

From Meerkat to Periscope: Does Intellectual Property Law Prohibit the Live Streaming of Commercial Sporting Events?

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ABSTRACT

On February 27, 2015, San Francisco entrepreneur Ben Rubin announced the launch of his live streaming video application, Meerkat. Named after “the cute but carnivorous mongoose native to Africa,” Meerkat allows users to upload video footage from smartphones to the Internet for worldwide, instantaneous viewing.

In the weeks following Meerkat’s launch, Twitter unveiled a similar online application, Periscope, which allows users to watch live videos for up to twenty-four hours after their initial broadcast. Twitter’s more recent entry into the live streaming market has enhanced the credibility of this new technology. Furthermore, it has placed live streaming on the radar of major private equity firms.

Although the American business community generally characterizes live streaming as a favorable technological development, the use of live streaming technologies to broadcast (or rebroadcast) commercial sporting events is more controversial. According to one sports network analyst, the advent of live streaming could potentially result in a “Napster-type thing” involving mass infringement of sports enterprises’ intellectual property rights. Another sports industry expert cautioned that “[t]his kind of technology is going to have huge [negative] implications for broadcasters like NBC, which has already paid billions for the Olympics.”

This Article discusses the potential impact of live streaming on the commercial sports industry and analyzes whether commercial sports enterprises have the legal power to stop live streaming of professional and collegiate sporting events. Part I of this Article explores the history of live streaming commercial sporting events. Part II analyzes whether courts are likely to hold live streamers directly liable for their actions under federal copyright law. Part III discusses whether courts are likely to hold manufacturers of live streaming applications secondarily liable for copyright infringement. Part IV assesses the legality of live streaming under right of publicity law. Part V then analyzes the legality of live streaming under unfair

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competition doctrines. Finally, Part VI concludes that current federal and state laws adequately address all meaningful public policy concerns related to the live streaming of commercial sporting events.

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INTRODUCTION

On February 27, 2015, San Francisco entrepreneur Ben Rubin announced the launch of his live streaming¹ video application, Meerkat.² Named after “the cute but carnivorous mongoose native to Africa,” Meerkat allows users to upload video

1. The term live streaming means “broadcasting in real time.” Scott Kleinberg, *Live Streaming: The Next Big Thing in Social Media*, CHI. TRIB. (Apr. 1, 2015), <http://www.chicagotribune.com/lifestyles/ct-so-social-livestreaming-meerkat-periscope-20150401-column.html>.

2. See Kristen V. Brown, *Meerkat’s 15 Minutes of Fame—And Why It Might Last Longer*, SFGATE (Mar. 13, 2015), <http://www.sfgate.com/business/article/Meerkat-s-15-minutes-of-fame-and-why-it-6132669.phpperma> [<https://perma.cc/CM48-9Q2G>]; see also Edward Baig, *Meerkat App Is the Cat’s Meow*, USA TODAY, Mar. 16, 2015, at B4.

footage from smartphones to the Internet for worldwide, instantaneous viewing.³

In the weeks following Meerkat's launch, Twitter unveiled a similar online application, Periscope, which allows users to watch live videos for up to twenty-four hours after their initial broadcast.⁴ Twitter's more recent entry into the live streaming market has enhanced the credibility of this new technology.⁵ Furthermore, it has placed live streaming on the radar of major private equity firms.⁶

Although the American business community generally characterizes live streaming as a favorable technological development, the use of live streaming technologies to broadcast (or rebroadcast) commercial sporting events is more controversial.⁷ According to one sports network analyst, the advent of live

3. Brown, *supra* note 2; see also Mae Anderson, *Live-Streaming Apps Dominate Buzz at South by Southwest*, CHARLESTON GAZETTE (Charleston, WV), Mar. 16, 2015, at A6 ("The simple app allows people to live stream anything at the touch of a button."); Baig, *supra* note 2 (explaining that, to use Meerkat, users need to download a free iOS application, and then tap the "stream" button in the app to start broadcasting live feeds instantly); Benny Evangelista, *Think You're Better than Joe Buck? New Tech Lets You Prove It*, SFGATE (Apr. 6, 2015), <http://www.sfgate.com/sports/article/Think-you-re-better-than-Joe-Buck-New-tech-6178431.php> [<https://perma.cc/BN87-EFE3>] (noting that both Meerkat and Periscope "stream live video from smartphones"); Jim Rossman, *Live video streaming app Meerkat takes off at SXSW, but will it fly too high?*, DALL. MORNING NEWS (Mar. 19, 2015), <http://www.dallasnews.com/business/columnists/jim-rossman/20150319-live-video-streaming-app-meerkat-takes-off-at-sxsw-but-will-it-fly-too-high.ece> (explaining that "Meerkat streams live audio and video from an iPhone to the Internet via Twitter").

4. See Jordan Graham, *Now Everyone Can Be a Broadcaster: Live Streaming Video App Rides Latest Digital Wave*, BOS. HERALD, Apr. 6, 2015, at 14 ("A key difference between the two live-streaming apps—and one that may give the Twitter app the edge—is that Periscope saves videos to be replayed. . . ."); see also James Covert, *Not 'Meer' Money: First Meerkat Raises \$14M in T'Town*, N.Y. POST, Mar. 27, 2015, at 32; Brian Fung, *How Periscope is Already Helping Politicians Kill the Press Conference*, WASH. POST: THE SWITCH (Mar. 25, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/03/26/how-periscope-is-already-helping-politicians-kill-the-press-conference> (concluding that "Meerkat has a drawback: You can't save the live videos you post online"); Michele Chandler, *Twitter Periscope Lets Users Live-Stream Video*, INVESTOR'S BUS. DAILY (Mar. 26, 2015), <http://www.investors.com/news/technology/twitter-launches-live-streaming-video-service-periscope> [<https://perma.cc/36CY-NC5Q>] ("Once a Meerkat video stream ends, it vanishes – like Snapchat but unlike Google's YouTube videos, which remain accessible.").

5. See generally Mike Proulx, *Why Brands Will Pay Attention to Twitter's Periscope over Meerkat*, MEDIAPOST MARKETING DAILY (Mar. 31, 2015), <http://www.mediapost.com/publications/article/246758/why-brands-will-pay-attention-to-twiters-perisco.html> [<https://perma.cc/62MR-9N96>] (noting the "credibility, stability and reach of Twitter"); Agence France-Presse, *Meerkat Raises \$14 Million in Funding as Twitter Launches Periscope*, NDTV GADGETS (Mar. 27, 2015), <http://gadgets.ndtv.com/apps/news/meerkat-raises-14-million-in-funding-as-twitter-launches-periscope-674944> [<https://perma.cc/7J77-QH9P>] (discussing the possibility for "multiple players" in the live streaming market).

6. See, e.g., Agence France-Presse, *supra* note 5 (explaining that Meerkat's \$14 million in venture funding "was led by the private equity group Greylock Partners," and also included Comcast Ventures and Entrée Capital among others).

7. See *infra* note 8 and accompanying text; see also Bryan Altman, *Periscope, Meerkat Threaten Multi-Billion Dollar Sports Broadcast Copyrights*, CBS LOCAL SPORTS (Apr. 2, 2015), <http://newyork.cbslocal.com/2015/04/02/periscope-meerkat-threaten-multi-billion-dollar-sports-broadcast-copyrights/> [<https://perma.cc/2KWL-2HLW>] (arguing that "[o]f all of the likely contenders [to challenge the advent of live streaming], the NFL and other major sports leagues, along with major television broadcast providers, appear to be prime candidates for a legal battle over their intellectual property

streaming could potentially result in a “Napster-type thing” involving mass infringement of sports enterprises’ intellectual property rights.⁸ Another sports industry expert cautioned that “[t]his kind of technology is going to have huge [negative] implications for broadcasters like NBC, which has already paid billions for the Olympics.”⁹

This Article discusses the potential impact of live streaming on the commercial sports industry and analyzes whether commercial sports enterprises have the legal power to stop live streaming of professional and collegiate sporting events. Part I of this Article explores the history of live streaming commercial sporting events. Part II analyzes whether courts are likely to hold live streamers directly liable for their actions under federal copyright law. Part III discusses whether courts are likely to hold manufacturers of live streaming applications secondarily liable for copyright infringement. Part IV assesses the legality of live streaming under right of publicity law. Part V then analyzes the legality of live streaming under unfair competition doctrines. Finally, Part VI concludes that current federal and state laws adequately address all meaningful public policy concerns related to the live streaming of commercial sporting events.

I. HISTORY OF LIVE STREAMING TECHNOLOGIES AND THE LIVE STREAMING OF COMMERCIAL SPORTING EVENTS

A. THE HISTORY OF LIVE STREAMING TECHNOLOGIES

The ability of Internet users to upload video footage to the web dates back at least as far as YouTube’s launch in May 2005.¹⁰ But it was not until recently that Internet users had the ability to shoot video footage on their smartphones and simultaneously make that footage appear in real time on the web.¹¹

rights and broadcast copyrights”); *see generally* Don Kaplan & Christian Red, *Big Sucker Punch By Video Apps*, N.Y. DAILY NEWS, May 5, 2015, at 17 (quoting TV Media Insights Editor-in-Chief Marc Berman proclaiming Meerkat and Periscope “will cannibalize viewers” and that “[i]t’s a very dangerous time for broadcasters”); *see generally* Cecilia Kang & Will Hobson, *Streaming Apps Threaten a TV Bastion: Live Sports*, WASH. POST, May 6, 2015, at A1 (“Now live streaming apps such as Periscope and Meerkat threaten TV’s golden egg. Just hold a smartphone up to a television to record and stream what is airing, and suddenly piracy is easier than ever.”).

8. Christian Red, *New Sports Fight: Video Streaming*, N.Y. DAILY NEWS, May 5, 2015, at 47; *but see id.* (quoting a different television network insider indicating that the large broadcast stations might not be too concerned about Meerkat and Periscope because the networks “are able to provide a far superior product”).

9. Kaplan & Red, *supra* note 7.

10. *See About YouTube*, YOUTUBE, <https://www.youtube.com/yt/about/> [<https://perma.cc/F8XT-5V8X>] (last visited Apr. 18, 2016); *cf.* Michele Chandler, *YouTube Still Leading High-Stakes Game*, INVESTOR’S BUS. DAILY, Apr. 21, 2015, at A04 (stating that “YouTube remains the online video leader, but it’s far from the only star in an increasingly competitive field Google doesn’t break out YouTube’s financial results, but research firm eMarketer estimates that YouTube will reach \$1.99 billion in net U.S. video ad revenue”). Meanwhile, the practice of live streaming, according to reporter Scott Kleinberg, has been around since the 1990s, but “only very recently has it become easy enough for everyone to use.” Kleinberg, *supra* note 1.

11. *See infra* notes 12–14 and accompanying text. Before live streaming from iPhones and other handheld devices, there were a few precursor attempts at live streaming onto the Internet from other

The earliest attempts to live stream video from one's handheld mobile device onto the Internet date back to 2011 when a few start-up companies launched barebones applications to allow friends to share live video.¹² Nevertheless, these early attempts at live streaming failed to gain mass popularity because not many consumers had smartphones powerful enough to stream live videos.¹³ In addition, most data networks were not fast enough to allow users to send videos to the cloud, and many potential consumers were not comfortable sharing their personal videos without the opportunity to review their content first.¹⁴

This all changed, however, right around the time of the 2015 South by Southwest Conference in Austin, Texas.¹⁵ At this conference, San Francisco-based entrepreneur Ben Rubin announced the launch of a new live streaming web application, Meerkat, which was far simpler to use than previous attempts at live streaming.¹⁶ Meerkat additionally allowed users to target a far broader audience

formats; for example, Justin Kan, a technology entrepreneur, in 2007 launched Justin.tv, a website that allowed viewers to watch the entirety of his life on television. See Greta Kaul, *What Video Apps Meerkat and Periscope Can Learn from Justin.tv*, SFGATE (Mar. 27, 2015), <http://www.sfgate.com/business/article/What-video-apps-Meerkat-and-Periscope-can-learn-6163481.php> [https://perma.cc/DMM8-NATH]. Later Kan created Twitch—a website that through live streaming allows people to watch others' performance in videogames, and which Amazon ultimately purchased for \$970 million. See *id.* Another early video technology was the app Vine, which was purchased by Twitter in early 2013; however, Vine allowed for the downloading of video rather than live streaming, and the accessible video was just six seconds in length. See Michele Chandler, *Twitter Allies with Google, Tries Live Video in Bid to Grow*, INVESTOR'S BUS. DAILY, Apr. 14, 2015, at A02 (discussing Vine).

12. See Tracy McVeigh, *Periscope Phone App Gives Millions a Way to Live-Stream Their Lives*, OBSERVER (London), Apr. 4, 2015, at 10 (dating early live streaming back to websites such as Livestream and UStream that emerged in 2011); *c.f.* Brown, *supra* note 2 (dating the earliest live streaming technologies to 2013); Samuel Gibbs, *What Do Periscope and Meerkat Mean for Broadcasting Copyright?*, GUARDIAN (May 11, 2015), <http://www.theguardian.com/technology/2015/may/11/periscope-meerkat-broadcast-copyright-premier-league> [https://perma.cc/VK9L-X7ZK] (purporting that live streaming services “have been around since the early 2000s”).

13. See Jeff Ward-Bailey, *Live-Streaming Apps: Periscope Rises to Challenge Meerkat*, CHRISTIAN SCI. MONITOR, (Mar. 26, 2015), <http://www.csmonitor.com/Technology/2015/0326/Live-streaming-apps-Periscope-rises-to-challenge-Meerkat> [https://perma.cc/QVT7-WWD4]; see also Ed Baig, *Periscope Streams Challenge Meerkat*, USA TODAY, Mar. 27, 2015, at B5.

14. See Tali Arbel, *Boxing Match Pops up on Phones as TV Habits Change*, HONOLULU STAR-ADVERTISER (May 5, 2015) (“It’s a sign of how comfortable people are getting watching video on small screens from new types of platforms and providers.”); Mike Isaac & Vindu Goel, *As Twitter Introduces Periscope, Tech Titans Bet on Live Streaming Video*, N.Y. TIMES (Mar. 26, 2015), <http://nyti.ms/1GrvSTY> (“Driving the shift [in interest in live streaming technology] are technological advances and the ubiquity of smartphones, as well as years of people getting more comfortable with revealing information about themselves online through text and photos.”); Ward-Bailey, *supra* note 13; see also Baig, *supra* note 13, at B5 (“The promise of live mobile video has hung out there for years. Only now with faster and more robust networks, powerful smartphones in the hands of many, and, of course, the presence of social networks, the experience is finally gaining meaningful traction.”).

15. See Richard Nieva & Dara Kerr, *Of Meerkats and Marketers: The Highlights of SXSW 2015*, CNET (Mar. 18, 2015), <http://www.cnet.com/news/of-meerkats-and-marketers-the-highlights-of-sxsw-2015> [https://perma.cc/B36M-C69G] (describing Meerkat as “the fast-growing live-stream video app that stole the show this year”).

16. Brown, *supra* note 2; see generally Rossman, *supra* note 3 (noting that at the time of Meerkat’s launch, it was “a small company with 11 employees,” albeit the company has since begun its rapid growth).

than previous live streaming applications.¹⁷ According to Rubin, Meerkat was intended “to get live video to travel at the speed of tweets.”¹⁸ His goal was “to turn live streaming into a habit the same way snapping a photo is.”¹⁹

Within two weeks of Meerkat’s launch, the online application had garnered more than 100,000 downloads on Apple’s app store, with celebrities such as Ashton Kutcher and Jimmy Fallon emerging as some of the earliest adopters of this technology.²⁰ U.S. Secretary of Commerce Penny Pritzker later broadcasted on Meerkat the swearing in ceremony of the new Director of the U.S. Patent and Trademark office, Michelle Lee.²¹ Meanwhile, a prominent New York real estate agent created a popular video to show newly available properties to prospective buyers on the web.²²

As Meerkat began to attract mainstream use, Twitter boldly announced its purchase of another live streaming application that was still in its beta testing phase: Periscope.²³ With Twitter’s financial backing, Periscope rapidly completed its beta testing and launched on March 26, 2015.²⁴ Periscope’s entry into the live streaming marketplace provided Meerkat with its first genuine competition for market share.²⁵ But it also helped to establish bona fide credibility for the marketplace overall and a greater interest in both live streaming applications.²⁶

Currently, both the Meerkat and Periscope applications are free for consumers, with both applications offering similar live streaming capabilities.²⁷ Consumers have used these applications to live stream everything from friendly videos, to disasters and emergencies, to even organized sporting events.²⁸ In most cases, live

17. Brown, *supra* note 2.

18. Baig, *supra* note 2.

19. Brown, *supra* note 2; *see also* Claire Atkinson, *A Question of Trust Post-Sunmer: CBS-Viacom Power a Mixed Bag*, N.Y. POST, Mar. 15, 2015, at 36 (explaining that the Meerkat application was first introduced in March 2015 at the Austin, Texas technology and media exhibition, South by Southwest).

20. Brown, *supra* note 2 (noting that “Ashton Kutcher tweeted links to Meerkat broadcasts”).

21. Anderson, *supra* note 3 (“At a panel Friday about government patents, U.S. Commerce Secretary Penny Pritzker had used Meerkat to stream her official swearing in of the new chief of the U.S. Patent and Trademark office Michelle Lee on Twitter.”).

22. Baig, *supra* note 2.

23. *See also* Brown, *supra* note 2; *see generally* Baig, *supra* note 2 (Rubin discusses how he had never discussed a potential sale with Twitter before Twitter made the decision to purchase Periscope).

24. *See* Chandler, *supra* note 4.

25. *See* John Patrick Pullen, *Periscope vs. Meerkat: Which Is the Livestreaming App for You?*, TIME (Mar. 27, 2015), <http://time.com/3761315/periscope-meerkat-livestreaming-twitter> (“In development for more than a year but bought by Twitter earlier this year, Periscope offers a nearly identical service to Meerkat, the wildly popular ephemeral app that launched on Feb. 27. But in this battle for live streaming dominance, Twitter and Periscope currently have a huge advantage: it owns both the seas and the ports.”).

26. Agence France-Presse, *supra* note 5 (discussing the emerging competition between Meerkat and Periscope).

27. *See* Baig, *supra* note 2 (describing the Meerkat application as “free”); *see also* Covert, *supra* note 4 (discussing the additional functionality of Periscope). *Cf.* Marco Santana, *Orlando’s Joicaster Sees Competition as a Plus*, ORLANDO SENTINEL, Apr. 17, 2015, at A10 (discussing another live streaming technology, Joicaster, that has been charging a fee for its service).

28. Caitlin Dewey, *What Happens When You Livestream Your Office Fridge on Periscope*, WASH. POST (Mar. 30, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/03/30/>

streaming on Meerkat or Periscope has not been met with much resistance.²⁹ However, the commercial sports industry has taken a somewhat more cautious approach to these new technologies.³⁰

B. THE LIVE STREAMING OF SPORTING EVENTS

Commercial sports enterprises have long feared that the unauthorized rebroadcast of their sporting events would “impair the marketability and profitability” of their licensed sports broadcasts.³¹ To deter fans from creating their own game broadcasts, most sports teams include restrictive language on the back of game tickets to allow for the eviction of fans who enter the stadium with the intent to broadcast aspects of the game.³² The back of one 2014 NFL ticket, for example, states that “[t]he ticket holder may not transmit or aid in transmitting any photographs, images, videos, or others accounts or descriptions in any media of all or any part of the football game events.”³³

what-happens-when-you-livestream-your-office-fridge-on-periscope/ (“In the wake of an explosion in Manhattan’s East Village on Thursday, Meerkat and Periscope both became hubs for live footage from the scene.”).

29. See, e.g., Alexis Amaral, *What Live Streaming Means for Small Businesses*, CONSTANT CONTACT (May 25, 2015), <http://blogs.constantcontact.com/small-business-live-streaming> [<https://perma.cc/MH2M-572Y>] (discussing the many virtues of live steaming for small businesses).

30. See Gibbs, *supra* note 12 (explaining that “[t]he Premier League is joined by other sports leagues such as the NBA, MLB and NFL in being wary of the march of the live-streaming apps”); *id.* (“Due to its live nature, [live streaming] is unlikely to attract the ire of Hollywood – more concerned will be broadcasters of live events such as sports where their value is inherent to their timeliness.”).

31. Complaint at ¶ 38, *Showtime Networks, Inc. v. John Doe* (No. 2:15-CV-03147), 2015 WL 1910767 (C.D. Cal. Apr. 28, 2015) (claiming the unlicensed live streaming of the Mayweather-Pacquiao fight would “impair the marketability and profitability of the Coverage, and interfere with Plaintiffs’ own authorized distributions of the Coverage”); *cf.* Cecilia Kang & Will Hobson, *Periscope and Other New Apps Threaten TV’s Golden Egg: Live Sports*, WASH. POST, May 6, 2015, at A1 (discussing the value of sports broadcasting as part of TV’s “golden egg”); see generally Callum Borchers, *Apps Threaten Teams’ Grip on Video*, BOS. GLOBE (May 1, 2015), <https://www.bostonglobe.com/business/2015/05/18/periscope-meerkat-threaten-teams-hold-video-feeds-sports-arenas/> W9qlrhi5A5DhhAwjkMIKK/story.html [<https://perma.cc/BC4F-R5YU>] (noting that approximately \$6 billion of the National Football League’s \$9.2 billion in annual revenue comes from selling television broadcast rights).

32. See also *Pittsburgh Athletic Co. v. KQV Broad.*, 24 F. Supp. 490, 492 (W.D. Pa. 1938) (noting language on a Pittsburgh Pirates baseball ticket dating back to 1938 which states that the ticket holder may not share any information related to the game during the playing of the game itself). Nevertheless, despite these limits on the licenses that allow individuals to enter many sports stadiums and arenas that emerge out of contract or licensing law, there seems to be less support directly in intellectual property law that would naturally prevent a competitor from creating a rival broadcast to an event, separate and apart from the one that event hosts may purport to promote. See, e.g., *Prod. Contractors, Inc. v. WGN Cont’l Broad. Co.*, 622 F. Supp. 1500 (N.D. Ill. 1985) (finding that nothing in copyright law prevents a rival television station to the officially licensed broadcaster from producing its own, independent broadcast of a parade and airing it on its own television station). *But see Pittsburgh Athletic Co.*, 24 F. Supp. at 493–94 (“The right, title and interest in and to the baseball games played within the parks of members of the National League, including Pittsburgh, including the property right in, and the sole right of, disseminating or publishing or selling, or licensing the right to disseminate, news, reports, descriptions, or accounts of games played in such parks, during the playing thereof, is vested exclusively in such members.”).

33. Red, *supra* note 8.

The emergence of new, live streaming technologies has only increased the vigilance of sports enterprises against unauthorized game broadcasts.³⁴ According to an April 2015 article in the *Investor's Business Daily*, Major League Baseball had already gone “on the lookout for fans sharing extreme amounts of live video.”³⁵ Meanwhile, by late April 2015, the NBA and NHL announced clearer policies to prohibit media members from live streaming anything other than press conferences.³⁶

Nonetheless, the single event that has most directly led to the commercial sports industry's hyper-vigilance against live streaming involved the mass “piracy” of the May 2, 2015 welterweight boxing match between Floyd Mayweather, Jr. and Manny Pacquiao.³⁷ The Mayweather-Pacquiao fight, which was held at the MGM Grand Garden Arena in Las Vegas, Nevada, was widely promoted for weeks as the “Fight of the Century.”³⁸ The television stations HBO and Showtime jointly produced the only licensed broadcast of the fight,³⁹ which they in turn sold via pay-

34. See Borchers, *supra* note 31; see also Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue at *3, *Showtime Networks, Inc. v. John Doe* (No. 2:15-CV-03147-GW-MRW) (C.D. Cal. Apr. 30, 2015) (“Among other things, Defendants’ threatened infringement [of Showtime and HBO’s exclusive broadcast rights for the Mayweather-Pacquiao fight] would strip Plaintiffs of the critical right of first transmission and publication of an extremely valuable sporting event.”); See also Complaint at ¶ 38, *Showtime Networks, Inc. v. John Doe* (No. 2:15-CV-03147) 2015 WL 1910767 (C.D. Cal. Apr. 28, 2015) (noting that the unlicensed rebroadcast of a sporting event is most troubling to a sports enterprise and its licensed broadcaster where it involves “live coverage of a one-time live sporting event whose outcome is unknown”).

35. See Michele Chandler, *Will Twitter Users Play with MLB?*, *INVESTOR'S BUS. DAILY*, Apr. 7, 2015; see also Cecilia Kang & Will Hobson, *Streaming Apps Threaten a TV Bastion: Live Sports*, *WASH. POST*, May 6, 2015, at A1 (“Baseball Commissioner Rob Manfred told journalists last month that he is aware that some fans use Meerkat and Periscope during games. ‘We know it happens, and we haven’t done anything about it,’ he said. ‘We haven’t done it because it’s in very limited chunks of times. If somebody tries to stream a whole game from his phone, there’s probably going to be a problem.’”). As one potential example of such, an article in the *Christian Science Monitor* noted that “[a] Boston Red Sox fan broadcast an entire game recently”. Chris Gaylord, *Periscope App: Next Evolution in Live Streaming*, *CHRISTIAN SCIENCE MONITOR* (May 15, 2015), <http://www.csmonitor.com/Technology/2015/0515/Periscope-app-next-evolution-in-live-streaming-video> [<https://perma.cc/7UPB-7LER>].

36. Red, *supra* note 8; see also Gibbs, *supra* note 12 (discussing the NFL policy to ban in-game live streaming beginning 30 minutes before the opening faceoff).

37. Andrew Wallerstein, *Did Boxing Match Start Fight Between Twitter, Hollywood?* *CHI. TRIB.*, May 6, 2015, at 6 (“Any pay-tv channel that pays billions to sports leagues for exclusive rights to programming is going to be concerned about retransmissions to Periscope during the Mayweather-Pacquiao fight. While piracy via live stream is far from a new phenomenon, it may well have achieved a new level of visibility this weekend.”); see also Kaplan & Red, *supra* note 7, at 17; Scott Mayerowitz, *Problems with the Fight? You Weren't the Only One*, *VIRGINIAN-PILOT* (Norfolk, VA) (May 4, 2015); see also Sophia Rosenbaum, *Fans flocked to Web to watch Mayweather-Pacquiao for Free*, *N.Y. POST* (May 5, 2015), <http://nypost.com/2015/05/04/fans-flocked-to-web-to-watch-mayweather-pacquiao-for-free> [<https://perma.cc/JJ74-63AE>] (“Saturday night was a knockout victory for social media – and TV piracy – as people live-streamed the big fight to thousands of viewers who didn’t pay a cent to watch. Many boxing fans bypassed the official cable channels, which charged nearly \$100 for pay-per-view of the Floyd Mayweather-Manny Pacquiao fight, opting to watch for free via live-streaming apps such as Meerkat and Twitter’s Periscope.”).

38. See Mayerowitz, *supra* note 37; Complaint at ¶ 11, *Showtime Networks, Inc. v. John Doe* (No. 2:15-CV-03147) 2015 WL 1910767 (C.D. Cal. Apr. 28, 2015).

39. Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should

per-view television for an in-home fee of approximately \$100.⁴⁰ Some fans paid the fee to purchase access to the fight from pay-per-view,⁴¹ but thousands of others instead watched one of the unlicensed, free versions of the fight “with a picture quality that was shaky and pixilated, yet still quite adequate.”⁴²

By the conclusion of the fight, former Twitter chief executive Dick Costolo brazenly proclaimed Periscope as “the winner”—a statement that seems to recognize mass live streaming of the fight and its licensed televised broadcast.⁴³ All of this was in spite of the purported best efforts of lawyers from both HBO and Showtime to have live streamed footage of the fight instantaneously removed from Meerkat and Periscope.⁴⁴

II. DIRECT LIABILITY FOR LIVE STREAMING OF SPORTING EVENTS UNDER FEDERAL COPYRIGHT LAW

A. AN OVERVIEW OF FEDERAL COPYRIGHT LAW

For professional sports leagues and their licensed broadcast partners, there are many legal means to attempt to bring a halt to live streaming.⁴⁵ One method by which sports leagues may attempt to prevent the live streaming of their events is through copyright law.⁴⁶ Article I, Section 8 of the U.S. Constitution states that “Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their

Not Issue, *Showtime Networks, Inc. v. John Doe*, No. 2:15-CV-03147-GW-MRW (C.D. Cal. Apr. 30, 2015) (noting that plaintiffs Showtime and HBO “have established that they jointly own the exclusive rights to, among other things, reproduce and transmit the coverage of the May 2, 2015 fight between Manny Pacquiao and Floyd Mayweather, including the two undercard bouts”); *see also* Complaint at ¶¶ 13, 17, *Showtime Networks, Inc. v. John Doe* (No. 2:15-CV-03147), 2015 WL 1910767 (C.D. Cal. Apr. 28, 2015) (stipulating same).

40. *See* Mayerowitz, *supra* note 37; *Charter Apparently to Refund Price of Fight Telecast to Those who Had Outage*, ST. LOUIS POST-DISPATCH, May 4, 2015, at B9 (confirming the \$100 price tag from a “high-definition feed” to the fight); Don Kaplan & Christian Red, *Live Streams of Mayweather-Pacquiao Fight Latest Battle in Fight Against Online Piracy*, N.Y. DAILY NEWS, May 5, 2015, at 17 (explaining that despite live streaming of the fight on Meerkat and Periscope, HBO and Showtime still made more than \$400 million in pay-per-view sales).

41. *See* Richard Sandomir, *Mayweather-Pacquiao Bout Shatters Pay-Per-View Records*, N.Y. TIMES, May 13, 2015, at B14 (stating that “[a]n estimated 4.4 million viewers paid a record price of \$89.95 to \$99.95 to watch the fight, generating more than \$400 million in domestic revenue”).

42. Wallerstein, *supra* note 37; *see also* *Infographic: How Periscope and Meerkat Stack Up Against Established Social Apps*, ADWEEK (May 25, 2015), <http://www.adweek.com/news/technology/infographic-how-periscope-and-meerkat-stack-against-established-social-apps-164944> [<https://perma.cc/T5EB-2N6H>] (“Thousands of people are estimated to have watched Floyd Mayweather defeat Manny Pacquiao via live-streaming Twitter app Periscope and rival Meerkat”); *see* Mayerowitz, *supra* note 37 (noting that some boxing fans who watched a live-streamed version of the fight “went as far as calling it the future and a knock-out victory for social media”).

43. *See* Richard Sandomir, *Streaming App Hooks Viewers; Broadcasters Counterpunch*, VIRGINIAN-PILOT (Norfolk, VA), May 5, 2015, at 1.

44. Kaplan & Red, *supra* note 40, at 17.

45. *See infra* notes 46–152 and accompanying text.

46. *See infra* notes 47–98 and accompanying text.

respective Writings and Discoveries.”⁴⁷ The goal of this power is “to secure a fair return for an ‘author’s’ creative labor.”⁴⁸

The Copyright Act governs modern copyright law in the United States.⁴⁹ The Act stipulates that authors enjoy the benefit of legal protection of their “original works of authorship fixed in any tangible medium of expression.”⁵⁰ Examples of “original works of authorship,” as noted in the Copyright Act, include: (1) literary works, (2) musical works, (3) dramatic works, (4) pantomimes and choreography, (5) pictorial works, (6) motion pictures and other audiovisual works, (7) sound recordings, and (8) architecture.⁵¹ In addition, the Copyright Act allows courts “sufficient flexibility” to protect other types of works that are not specifically delineated in the act itself.⁵²

Federal copyright protection, nevertheless, is not boundless.⁵³ For example, the Copyright Act does not give the possessor of a copyright complete control over all possible uses of her works.⁵⁴ To the contrary, “individuals may reproduce a copyrighted work for a ‘fair use’”—a term that is often defined as “for a legitimate purpose.”⁵⁵ In determining whether a particular use constitutes a “fair use,” the Copyright Act instructs courts to consider four factors: (1) the purpose and character of the use; (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.⁵⁶

47. U.S. CONST. Art. I, § 8.

48. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).

49. 17 U.S.C. §101.

50. 17 U.S.C. §102(a); *see also* Douglas Lichtman, *Copyright as a Rule of Evidence*, 52 DUKE L. J. 683, 716 (2003) (referencing these “two main prerequisites to federal copyright protection”); *cf.* *Feist Publ’ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author.”).

51. 17 U.S.C. § 102(a).

52. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 52 (1976) (explaining that “[t]he use of ‘include,’ as defined in section 101 [of the Copyright Act,] makes clear that the listing is ‘illustrative and not limitative,’ and that the [eight] categories do not necessarily exhaust the scope of ‘original works of authorship’ that the bill is intended to protect”).

53. *See infra* notes 54–56 and accompanying text.

54. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).

55. *See New Bos. Television v. Entm’t Sports Programming Network*, No. 81-1010-Z, 1981 WL 646100, at ¶ 25,293 (D. Mass. Aug. 3, 1981) (“The fair use defense is a judicially developed doctrine which is now codified in the Copyright Revision Act of 1976, 17 U.S.C. §107. It has been defined as ‘a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent; notwithstanding the monopoly granted to the owner.’”); *see also* Kristen Chiger, *South Park & the Law*, 14 TEX. REV. ENT. & SPORTS L. 47, 51 (2012) (“The fair use doctrine serves as such a defense by permitting uses that would ordinarily be infringement but for the existence of certain factors.”); Rachel S. Leeds, *Confronting Digital Technology: The Motion Picture Industry’s Battle with Online Piracy*, 5 J. OF HIGH TECH. L. 303, 305–07 (2005) (discussing the general issue of “fair use”).

56. 17 U.S.C. § 107. None of these factors alone is entirely dispositive of the issue of “fair use” as individual courts may choose to weigh each factor differently based on the factual nature of each “fair use” claim. *See Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991) (“Because [the application of the fair use doctrine] is not a mechanical determination, a party need not ‘shut-out’ her opponent on the four factor tally to prevail.”); Barton Beebe, *An Empirical Story of U.S. Copyright Fair*

B. FEDERAL COPYRIGHT CHALLENGES TO LIVE STREAMING OF TELEVISED BROADCASTS

Commercial sports enterprises may seek to challenge various types of live streaming under federal copyright law.⁵⁷ Among them, the strongest challenges arise from the live streaming of televised game broadcasts directly from one's home television set.⁵⁸ Generally, there is little doubt that televised broadcasts of traditional sporting events constitute "original works of authorship" because the camera angles chosen for the broadcast and the manner of game announcing both entail at least "a modicum of creativity."⁵⁹ Further, the televised broadcast of a sporting event is treated under the law as being "fixed in a tangible medium of expression simultaneously with its initial transmission."⁶⁰

Use Opinions, 1978-2005, 156 U. PA. L. REV. 549, 561-62 (2008) ("In the opinions studied, courts often acknowledge that the four-factor test should not be applied formulaically; as one court put it, the test does not 'constitute an algorithm that enables decisions to be ground out mechanically.' Yet the data show that after an initial period of flexibility, judges shifted in the late 1980s toward a rhetorically quite formal and explicit treatment of the section 107 factors."); David Nimmer, "Fairest of Them All" and Other Fairy Tales of Fair Use, 66-SPG LAW & CONTEMP. PROBS. 262, 281-82 (2003) ("[I]t is not surprising to discover, in a given case, that the district judge found each of the four factors favoring fair use, whereas the Court of Appeals, in reversing, concluded the very opposite as to each factor . . . [P]ious words notwithstanding, it is largely a fairy tale to conclude that the four factors determine resolution of concrete fair use cases.").

57. See *infra* notes 58-98 and accompanying text.

58. See *infra* notes 59-71 and accompanying text.

59. *Feist Publ'n's Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (explaining that "originality requires independent creation plus a modicum of creativity"); see also H.R. Rep. No. 94-1476 5 ("When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes 'authorship.'"); see generally 17 U.S.C. § 101 (defining protectable "audiovisual works" as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied"); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997) ("In 1976 . . . Congress passed legislation expressly affording copyright protection to simultaneously-recorded broadcasts of live performances such as sports events.").

60. *Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue at *2, Showtime Networks, Inc. v. John Doe*, No. 2:15-CV-03147-GW-MRW (C.D. Cal. Apr. 30, 2015) (explaining that broadcast coverage of the Mayweather-Pacquiao boxing match is protected under the Copyright Act because "it is fixed in a tangible medium of expression simultaneously with its initial transmission"); *Balt. Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663, 668 (1986) (recognizing that under modern interpretation of copyright law, the fact that "telecasts of the games are videotaped at the same time that they are broadcast" indicates they are in fixed tangible form); H.R. Rep. No. 94-1476 52 ("If the images and sounds to be broadcast are first recorded (on a video tape, film, etc.) and then transmitted, the recorded work would be considered a 'motion picture' subject to statutory protection against unauthorized reproduction or retransmission of the broadcast. If the program content is transmitted live to the public while being recorded at the same time, the case would be treated the same; the copyright owner would not be forced to rely on common law rather than statutory rights in proceeding against an infringing user of the live broadcast."); cf. Lichtman, *supra* note 50 ("[T]he fact that fixations are not required to survive much beyond their first moments of existence suggests that lawmakers were thinking about publication when crafting the fixation requirement.").

Additionally, any argument that the live streaming of televised game broadcasts from one's television set constitutes "fair use" is doubtful at best.⁶¹ Going through each of the four elements of "fair use," it is certainly possible that the character of a live streamer's use may be deemed non-commercial.⁶² Nevertheless, the intent of such use is also not for "nonprofit educational purposes."⁶³ Moreover, even to the extent that the underlying facts of a sporting event are deemed to be "newsworthy" and thus the nature of the underlying facts deserve some First Amendment protection, that still likely "does not . . . permit defendants to appropriate the . . . expression of that information by copying the [protected] films themselves."⁶⁴

Similarly, with respect to the factor of substantiality of the use, the rebroadcast of an entire sporting event certainly would be defined as "substantial."⁶⁵ Moreover, even the live rebroadcast of key moments from within a sporting event, according to some courts, may reasonably be perceived as "substantial" based on the quality of the broadcast that was copied.⁶⁶ For example, the U.S. District Court for the District of Massachusetts in *New Boston Television v. Entertainment Sports Programming Network* held that the unlicensed rebroadcasting of sports highlights on a nightly sports news program would likely constitute substantiality for purposes of a "fair use" analysis.⁶⁷

Finally, there is little doubt that the live streaming of a televised sports broadcast has a negative effect on the market for the original work.⁶⁸ Courts have recognized that it is for the possessor of a copyright in a sports broadcast "to determine when and in what manner they choose to exploit their copyright."⁶⁹ Thus, the mere potential to sublicense televised broadcasts for a fee is enough reason for courts to caution a Meerkat or Periscope user against retransmitting a copyright holder's broadcast without permission.⁷⁰ Indeed, several newspaper reports seem to indicate that at least some boxing fans who watched the Mayweather-Pacquiao fight on Meerkat or Periscope instead would have purchased the fight on pay-per-view if the free version of the fight was not readily available.⁷¹

61. See *infra* notes 62–71 and accompanying text.

62. See generally *New Bos. Television v. Entm't Sports Programming Network*, No. 81-1010-Z, 1981 WL 646100, at ¶ 25,293 (D. Mass. Aug. 3, 1981).

63. *Id.*

64. *Id.* (emphasis in original); see also *Iowa State Univ. v. Am. Broad. Co.*, 621 F.2d 57, 61 (2d Cir. 1980) ("The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.").

65. See *infra* notes 66–67 and accompanying text.

66. *New Bos. Television*, 1981 WL 646100, at ¶ 25,293.

67. See, e.g., *id.* (noting that "it is the quality of the use rather than its quantity" that is determinative in assessing the substantiality of use, and that airing the "highlights" of a sporting event reasonably may be seen as substantial).

68. See *infra* notes 69–71 and accompanying text.

69. *New Bos. Television*, 1981 WL 646100, at ¶ 25,293.

70. See *supra* notes 68–69 and accompanying text; see also Gibbs, *supra* note 12 ("TV companies the world over pay exorbitant amounts for the rights to broadcast sporting events. Any attempt to circumvent of [sic] those rights is seen in a very dim light.").

71. See *supra* notes 37–42 and accompanying text.

C. FEDERAL COPYRIGHT CHALLENGES TO LIVE STREAMING FROM STADIUMS AND ARENAS

Sports enterprises may also seek to challenge the live streaming of sporting events by fans located within an actual stadium or arena under federal copyright law. However, most courts would be far more likely to resolve this kind of legal challenge in favor of the live streamer, rather than the sports enterprise.⁷²

In contrast to televised game broadcasts that almost certainly enjoy copyright protection, actual sporting events do not meet the threshold requirements for federal copyright protection.⁷³ A sporting event in itself does not generally constitute an “original work of authorship” because sporting events “are competitive and have no underlying script.”⁷⁴ In addition, the sporting events themselves are not “fixed in a tangible medium of expression” because they are not stored or saved anywhere—thus making them entirely intangible.⁷⁵

Allowing fans who live stream games from within sports facilities to evade copyright law may seem counterintuitive to some given the effort that sports enterprises invest in producing their games.⁷⁶ However, as Professor Andrew Beckerman-Rodau explains in his 2011 law review article, *Ideas and the Public Domain*, “[a]n economic system based on free competition will always have a certain degree of free riding.”⁷⁷

The best way to overcome free riding is to develop a superior product.⁷⁸ If professional sports enterprises do not want their fans to live stream games from their facility, they should produce televised game broadcasts that are far superior to anything that fans could independently create.⁷⁹ Some potential ways to ensure that licensed sports broadcasts are superior to their fan-generated counterparts may

72. See *infra* notes 73–80 and accompanying text; see also *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 2005) (explaining that while the Copyright Act of 1976 extends to “simultaneously-recorded broadcasts of live performances such as sports events,” it does not extend to “the underlying events”).

73. See *infra* notes 74–80 and accompanying text; see also *In re Major League Baseball Petition for Special Relief*, 6 FCC RCD. 5573, 1991 WL 637900 at *6 (Oct. 1, 1991) (“To the extent that Baseball urges that it is the game itself rather than its telecast that is deserving of exclusivity, the weight of authority holds that baseball games are not copyrightable, though their fixed telecasts may be.”).

74. *Nat’l Basketball Ass’n*, 105 F.3d at 846.

75. See Lichtman, *supra* note 50 (“While federal law has over time significantly expanded the categories of what is deemed eligible for copyright . . . no federal copyright statute has ever attempted to protect completely intangible expression.”); see also ROBERT P. MERGES ET. AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 452 (2012) (explaining that the fixation requirement “helps in providing authorship”). For case law that seems to reach this conclusion, see generally *Prod. Contractors, Inc. v. WGN Cont’l Broad. Co.*, 622 F. Supp. 1500, 1504 (N.D. Ill. 1985) (explaining that copyright protection of a videotaped parade “does not extend to prevent another simultaneous live telecast by another television or radio station”).

76. *Cf. Pittsburgh Athletic Co. v. KQV Broad.*, 24 F. Supp. 490, 492 (W.D. Pa. 1938) (finding an importance in protecting sporting events from being broadcast without permission given the cost and effort that sports teams invest into producing the game).

77. Andrew Beckerman-Rodau, *Ideas and the Public Domain: Revisiting INS v. AP in the Internet Age*, 1 N.Y.U. J. INTELL. PROP. AND ENT. L. 1, 22 (2011).

78. See generally *id.*

79. See generally *id.*

include hiring elite game announcers and embedding interesting promotional information into the licensed telecasts. In addition, the enhanced business relationship between professional sports leagues and the fantasy sports industry creates an opportunity for licensed sports broadcasters to insert interactive fantasy sports contests into their broadcasts—something that individual live streamers would not be able to replicate easily.⁸⁰

III. SECONDARY LIABILITY FOR LIVE STREAMING OF SPORTING EVENTS UNDER FEDERAL COPYRIGHT LAW

Based upon the logistical difficulty of any sports enterprise enforcing its rights in protected works against direct infringers, sports leagues may also attempt to hold companies that produce live streaming technologies secondarily or vicariously liable for their users' copyright violations.⁸¹ Although there is no evidence that any commercial sports enterprise has seriously threatened to sue Meerkat or Periscope,⁸² HBO purportedly “sent at least five takedown notices to Twitter” in April 2015 pertaining to Periscope users' live streaming of the television show *Game of Thrones*.⁸³ Meanwhile, CBS and Time Warner's HBO preemptively took

80. For a discussion of the enhanced relationship between some professional sports leagues and fantasy sports companies, see, e.g., Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 ILL. L. REV. 117 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2587362 (discussing the direct business relationships that the NBA and MLB currently maintain with large “daily fantasy sports” businesses); Marc Edelman, *8 Legal Challenges of Major League Baseball's New Daily Fantasy Sports Partnership with DraftKings*, FORBES (Apr. 8, 2015), <http://www.forbes.com/sites/marcedelman/2015/04/08/8-legal-challenges-of-major-league-baseballs-new-daily-fantasy-sports-partnership>; Marc Edelman, *7 Risks of the NBA Investing in FanDuel*, FORBES (Nov. 13, 2015), <http://www.forbes.com/sites/marcedelman/2014/11/13/7-legal-risks-of-the-nba-investing-in-fanduel>.

81. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 545 U.S. 913, 930 (2005) (“One infringes contributorily by intentionally inducing or encouraging direct infringement, and infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.” (citation omitted)); see also *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984) (explaining that a theory of “contributory infringement” in certain circumstances may hold a product manufacturer responsible for the wrongdoing of product end-users); *id.* at 435 (“[V]icarious liability is imposed in virtually all areas of law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another.”); *Grokster*, 545 U.S. at 929–30 (explaining that “it may be impossible to enforce rights in the protected work effectively against all direct infringers”). For a more general discussion of the subtle differences in legal theory between contributory infringement and vicarious infringement and their respective developments, see, e.g., ROBERT P. MERGES ET. AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 598–600 (2012); Leeds, *supra* note 55, at 313–15 (discussing the requisite legal elements of each theory).

82. The closest thing that exists to the threat of anyone involved in sports to sue Meerkat or Periscope is a sentence from a May 5, 2015 *Los Angeles Times* article stating that “[n]ot satisfied with their record-breaking haul, the promoters [of the Mayweather-Pacquiao fight] are now threatening to sue the companies that provided the technology to broadcast the bootlegs.” *The Fight over the Fight*, LOS ANGELES TIMES, May 5, 2015, at 10; see also David Pierson, *Cable Took the Hardest Blow in the Mayweather-Pacquiao Fight*, LOS ANGELES TIMES, May 5, 2015, at 1; see generally Sandomir, *supra* note 43, at 1 (Todd DeBoef, president of Top Rank, said that “Top Rank, Showtime, and HBO planned to meet soon to discuss how to protect themselves in the future. They do not rule out legal action.”).

83. Tracy Swartz, *Battle for the Throne: HBO Wields Legal Ax Against Bars Organizing Watch*

websites BoxingHD.net and SportShip.org to court to prevent them from offering unauthorized streaming of the Mayweather-Pacquiao fight.⁸⁴

In reviewing claims for contributory or vicarious liability, courts typically attempt to strike a balance between “the respective values of supporting creative pursuits through copyright protection and promoting innovation in new communication technologies.”⁸⁵ In this vein, courts will generally hold manufacturers contributorily or vicariously liable for users’ copyright infringement only if the manufacturers have sold products “with constructive knowledge of the fact that their customers may use [them] to make unauthorized copies of copyrighted material.”⁸⁶

Two important Supreme Court decisions address whether a product manufacturer may be held vicariously liable for copyright infringement.⁸⁷ In *Sony Corp. v. Universal City Studios, Inc.*, the U.S. Supreme Court upheld a district court’s finding that Sony Corporation was not contributorily or vicariously liable for customers’ infringing uses of the company’s videocassette recorders because Sony’s videocassette recorder was “capable of substantial non-infringing uses” such as the time-shifting of home viewership of television programs.⁸⁸ Meanwhile, in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, the Supreme Court held that peer-to-peer file sharing networks Grokster and StreamCast were liable for their users’ copyright violations because both companies promoted their free, peer-to-peer software-sharing networks based on an infringing use.⁸⁹ Additionally, there was ample evidence that customers used both Grokster and StreamCast primarily for infringing purposes.⁹⁰

The holdings of these two cases are reconcilable in a rather straightforward way.⁹¹ Simply stated, companies that devise new technologies with primarily non-infringing purposes cannot be punished under copyright law if some users find an infringing use and exploit it.⁹² By contrast, companies that devise new technology

Parties, CHI. TRIB., Apr. 29, 2015, at 1.

84. See Mayerowitz, *supra* note 37; see also Complaint at ¶¶ 70–91, Showtime Networks, Inc. v. John Doe (No. 2:15-CV-03147) 2015 WL 1910767 (C.D. Cal. Apr. 28, 2015) (alleging contributory and vicarious liability against companies that intended to live stream the Mayweather-Pacquiao boxing fight).

85. *Grokster*, 545 U.S. at 928.

86. *Sony*, 464 U.S. at 439; see also *Grokster*, 545 U.S. at 936 (“[A] showing that infringement was encouraged overcomes the law’s reluctance to find liability when a defendant merely sells a commercial product suitable for some lawful use.”).

87. See *infra* notes 88–90 and accompanying text.

88. See *Sony*, 464 U.S. at 456; see also *Grokster*, 545 U.S. at 931–32 (explaining same).

89. *Grokster*, 545 U.S. at 918–19; see also *id.* at 936–37 (“[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”).

90. *Id.* at 922 (explaining that Metro-Goldwyn-Mayer Studios “commissioned a statistician to conduct a systematic search, and his study showed that nearly 90% of the files available for download on the FastTrack system were copyrighted works”); *id.* at 929 (“The argument for imposing indirect liability in this case is, however, a powerful one, given the number of infringing downloads that occur every day using StreamCast’s and Grokster’s software.”).

91. See *infra* notes 92–98 and accompanying text.

92. See *supra* notes 93–98 and accompanying text.

for infringing purposes can and will be found liable—especially when speaking with bravado about the infringing use.⁹³ Thus, it seems rather unlikely that either Meerkat or Periscope would be held liable for their users' copyright violations, because both companies offer live streaming to support a wide range of popular, non-infringing uses.⁹⁴ Neither company promotes its live streaming technology for the purpose of infringing on sports copyrights, and both Meerkat and Periscope's terms of service indicate that "users are prohibited from violating third party copyrights and trademarks and that they will respond to all reasonable claims of copyright infringement."⁹⁵

To the extent that either company may be found secondarily liable for its users' live streaming of televised sporting events, Periscope seems to lie in the more vulnerable position based on its parent company's former chief executive's statement that Periscope was "the winner" of the Mayweather-Pacquiao fight.⁹⁶ However, a single loose statement—even by a company's chief executive—should not alone be definitive of secondary liability.⁹⁷ In addition, Dick Costolos's loose statement could theoretically be construed as taking pride exclusively in the live streaming by those who actually attended the boxing match: conduct that is very likely permissible under federal copyright law.⁹⁸

IV. LIVE STREAMING OF SPORTING EVENTS UNDER RIGHT OF PUBLICITY LAW

Given that copyright law seems to prevent the live streaming of televised broadcasts but not the live streaming of a sporting event itself, sports enterprises may attempt to turn to other legal theories to prevent fans that are located within

93. See *supra* notes 94–98 and accompanying text.

94. See Benny Evangelista, *Call Your Own Game with this Streaming Platform*, S.F. CHRON., Apr. 6, 2015, at 1 (explaining that "a legal case could be made for protecting live streaming technology because of non-infringing uses"); *The Fight over the Fight*, L.A. TIMES, May 5, 2015, at 10 ("Unlike Napster, though, [Meerkat and Periscope] were created for a legitimate purpose: to let people stream live, original videos. Piracy is just an unfortunate byproduct.")

95. Bryan Altman, *Periscope, Meerkat Threaten Multi-Million Dollar Sports Broadcast Copyrights*, CBS (Apr. 2, 2015), <http://newyork.cbslocal.com/2015/04/02/periscope-meerkat-threaten-multi-billion-dollar-sports-broadcast-copyrights> [<https://perma.cc/4RGT-TPUP>]; see also *id.* ("Generally, the way the courts look at these issues is they ask whether the service has a bona fide permissible objective, or exists primarily for the purposes of infringement," Edelman explained. "While Periscope and Meerkat certainly could become subject to litigation if some user rebroadcasts material with copyright infringement, reasonable efforts to remove the material that is found to be infringing, would seem to greatly protect these companies, given that their purpose is a legal and permissible one.") (internal quotations omitted); see generally Jordan Valinsky, *Periscope Complies to 71 Percent of Copyright Takedown Requests*, DIGIDAY (Apr. 11, 2015), <http://digiday.com/platforms/periscope-complies-71-percent-copyright-takedown-requests> [<https://perma.cc/W3L7-7JB7>] (noting that as "[c]ompared to Twitter and Vine, Periscope has the highest compliance rate," with takedown requests at 71 percent).

96. See *supra* notes 43–44 and accompanying text.

97. Cf. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 545 U.S. 913, 926 (2005) (noting that the evidence that was relied upon to find vicarious liability included express promotions based on the use of the service for an infringing use).

98. See *supra* notes 43–44 and accompanying text.

their facilities from live streaming games.⁹⁹ One such alternative legal theory is for sports enterprises to challenge live streaming under right of publicity law.¹⁰⁰

The right of publicity is a state law intellectual property right that serves “to protect the commercial interests of celebrities and their identities.”¹⁰¹ In most states, a prima facie claim for breach of one’s right of publicity entails four elements: “(1) the use of one’s identity; (2) for purposes of a commercial advantage; (3) without consent; and (4) in a manner that causes monetary harm.”¹⁰² If a plaintiff meets its burden of showing each of these four elements, “the court will then balance the plaintiff’s right of publicity claim against potential affirmative defenses, including First Amendment defenses.”¹⁰³

The live streaming of commercial sporting events is very likely to meet the first, third, and fourth elements needed to make out a prima facie right of publicity claim.¹⁰⁴ The live streaming of commercial sporting events undoubtedly uses the identities of athletes, coaches, and other celebrities.¹⁰⁵ In addition, this is without their consent.¹⁰⁶ In commercial sporting events where the athletes are paid, the consent to use their likeness most likely lies with the athletes’ employers as part of a work-for-hire.¹⁰⁷ Meanwhile, in commercial sporting events where the athletes are uncompensated (e.g., National Collegiate Athletic Association sports), the right

99. See *infra* notes 100–152 and accompanying text.

100. For a thorough discussion of right of publicity law, see, e.g., Marc Edelman, *Closing the ‘Free Speech’ Loophole: The Case for Protecting College Athletes’ Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 553, 559–67 (2013).

101. *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983); see also *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977) (The right of publicity “provides an economic incentive for [a performer] to make the investment required to produce a performance of interest to the public. This same consideration underlies the patent and copyright laws long enforced by this Court.”).

102. Edelman, *supra* note 100, at 560.

103. Edelman, *supra* note 100; see also *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313 (Cal. App. 2001) (noting that “the common law right [of publicity] does not provide relief for every publication of a person’s name or likeness” and that “[t]he First Amendment requires that the right to be protected from unauthorized publicity ‘be balanced against the public interest in the dissemination of news and information consistent with the democratic process under the constitutional guaranties of freedom of speech and of the press’”).

104. See *infra* notes 105–109 and accompanying text.

105. See *infra* notes 116–121 and accompanying text (discussing the use of athletes’ identities more generally in television broadcasts).

106. See *No Doubt v. Activision Publ’g, Inc.*, 122 Cal. Rptr. 397, 406 (Cal. Ct. App. 2011) (explaining that the right of publicity element, “without consent,” is generally met unless there is a license explicitly providing the use of one’s publicity rights to a third party).

107. See *Balt. Orioles v. Major League Baseball Players Ass’n*, 805 F.2d 663, 670 (7th Cir. 1986) (finding that the broadcast of a Major League Baseball game constitutes a “work for hire” and that “in the absence of an agreement to the contrary, the Clubs are presumed to own all of the rights encompassed in the telecasts of the games”); *id.* at 667 (“A work made for hire is defined in pertinent part as ‘a work prepared by an employee within the scope of his or her employment.’” 17 U.S.C. § 101. Thus, an employer owns a copyright in a work if (1) the work satisfies the generally applicable requirements for copyrightability set forth in 17 U.S.C. § 102(a), (2) the work was prepared by an employee, (3) the work was prepared within the scope of the employee’s employment, and (4) the parties have not expressly agreed otherwise in a signed, written instrument.”).

of publicity presumably lies with the athletes themselves.¹⁰⁸ Furthermore, unlicensed live streaming causes monetary harm to those parties who hold publicity rights in athletes' identities by denying them the opportunity to sell these rights commercially as would otherwise be viable.¹⁰⁹

Whether the use of athletes' likenesses in live streaming meets the second element for a right of publicity violation ("for purposes of commercial advantage") is somewhat more complicated.¹¹⁰ The term "purposes of commercial advantage" conventionally is defined as "the use of goodwill of another's name or identity for purposes of making a profit."¹¹¹ Most of the footage currently posted on Meerkat and Periscope does not provide any direct commercial advantage to the live streamer.¹¹² Nevertheless, it is not too difficult to imagine how users could add commercial advertising into live-streamed sports broadcasts as a means to convert these broadcasts into "for profit" videos.¹¹³ In addition, users of the Meerkat and Periscope services could theoretically charge others a fee in exchange for access to their accounts and videos—thus making use of either the Meerkat or Periscope service directly commercial.¹¹⁴

Presuming that a plaintiff is able to show all four prima facie elements of a claim for breach of one's right of publicity, the analysis next turns to whether such

108. See 17 U.S.C. § 101 (noting that a "work for hire" only occurs where work is performed by an employee within the scope of his employment). Of course, if the athletes that provide the labor force for certain sports are ultimately declared to be "employees" under the National Labor Relations Act, presumably they will be able to sell their services to college sports teams, and thus college sports broadcasts too may be deemed a "work for hire." See *Balt. Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663, 669–70 (7th Cir. 1986) (discussing the "work for hire" relationship in the context of paid athletes).

109. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION, § 49 cmt. b (1995) (noting that the monetary harm arising from the breach of one's publicity rights "focuses on [either] the pecuniary loss to the plaintiff or the unjust pecuniary gain to the defendant"); cf. *New Bos. Television v. Entm't Sports Programming Network*, No. 81-1010-Z, 1981 WL 646100, at ¶ 25,293 (D. Mass. Aug. 3, 1981) (recognizing in the context of copyright law the "monetary harm" caused by inhibiting the rights holder's ability to sell licenses in the original video work).

110. See *infra* notes 111–114 and accompanying text.

111. Edelman, *supra* note 100, at 562.

112. See, e.g., Reid Wilson, *READ IN: Debates Over Debates Edition*, WASH. POST (May 6, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/05/06/read-in-debates-over-debates-edition> (noting that "[l]ive-streaming apps like Periscope and Meerkat offer viewers a new chance to watch sporting events free"); see also Mike Snyder, *Live Streaming Video Apps Hit Boxing Where it Hurts; Many Watch Free Via Periscope, Meerkat*, USA TODAY, May 4, 2015, at 1A (noting that the Mayweather-Pacquiao boxing match, which was one of the most widely viewed events on either Meerkat or Periscope, was entirely free to the viewers).

113. See Edelman, *supra* note 100, at 562–63 (citing *C.B.C. Distrib. & Mktg. Inc. v. Major League Baseball Advanced Media*, 505 F.3d 818, 822 (8th Cir. 2007) ("The most traditional category of 'commercial advantage' involves the use of an individual's name or likeness for advertising and merchandising purposes, or as a means of indicating an endorsement.")).

114. See, e.g., Abhishek Sharma & Pol Ferrer Catusus, *Meerkat Monetization*, LAUNCHING TECH VENTURES HARVARD BUSINESS SCHOOL (May 12, 2015), <http://launchingtechventures.blogspot.com> (suggesting that on Meerkat, "[b]roadcasters [c]ould price their content independently. Users would store their payment details in a native online wallet and purchase paid-content as they consume it. Meerkat would charge broadcasters a take rate (e.g., a percentage of value) on every viewing transaction.")).

publicity rights survive when balanced against the First Amendment.¹¹⁵ The proper way to balance a celebrity's publicity rights against the First Amendment is set forth by the Supreme Court's seminal 1977 decision, *Zacchini v. Scripps-Howard Broadcasting Co.*¹¹⁶ There, the Court held that the freedoms of speech and press articulated by the First and Fourteenth Amendments do not trump a state's discretion under its right of publicity laws to prevent the live broadcast of a performer's entire act.¹¹⁷ While the outer contours of the *Zacchini* ruling are not explicitly stated, this reasoning, at a minimum, suggests that "the First Amendment does not guarantee media organizations an unfettered right to broadcast entire sporting events without regard for the participating athletes' rights of publicity."¹¹⁸

Beyond *Zacchini*, several lower court decisions seem to support the conclusion that athletes' state law publicity rights may trump the First Amendment argument in favor of free broadcasts.¹¹⁹ For instance, in *Ettore v. Philco Television Broadcasting*, the U.S. Court of Appeals for the Third Circuit held that "a television network had violated a professional boxer's right of publicity by broadcasting one of his old fights without his consent."¹²⁰ Meanwhile, in the *Student-Athlete Name and Likeness Licensing Litigation*, the U.S. District Court for the Central District of California held that absent the NCAA bylaws, college athletes "would have an economic interest in being able to sell group licenses for the rights to broadcast their games," and that "[u]nder those circumstances, the First Amendment would not empower broadcasters to undermine the student-athletes' economic interests."¹²¹

The lone case that seems to point in the opposite direction is *Marshall v. ESPN*.¹²² There, the U.S. District Court for the Middle District of Tennessee granted a motion to dismiss a putative class action brought by current and former college athletes against their conferences and television broadcasters for allegedly profiting from the unlicensed use of their names, likenesses, and images.¹²³ The court explained that Tennessee's right of publicity statute states that "[i]t is deemed a fair use and no violation of an individual's rights shall be found . . . if the use of a name, photograph, or likeness is in connection with *any . . . sports broadcast or account*."¹²⁴ Thus, the ruling in *Marshall* was driven primarily by statutory

115. See *infra* notes 116–129 and accompanying text.

116. 433 U.S. 562 (1977).

117. *Id.* at 578–79.

118. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1140 (N.D. Cal. 2014).

119. *Balt. Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663, 677 (7th Cir. 1986) ("As a number of courts have held, a right of publicity in a performance is violated by a televised broadcast of the performance."); see also *infra* notes 120–121 and accompanying text.

120. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d at 1140–41 (citing *Ettore v. Philco Television Broad. Corp.*, 229 F.2d 481 (3d Cir. 1956)).

121. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d at 1140.

122. *Marshall v. ESPN*, 111 F. Supp. 3d 815 (M.D. Tenn. 2015).

123. *Id.* at 838.

124. *Id.* at 827 (quoting Tenn. Code Ann. § 47-25-1107(a) (emphasis added)). The court in *Marshall* further explained that "the statutory and common law right to publicity are co-extensive under Tennessee law, that the common law in Tennessee does not recognize an individual participant's right to

language specific to Tennessee and not any broader common law principles.¹²⁵

Nevertheless, the irony of the defendants' legal position in *Marshall* should not be lost on the reader, nor on any future court applying Tennessee right of publicity law.¹²⁶ Indeed, in *Marshall*, it was the college sports conferences and their broadcast partners that argued against college athletes' publicity rights in their own likenesses.¹²⁷ Although the defendants prevailed, their legal arguments were provincial as to their own long-term goals, because if major television stations become allowed to use college athletes' likenesses without violating their publicity rights, then so too could third parties without a license from any NCAA member school or conference.¹²⁸ Thus, if the *Marshall* decision is not reversed on appeal, fans attending University of Tennessee or University of Memphis sporting events may be entitled to live stream these events without the risk of any meaningful legal remedy.¹²⁹

V. LIVE STREAMING OF SPORTING EVENTS UNDER COMMON LAW UNFAIR COMPETITION DOCTRINES

Finally, as a matter of last resort, some sports enterprises might even attempt to challenge the live streaming of sporting events under common law unfair competition doctrines.¹³⁰ These additional doctrines include the "hot news" doctrine, common-law copyright doctrines, and the idea misappropriation doctrine.¹³¹

A. "HOT NEWS" DOCTRINE

The "hot news" doctrine, which is articulated in *International News v. Associated Press*, states that it constitutes unfair competition for any enterprise to use the news created or obtained by another at great expenditure until the

publicity in sports broadcasts, and that, in any event, the TPRPA circumscribes whatever rights may exist under the common law insofar as sports broadcast are concerned." *Id.* at 827–28.

125. See generally *id.*

126. See *infra* notes 127–129 and accompanying text.

127. *Marshall*, 111 F. Supp. 3d at 824.

128. See *id.*

129. See *supra* notes 122–128 and accompanying text. Note, however, that even if live streaming of a sporting event from its venue would not violate federal copyright law or athletes' publicity rights under Tennessee state law, there is still the more remote possibility that such practices may violate common law unfair competition doctrines as discussed in the following section. See *infra* notes 130–152 and accompanying text.

130. See *infra* notes 131–152 and accompanying text; see also *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 236 (1918) ("[T]he question of what is unfair competition in business must be determined with particular reference to the character and circumstances of the business."); *id.* at 241–42 (explaining that unfair competition claims are not limited to situations in which a defendant attempts to palm off its goods as those of the complainant" but rather extend to a broader classification of claims where equitable relief seems justified). Cf. *Beckerman-Rodau*, *supra* note 77, at 9 ("State common law, in contrast to federal intellectual property law, has provided protection for ideas even though such ideas were outside the domain of patent and copyright protection.").

131. See *infra* notes 132–152 and accompanying text.

commercial value of the news has been extinguished.¹³² The rationale behind the “hot news” doctrine arises from the notion that copying the news gathered by another constitutes free riding in the sense that it can “economically injure or destroy [an] enterprise[.]”¹³³ According to at least one court decision, a “hot news” claim may prevail even where a copyright claim fails if one of the following five situations is met:

(i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.¹³⁴

In *Pittsburgh Athletic Association Co. v. KQV Broadcasting Co.*, the U.S. District Court for the Western District of Pennsylvania held that the “hot news” doctrine allowed the Pittsburgh Pirates baseball club to prevent any radio station other than its chosen broadcast partner from issuing a live broadcast account of their home baseball games from within the team's baseball stadium.¹³⁵ In reaching this conclusion, the court opined that sports radio stations use baseball news “as material for profit,”¹³⁶ and that the Pittsburgh Pirates ownership group “has, at great expense, acquired and maintains a baseball park, pays the players who participate in the game, and have, as we view it, a legitimate right to capitalize on the news value of their games by selling exclusive broadcasting rights to companies which value them as affording advertising mediums for their merchandise.”¹³⁷

132. See *Int'l News Serv.*, 248 U.S. at 245 (1918) (“In brief, [the remedy imposed under the ‘hot news’ doctrine] restrains any taking or gainfully using of the complainant's news, either bodily or in substance from bulletins issued by the complainant or any of its members, or from editions of their newspapers, ‘until its commercial value as news to the complainant and all of its members has passed away.’”) (emphasis added); see generally *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 845, 850, 852 (2d Cir. 2005) (explaining that “[b]ased on legislative history of the 1976 amendments [to the Copyright Act], it is generally agreed that a ‘hot-news’ *INS*-like claim survives preemption [by federal copyright law]”); Beckerman-Rodau, *supra* note 77, at 4 (stating that “[t]he underlying basis for the Court's decision [in *International News Service v. Associated Press*] was a federal common law action for misappropriation”).

133. Beckerman-Rodau, *supra* note 77, at 3.

134. *Nat'l Basketball Ass'n*, 105 F.3d at 845. Cf. Beckerman-Rodau, *supra* note 77, at 4 (noting that “despite the fact that some courts have relied on preemption under copyright law to greatly reduce the scope of a misappropriation action, it has continued to survive”).

135. 24 F. Supp. 490, 492 (W.D. Pa. 1938).

136. *Id.* at 492. Although the court acknowledges that the defendant radio station “obtains no compensation from a sponsor or otherwise from its baseball broadcasts,” the court notes that even the radio station concedes that it “seeks by its broadcast of news of baseball games to cultivate the good will of the public for its radio station.” *Id.* at 493. Thus, according to the court, “[t]he fact that no revenue is obtained directly from the broadcast is not controlling, as these broadcasts are undoubtedly designed to aid in obtaining advertising business.” *Id.* at 493.

137. *Id.* at 492. (further stating that it is the court's opinion that “the Pittsburgh Athletic Company, by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news, and the right to control the use thereof for a reasonable time following the games”).

Applying this rationale, a sports enterprise may be able to argue that the “hot news” doctrine prevents any broadcaster other than its chosen and paid partner from misappropriating the team’s games—irrespective of whether the unlicensed broadcasts appear via television or the Internet.¹³⁸ Furthermore, even if live streamers of sporting events do not profit directly from their activities, sports enterprises can reasonably argue under the “hot news doctrine” that live streamers’ behavior inequitably deprive them of “their reasonable opportunity to obtain just returns for their expenditures.”¹³⁹ Nevertheless, such an argument relies heavily on equitable (rather than legal) principles, and the likelihood of prevailing against a live streamer based on the “hot news” doctrine today seems rather remote.¹⁴⁰

B. COMMON LAW COPYRIGHT DOCTRINES

Similarly, common law copyright doctrines may allow for the protection of creative works of authorship even if they do not meet the threshold requirements of federal copyright protection.¹⁴¹ The underlying rationale for broader common law copyright protection is to allow protection to “attach to the fruits of intellectual labor” regardless of whether the labor appears in a tangible form.¹⁴² Indeed, it is an underlying principle of common law copyright protection “that it is not the tangible embodiment of the author’s work but the creation of the work itself which is protected.”¹⁴³

Although early common law copyright protection related to unpublished written material, the doctrine has expanded as speech has become “easily captured by electronic devices.”¹⁴⁴ Where the doctrine has been expanded in this manner “it would, at the very least, be required that the speaker indicate that he intended to mark off the utterance in question from the ordinary stream of speech, that he meant to adopt it as a unique statement and that he wished to exercise control over its publication.”¹⁴⁵

138. See *supra* notes 135–137 and accompanying text.

139. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 241 (1918).

140. See Lauren M. Gregory, Note, *Hot Off the Presses: How Traditional Newspaper Journalism Can Help Reinvent the ‘Hot News’ Misappropriation Tort in the Internet Age*, 13 VAND. J. ENT. & TECH. L. 577, 586, 614 (2011) (describing the “hot news” doctrine and other unfair competition doctrines as being “equitable”); see also Laura Hunter Dietz et. al., *News Reports, Commentaries, and Compilations of Information: ‘Hot News’ Doctrine*, 104 N.Y. JURIS. 2D TRADE REG. § 271 (2015) (noting that “[t]he hot news doctrine creates narrow quasi-property right in news, which otherwise consists of noncopyrightable facts, as against business competitors, and for so long as it retains its commercial value as ‘hot news’”).

141. See, e.g., *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 346 (1967).

142. See, e.g., *id.*; see generally *id.* at 347 (explaining that “[t]he ‘public delivery of an address or a lecture or the performance of a play is not deemed a ‘publication,’ and, accordingly, it does not deprive the author of his common-law copyright in its contents”).

143. *Id.* at 346.

144. *Id.* at 348.

145. *Id.* at 349.

C. IDEA MISAPPROPRIATION DOCTRINE

Finally, and most controversially, a few states seem to recognize a limited and more general protection against the misappropriation of ideas.¹⁴⁶ For example, the State of Alaska implied in *Reeves v. Alyeska Pipeline Serv. Co.* that the promise of non-disclosure and non-use of an idea may be legally binding if grounded in contract law or quasi-contract theory.¹⁴⁷ Similarly, in *Tate v. Scanlan International, Inc.*, the Minnesota Court of Appeals explained that “[i]n order for an abstract idea to be the subject of an express or implied contract or to be otherwise protected by the law, it must be novel and concrete.”¹⁴⁸ Meanwhile, in *Sellers v. American Broadcasting Co.*, the U.S. Court of Appeals for the Eleventh Circuit, applying New York State law, held that recovery for the misappropriation of an idea or theory is proper if “(1) the idea is novel; (2) the idea is in a concrete form; and (3) the defendant makes use of the idea.”¹⁴⁹

These limited cases arising under the idea misappropriation doctrine generally relate to the sharing of ideas that the disclosing party had believed it shared in confidence.¹⁵⁰ However, the cases do not specifically reject the possibility that other forms of “work product” that are not otherwise protectable cannot fall under the same classification of “ideas” under the auspices of this doctrine.¹⁵¹ Presuming that sports events themselves could constitute “ideas,” the strongest argument that sports enterprises could make in favor of a claim for idea misappropriation is that the language on facility entry tickets explicitly disallows fans from retransmitting accounts of the game: in essence, the very act of live streaming.¹⁵²

VI. FROM EXISTING LAW TO PUBLIC POLICY: WHY THE CURRENT STATUS OF LIVE STREAMING ADEQUATELY ADDRESSES SOCIETAL NEEDS

Based on the foregoing, the following legal conclusions seem self-evident:¹⁵³ First, sports enterprises and their broadcast partners may use federal copyright law to prevent the unlicensed live streaming of the televised accounts of their games.¹⁵⁴ Second, sports enterprises may not use copyright law to prevent those in actual attendance from live streaming games.¹⁵⁵ Finally, sports enterprises sometimes

146. Beckerman-Rodau, *supra* note 77, at 14 (“Despite judicial recognition that common law misappropriation actions exist to protect ideas and information, such actions are generally unsuccessful.”).

147. 926 P.2d 1130, 1135–36 (Alaska 1996).

148. 403 N.W.2d 666, 671 (Minn. Ct. App. 1987).

149. 668 F.2d 1207, 1210 (11th Cir. 1982).

150. *See supra* notes 147–149 and accompanying text.

151. *See supra* notes 147–149 and accompanying text.

152. *See Red, supra* note 8, at 47 (discussing the language on the back of a standard NFL ticket); *see also* *The Estate of Harold Oshinsky v. N.Y. Football Giants*, No. 09–cv–01186 (PGS), 2011 WL 383880 at *5–8 (D. N.J. Feb. 2, 2011) (describing a football game ticket as a revocable license).

153. *See infra* notes 154–156 and accompanying text.

154. *See supra* notes 57–71 and accompanying text.

155. *See supra* notes 72–80 and accompanying text.

may use state right of publicity law and unfair competition law to stop game attendees from live streaming certain events; however, state law will not prevent the live streaming of all sporting events.¹⁵⁶

Recently, some commentators have suggested the need for new laws to address directly the live streaming of sporting events.¹⁵⁷ However, implementing such a drastic approach to a single new technology seems unnecessary given that the current array of federal and state laws already produces reasonable guideposts about the legality of live streaming.¹⁵⁸ Specifically, federal copyright law makes it indubitably clear that individuals may not stream from their television sets the licensed, televised broadcasts of sporting events.¹⁵⁹ This protection serves the generalized needs of society because it ensures that there is still sufficient incentive for television stations to produce individual game broadcasts.¹⁶⁰

In addition, federal copyright law's lack of protection for the underlying sporting events also makes economic sense.¹⁶¹ Commercial sports enterprises already earn large sums of money from gate receipts, luxury box sales, licensing deals, and selling naming rights to their stadiums.¹⁶² Thus, depriving the commercial sports industry of complete monopoly power over the sale of broadcast rights would not have a chilling effect on the supply of sporting events.¹⁶³ At most, it would induce some commercial sports enterprises to improve their licensed broadcasts or act more vigilantly to evict live streamers from their facilities.¹⁶⁴

Furthermore, the seeming willingness of some states to prevent live streaming by enforcing right of publicity and unfair competition laws also leads to a reasonable set of outcomes.¹⁶⁵ As long as some states recognize that athletes control the publicity rights to the use of their likenesses in television broadcasts, professional sports leagues will continue to secure these rights from the players

156. See *supra* notes 99–152 and accompanying text.

157. Cf. *Nat'l Assembly of Kenya Official Report*, MZALENDO (Mar. 26, 2014, 2:30 PM), http://info.mzalendo.com/hansard/sitting/national_assembly/2014-03-26-14-30-00 [<https://perma.cc/WD9W-WSEQ>].

158. MZALENDO, *supra* note 157 (mentioning a report suggesting that “the Government should formulate policies to regulate live streaming of events”).

159. See *supra* notes 57–71 and accompanying text.

160. See generally Gibbs, *supra* note 12.

161. See *supra* notes 72–80 and accompanying text.

162. See Marc Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 911 (2008) (describing the primary revenue stream in professional sports as including the following: “(1) individual gate receipts and other fan-related revenues; (2) corporate proceeds; (3) broadcast revenues; (4) licensing/merchandising fees; and (5) Internet/new media revenues”).

163. See *id.* at 911–24 (discussing a wide range of other revenue streams in professional sports, beyond broadcast rights).

164. See, e.g., Jacob Pranek, *What Meerkat, Periscope Mean for Sports Broadcasts*, NBC.com (Mar. 30, 2015, 2:28 PM), <http://www.cnbc.com/2015/03/30/what-meerkat-periscope-mean-for-sports-broadcasts.html> [<https://perma.cc/B3U7-NMPB>] (arguing that live streaming does not currently pose much of a threat to traditional television broadcasts due to traditional broadcasts' superior quality); Red, *supra* note 8, at 47 (discussing the eviction of fans from stadiums for live streaming based on the violation of terms of ticket license).

165. See *supra* notes 99–152 and accompanying text (discussing basic application of right of publicity law).

through a “work for hire” arrangement.¹⁶⁶

Meanwhile, in the context of college sports, recognizing that athletes in some states possess publicity rights yields three important benefits.¹⁶⁷ First, it empowers unpaid athletes (rather than their well compensated colleges) to control whether to take affirmative steps to prevent live streaming. Second, it encourages college sports teams to compensate their athletes as a means to secure their publicity rights under the “work for hire” doctrine.¹⁶⁸ Finally, it discourages college athletic conferences and their broadcast partners from making legal claims that denounce college athletes’ publicity rights in game broadcasts.

CONCLUSION

Over the past century, the commercial sports industry has repeatedly articulated concerns about new technologies that threaten their monopoly over licensed broadcast rights.¹⁶⁹ However, the commercial sports industry’s concern over live streaming is unique because, if legal, live streaming affects the industry’s exclusive control over broadcast rights in real time—the very moment when these rights are most valuable.¹⁷⁰

Commercial sports enterprises could adopt many strategies to reduce the risk of fans live streaming their events.¹⁷¹ Among them, commercial sports enterprises may sue live streamers under federal copyright law for streaming game broadcasts onto the web from their home television sets.¹⁷² In addition, under certain circumstances, commercial sports enterprises may use federal copyright law to hold companies that produce live streaming applications secondarily liable for user infringement.¹⁷³

166. See *supra* notes 99–121 and accompanying text (discussing application of “work for hire” doctrine in professional sports); see also *Balt. Orioles v. Major League Baseball Players Ass’n*, 805 F.2d 663, 670 (1986) (explaining that absent an agreement to the contrary, the copyright of professional sports broadcasts belongs to the team or league based on the “work for hire” doctrine).

167. See *infra* note 168 and accompanying text.

168. See generally Edelman, *supra* note 100, at 559 (discussing the publicity rights of college athletes); see also *Balt. Orioles*, 805 F.2d at 670 (explaining how the “work for hire” doctrine applies to paid college athletes).

169. See, e.g., *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 2005) (NBA expressed fear that company that sold pagers providing real-time information about NBA games would harm demand for NBA game broadcasts).

170. See Danny Ecker, *How Your Smartphone Threatens Pro Sports Teams’ Bottom Line*, CRAIN’S CHI. BUS. (May 8, 2015), <http://www.chicagobusiness.com/article/20150508/ISSUE01/150509841/how-your-smartphone-threatens-pro-sports-teams-bottom-line> [https://perma.cc/4Y4B-TVDH]; Wilson, *supra* note 112 (noting that “[l]ive-streaming apps like Periscope and Meerkat offer viewers a new chance to watch sporting events free, and live. That terrifies TV networks, for whom sports remain the most lucrative source of ad revenue.” (emphasis added)); see also Gibbs, *supra* note 12 (“The key difference between services such as Google’s YouTube and the newer live-streaming apps is the live element.”).

171. See *infra* notes 172–173 and accompanying text.

172. See *supra* notes 58–71 and accompanying text.

173. See *supra* notes 81–98 and accompanying text; cf. Gibbs, *supra* note 12 (noting, in the general context, that “[c]oncern has been raised, in particular, over large right holders such as sports broadcasters and Hollywood studios suing Periscope for users who film content direct from TV or

Moreover, in certain jurisdictions sports enterprises reasonably may prevent in-stadium live streaming based on either right of publicity law or unfair competition law.¹⁷⁴ To prevail with a legal challenge grounded in right of publicity law, commercial sports enterprises will need to overcome three substantive obstacles.¹⁷⁵ First, they will need to show that live streamers are acting for the purpose of a “commercial advantage” rather than merely for personal amusement.¹⁷⁶ Next, they will need to show that protecting athletes’ publicity rights is a sufficiently strong state objective as to override all First Amendment concerns.¹⁷⁷ Finally, commercial sports enterprises will need to show that, prior to the alleged infringement, these enterprises secured the athletes’ publicity rights under the “work for hire” doctrine.¹⁷⁸

Finally, some commercial sports enterprises, rather than pursue legal remedies against in-stadium live streamers, may instead seek to hire private security personnel to remove from their facility any fans who attempt to live stream games.¹⁷⁹ Other sports enterprises may attempt to limit Internet access to fans within their facilities, albeit this strategy may alienate a significant segment of their fan base. Lastly, a more progressive segment of the commercial sports industry might even embrace in-stadium live streaming – recognizing that live streaming could expand the overall interest in their events, as well as enable sports teams to charge higher ticket prices for seats that offer the best views and the best Internet access.¹⁸⁰

Based on the foregoing, the future relationship between the commercial sports industry and the live streaming marketplace remains unsettled. Although

events via their smartphone”).

174. See *supra* notes 99–152 and accompanying text.

175. See *infra* notes 176–178 and accompanying text.

176. See *supra* notes 110–114 and accompanying text.

177. See *supra* notes 115–129 and accompanying text.

178. See *supra* notes 165–166 and accompanying text.

179. See Julian Moore, *Live Streaming Via Fans’ Mobiles—The Challenge for Sports Bodies and Broadcasters*, OUT-LAW.COM (Apr. 22, 2015), <http://www.out-law.com/en/articles/2015/april/live-streaming-via-fans-mobiles--the-challenge-for-sports-bodies-and-broadcasters> [https://perma.cc/7TVX-XL48] (explaining that “[i]nstead of relying on intellectual property rights, sports bodies and clubs tend to rely on the terms they impose on access to events, such as to footballing stadia, usually detailed on tickets sold to fans. These terms generally prohibit filming when matches are in progress.” The article further proceeds to explain that “[u]ntil now clubs have adopted a light-touch approach to enforcing the filming ban Live streaming could demand a rethink, however. How sports bodies respond to this technology is likely to be dictated by the pressure they are put under by broadcast partners. Clubs might have to put in place more stringent monitoring systems and eject, fine or even ban fans that [are] engaging in filming”).

180. See *Time for Sport Leagues to Embrace, Not Fight, Free Online Streams*, TECHDIRT (June 28, 2010, 5:39 AM), <https://www.techdirt.com/articles/20100627/0151549972.shtml> [https://perma.cc/ETR5-EMAH]; see also Moore, *supra* note 179 (“Harnessing correctly, new technology such as Meerkat and Periscope can give new life to a sport, be used to grow interest and enhance existing coverage without cutting across what official broadcast partners offer, ultimately safeguarding the value of commercial rights on which many sports rely.”); Pranek, *supra* note 164 (quoting Manish Tripathi, an Emory marketing professor and co-founder of Emory Sports Marketing Analytics, as describing live streamed broadcasts as potentially “viewed as ancillary to the actual broadcasts” and “as opportunities to enhance [team] marketing”).

commercial sports enterprises will likely succeed at halting the live streaming of televised game broadcasts, in-stadium live streaming will likely continue to flourish, at least in some capacity, within certain jurisdictions.¹⁸¹

Thus, for the foreseeable future, some sports fans in certain jurisdictions will likely continue to enjoy the choice between paying for official licensed sports broadcasts and watching sporting events for free via amateur live streams. Meanwhile, a few resourceful entrepreneurs might even find a way to profit from their own live streaming, by either embedding advertising into their streamed game broadcasts or by charging user subscription fees for access to the live streamed broadcasts.

181. See *supra* notes 58–152 and accompanying text.