteen-second clip of his performance, a circus act at a county fair featuring his human cannonball routine. The case made its way to the U.S. Supreme Court where the Court held that the First Amendment does not privilege the news media to televise a performer’s entire act against his express objection.<sup>68</sup> The Supreme Court indicated that state law rights of publicity must be balanced against First Amendment considerations.

Perhaps a subtle distinction that a future stakeholder may point out is the fact that the Court evaluated this case as it relates to “a performer’s entire act” as opposed to a portion of the act. Whether or not the Court would have been persuaded if only a portion of the performance was shown was not determined here.<sup>69</sup> The dissent suggests that a First Amendment analysis of the case should have taken on a different starting point. It writes that the Court should have looked at the actions of the media and how it used the footage. The dissent asserts that if the footage was used routinely, the First Amendment would protect the station’s “right of publicity” or “appropriation” suit, unless the media’s use of the footage was a “subterfuge” for private or commercial exploitation.<sup>70</sup>

In *NBA v. Motorola, Inc.*,<sup>71</sup> the Second Circuit held that actual NBA games themselves were not protected under copyright law. In the *Motorola*

---

66. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

67. *Id.* at 566, 574–75.

68. *Id.* at 578–79.

69. The actual performance lasted fifteen seconds. However, the proposition as to if a portion of a performance could be shown could be an issue. The opinion’s focus on the “entire act” was noted by the dissent. *See id.* at 580–81 (Powell, J., dissenting).

70. *Id.* at 581 (Powell, J., dissenting).

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

case, the NBA filed suit against Motorola and Sports Team Analysis and Tracking

Systems (STATS) in connection with the defendants' dissemination of real-time statistical information via a mobile pager system.<sup>72</sup> Similar to the statements made by the PGA Tour's Votaw, the NBA asserted its right of ownership over its games. In its legal briefing, the NBA argued that Motorola and STATS should not be entitled to profit off of something that they neither paid for or created.<sup>73</sup> This position was buttressed through amici filing by the NFL, MLB, and the NHL.<sup>74</sup> The leagues asserted, "Protecting sporting events from commercial piracy is completely consistent with the First Amendment."<sup>75</sup> Attorneys for Motorola argued that "the First Amendment protects 'entertainment' just as zealously as it protects 'news.'"<sup>76</sup>

Yet, the court was not persuaded by the leagues' argument as it reviewed the legislative history of the Copyright Act in confirming that while broadcasts are protected under copyright law, the underlying games are not.<sup>77</sup> "[T]he district court correctly held that Motorola and STATS did not infringe NBA's copyright because they reproduced only facts from the broadcasts, not the expression or description of the game that constitutes the broadcast."<sup>78</sup> The court recognized the "fact/expression dichotomy" in the limits of copyright protection in fact-based works.

The court conceded that there was a "lack of caselaw" related to this subject, just as there was "a general understanding that athletic events were, and are, uncopyrightable."<sup>79</sup> It notes that the NBA cited a footnote from the Seventh Circuit that ruled players' performances contain "modest creativity required for copyright ability."<sup>80</sup>

In *Morris Communications Corp. v. PGA Tour*,<sup>81</sup> the Eleventh Circuit

72. *Id.* at 843.

73. Brief for Appellees-Cross-Appellants the National Basketball Association and NBA Properties, Inc. at 19, 38, *Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1992) (No. 96-7975); see Ryan M. Rodenberg, John T. Holden & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH. & ARTS 63, 90 (2015).

74. Brief for the NFL et al. as Amici Curiae Supporting the NBA and NBA Properties, Inc., *Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1992) (No. 96-7975).

75. *Id.* at 25–26.

76. Rodenberg, Holden & Brown, *supra* note 73, at 92.

77. *Motorola, Inc.*, 105 F.3d at 846–47.

78. *Id.* at 847.

79. *Id.*

80. *Id.* at 846 (citing *Baltimore Orioles, Inc. v. MLB Players Ass'n.*, 805 F.2d 663, 669 n.7 (7th Cir. 1986)).

81. *Morris Comm'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1298 (11th Cir. 2004).

ruled against a “free-riding” entity in siding with the PGA Tour as it denied a company’s right to report real-time golf scores. Supporters of Morris Communications argued that the PGA Tour’s press pass credentials included contractual language that precluded the reporting of “real-time” scores and information.<sup>82</sup> Notably, Morris brought this lawsuit as an antitrust case as opposed to a First Amendment or copyright law case.<sup>83</sup>

In *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*,<sup>84</sup> the Eighth Circuit granted fantasy baseball game operator C.B.C. use of names and information of MLB players in connection with C.B.C.’s baseball products. In holding in favor of the fantasy sports company, the court balanced the right of publicity held by MLB against First Amendment rights, and found that the First Amendment superseded the right of publicity. In the *C.B.C.* ruling, the court indicated that the information (i.e., baseball records and statistics of former players) was already in the public domain. It noted the oddity seemingly argued was that a person would not have a First Amendment right to use information that was already available to everyone. It also stated that there was no real divide between speech that entertains versus speech that informs.

There is the plausible distinction that *Zacchini* stands for the taping of an “entire performance” as opposed to just a portion of a performance. With today’s technological advances, it is not out of the realm of possibility that platforms such as Periscope, Meekat, or video-sharing app Vine, may be the subject of litigation over its use at live events for recording a portion of the live event. This may occur in light of the NFL-Twitter deal. The *Motorola Inc.* case highlights the fact that leagues cannot lay claim to a broad ownership of its sport. This aligned with *C.B.C.* as the Eighth Circuit noted that baseball information was in the public domain and protected by the First Amendment. However, the court in the *Morris Communications Corp.* case ruled against freedom of “real-time” scores. The case highlights a “work-around” for leagues as the press pass credential has the ability to limit access for the press while contractually obliging them to certain terms. However, there is the consideration of whether or not the general public attending a live sporting event would have a First Amendment right to use Periscope that could pose a

---

82. *Id.* at 1292–293 n.6; see Brief of Amici Curiae for Morris Communications Corporation in Support of Reversal at 15–16, *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004) (Nos. 03-10226-C, 03-11502-CC).

83. See *Morris Commc’ns Corp.*, 364 F.3d at 1297 (noting that the case was about antitrust law and not about copyright law).

84. *C.B.C. Distribution & Mktg., Inc. v. MLB Advanced Media, L.P.*, 505 F.3d 818, 820 (8th Cir. 2007).

potential question. With citizen journalism occurring more often, the recognition of its existence and importance must be considered in future legal analysis on this subject.<sup>85</sup>

#### IMPLICATIONS OF A RULING IN FAVOR OF THE FIRST AMENDMENT

If the First Amendment applies to sport, then journalists have a viable argument that the reporting of live sporting events utilizing technology such as Periscope is free speech and, thus, is not protected under the guise that it is the league's intellectual property. As a result, there would not be a need for a reporter to sign guidelines or comply with a sports league's media policy with respect to the use of Periscope. This would be most advantageous to freelancers, bloggers, and citizen journalists who might not have a media credential but would like to report on an event they attend. More so, if this becomes a reality, not only will journalists like Wie be able to show practice rounds via Periscope, the general public will have a right to use Periscope for personal use. The danger, of course, is that it also might be used as a way to coordinate placing bets.

Although the merits of the case never reached the Second Circuit Court of Appeals, the possibility that a ruling in favor of the UFC could have caused major concern amongst sports leagues and media companies, as the ownership of its content would be at issue. In the *Zuffa* case, it is likely that sports leagues would side with New York's theory that sports are not subject to First Amendment protection. This position would reconcile the comments of Votaw, which other sports leagues might echo, in suggesting that the PGA Tour owns its content.

However, an amicus filing by Fox Broadcasting Company (Fox) and the Big Ten Network, LLC (Big Ten Network) in the *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* case offered a contrary viewpoint on behalf of media companies.<sup>86</sup>

The antitrust class-action lawsuit filed in 2010 stems from former UCLA basketball player Ed O'Bannon's claims, on behalf of NCAA Division I foot-

---

85. Lauren Keating, *Live Video Features on Social Media Turns Users into Citizen Journalists, but Should We Stream Murders?*, TECH TIMES (July 10, 2016) <http://www.techtimes.com/articles/169111/20160710/live-video-features-on-social-media-turns-users-into-citizen-journalists-but-should-we-stream-murders.htm>.

86. Brief of Amici Curiae Fox Broadcasting Company and Big Ten Network, LLC In Support of Defendant NCAA's Motion for Summary Judgment at 1, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) (No. 09-cv-01967) [hereinafter Fox Amicus Brief].

ball and men's basketball players, challenging the NCAA's use of the images of its former student-athletes for commercial purposes.<sup>87</sup> The suit argued that upon graduation, former student-athletes should become entitled to financial compensation for the NCAA's commercial uses of his or her image.<sup>88</sup>

During the litigation, the NCAA attempted to file a Motion for Summary Judgment to dismiss claims presented by the O'Bannon plaintiffs. On the side of the NCAA, attorneys for Fox and the Big Ten Network filed an amicus brief supporting the NCAA's motion. Curiously, one of the fundamental points they made in their brief was that the First Amendment protects sports broadcasts and rebroadcasts.<sup>89</sup>

Fox and the Big Ten Network made the distinction that the First Amendment provides a defense to misappropriation, or right of publicity, claims based on the publication of matters of public interest.<sup>90</sup> Although the argument is premised upon broadcast and rebroadcast rights, rather than performance in front of a live audience, as in the UFC appeal, the position taken in the amicus filing is an interesting side note to what might be highlighted as a change of course.<sup>91</sup>

One might believe that sports leagues seeking to retain control over their content would oppose an argument that sports would be protected by the First Amendment. However, it would seem that Fox and the Big Ten Network provide an opposing view in the amicus filing. Media companies airing content from sports leagues pay hefty sums for the rights. Making the argument that sports broadcasts are protected under the First Amendment would seem to be contrary to the business model for a media partner.

Maybe the UFC's protection of its own intellectual property might seem ironic in light of its First Amendment claims. In November 2015, the UFC sent out a press release advising media members to not post any highlights from UFC 193 until the company provided the necessary permission.<sup>92</sup> Although not an overt mention, the "reminder" was set out in response to Ronda Rousey's

---

87. *Ex-UCLA Bruin Ed O'Bannon Sues NCAA over Image Use*, ESPN (July 22, 2009), <http://www.espn.com/mens-college-basketball/news/story?id=4346470>.

88. *Id.*

89. Fox Amicus Brief, *supra* note 86, at 1, 3, 5, 10.

90. *Id.* at 5 (citing *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 797 (1995), among other cases).

91. *See id.* at 1. *See generally In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013). The Ninth Circuit subsequently rejected this claim. *See id.*

92. Jason Cruz, *UFC Preparing for Copyright Violators for Rousey Fight*, MMAPAYOUT (Nov. 12, 2015), <http://mmapayout.com/2015/11/ufc-preparing-for-copyright-violators-for-rousey-fight/>.

penchant for ending fights early. Rousey, the UFC women's bantamweight champion at the time, had finished all of her UFC fights, but one, in less than one round. Her prior three fights had ended in a submission or knock out in thirty-four seconds, fourteen seconds, and sixteen seconds, respectively.<sup>93</sup> Her fights were so short that many people were able to post Vines of her entire fight online.

Rousey's dominance over her opponents gained mainstream notoriety and had many casual fans wanting to see her fights. The UFC experienced a spike in business when Rousey fought. However, there was a segment of "fans" who admittedly would not order the PPV, relying on Vines of her fight rather than pay the sixty-dollar PPV price for a fight many estimated to be under one minute. The scenario presented an interesting conundrum. While there are many fans who want to see UFC content, how can the UFC protect its interests? Certainly, an advisory to media can help, however, it does not prevent those without press credentials from airing and posting fights online. Thinking outside the box in protecting live events is necessary with more technology available for the general public.<sup>94</sup>

#### CONCLUSION

As the NFL-Twitter partnership begins, the public will see the parties protecting the value of their investment by policing social media for violators that will upload NFL content. One might anticipate that the First Amendment will be a plausible defense. When Zuffa filed its lawsuit against New York in November 2011, it may not have known the possible far-reaching implications. The end goal for Clement and the UFC has come to fruition prior to oral arguments before the Second Circuit.<sup>95</sup> Thus, many First Amendment fans will be deprived of the opportunity to see the Second Circuit rule on the issue. If the Second Circuit had sided with Zuffa, it would likely draw an appeal from the State of New York. It would also have raised concerns from sports leagues and media companies that sports may be protected by the First Amendment, which would mean that ownership and future monetization of da-

---

93. Certainly, you could see that the *Zacchini* case would protect the UFC's right to the brief Rousey fights. See generally *Zacchini v. Scripps-Howard Broad. Comp.*, 433 U.S. 562 (1977).

94. Although not sports-related, comedian Kevin Hart now bans cell phones from his performances due to the potential of recording his shows. Alison Jones, *Kevin Hart Has Fans Thrown out of Arena for Recording Comedy Show on Mobile Phones*, MIRROR ONLINE (Jan. 19, 2016), <http://www.mirror.co.uk/news/uk-news/kevin-hart-fans-thrown-out-7204016>.

95. Oral arguments had yet to be scheduled according to the web site for the Second Circuit Court of Appeals. The parties subsequently dismissed the appeal.

ta and live streaming may go by the wayside.