

STREAMING SERVICE ARMS RACE: PROTECTION AND DISTRIBUTION OF LIVE SPORTS BROADCASTING IN A CORD-CUTTING ENVIRONMENT

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ABSTRACT

This paper highlights the disparity in meeting consumer expectations for broadcasting sports content. The current shift to online streaming services creates accessibility and affordability challenges, leading to an increase in illegal streaming. The existing copyright laws in Canada and the U.S. have some limitations in enforcing the rights of sports media rights holders against primary or secondary infringement, and intermediaries face difficulties in removing infringing content. While injunctions and site-blocking orders are potential solutions, they may not completely combat online piracy. A possible solution is a centralized streaming service to address piracy while improving customer satisfaction. However, concerns about feasibility, revenue loss, and media imperialism exist. At a minimum a practical solution is necessary to meet consumer preferences, benefit society, enhance current legal remedies, and reduce digital piracy.

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Introduction

This paper examines the application of copyright law in Canada and the United States of America (“U.S.”) in response to the rising trend of illegal sports streaming as fans make the shift towards online services to access content. There is a need for streaming services that address consumer accessibility, which may reduce illegal streaming through peer-to-peer (“P2P”) networks.

Digital technology is transforming how consumers access and consume media, including sports broadcasts. Sports streaming platforms make it easier than ever for consumers to access sports content from anywhere and at any time, but it also creates opportunities for unauthorized distribution and infringement of copyrighted material. Take for example, Sophie a 30-year-old from Toronto who watches her beloved Toronto Maple Leafs play on her phone most nights after work; Martin, a 15-year-old from Vancouver who invites his friends over every Sunday to watch the National Football League on his smart television; and Elizabeth a 20-year-old college student watching her hometown Denver Nuggets over the social media platform Twitch. Sophie, Martin, and Elizabeth all have one thing in common, they illegally stream their sports content.

Currently, sports fans are bypassing the high costs associated with traditional cable subscriptions, streaming services, and pay-per-view content to explore free alternatives.¹ The proliferation of sports broadcasting platforms and limitations to combat online piracy in Canadian and American copyright law, present challenges for sports media rights holders during an era of rapidly evolving technology and changing consumer behaviour.

The excess of streaming options and current state of copyright protection can direct the average sports fan to illegal streaming. The multi-level distribution chains of pirated sports services make it difficult for copyright owners to hold infringers liable locally and internationally. This paper argues that professional sports can embrace a more centralized streaming service to curb piracy and increase consumer satisfaction by comparing the effects of streaming platforms such as Spotify and Netflix on digital piracy.

Part 1 begins by explaining how media rights in sports work. Next, it is argued that despite the turn away from live broadcast cable television to online streaming

¹ Travis Sawchik, “The future of TV sports”, *theScore* (3 February 2022) at Part 1, online: <thescore.com/news/2286611> [perma.cc/Y2LT-BJL8].

services, professional sports leagues still rely heavily on traditional broadcasting.² As consumers turn to online streaming services, they face difficulty with affordability and access. This leads to an increase in illegal streaming due to the relatively easy access.³

Part 2 focuses on the legal and regulatory framework for addressing illegal sports streaming in Canada and the U.S. They are the jurisdictions where Major League Baseball (“MLB”), the National Basketball League (“NBA”), the National Hockey League (“NHL”), and the National Football League (“NFL”), known as the “Big Four,”⁴ implement the largest media rights deals. It explores the potential benefits and challenges related to the lack of copyright protection for live sports performances, broadcasting rights, potential infringement remedies, and internet intermediaries’ requirements. This section evaluates the potential solution of using site-blocking orders through injunctions to combat online piracy.

Part 3 argues that a centralized streaming service using “a la carte” pricing may be a proactive solution for copyright holders in the sports industry to curb piracy and increase consumer satisfaction. The potential benefits and limitations of this approach are explored by comparing other streaming platforms, while also assessing the current broadcasting structure in Canada and the U.S.

I. How We Got Here: Sports Streaming Primer

The shift towards streaming services is significantly impacting the media and entertainment industry. The sports television industry is only starting to experience these effects, as live sports is the final component keeping many households tethered to cable subscriptions.⁵

This section highlights that with an over-abundance of sports streaming options and major professional sports leagues still relying on traditional broadcasting

² *Ibid* at Part 1.

³ Brian A McKenzie, "Home Field Advantage: Establishing Personal Jurisdiction over Illegal Online Sports Streaming Websites in Copyright Infringement Litigation" (2022) 61:3 Washburn LJ 611.

⁴ The Big Four are considered the four of the five largest professional sports leagues in the world alongside the English Premier League, see “Major Professional Sports Leagues: The US & Canada”, (last accessed 14 February 2023), *The Daily Gazette* online: <dailygazette.com/major-professional-sports-leagues-the-us-canada/> [perma.cc/7MDF-5BE9].

⁵ Sawchik, *supra* note 1 at Part 1.

methods, sports fans are resorting to illegal streaming to consume content due to its ease of access.⁶

1. Sports Media Rights Ownership

Sports leagues and broadcasters must prove ownership to enforce copyright protection.⁷ The “Big Four” exercise their rights collectively under the *Sports Broadcasting Act of 1961*.⁸ The Act allows the leagues to pool the rights of their teams together to enter lucrative contracts with broadcasters while preventing any disparity between small and large market teams.⁹

Most media rights rest with team owners who collectively own and govern the leagues. They determine the number of games that teams can schedule, which governs the number of broadcasting rights that can be sold.¹⁰ While there are slight differences, each league generally enters into national media contracts for most of its games where revenue is usually distributed equally between the teams.¹¹ Collective Bargaining Agreements (“CBA”) between the players and the leagues establish what level of revenue from these contracts is distributed to player salaries.¹² For example, the NBA’s CBA requires players to get 50% of all revenue generated from television (“TV”) contracts, merchandise sales, ticket sales, and more.¹³

Individual teams can usually contract with the local or regional broadcaster for a select number of designated games not covered by the national contracts in both Canada and the U.S. This means teams can negotiate their deals with local TV stations, which can vary in terms of the length, value, and exclusivity of the agreements.¹⁴

⁶ *Ibid.*

⁷ McKenzie, *supra* note 3 at 623-624.

⁸ *Sports Broadcasting Act of 1961*, 15 USC §§1291–1295; See e.g., McKenzie, *supra* note 3 at 621: This legislation overruled the federal court’s decision in *Nat’l Football League v McBee & Bruno’s, Inc.*, 792 F.2d 726, 731 (8th Cir. 1986) that prevented the NFL from agreeing to package the teams’ broadcasting rights.

⁹ McKenzie, *supra* note 3 at 624.

¹⁰ Michael Cragg, Daniel Fanaras & Daniel Gaynor, “The Economics of Professional Sports League Broadcasts”, *Antitrust* 34:1 (2019) at 17.

¹¹ Sawchik, *supra* note 1 at Part 1.

¹² Gustavo Bergantiños & Juan D Moreno-Ternero, “Sharing the revenues from broadcasting sport events” (2020) 66:6 *Management Science* 2417.

¹³ NBA-NBPA, “Collective Bargaining Agreement (Effective as of 7/1/2017)” (last accessed 4 April 2023), online (pdf): <cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [perma.cc/52B8-RASS].

¹⁴ Cragg, *supra* note 10 at 17.

The leagues have separate media rights deals in Canada. For example, Rogers Communications (“Rogers”) national deal for the exclusive right to broadcast NHL games across Canada is worth \$5.2 billion.¹⁵ Bell Canada (“Bell”) and Rogers generally control Canadian teams’ broadcast and streaming rights,¹⁶ which leads to lower competition for such rights in Canada.¹⁷

2. Shift from Cable to Live Streaming

Traditionally, consumers have minimal choice in what sports they watch.¹⁸ Regional Sports Networks (RSNs) present sports programming to a local media market or geographical region. RSNs are considered the most expensive channels carried by cable television providers and justify their high prices due to the demand for the local sports team they carry, specifically for those in the Big Four.¹⁹ An out-of-market sports package is a subscription service that provides access to content from someone’s home region and allows them to watch non-nationally televised sporting events besides RSNs. While these packages usually add channels to a cable TV plan, they can also take the form of online streaming services.²⁰

In Canada, Bell and Rogers are major players in the sports television industry, with both companies involved in team ownership, broadcast network operation, and cable and satellite distribution.²¹ Rogers owns Sportsnet, which has four regional sports networks that act like RSNs.²² Meanwhile, The Sports Network (“TSN”) is

¹⁵ Dan Rosen, “NHL, Rogers announce landmark 12-year deal”, *NHL.com* (26 November 2013), online: <nhl.com/news/nhl-rogers-announce-landmark-12-year-deal/c-693152> [perma.cc/GGP9-ZGMH].

¹⁶ Rogers is the owner of the Blue Jays and shares ownership of Maple Leaf Sports and Entertainment, which owns the Toronto Raptors and Maple Leafs, with Bell. As the only MLB and NBA teams in Canada are the Blue Jays and Raptors, their broadcasting rights have not been sold to other networks for several years. See Sawchik, *supra* note 1 at Part 3.

¹⁷ *Ibid.*

¹⁸ David Stephen Rivard Jr, “Through the Eyes of the Spectator: Solving Personal Streaming of Live Sports under the Current Copyright Regime through Federal Misappropriation” (2014) 13:2 *Appalachian JL* 197 at 198.

¹⁹ See “Major Professional Sports Leagues: The US & Canada”, *supra* note 4.

²⁰ “Wikiwand - Sports broadcasting contracts in the United States”, (Last 4 April 2023) *Wikiwand*, online:

<wikiwand.com/en/Sports_broadcasting_contracts_in_the_United_States?fbclid=IwAR2iKVcAtxxKyXE4jJ3TTYKQUrCUZ10fjHNtRPIIEHcroYvtYaZpveSDSFU> [perma.cc/D8QT-5GXN].

²¹ Sawchik, *supra* note 1 at Part 1.

²² *Ibid.*

another Canadian sports channel that offers four regional feeds and is jointly owned by Bell and the Entertainment and Sports Programming Network (“ESPN”).²³

The U.S. sports television ecosystem differs from Canada.²⁴ RSNs in the U.S. are independently operated by national sports networks. The U.S. earns an estimated \$22.42 billion in sports broadcasting rights, with the NFL having the largest television contracts.²⁵ In the U.S., DirecTV offers all regional sports networks to all subscribers, but live games and other selected programs are “blacked out” outside their home markets.²⁶

“Cord-cutting” refers to the practice of canceling or reducing traditional cable or satellite television subscriptions and instead opting for alternative methods of consuming television and video content, typically over the internet.²⁷ Commenting on the phenomenon of “cord-cutting” NBA commissioner Adam Silver said “For now, the bundle [cable package of sports broadcasts] is broken.”²⁸ The number of cable subscribers in the U.S. declined from 100.5 million in 2013 to 74 million in 2022, and research predicts that the rate of decline will continue.²⁹ According to a report by Synamedia, the cord-cutting revolution is mainly driven by younger consumers as 64% of adults aged between 18 and 34 do not subscribe to linear cable.³⁰

²³ *Ibid.*

²⁴ Bally Sports Regional Networks, owned by Diamond Sports Group, carry regional broadcasts of sporting events from various professional and collegiate sports teams to 45 states, but filed for Chapter 11 Bankruptcy on March 14, 2023, see Daniel Kaplan, “Diamond Sports, parent of Bally Sports Regional Networks, files for bankruptcy protection”, *The Athletic* (15 March 2023), online: <theathletic.com/4310553/2023/03/14/diamond-sports-bankruptcy/> [perma.cc/2BQN-DEKC].

²⁵ Mark Maske, “NFL completes TV deal with Fox, CBS and NBC totaling about \$3 billion...”, *The Washington Post* (12 April 2013), online: <[washingtonpost.com/sports/redskins/nfl-completes-tv-deal-with-fox-cbs-and-nbc-totaling-about-3-billion-per-year/2011/12/14/gIQRJdmuO_story.html](https://www.washingtonpost.com/sports/redskins/nfl-completes-tv-deal-with-fox-cbs-and-nbc-totaling-about-3-billion-per-year/2011/12/14/gIQRJdmuO_story.html)> [perma.cc/ETN2-XPHP].

²⁶ Sonali Chitre, “Technology and Copyright Law - Illuminating the NFL's Blackout Rule in Game Broadcasting” (2010) 33:1 *Hastings Comm & Ent LJ* 97.

²⁷ Sawchik, *supra* note 1 at Part 1.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Synamedia, “Synamedia unveils first global research to define fans by attitudes to sports piracy”, *PR Newswire* (4 June 2020), online: <prnewswire.com/news-releases/synamedia-unveils-first-global-research-to-define-fans-by-attitudes-to-sports-piracy-301070783.html> [perma.cc/EU2J-WQAH]. The full report can be downloaded at <synamedia.com/whitepapers-reports/charting-global-sports-piracy/> [perma.cc/A3PM-PCKV].

In response, traditional broadcasters are shifting towards simulcasting live games on TV and digital platforms. All sports rights holders interviewed by MediaKind for its “2021 Sports D2C Forecast Study” see streaming as an essential part of their distribution strategy for live sports.³¹ This shift also introduced over-the-top streaming services (“OTT”) to the sports broadcasting economy, which are destined to grow over the next few years.³² OTT’s video-on-demand technology delivers media content via the internet, either by bypassing cable or retransmitting the original broadcast.³³

3. Live Sport Broadcasting Limitations: Fostering Digital Piracy

The existing model for watching sports is inconvenient for sports fan due to an overpriced “arms race” for viewership where leagues seek to maximize revenue.³⁴ The average fan turns to digital piracy due to factors such as regional blackouts, overvalued broadcasting deals, an excess of streaming platforms leading to high costs, and the ease of access to illegal sports streaming.³⁵ While the global sports revenue industry totalled over \$480 Billion in 2022,³⁶ the sector is losing as much as \$28.4 billion per year in revenue due to sports piracy and illegal streaming.³⁷ It is anticipated this will rise if the current obstacles to accessing sports content persist or worsen due to the proliferation of sports streaming services.³⁸

³¹ Adrian Pennington, “The state of live streaming 2022”, *Streaming Media Magazine* (26 March 2022) at 14, online: <streamingmedia.com/Articles/Editorial/Featured-Articles/The-State-of-Live-Streaming-2022-152088.aspx?utm_source=related_articles&utm_medium=gutenberg&utm_campaign=editors_selection> [perma.cc/C39F-35K6].

³² Jack Genovese, “The role of sports in the global streaming wars” (February 2023), [perma.cc/2FF7-B95H].

³³ Irene Calboli, “Legal Perspectives on the Streaming Industry: The United States” (2022) 70:1 *Am J Comp L* at 229, DOI: <10.1093/ajcl/avac021> [perma.cc/P8F6-TG2A].

³⁴ Genovese, *supra* note 32.

³⁵ *Ibid.*

³⁶ Queen’s Business Review, “The Rise of Sports Piracy”, (30 November 2023) *Queen’s Business Review*, online: <queensbusinessreview.com/articles/3qv2elf5mizyar4cwj30musoijioi> [perma.cc/A8WA-J3RC].

³⁷ US Patent and Trademark Office “UFC NBA NFL Joint Comment Letter - USPTO Antipiracy Anticounterfeiting Request” Document: PTO-C-2023-0006-0001 (24 August 2023), online (pdf): <regulations.gov/comment/PTO-C-2023-0006-0041> [perma.cc/6YKY-AEJJ].

³⁸ Queen’s, *supra* note 36.

"This event is under a local blackout and cannot be broadcast in this area" is a disheartening message to sports fans.³⁹ A blackout is intentionally preventing certain audience members from receiving television or radio broadcasts. In sports, this manifests itself with games not airing due to RSNs having exclusive broadcasting rights.⁴⁰ Broadcast restrictions on sporting events are imposed in most major sports leagues.⁴¹ The NFL routinely imposes local blackouts within a 75-mile radius of the stadium when it is evident that a stadium will not sell out within 72 hours of the start of the game, to maximize stadium attendance.⁴²

Illegal sports streaming is popular because consumers do not have an easily accessible and comprehensive option that provides them access to all the content, they are interested in.⁴³ Blackout restrictions may lead fans to illegal streaming, which raises questions about the efficacy of blackout policies. A report by Synamedia suggests that 31% of those who regularly watch illegal content do so because they are unable to access the events they want to watch through legal means.⁴⁴ This is underscored by the fact that many streaming services offered by traditional broadcasters or the leagues themselves advertise access to blacked-out games for an additional fee.⁴⁵

Pay-per-view ("PPV") broadcast restrictions share a common goal of regulating the audience for the broadcasts. PPV transmissions can be easily accessed by anyone who pays, irrespective of where they are or where the initial broadcast took place, through a straightforward process.⁴⁶ PPV is considered most vulnerable to unauthorized streaming due to how it regulates its audience. The Ultimate Fight Club ("UFC") which utilizes PPV for its content has spent millions trying to battle illegal

³⁹ Al Bleu, "To see or not to see: a primer on sports blackouts" *The Lawyers Weekly* 21:8 (2001), [perma.cc/F2Q4-QYZ7].

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*; See also Chitre, *supra* note 26 at 99.

⁴³ Synamedia, *supra* note 30; see also Dario Miocevic & Ivana Kursan Milakovic, "How ethical and political identifications drive adaptive behavior in the digital piracy context" (2022) 32:1 *Bus Ethics, Env't & Responsibility* 256–273 at 256.

⁴⁴ Genovese, *supra* note 32 at 6.

⁴⁵ The promotional packages offered by Bell Canada can be found at <aliant.bell.ca/Promotions/Sports-packages> [perma.cc/2K2B-WKUB].

⁴⁶ Bleu, *supra* note 39; McKenzie, *supra* note 3 at 623-624.

piracy.⁴⁷ According to a recent survey by The Athletic, 40% of UFC viewers illegally stream events.⁴⁸

Professional sports leagues still rely on traditional sports networks for broadcasting games, which guarantees revenue years in advance.⁴⁹ These networks have increased their fees to make up for the loss of viewership due to cord-cutting. However, the cost of acquiring broadcasting rights to premium sporting events is higher than the revenues generated by subscriptions to these sports channels.⁵⁰ These losses mean the number of channels in cable bundles gets smaller, while subscription prices are increased to offset these losses.⁵¹ It is estimated that ESPN overpaid roughly 2 billion dollars for exclusive rights to NFL, NBA, and MLB content since 2014, while viewership over its traditional cable networks has decreased at the same time.⁵²

The Big Four generally offer direct streaming packages as the only way to watch or stream out-of-market games.⁵³ Unfortunately, these packages are expensive and still lack access where certain broadcasters have exclusive rights.⁵⁴ For example, under the NFL's latest media deal that runs until 2033, the games that each broadcaster has the can only be exclusively streamed on their subscription-based streaming services, namely, Amazon Prime Video, Paramount Plus, ESPN+, Tubi, and Peacock.⁵⁵

⁴⁷ Afnan Chougle, "We Have Spent Millions of Dollars a Year Battling It? Dana White Reveals UFC's Biggest Struggle Every Year", (16 March 2022) *EssentiallySports*, online: <essentiallysports.com/ufc-mma-news-we-have-spent-millions-of-dollars-ufc-prescient-dana-white-reveals-his-struggles-to-battle-illegal-piracy/> [perma.cc/L4YM-T5DL].

⁴⁸ Chad Dundas, "MMA fan survey: Pay-per-view pirates, ESPN+ subscribers and a lack of DAZN", (14 April 2020) *The Athletic* online: <theathletic.com/1746108/2020/04/14/mma-fan-survey-pay-per-view-pirates-ESPN-ufc-bellator-dazn/> [perma.cc/C663-C4YE].

⁴⁹ Sawchik, *supra* note 1 at Part 1.

⁵⁰ Nearly twice as many sports fans (37%) would now rather watch live sports via a streaming service than on a broadcast TV channel (21%), see Genovese, *supra* note 32.

⁵¹ Sawchik, *supra* note 1 at Part 1; Matthew Edwards, "Note and Comment: Competitive Advantage: the Actions Espn Must Take in Order to Maintain a Leadership Position in the Wake of Cable Un-bundling" (2016) 46:1 Sw L Rev 196 at 203-204.

⁵² Edwards, *supra* note 51 at 203-204.

⁵³ McKenzie, *supra* note 3 at 612; citing See NBA League Pass, NAT'L BASKETBALL ASS'N, <watch.nba.com/packages>[perma.cc/6QYG-RCXT] (last visited Nov. 1, 2021) (costing viewers \$ 149.99 per season); NFL Sunday Ticket, NAT'L FOOTBALL LEAGUE, <directv.com/sports/nfl> [perma.cc/T8DF-R3E5] (last visited Nov. 1, 2021) (costing viewers \$ 293.94 per season).

⁵⁴ Genovese, *supra* note 32.

⁵⁵ Pennington, *supra* note 31.

This approach fails to account for the preferences of the modern sports fan or the current cord-cutting environment. A report by Ampere suggests nearly twice as many sports fans would now rather watch live sports via a streaming service than on a broadcast channel.⁵⁶

New subscription OTT platforms are emerging to meet consumer preferences.⁵⁷ DAZN is a direct-to-consumer access platform to premium sports, which owns the streaming rights to the NFL and the UEFA Champions League in Canada. It accounted for 54% of all subscription OTT services spent on sports rights globally in 2022.⁵⁸ DAZN can hold the rights to some of the most valuable rights properties by spending on sports rights for single-country deals.⁵⁹ In turn, this makes it easier for international viewers of professional sports to have a centralized viewing experience and increases consumer satisfaction.⁶⁰ One of DAZN's main competitors, fuboTV, has the goal of "global domination."⁶¹ fuboTV acquired exclusive rights to all English Premier League matches in Canada through 2025 and several top domestic soccer leagues in Europe.⁶²

The current streaming choices available to sports fans are inaccessible due to cost. According to a survey conducted by ESPN in 2020, the average sports fan is willing to pay \$42 per month for a streaming service that includes live sports.⁶³ Similarly, a recent YouGov survey found that only 9% of Americans would be willing to pay \$60 or more for streaming services.⁶⁴ The chart below presents an overview of the cost of the sports streaming services currently offered to Canadians. Despite a few similarities in their coverage, a comprehensive viewing experience of major sports leagues in Canada requires subscriptions to multiple services. This is amplified if they

⁵⁶ Genovese, *supra* note 32.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Edwards, *supra* note 51.

⁶¹ Pennington, *supra* note 31 at 20.

⁶² FuboTV, "fuboTV Acquires Exclusive Premier League Rights in Canada Beginning With 2022/2023 Season", (13 January 2022), online: <ir.fubo.tv/news/news-details/2022/fuboTV-Acquires-Exclusive-Premier-League-Rights-in-Canada-Beginning-With-20222023-Season/default.aspx> [perma.cc/2QAA-3HJX].

⁶³ Jason Collins, "Most Sports Streaming Subscribers Have Cut the Cord on Cable TV", (11 July 2022), online: <civicscience.com/most-sports-streaming-subscribers-have-cut-the-cord-on-cable-tv/> [perma.cc/52UE-2F9X].

⁶⁴ Sawchik, *supra* note 1 at Part 1.

want to follow an American team in any of the four major sports leagues.⁶⁵ These constraints push the average sports fan towards illegal streaming. This, in turn, exacerbates the problem as illegal sports content is easily accessible online.

Sports Streaming Services available in Canada⁶⁶		
Streaming Service	Monthly Subscription Fee (CAD)	Yearly Subscription Fee (CAD)
DAZN	\$24.99	\$199.99
fuboTV	\$24.99	\$200.04
Sportsnet Now	\$14.99	\$149.99
Sportsnet Now Premium⁶⁷	\$34.99	\$249.99
TSN Direct	\$19.99	\$199.90
NBA League Pass	\$19.99	\$99.99
MLB.TV	\$24.99	\$149.99

4. Illegal sports streaming: Easy Access

Professional sports leagues are prime candidates to be affected by digital piracy as they seek to enforce their intellectual property rights and broadcast copyrights against those who rebroadcast without permission.⁶⁸ The music and movie industries

⁶⁵ *Ibid.*

⁶⁶ Prices are reflective as of April 4, 2023, data was retrieved from the websites for these streaming services (mlb.com; dazn.com; sportsnet.ca; tsn.ca; nba.ca; fubo.tv).

⁶⁷ Sportsnet Now Premium replaces NHL Live and is the only way in Canada to get full coverage of the NHL, see Sportsnet, "Important Changes to NHL LIVE for the 2022-2023 Season", (6 July 2022), *Sportsnet NOW*, online: <snow.ca/support/watching-snow/getting-started/important-changes-to-nhl-live-for-the-2022-2023-season> [perma.cc/DU5D-SU47].

⁶⁸ Gregory Bailey "Streaming Is the Name of the Game: Why Sports Leagues Should Adapt to Consumers and Follow Ad Dollars towards Live Streaming" (2019) 26:2 Jeffrey S Moorad Sports LJ 323 at 327-328.

have already experienced the harm that illegal alternatives can cause,⁶⁹ which led to the emergence of OTT services such as Spotify and Netflix.⁷⁰ Leagues and broadcasters continue to lose viewers and billions of dollars in revenue to illegal online streaming.⁷¹ The cost is ultimately borne by legitimate consumers of sports content in the form of increased prices.⁷²

The significance of protecting sports events is linked to the live, real-time aspect when games are broadcasted or streamed.⁷³ “Liveness” is considered the crucial property of media sports coverage.⁷⁴ Viewers are often only interested in watching during the actual event. Due to this, sports leagues have valid concerns regarding illegal streaming, as it allows viewers to watch the event live without paying for it.⁷⁵

Though leagues and networks have tried to adapt to the online streaming revolution, illegal live sports streaming is growing.⁷⁶ Currently, thousands of piracy sites on the Internet, give fans across the globe unlimited options to watch any broadcasted sporting event.⁷⁷ Synamedia reports that 51% of sports fans have used illegal streaming services to access sports content at least once a month, despite willingness to pay for preferred events through legitimate pay TV or subscription OTT services.⁷⁸ More than 40% of fans who engage in illegal streaming use it solely for the purpose of watching sports on a daily basis.⁷⁹

There is a discrepancy in how sports broadcasts meet consumer expectations. Illegal streaming provides the opportunity for individuals who cannot afford authorized sports streaming services to enjoy sports matches.⁸⁰ According to users of illegal streaming sites, original broadcasters discriminate against people based on

⁶⁹ Stephanie N Horner, “DMCA: Professional Sports Leagues’ Answer to Protecting Their Broadcasting Rights Against Illegal Streaming” (2014) 24 Marq Sports L Rev 435 at 436-437.

⁷⁰ Sawchik, *supra* note 1 at Part 1.

⁷¹ McKenzie, *supra* note 3 at 621.

⁷² Horner, *supra* note 69 at 437-438.

⁷³ McKenzie, *supra* note 3 at 612-613.

⁷⁴ Brett Hutchins, Bo Li & David Rowe, “Over-the-top sport: live streaming services, changing coverage rights markets and the growth of media sport portals” (2019) 41:7 Media, Culture & Society 975 at 990.

⁷⁵ McKenzie, *supra* note 3 at 613-614.

⁷⁶ *Ibid* at 612.

⁷⁷ McKenzie, *supra* note 3 at 612.

⁷⁸ Synamedia, *supra* note 30; McKenzie, *supra* note 3 at 612.

⁷⁹ Synamedia, *supra* note 30; McKenzie, *supra* note 3 at 612.

⁸⁰ Horner, *supra* note 69.

their location and income by attempting to compel people to attend stadiums through regional blackouts.⁸¹

Live streaming refers to the real-time broadcast and of data to end-users, which is temporary and disappears after the transmission.⁸² Online illegal sports streaming is facilitated through various means. One method is unicast streaming, which distributes a stream saved on a server and made available on a website.⁸³ While unicast streaming was once the primary method for pirating live sports, it is now less common due to its reliance on centralized server locations, making them easier for law enforcement to locate and shut down.⁸⁴

The primary method of illegal sports streaming is over P2P networks. The greatest threat broadcasters are websites that provide viewers with an index of links to illegal streams in a central location.⁸⁵ P2P allows individuals to anonymously share the stream with other users on a decentralized and interconnected server.⁸⁶ The distribution of pirated sports streams involves multi-level distribution chains and is difficult to track due to the long sequence of infringed content moving in transit across international dynamic servers.⁸⁷ Online pirates use modern technology to steal cable and satellite feeds or to record content directly from official streaming sites.⁸⁸ The streams work at three levels: hosting, indexing, and linking.⁸⁹ Hosting sites involve individuals directly uploading infringing live streams through a peer-to-peer network. Indexing sites categorize each live stream by sport. Linking sites promote indexing sites through social media platforms like Reddit, Twitter, YouTube and Twitch and retain limited liability under copyright law.⁹⁰ Although it is difficult to track the financial gains of indexing sites, they can generate significant revenue through advertisements and donations.⁹¹

⁸¹ Kanchana Kariyawasam & Matthew Tsai “Copyright and live streaming of sports broadcasting” (2017) 31:3 Intl Rev L, Computers & Tech 265.

⁸² Calboli, *supra* note 33 at 224.

⁸³ Kariyawasam, *supra* note 81.

⁸⁴ McKenzie, *supra* note 3 at 616.

⁸⁵ Horner, *supra* note 69 at 437.

⁸⁶ McKenzie, *supra* note 3 at 616-617.

⁸⁷ McKenzie, *supra* note 3 at 616-617; Horner, *supra* note 69 at 438.

⁸⁸ Michal J Mellis, “Internet Piracy of Live Sports Telecasts” (2008) 18 Marq Sports L Rev 259 at 261-262.

⁸⁹ McKenzie, *supra* note 3 at 616-617.

⁹⁰ McKenzie, *supra* note 3 at 616-617.

⁹¹ One of the largest indexing sites generated annual revenue ranging from \$8.2 million to \$14.5 million in 2013, see Horner, *supra* note 69 at 438-439.

Another method is spectator live streaming, where audience members record sports matches with their electronic devices and stream it live through social media applications.⁹² While these services may forbid users from posting videos that constitute infringement, monitoring and enforcing this rule is difficult.⁹³ As will be discussed, sports leagues may have no legal recourse against live spectators who broadcast their own version of the same game.⁹⁴

II. Canadian and American Copyright Law: Are there tools to combat the illegal sports streaming piracy?

Copyright law in Canada and the U.S. has limitations in combatting illegal sports streaming, which allows sports fans to circumvent the escalating costs associated with numerous sports streaming packages through digital piracy. The legal and regulatory framework for combating illegal sports streaming in these jurisdictions is evaluated, as they are the largest media rights deals markets for the Big Four.

1. Legislative Overview

The Canadian *Copyright Act* (“CA”) is federal legislation that governs Canadian copyright law.⁹⁵ It aims to strike a balance between promoting the public interest in the dissemination of creative works and providing appropriate compensation to creators.⁹⁶ Copyright in Canada refers to two categories of creation: (1) authored works and (2) other subject matter, which includes broadcasts.⁹⁷ Each is given a particular bundle of rights under the Act. It does not protect ideas, concepts, or themes, but rather the expression of them.⁹⁸ Owners of copyrighted works have the exclusive right to produce, reproduce, publish, translate, authorize, and convert a

⁹² Rivard Jr, *supra* note 18 at 198; See also Selene Presseller, "Copyright Infringement Via Social Media Live Streaming Shortcomings of the Digital Millennium Copyright Act" (2018) 7:2 Arizona State Sports & Entertainment LJ 357 at 362.

⁹³ During a highly anticipated boxing match between “Danny Green and Anthony 153,00 users were watching the live stream on Facebook for free when Foxtel was charging customers nearly \$60 to watch the fight on its Main Event channel,” see Kariyawasam, *supra* note 81.

⁹⁴ Samanta C Franchim, "It's a Deal: Forging Media Rights Deals in Response to Spectator Live Streaming" (2017) 21:2 J Tech L & Pol'y 223.

⁹⁵ *Copyright Act*, RSC 1985, c C-42.

⁹⁶ *Copyright Act*, *supra* note 95 at s 3(1); see also Lucie Guibault et al, *Canadian Intellectual Property Law*, (Creative Commons Attribution ShareAlike, Pressbook) at 28, online: <digitaleditions.library.dal.ca/cdn-ip-law/> [perma.cc/2NMK-5THJ]; *CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 at para 23; *Society of Composers, Authors and Music Publishers of Canada v Canadian Ass'n of Internet Providers*, 2004 SCC 5 at para 92; *Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34 at para 31.

⁹⁷ Cameron Hutchinson, *Digital Copyright Law* (Toronto, ON: Irwin Law Inc, 2016) at 43.

⁹⁸ *Winkler v Hendley*, 2021 FC 498.

work.⁹⁹ Amendments through the *Copyright Modernization Act*, 2012 (“CMA”), adapt to the digital environment by incorporating principles of technological neutrality and seek to ensure that copyright law remains relevant and applicable to works communicated through digital means.¹⁰⁰

The *Copyright Act of 1976* (“U.S. CA”) is U.S. federal legislation that protects creative works and provides licensing protection for various forms of media.¹⁰¹ The Act protects "original works of authorship" in a tangible medium of expression, ensuring creators receive fair protection and compensation through licensing or royalties.¹⁰² Courts have sufficient flexibility to protect other types of works that are not specifically defined in the Act.¹⁰³ Copyright owners have the exclusive rights to reproduce, create derivative works, distribution, perform, publicly display the copyrighted materials, and the right to control digital transmission of the copyrighted materials under the Act.¹⁰⁴ The U.S. CA is complemented by the *Digital Millennium Copyright Act* (“DMCA”), which was enacted to protect copyright on the internet.¹⁰⁵

These legal frameworks for copyright protection are limited to deal with illegal sports streaming, which prompts a significant number of sports enthusiasts to engage in digital piracy to access sports content.¹⁰⁶

2. Live Sports Performance: Lack of Protection for the Underlying Game

The live performance of athletes, also known as the “underlying game” is not protected under either Copyright regime. There is a substantial risk to professional sports with the emergence and uncertain future of “spectator live streaming,” which

⁹⁹ Barry B Sookman, *Sookman: Computer, Internet, and Electronic Commerce Law* (Toronto: Thomson Reuters, 2023) (loose-leaf updated 2022, release 2022-6) at §3:1; see also *Copyright Act, supra* note 95 at s 3(1).

¹⁰⁰ Sookman, *supra* note 99 at § 3:167; see also *Copyright Act, supra* note 95 at s 41(1).

¹⁰¹ *Copyright Law of the United States (Title 17)*, 17 USC §§ 101-810 [US CA]; Bailey, *supra* note 68 at 342.

¹⁰² Bailey, *supra* note 68 at 342; US CA, *supra* note 101 at § 102.

¹⁰³ Marc Edelman, “From Meerkat to Periscope: Does Intellectual Property Law Prohibit the Live Streaming of Commercial Sporting Events?” (2016) 39:4 Colum J L & Arts 469–495 at 478.

¹⁰⁴ US CA, *supra* note 101 at § 106; *NBA v Motorola, Inc.*, 105 F 3d 841 at 847 [Motorola].

¹⁰⁵ Bailey, *supra* note 68 at 342; *Digital Millennium Copyright Act* 17, USC (1998) [DMCA].

¹⁰⁶ McKenzie, *supra* note 3 at 612.

is the practice of broadcasting live sports events over the internet for viewers to watch remotely.¹⁰⁷

Original works in Canada must be original, fixed and originate from Canada or another treaty country to be capable of protection.¹⁰⁸ In *FWS Joint Sports Claimants v Canada*, the Court addressed whether there is a copyright in the playing of a sports game. The Court ruled that there is no such copyright because the playing of a game is too unpredictable to be copyrightable.¹⁰⁹ However, the Court did recognize that there is a copyright in the television production of a game.¹¹⁰

In *National Basketball Association v Motorola, Inc.*, the U.S. Second Circuit Court decided that the underlying basketball game did not come within the subject matter of copyright and that copyrighting an athletic event would undermine the competitive nature of sports.¹¹¹ Subsequent cases have confirmed this decision in holding underlying games is not within the subject matter of copyright.¹¹²

Broadcast rights are vulnerable to spectator live streaming since the underlying game is not protected by copyright law. Even if a legal remedy was available, sports media rights holders could only use them after a harm is already done, rather than stopping spectator live streaming as it is occurring.¹¹³ Live streaming apps like Twitter's Periscope became popular due to their ability to create a unique broadcasting experience.¹¹⁴ The 2015 boxing match between Floyd Mayweather, Jr. and Manny Pacquiao was coined as the “fight of the century.”¹¹⁵ While some paid \$100 to watch on Pay-Per-View, as many as 10,000 people watched free over Periscope from people streaming it ringside.¹¹⁶ While Periscope was ultimately discontinued due to declining

¹⁰⁷ Franchim, *supra* note 94 at 223.

¹⁰⁸ Treaty country includes a Berne Convention Country, a Universal Copyright Convention Country, or a World Trade Organization member, see Hutchinson, *supra* note 97.

¹⁰⁹ The court differentiated between choreographic works, where the high degree of planning leads to a predetermined outcome, and sports games, which are inherently unpredictable, see *FWS Joint Sports Claimants v Copyright Board (Can) et al.*, (1991) 129 NR 289 (FCA) at paras 9-10.

¹¹⁰ *Ibid* at para 10.

¹¹¹ *Motorola*, *supra* note 104 at 846-847; Franchim, *supra* note 94 at 228-229.

¹¹² Franchim, *supra* note 94 at 228.

¹¹³ *Ibid* at 237.

¹¹⁴ *Ibid* at 223-224.

¹¹⁵ Edwards, *supra* note 51.

¹¹⁶ Franchim, *supra* note 94 at 223-224.

usage and high maintenance costs,¹¹⁷ it highlights emerging technology that leaves leagues susceptible to spectator live streaming if underlying games are not protected by copyright.¹¹⁸

The social platform Twitch has become a frequent location for streaming live sports. During the 2021 FIFA Club World Cup final, three of the top 10 livestreams listed in Twitch's directory were streams from the match. This piracy is not constrained to soccer either, in December a stream of a boxing match attracted over 86,000 viewers.¹¹⁹ According to lawyer David Rivard Jr, the emergence of Google Glass technology could also potentially pose a threat to the traditional television broadcasts of major sports providers, as it allows users to stream live game footage.¹²⁰ While this has not yet been fully realized, the possibility of similar technologies emerging in the future leaves the leagues vulnerable.¹²¹

3. Broadcasting: Where the rights lie

Broadcasting rights are the primary means of copyright protection for sporting events. Sports broadcasts and online streams are protectable. Broadcasting rights, protect large scale sports media contracts, recognize the efforts of broadcasting organizations, and reward contribution to information and culture.¹²² Understanding how these rights work provides the basis for sports media rights owners enforcing their copyright protections.

In Canada, a separate scheme of the CA protects subject matter other than works of authorship, which includes broadcasts.¹²³ These are known as "other subject matters." Communications signals of broadcasters are protected under section 21.¹²⁴ A broadcaster is a body that operates "a broadcast undertaking", which broadcasts a

¹¹⁷ Chaim Gartenberg, "Twitter is shutting down its Periscope apps", *The Verge* (15 December 2020), online: <theverge.com/2020/12/15/22176842/twitter-periscope-shut-down-live-video-streaming-apps-2021> [perma.cc/7NBZ-DQH9].

¹¹⁸ Rivard Jr, *supra* note 18.

¹¹⁹ Cecilia D'Anastasio, "Twitch Has Become a Haven for Live Sports Piracy", *WIRED* (15 January 2020), online: <[wired.com/story/twitch-sports-piracy-streaming/?fbclid=IwAR3QPgTVcaa4V0i8I93UtCL-qTsekq69JKAuQXDTVoLulL6m2kzaj12zkn4](https://www.wired.com/story/twitch-sports-piracy-streaming/?fbclid=IwAR3QPgTVcaa4V0i8I93UtCL-qTsekq69JKAuQXDTVoLulL6m2kzaj12zkn4)> [perma.cc/ZBD8-P6R9].

¹²⁰ Rivard Jr, *supra* note 18.

¹²¹ *Ibid.*

¹²² World Intellectual Property Organization (WIPO), "Broadcasting & Media Rights in Sport", (last accessed 5 April 2023) online: <wipo.int/sports/en/broadcasting.html> [perma.cc/FP79-9CJY].

¹²³ *Copyright Act*, *supra* note 95 at Part II.

¹²⁴ *Ibid* at s 21.

communication signal.¹²⁵ Broadcast undertaking includes radio, television, and cable and internet distribution.¹²⁶ Protection is afforded to broadcasters located in Canada, or in Rome convention or TRIPS agreement member countries. The rights afforded to broadcasters are fixation, reproduction, communication to the public by telecommunication, and performance in public.¹²⁷ This means that the person or organization that produces a sports broadcast owns the copyright and has the right to control how the content is used, distributed, and reproduced whether over cable or the internet.¹²⁸ The broadcaster is presumed to be the first owner of the copyright in its communication signals, and this right crystallizes upon the first broadcast of the signal.¹²⁹ *FWS* confirms there is a copyright in the television production of a sports game.¹³⁰

The primary way broadcasters exercise their rights is through the right of communication to the public by telecommunication.¹³¹ Communication over the internet is included in this definition, which suggests sports streaming enjoys the same rights as broadcasters.¹³² The Supreme Court of Canada ruled that hosting content online is considered 'telecommunication' as defined by the Act.¹³³ Moreover, the CA includes technological protection measures ("TPMs") that aim to prevent unauthorized access to copyrighted material.¹³⁴

The Federal Government has exclusive authority to regulate broadcasting in Canada under the *Broadcasting Act*, which requires the Canadian broadcasting system be effectively owned and controlled by Canada to strengthen its cultural fabric.¹³⁵

¹²⁵ *Ibid* at s 2.

¹²⁶ Hutchinson, *supra* note 95.

¹²⁷ *Ibid*.

¹²⁸ *Copyright Act*, *supra* note 95 at s 21(1)(2).

¹²⁹ *Ibid* at s 21.

¹³⁰ *FWS*, *supra* note 109 at 9-10.

¹³¹ *Copyright Act*, *supra* note 95 at s 3(1)(f); Bill C-11, *Copyright Modernization Act*, 1st Session, 41st Parliament, 2012 [CMA].

¹³² See CMA, *supra* note 131, s 2.4(1.1): "For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public."

¹³³ *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34; *SOCAN v ESA*, 2022 SCC 30.

¹³⁴ *Copyright Act*, *supra* note 95 at s 41.

¹³⁵ *Broadcasting Act*, SC 1991, c 11.

The U.S. CA sets out three essential requirements for protection: (1) the work must be an original creation, (2) the work must be recorded in a tangible form, and (3) the work must fall within the scope of copyright subject matter.¹³⁶ Originality is considered a low threshold and is an objective standard.¹³⁷ Broadcasts such as sports are presumed to satisfy the fixation requirements under the Act.¹³⁸ The fixation of live sports broadcasts is considered audiovisual work under this regime.¹³⁹

U.S. courts have consistently ruled that the recording and transmission of a live sports event meets all the requirements for copyright protection.¹⁴⁰ In *Baltimore Orioles Inc., v Major League Baseball Players Association*, it was established that the telecast of MLB games satisfied each element necessary for copyright protection and were classified as an “audiovisual work.”¹⁴¹ These protections extend to online streaming of sports events. In *Wisconsin Interscholastic Athletic Ass'n*, the Court said there is “no meaningful distinction between the online setting and more traditional media” as websites function as online channels.¹⁴²

Professional sports leagues are collective owners of their teams' broadcasting rights and receive protection under the U.S. CA.¹⁴³ The most valuable rights are the exclusive rights to publicly perform, which includes transmitting or communicating it through any means or device, including the Internet.¹⁴⁴ It is well established that online broadcasts receive the same level of protection as those transmitted via television or radio.¹⁴⁵

4. Legal Tools to Combat Illegal Sports Streaming

Both Canada and the U.S. provide various remedies for illegal sports streaming. Although both regimes provide specific exceptions and fair use defenses for potential

¹³⁶ McKenzie, *supra* note 3 at 619-621; *US CA, supra* note 101 at § 102(a).

¹³⁷ McKenzie, *supra* note 3 at 619-621 citing *Feist Publications, Inc v Rural Telephone Service Co*, 499 US 340, 345 (1991).

¹³⁸ McKenzie, *supra* note 3 at 619-621; *US CA, supra* note 101 at § 101.

¹³⁹ McKenzie, *supra* note 3 at 619-621; *US CA, supra* note 101 at § 101.

¹⁴⁰ See *Baltimore Orioles, Inc v Major League Baseball Players Association*, 805 F.2d 663, 66 8 (7th Cir.) [*Orioles*]: holding telecast of Major League Baseball game copyrightable; *National Football League v McBee & Bruno's, Inc*, 792 F 2d 726, 731 (8th Cir 1986: holding live broadcast of professional football game copyrightable audiovisual work.

¹⁴¹ *Orioles, supra* note 140.

¹⁴² Horner, *supra* note 69 at 445; *Wis. Interscholastic Athletic Association v Gannett Co.*, 658 F.3d 614, 622 (7th Cir. 2011) at 662.

¹⁴³ *Sports Broadcasting Act, supra* note 8.

¹⁴⁴ Horner, *supra* note 69 at 443-444.

¹⁴⁵ *Ibid* at 444.

infringements, it is unlikely that unauthorized sports streaming of protected broadcasts meet these requirements.¹⁴⁶ Among these remedies, the most effective tool for combating infringement is the implementation of site-blocking orders.

i. Primary Infringement

Although sports rights holders have potential causes of actions under both primary and secondary infringement, they are limited in combating illegal sports streaming. Primary infringement refers to the direct violation of a copyright owner's rights by an individual.¹⁴⁷ In the case of illegal sports streaming, the primary infringer is the person who uploads the protected sports broadcast.¹⁴⁸ In Canada and the U.S., breaking digital locks is regarded as copyright infringement, such as bypassing encryption technology to access sports broadcasting.¹⁴⁹ This contrasts with the websites that index and categorize the individual streams, which pose a greater threat to leagues and broadcasters.¹⁵⁰ What is important is that the availability of other remedies requires an underlying primary infringing act, which is almost always present if someone illegally uploaded a protected stream.¹⁵¹

In Canada, primary infringement occurs when one of the rights listed in the CA are done without the owner's authorization.¹⁵² Since leagues and broadcasters have exclusive rights to control the use of their copyrighted works, it is illegal for anyone to make a protected work available or reproduce a substantial part of it. This includes retransmitting a broadcast or making a protected sports game available through the internet.¹⁵³

It is very likely the retransmission of an entire sporting event is a substantial reproduction amounting to infringement.¹⁵⁴ While there has been debate over

¹⁴⁶ McKenzie, *supra* note 3; *Copyright Act*, *supra* note 95 at ss 29, 29.1, 29.2.

¹⁴⁷ John S McKeown, *Fox on Canadian Law of Copyright and Industrial Designs, 4th edition* (Toronto: Thomson Reuters, 2023) (loose-leaf updated 2022, release 2023-2).

¹⁴⁸ Horner, *supra* note 69 at 462.

¹⁴⁹ *Copyright Act*, *supra* note 95 at s 41; *DMCA*, *supra* note 102 at § 1201.

¹⁵⁰ McKenzie, *supra* note 3 at 619-621.

¹⁵¹ Guibault, *supra* note 96 at 322-345.

¹⁵² *Copyright Act*, *supra* note 95 at s 27; McKeown, *supra* note 147 at § 21:7: This encompasses rights related to distribution, reproduction, and communication of the work to the public via telecommunication.

¹⁵³ *Copyright Act*, *supra* note 95 at s 3(1); *CMA*, *supra* note 131 at s 2.4(1.1).

¹⁵⁴ *Bell Media Inc v John Doe 1*, 2022 FC 1432 [Bell]; *Rogers Media Inc v John Doe 1*, 2022 FC 775 [Rogers].

whether streaming content over the internet or other networks violates these rights,¹⁵⁵ the fact that unlawful streaming of professional sports games has met the requirements for an interlocutory injunction strongly indicates that broadcasting rights extend to digital platforms and that illegal streaming can be considered primary infringement.¹⁵⁶

In the U.S., direct copyright infringement occurs when someone violates one of the exclusive rights awarded to copyright owners.¹⁵⁷ Unauthorized individuals who upload and stream broadcasts of live games online violate the leagues' exclusive right to perform the copyrighted work publicly.¹⁵⁸ In *Twentieth Century Fox Film Corp v iCraveTV*, a Canadian-based company streamed U.S. broadcasts of live sports events over the internet without authorization.¹⁵⁹ When granting an injunction, the court found iCraveTV violated the networks' exclusive right to perform their works publicly and authorized others to do so by streaming the copyrighted works over the internet.¹⁶⁰ Similarly, in *NFL v PrimeTime 24 Joint Venture*, the court found that PrimeTime infringed the NFL's copyrights when it retransmitted NFL games without authorization to Canada.¹⁶¹

These examples involve situations where infringers directly uploaded the games and committed the infringing activity, which suggests it may be more effective to combat unicast streaming.¹⁶² The benefit of these cases shows primary infringement exists for unauthorized sports streaming, which makes other remedies available.¹⁶³

However, the main concern for professional sports leagues are websites indexing illegal streams uploaded by third party individuals.¹⁶⁴ These websites categorize individual streams, rather than directly uploading the streams making it unlikely they

¹⁵⁵ Sookman, *supra* note 99 at §3:63.

¹⁵⁶ Bell, *supra* note 154; Rogers, *supra* note 154.

¹⁵⁷ Horner, *supra* note 69 at 446 citing *A & M Records, Inc. v Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) [*Napster*]: "To prove direct copyright infringement, the plaintiff must show that they own the material and that at least one of their exclusive rights has been violated."

¹⁵⁸ *Napster*, *supra* note 157.

¹⁵⁹ *Twentieth Century Fox Film Corp v iCraveTV*, 2000 WL 255989 (WD Pa 2000).

¹⁶⁰ *Ibid.*

¹⁶¹ *NFL v Primetime 24 Joint Venture*, 211 F.3d 10, 98 Civ. 3778 (AJP) (SDNY Feb 5, 2001) at 11, 13.

¹⁶² McKenzie, *supra* note 3 at 612.

¹⁶³ McKeown, *supra* note 147.

¹⁶⁴ McKenzie, *supra* note 3 at 612.

would be liable under primary infringement.¹⁶⁵ Additionally, this remedy is not considered practical, as the expenses of litigating direct infringement claims outweigh the benefits.¹⁶⁶ Identifying the person who has infringed the copyright can be problematic due to the absence of stringent requirements and the ease with which the identifying information can be fabricated while uploading a video.¹⁶⁷

ii. Secondary Infringement

Alternatively, sports rights holders may try to pursue a secondary infringement action against the P2P websites indexing unauthorized streams. The issue with this approach is the global reach of the Internet and the widespread accessibility of indexing websites make infringement difficult to locate.¹⁶⁸ Furthermore, leagues and broadcasters could have difficulty establishing personal jurisdiction over online defendants.¹⁶⁹

Under the CA, P2P websites that exist “primarily for the purpose of enabling acts of infringement” can be liable for infringement.¹⁷⁰ Courts can consider a variety of factors to determine whether a service exists primarily for infringement.¹⁷¹ This provision of the CA is designed to give courts flexibility to make infringement findings and will weigh against services if the website has not taken steps to limit infringement.¹⁷² While this provision was traditionally aimed at sites enabling file sharing of copyrighted content, we are beginning to see how indexing sites may be liable.¹⁷³

In *Bell Media Inc. v GoldTV.Biz*, Bell sought an injunction against an TV provider that delivered content over the internet without authorization.¹⁷⁴ The court granted the injunction, finding that GoldTV.Biz infringed on Bell’s copyright by making its programming available to the public without permission.¹⁷⁵ The court found that GoldTV.Biz had engaged in secondary infringement under subsection 27(2.3), as the

¹⁶⁵ Horner, *supra* note 69 at 449.

¹⁶⁶ McKenzie, *supra* note 3 at 617.

¹⁶⁷ Horner, *supra* note 69 at 449.

¹⁶⁸ McKenzie, *supra* note 3 at 614.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Copyright Act*, *supra* note 95 at s 27(2.3), 38.1(1.1).

¹⁷¹ *Copyright Act*, *supra* note 95 at s 27(2.4).

¹⁷² Hutchinson, *supra* note 97 at 187.

¹⁷³ *Ibid.*

¹⁷⁴ *Bell Media Inc v GoldTV.Biz*, 2019 FC 1432.

¹⁷⁵ *Ibid* at paras 57-70.

service was used to enable acts of copyright infringement.¹⁷⁶ Additionally, in *Google v Equustek*, Google was found to be secondarily liable as it failed to de-index infringing websites that involved a trademark to confuse consumers.¹⁷⁷

The U.S. CA does not specifically hold one liable for another's infringement, but the common law doctrine of secondary liability can impose liability on a third party if certain criteria are met. This doctrine has evolved into two claims: contributory infringement and vicarious infringement.¹⁷⁸

A&M Records, Inc. v Napster, Inc. involved the use of Napster's software, which enabled users to share music files through a searchable index and central location for downloading.¹⁷⁹ The court determined that Napster was responsible for both contributory and vicarious infringement because it was aware of and assisted with the infringement, had the ability to control it, did not take action to remove infringing files from the index, and profited from the infringing activity.¹⁸⁰

However, *In Perfect 10, Inc. v Amazon.com, Inc.* Perfect 10 accused Google of copyright infringement by displaying thumbnail images of infringing pictures and providing links to third-party websites that posted them.¹⁸¹ Unlike *Napster*, Google lacked the necessary software and user registration to monitor all the third-party websites it linked to.¹⁸² The court ruled that Perfect 10 could not prove that Google had the authority to stop the infringement or failed to do so.¹⁸³ This nuance in the secondary liability of websites linking to infringing content could present challenges for sports media rights holders in making a claim.¹⁸⁴

Professional sports leagues may use secondary liability against websites that index and provide access to illegal streams of their games. However, this is limited by the fact that these websites are often located outside of Canada or the U.S. and consist of multi-level distribution chains, making it difficult to locate them or establish personal jurisdiction.¹⁸⁵ Moreover, since the websites stream all sports and not just

¹⁷⁶ The court ordered GoldTV.Biz to shut down its service and pay damages to Bell Media, see *Ibid* at para 117.

¹⁷⁷ *Google v Equustek*, 2017 SCC 34.

¹⁷⁸ Edelman, *supra* note 103 at 483-484.

¹⁷⁹ *Napster*, *supra* note 157; Horner, *supra* note 69 at 451.

¹⁸⁰ *Napster*, *supra* note 157; Horner, *supra* note 69 at 451-452.

¹⁸¹ McKenzie, *supra* note 3 at 630.

¹⁸² *Perfect 10, Inc v Amazon.com, Inc*, 508 F 3d 1146 (9th Cir., 2007).

¹⁸³ *Ibid*.

¹⁸⁴ McKenzie, *supra* note 3 at 630.

¹⁸⁵ *Ibid*.

American sports, they do not directly target or interact with users in North America, even though they are not the ones directly uploading or streaming the games.¹⁸⁶

In response to these limitations, the U.S. introduced the *Protecting Lawful Streaming Act of 2020* that provides criminal sanctions for large-scale streaming of copyright material.¹⁸⁷ The Act relates to secondary infringement because it targets the operators of websites that stream, or host copyrighted material without authorization from the copyright holders.¹⁸⁸ It is difficult to determine whether the Act has decreased piracy since it is relatively new and its impact on piracy has not been extensively studied yet.¹⁸⁹ It could be limited as illegal streaming is compounded by the continual advances in technology, which make detecting and tracing illegal streaming more troublesome.¹⁹⁰ Sports media rights holders are hopeful the Act will help close the streaming loophole.¹⁹¹

iii. Internet Intermediaries

Both Canada and the U.S. have devised strategies to allocate the responsibility of managing internet copyright infringement between copyright owners and intermediaries. However, these strategies are inadequate in tackling the issue of illegal sports streaming due to the challenges posed by the complex and widespread nature of P2P sharing sites.¹⁹² Moreover, intermediaries are often able to evade liability through safe harbour provisions.¹⁹³ Overall, addressing this issue requires a more comprehensive approach that takes into account the unique challenges posed by P2P sharing sites and the driving factors directing sports fans towards digital piracy.

Internet intermediaries are companies that facilitate the use of the internet, including Internet Service Providers (“ISPs”), search engines and social media

¹⁸⁶ McKenzie, *supra* note 3 at 612.

¹⁸⁷ *Protecting Lawful Streaming Act of 2020*, 18 USC § 2319C.

¹⁸⁸ Alain Villeneuve et al, “The Streaming Loophole Is, Finally, Closed” (2021) 39:7 *Computer & Internet Lawyer* at 15-16.

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

¹⁹¹ Joseph Cairo, “Brooklyn Sports & Entertainment Law Blog - The Shortcomings of Past Anti-Streaming Laws and Hope for the PLSA”, (2 December 2021), online: <sports-entertainment.brooklaw.edu/film-tv/the-shortcomings-of-past-anti-streaming-laws-and-hope-for-the-plsa/> [perma.cc/79Q3-ZZ6C].

¹⁹² McKenzie, *supra* note 3 at 617.

¹⁹³ Hutchinson, *supra* note 97.

platforms.¹⁹⁴ Internet intermediaries offer the means for online communication, but they also enable the distribution of infringing content on a large scale, causing concerns for copyright holders.¹⁹⁵ As pursuing each individual infringer is expensive, intermediaries have become the target of copyright holders to obtain compensation for facilitating and profiting from pirated content. Intermediaries face challenges in monitoring and removing infringing content, as it is difficult to identify and pursue those who upload it.¹⁹⁶

These approaches require copyright owners to monitor and report infringements to intermediaries. Upon notification, the intermediary is obligated to act to address infringing activities, failing which they may be held liable. Safe harbor protections will not apply.¹⁹⁷ The main safe harbour policies include the notice-and-notice regime (“NAN”) in Canada and notice-and-takedown (“NAT”) regime in the U.S.

In 2012, the CA was amended to address the issue of intermediary liability arising from the prevalence of the Internet.¹⁹⁸ In Canada, NAN means that if a copyright owner suspects that someone has used their internet account to violate their copyright by downloading or uploading content without permission, they can send a notice of alleged infringement to the ISP.¹⁹⁹ Notices should include the sender's details, the alleged infringement, and the electronic location, among other things.²⁰⁰ The ISP is then required to forward this notice to the account holder who is suspected of having used their account to violate or infringe copyright. If these requirements are not met by the owner, the intermediary is not required to forward the notice to the alleged infringer.²⁰¹ The intermediary must retain records for 6 months to a year from the start date of reception of the notice by the alleged infringer. If an intermediary fails to follow the notice-and-notice requirements, the rights owner is entitled to statutory damages between \$5,000-\$10,000 CAD.²⁰²

¹⁹⁴ Presseller, *supra* note 92 at 359.

¹⁹⁵ Hutchinson, *supra* note 97 at 175.

¹⁹⁶ *Ibid* at 175-176.

¹⁹⁷ *Ibid* at 176.

¹⁹⁸ CMA, *supra* note 131.

¹⁹⁹ Hutchinson, *supra* note 97 at 180.

²⁰⁰ See *Copyright Act*, *supra* note 95 at s 41.25: “The notice must specify the work, electronic location, and the infringement claimed.”

²⁰¹ Hutchinson, *supra* note 97 at 181-182; *Copyright Act*, *supra* note 95 at 41.25.

²⁰² *Copyright Act*, *supra* note 95 at s 41.26.

In Canada intermediaries are exempt from liability when they “act strictly in caching, communication and hosting services.”²⁰³ This can have implications for infringement claims related to the right of “authorization”, as the level of involvement of the intermediary in transmitting infringing content may be viewed as authorizing infringement. As a result, ISPs in Canada may face implications for authorization infringement, regardless of whether or not they follow the NAN procedure.²⁰⁴

The benefits of the NAN system include its potential as a deterrent for illegal sports streaming by copyright owners. According to a study by Statistics Canada on online consumption, 61% of recipients of a notice took proactive steps to address online infringement, such as discontinuing illegal streaming and becoming more aware of copyright infringement.²⁰⁵ Another advantage is the protection of user privacy, as Internet providers are not allowed to disclose subscribers' personal information as part of the notice-and-notice process.²⁰⁶

The primary drawback of the NAN system is its limited regulatory and organizational capacity. The system places the responsibility on copyright owners to monitor infringements, while also increasing pressure on intermediaries.²⁰⁷ For instance, a survey by Statistics Canada indicates that only 10% of online content consumers received a notice alleging infringement.²⁰⁸ Moreover, a survey by Synamedia revealed that 51% of sports fans have used illegal streaming services at least once a month, suggesting a significant gap in catching and addressing such users.²⁰⁹ Another issue is that the CA does not prohibit copyright holders from including additional information in the notices. This has resulted in instances of abuse

²⁰³ *Ibid* at s 31.1.

²⁰⁴ Hutchinson, *supra* note 97 at 179-180.

²⁰⁵ Statistics Canada. *Study of Online Consumption of Copyrighted Content: Attitudes Toward and Prevalence of Copyright Infringement in Canada* (2018), online: <[ised-isde.canada.ca/site/public-opinion-research/en/study-online-consumption-copyrighted-content-attitudes-toward-and-prevalence-copyright-infringement](https://www150.statcan.gc.ca/n1/pub/98-646-x/2018001/article/00001-eng.htm)> [perma.cc/4KMS-EUKV].

²⁰⁶ Ashwin Ramakrishnan, “Towards an Effective Regime against Online Copyright Infringement in India” (LLM Thesis, Dalhousie University, Schulich School of Law, 2016) [Unpublished] at 68, online (pdf): <digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1082&context=llm_theses> [perma.cc/4ANT-C3GL].

²⁰⁷ *Ibid* at 70.

²⁰⁸ Statistics Canada, *supra* note 205.

²⁰⁹ Synamedia, *supra* note 30.

where users are threatened with higher fines without sufficient evidence that they are responsible for the alleged infringement.²¹⁰

The NAT system aims to provide protections for both copyright owners and ISPs.²¹¹ It requires the copyright holder to send a notice of alleged infringement to the ISP, which must establish that the sender owns the copyrighted work, that the alleged infringement is not covered by exceptions such as fair use, and that the content can be infringed online.²¹² ISPs are protected from liability if they remove the content upon notification from the copyright holder.²¹³ The system also includes a counter notification process where subscribers can object to the removal if they believe it does not infringe copyright.²¹⁴

These safe harbor provisions provide limited liability protection for activities that are commonly carried out by ISPs, which shields them from claims of copyright infringement.²¹⁵ Courts in the U.S. have faced challenges in adjudicating copyright cases under the DMCA, particularly related to evidentiary issues.²¹⁶

The NAT is considered ineffective in combatting digital piracy. Copyright owners are currently sending notices for over 78 million infringing files annually, but the costs associated with locating, identifying, and sending notices for such a large number of files are prohibitive, leading even large companies to limit their efforts.²¹⁷ Furthermore, U.S. courts have clarified the regime only requires site owners to remove the specific file indicated in a takedown notice.²¹⁸ This fails to address the modern infringement method of illegal sports streaming. As a result, when a takedown occurs, the same content often reappears within hours after removal, unless

²¹⁰ Hutchinson, *supra* note 97 at 182.

²¹¹ DMCA, *supra* note 105 at Title II.

²¹² DMCA, *supra* note 105 at § 512; Hutchinson, *supra* note 94 at 180.

²¹³ Presseller, *supra* note 91 at 367.

²¹⁴ DMCA, *supra* note 105 at § 512; Hutchinson, *supra* note 94 at 180.

²¹⁵ Presseller, *supra* note 91 at 368-369.

²¹⁶ *Viacom International, Inc. v YouTube, Inc.*, 676 F.3d 19 (2nd Cir., 2012) [*Viacom*]: “ISPs may avoid liability if copyright holders cannot prove that the ISPs influenced or participated in the infringement, even if they were aware of copyrighted material being posted on their sites.”

²¹⁷ Bruce Boyden, “The Failure of the DMCA Notice and Takedown System: A Twentieth Century Solution to a Twenty-First Century Problem”, (December 2013) *George Mason University School of Law* at 2, online (pdf): <sls.gmu.edu/cpip/wp-content/uploads/sites/31/2013/08/Bruce-Boyden-The-Failure-of-the-DMCA-Notice-and-Takedown-System1.pdf> [perma.cc/J2XF-49WE].

²¹⁸ *Viacom*, *supra* note 216.

a site utilizes content filtering technology.²¹⁹ This poses significant challenges for sports media rights holders in their efforts to target P2P sports streaming sites.

iv. Injunctions and site-blocking orders

In both Canada and the U.S., injunctions and site-blocking orders have emerged as promising tools in the fight against online piracy. These remedies are a potential avenue for sports rights holders to safeguard broadcasting and streaming rights.

Rogers Media Inc. v John Doe 1 allowed for the issuance of a dynamic site-blocking order to keep up with the evolving nature of online copyright piracy.²²⁰ In this case, Rogers sought an injunction against an unknown defendant, for alleged copyright infringement of NHL game broadcasts. Rogers argued a traditional site-blocking would be ineffective as the defendant was constantly moving the infringing content from site to site during games. They argued that a dynamic site-blocking order, enabling websites to be blocked in "real time", was necessary to effectively combat online copyright piracy.²²¹ The Federal Court determined that the defendant infringed the plaintiffs' copyright in the NHL broadcasts by unlawfully distributing the broadcasts.²²² The Court found that the balance of convenience favored issuing the injunction. It concluded that the respondent ISPs had the technical capability to engage in dynamic IP address site-blocking, and that the order could be tailored to reflect their legitimate rights and interests while minimizing the burden imposed upon them.²²³ Media rights holders are increasingly relying on this approach to protect their rights, as evidenced by cases such as *Bell Media Inc. v John Doe 1*, where an order identical to that granted in *Rogers* was issued to block access to unauthorized streams of FIFA World Cup Qatar 2022 matches.²²⁴

In the *United King Films* proceedings, the plaintiffs filed copyright infringement claims against unknown defendants who re-broadcasted and streamed the plaintiffs' original content, broadcasting channels, and television services without

²¹⁹ Boyden, *supra* note 217.

²²⁰ *Rogers*, *supra* note 154 at paras 35-41.

²²¹ *Ibid* at para 6.

²²² *Ibid* at para 120.

²²³ *Ibid* at paras 312-324.

²²⁴ *Bell*, *supra* note 154.

authorization.²²⁵ Default judgments were awarded against the defendants for copyright infringement.²²⁶ The court awarded statutory damages totaling \$7.65 million.²²⁷ The site-blocking order in the case targeted a wider range of third parties, including U.S. ISPs, registrars and registries, monetary account holders, and various third-party service providers such as banks, PayPal, and advertising service providers.²²⁸ These orders required U.S. ISPs to block the infringing websites and any other websites used by the defendants for similar purposes, and also required the transfer of domain names associated with these websites to the plaintiffs, among other relief.²²⁹

These cases advance the strategies and remedies available to copyright holders to address widespread copyright infringement on the internet within their respective jurisdictions and highlight the evolving legal landscape and increasing efforts to combat digital copyright infringement. The orders issued have expanded the legal tools and options for copyright owners to combat mass infringement of their copyrighted works online.²³⁰

Blocking sites can decrease piracy and increase usage of legal subscription sites, which suggests this is most promising legal avenue for sports media rights holder to prevent infringement.²³¹ Dr. Brett Danaher's research indicates that implementing piracy website blocking measures can result in higher rates of legal consumption. Notably, in India, website blocking in 2019 and 2020 led to an 8.1% and 3.1% increase in legal consumption respectively, while in Brazil in 2021, it resulted in a 5.2%

²²⁵ *United King Film Distribution Ltd, DBS. Satellite Services (1998) Ltd, HOT Communication Systems Ltd, Reshet Media Ltd, Keshet Broadcasting Ltd, Charlton Ltd and Keshet Broadcasting Ltd v Does 1-10, d/b/a Israeli-tv.com*, 21 Civ 11024, 1:2021cv11025 (2021).

²²⁶ Cassels LLP, "Dynamic Site Blocking North and South of the Border", (28 July 2022), online: <cassels.com/insights/dynamic-site-blocking-north-and-south-of-the-border/> [perma.cc/P3QF-28T7].

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ Brett Danaher, Michael D Smith & Rahul Telang, "The Effect of Piracy Website Blocking on Consumer Behavior" (2015) *SSRN Electronic Journal* at 2, DOI: <10.2139/ssrn.2612063> [perma.cc/5NPW-SLW8].

increase. These findings are consistent with his previous study on website blocking in the U.K. between 2013 and 2014.²³²

While website blocking may be an effective strategy for increasing legal consumption of copyrighted content, they still have limits suggesting a more proactive solution might be necessary.²³³ Research suggests that blocking a single site is unlikely to increase the usage of legal sites but may increase visits to other unblocked piracy sites.²³⁴ Additionally, when sites are blocked, but content is not actually removed from the internet, this often causes the emergence of a number of new piracies linking sites to the content. The cost to users to discover new linking sites is often lower than switching to consumption of legal channels.²³⁵ Users can circumvent website blocking measures in their countries by utilizing VPN services, which can virtually fake their computer's location.²³⁶ This poses a challenge as site-blocking orders are limited to their respective jurisdictions.

A major limitation for site-blocking effectiveness in Canada is that the Court in *Rogers* emphasized the overall burden on the respondent ISPs would be reduced as the order would be in place for a limited duration and a finite number of games during the NHL playoffs.²³⁷ This indicates site-blocking may not be a long-term solution. Furthermore, the implementation of these orders necessitates substantial resources and time.²³⁸ These orders may not align with an efficient approach to combating copyright infringement considering the multi-level distribution chain involved in illegal streaming and the dynamic nature of the internet.²³⁹ More efficient methods to address this issue are likely required.

3. A Fan Centric Solution: Centralizing sports streaming

This section argues that a centralized streaming service with "a la carte" pricing can be a proactive solution for copyright holders in the sports industry to reduce piracy by enhancing customer satisfaction. From a consumer perspective, an

²³² Brett Danaher et al, "The Impact of Online Piracy Website Blocking on Legal Media Consumption" (12 February 2024), online:

<papers.ssrn.com/sol3/papers.cfm?abstract_id=4723522>.

²³³ Danaher, *supra* note 231.

²³⁴ *Ibid* at 3-4.

²³⁵ *Ibid*.

²³⁶ Mengna Liang, "Copyright Issues Related to Reproduction Rights Arising from Streaming" (2020) 23:5-6 *J World Intellectual Property* 798 at 808-809.

²³⁷ *Rogers*, *supra* note 154 at para 248.

²³⁸ Danaher, *supra* note 231.

²³⁹ McKenzie, *supra* note 3 at 630.

affordable and centralized streaming service that offers viewers access to their preferred sports content is recommended.

With the sector losing as much as 28.4 billion dollars annually to illegal streaming, a solution is necessary.²⁴⁰ According to a report by Synamedia, 74% of individuals currently engaging in illegal streaming expressed a willingness to switch to a legal source if it were easily accessible. Additionally, the study highlighted that despite 89% of global fans paying for a sports subscription, more than half of this demographic resorted to illegal streaming methods to watch games for free.²⁴¹ To address the loss in revenue, the sports industry must understand the causes of piracy and effectively address it. This issue is complex and influenced by various factors, but the primary concern relates to pricing and a lack of access. Many individuals are hesitant to pay the high costs of multiple subscription models, especially when they are unable to access certain games due to blackouts. The expense of accessing sports content has steadily risen over time, driven by the escalating value of media rights.²⁴²

The potential benefits and limitations of a centralized service are analyzed by comparing other steaming models and evaluating the existing the broadcasting system in both Canada and the U.S.

1. International Concern with Limited Options

The World Intellectual Property Organization (“WIPO”) recognizes that the protection of sports broadcasting organizations from digital piracy is an international concern that requires stronger international-level protection.²⁴³ However, international cooperation alone may not be effective in stopping infringement due to the multi-level distribution chain of digital piracy, making it difficult to detect and enforce rights without adequate protective measures.²⁴⁴ Despite courts taking measures to stop infringing activities, legal remedies have not been entirely

²⁴⁰ US Patent and Trademark Office, *supra* note 37.

²⁴¹ Synamedia, *supra* note 30.

²⁴² Brett Danaher, Michael Smith & Rahul Telang. “Pro Sports has a piracy problem”, (14 February 2024), online: *Harvard Business Review* <hbr.org/2024/02/pro-sports-has-a-piracy-problem#:~:text=The%20NFL%2C%20NBA%2C%20and%20UFC,in%20additional%20potential%20annual%20revenue.%E2%80%9D> [perma.cc/4XT6-7ZTR].

²⁴³ WIPO, *supra* note 121; Singapore’s copyright regime institutes a notice-and-takedown regime but data discloses that Singapore’s per capita infringement ranks first in Asia and fifth highest globally, see Donna Wong, “The EPL drama – paving the way for more illegal streaming? Digital piracy of live sports broadcasts in Singapore” (2016) 35:5 *Leisure Studies* 534.

²⁴⁴ McKenzie, *supra* note 3 at 629.

effective.²⁴⁵ Although WIPO is in the process of updating its international protection of broadcasting organizations, this will take time and new piracy technologies may emerge.²⁴⁶ This slow process highlights the difficulty in creating laws, particularly at an international level. Therefore, sports rights holders should consider using centralized streaming services with a la carte pricing to balance owner rights with user freedom and reduce illegal sports streaming.

2. Implementing a Centralized Sports Streaming Service

A centralized over-the-top (OTT) streaming service that offers affordable options for viewers to access their preferred sports content could be implemented by professional sports leagues. This service could use the pricing model known as “a la carte” that offers customers the option to subscribe to individual channels. This is an alternative to the traditional model of cable bundling, where customers must purchase entire packages of channels rather than select from individual ones.²⁴⁷ The a la carte model may enable sports fans to customize their viewing preferences by selecting and paying for only the leagues they are interested in watching without being affected by blackouts. By personalizing the experience, the proposed approach would reduce the demand for illegal sports streaming services by increasing consumers accessibility.²⁴⁸ Otherwise, conventional methods of sports broadcasting could be at risk of becoming obsolete in the face of cord cutting.²⁴⁹

i. Benefits of a centralized service

The primary advantage of this approach is that it does not rely on ineffective legal measures to hold infringers responsible, but rather enables leagues to adjust to consumers' preferences in the digital era while simultaneously reducing the need for digital piracy. In Canada, this approach reflects the view of the CRTC that “everyone will be able to find an option or a bundle that suits their household.”²⁵⁰

²⁴⁵ Horner, *supra* note 66 at 449 citing *Football Association Premier League Ltd. v British Sky Broadcasting Ltd.*, [2013] EWHC 2058 (Ch).

²⁴⁶ WIPO, *supra* note 121.

²⁴⁷ Hutchins, *supra* note 74 at 976.

²⁴⁸ *Ibid* at 977.

²⁴⁹ Sawchik, *supra* note 1 at Part 2.

²⁵⁰ Matt Kwong “Pick-and-pay TV: Consumer choice, but at what cost?” (20 March 2015), online: <cbc.ca/news/business/pick-and-pay-tv-consumer-choice-but-at-what-cost-1.3002418> [perma.cc/DF3W-KDLV].

Research indicates that despite the awareness that digital piracy is illegal and harmful, consumers are unable to switch from illegal streaming due to the high activation costs of subscription services and overabundance of options.²⁵¹ When consumers have positive emotions towards subscription streaming services, they are more likely to comply with copyright laws. These types of services may be economically feasible in the sports streaming context.²⁵² For instance, DAZN has maintained a relatively stable subscription base despite raising its prices, which has contributed to its revenue and operating margin growth.²⁵³ Conversely, negative emotions may lead to reactance and drive individuals towards digital piracy.²⁵⁴

This may be the reason legal OTT services such as Netflix and Spotify are effective in decreasing piracy in their relative media sectors. Despite the initial response of the music industry to combat copyright infringement through legal action against infringers, the ultimate solution to the issue was the introduction of a legal OTT service, namely Spotify.²⁵⁵ Streaming on Spotify has had positive effects on displacing music piracy. Although Spotify has displaced music sales, these are largely outweighed by the gains in streaming revenue that reduce digital piracy.²⁵⁶ Likewise, the availability of Netflix in a country has been linked to a reduction in digital piracy, as it has become the new standard for watching movies and TV shows.²⁵⁷ For example, the removal of certain movies on Netflix resulted “in a 20-22% increase in intent to pirate those movies, compared to movies that remained on Netflix.”²⁵⁸ This demonstrates the importance of sports media rights holders shifting to a centralized service to reduce digital piracy. Overall, a service that provides comprehensive access leading to positive emotions can reduce piracy and may be economically feasible. For

²⁵¹ Miocevic, *supra* note 43 at 268.

²⁵² Genovese, *supra* note 32.

²⁵³ *Ibid.*

²⁵⁴ Dario Miocevic, “Consumers’ responses to opposing copyright enforcement regimes: When cognitive appraisal leads to compliance vs reactance” (2022) 136:3 *Computers in Human Behavior*.

²⁵⁵ Filipa Reis, “Controlling Digital Piracy Via Domain Name System Blocks: A Natural Experiment” (2023) *J Econ Behavior & Organization* (forthcoming) at 2; *Napster*, *supra* note 154.

²⁵⁶ European Commission, Joint Research Centre, Institute for Prospective Technological Studies by Luis Aguiar & Joel Waldfogel. “As streaming reaches flood stage, does it stimulate or depress music sales?” (2018) 57 *IJ Industrial Organization* 278.

²⁵⁷ Reis, *supra* note 255.

²⁵⁸ Sarah Frick, “Pirate and Chill: The Effect of Netflix on Illegal Streaming” (2023) 209:1 *J Econ Behavior & Organization* 334.

example, despite raising its prices in recent years, DAZN's subscription base has remained broadly stable, contributing to revenue and operating margin growth.²⁵⁹

Another potential benefit of this model is the potential to level the playing field for coverage of women's sports that is often underfunded and underappreciated.²⁶⁰ Furthermore, the proposed service has the potential to assist sports with limited media exposure in reaching diverse and substantial viewership.²⁶¹ The inadequate coverage of female sports in the media leads to a gender pay disparity that poses a challenge for female athletes to earn a livelihood through their athletic career.²⁶² This reflects the view of Canadian Women & Sports that the "current sports system is failing to provide women with access to safe and quality sports."²⁶³ In the U.S., women's sports receive only 5% of media coverage, which reinforces gender biases perpetuated by the traditional broadcasting patterns.²⁶⁴ The streaming revolution provides the opportunity to give women's sports the coverage it deserves. Increased streaming services can lead to greater visibility for women's sports teams. This is already being observed with ESPN's OTT streaming service offering women's sports coverage. For instance, women's softball has gained popularity as a TV event, with the Women's College World Series drawing an average of 1.57 million viewers on ESPN in 2019, a 13% rise from 2018.²⁶⁵ Similarly, the women's NCAA championship attracted record audiences in 2023.²⁶⁶

ii. Limitations of a centralized service

While there are considerable advantages to adopting a centralized service, there are concerns about its feasibility and potential to allow market dominance by large

²⁵⁹ Genovese, *supra* note 32.

²⁶⁰ Cheryl Cooky et al, "One and Done: The Long Eclipse of Women's Televised Sports, 1989–2019" (2021) 9:3 Communication & Sport 347.

²⁶¹ Genovese, *supra* note 32.

²⁶² Cooky, *supra* note 260.

²⁶³ Canadian Women & Sports, *Rally Report 2022* (last accessed 5 April 2023), online: <womenandsport.ca/rally-report-2022/> [perma.cc/FPM8-GBY7].

²⁶⁴ Cooky, *supra* note 260.

²⁶⁵ Stephen Battaglio, "Live sports on TV and streaming boost female athletes", *Los Angeles Times* (8 March 2020), online: <latimes.com/sports/story/2020-03-08/live-sports-tv-streaming-womens-sports> [perma.cc/ME9D-ZJCF].

²⁶⁶ Associated Press, "LSU-Iowa NCAA women's championship game draws record TV audience", *ESPN* (4 April 2023), online: <espn.com/womens-college-basketball/story/_/id/36060079/l-su-iowa-ncaa-women-title-game-draws-record-tv-audience> [perma.cc/NWJ4-PBF4].

technology companies. These limitations show resistance to an approach that accounts for the shift in consumer behavior through cord cutting.

One of the main concerns is that the Big Four would be unwilling to institute this model.

The traditional broadcast market for the Big Four continues to deliver substantial revenue to leagues. When these deals are made, the leagues revenue is guaranteed years in advance.²⁶⁷ The leagues wield considerable power during negotiations with networks and can utilize it to obtain higher prices for their product. As a result, consumers may end up paying more or being forced to subscribe to additional channels that they do not require.²⁶⁸ Most major sports leagues still classify their streaming services as supplementary.²⁶⁹ One example is the NFL's media rights agreement in the U.S., worth \$110 billion and runs until 2033. The agreement grants exclusive rights for most games to traditional broadcasters who also have their own streaming services.²⁷⁰ According to Blake Stuchin, VP of digital media business development for the NFL, the traditional TV platform is “going to remain the primary reach vehicle and revenue driver for the NFL for years to come.”²⁷¹ Moreover, there is significant opposition to the adoption of a la carte sports programming in the U.S. due to concerns that it would erode programming diversity.²⁷² This could potentially make the establishment of such a service challenging.

The technological capabilities of a centralized platform could enable multinational corporations to rapidly establish a monopoly, leading to international domination.²⁷³ The concern is that these providers could engage in “media imperialism” by rapidly and expansively importing its service into other nations by monopolizing a streaming platform. This results in a significant increase in the economic power of these corporations as their services become more widespread.²⁷⁴

²⁶⁷ Pennington, *supra* note 31 at 14.

²⁶⁸ Bailey, *supra* note 68 at 362.

²⁶⁹ Pennington, *supra* note 31 at 14.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² Peter Kaplan, “Minority groups oppose FCC ‘a la carte’ proposal”, *Reuters* (31 May 2008), online: <[reuters.com/article/television-programmers-fcc-dc-idUSN2931374420080531](https://www.reuters.com/article/television-programmers-fcc-dc-idUSN2931374420080531)> [perma.cc/ZG3D-B4U5].

²⁷³ Stuart Davis, “What is Netflix imperialism? Interrogating the monopoly aspirations of the ‘World’s largest television network’” (2020) 26:6 *Information, Communication & Society* 1143.

²⁷⁴ *Ibid* at 4.

As a result of their monopolistic practices, these corporations can evade taxes and are often not accountable for their interactions with citizens in the countries they operate in.²⁷⁵ This is concerning as large American technology companies are targeting the sports streaming landscape. Amazon Prime Video secured exclusive broadcasting rights to Thursday Night Football games through the NFL's inaugural all-digital package, for which the streaming service paid a hefty sum of \$1 billion annually.²⁷⁶ With an annual expenditure of approximately \$7 billion on content for its streaming service, Apple appears to be a strong contender for various rights packages. The NBA's national rights are set to expire after the 2024-25 season, and there are speculations that Apple or Amazon may make a bid for them.²⁷⁷

Canada's legislative structure could make the implementation of a centralized service impractical. Regulations on Canadian content and broadcasting ownership are imposed by the *Broadcasting Act*. The act seeks to maintain Canadian cultural identity by ensuring accessibility to Canadian media.²⁷⁸ The regime currently requires that at least 55% of all programming aired annually by broadcast television stations must be Canadian content.²⁷⁹ Although, OTT services, are not presently regulated by the act, the proposed Bill C-11, the *Online Streaming Act*, may further limit the feasibility of a centralized service.²⁸⁰ For example, in 2019, The President of the Canadian Broadcasting Corporation accused Netflix of practicing 'cultural imperialism' for promoting an economic and cultural invasion reminiscent of historical imperialists.²⁸¹ The bill, which has been passed in the House of Commons and in the Senate, would give the Canadian Radio-television and Telecommunications Commission the power to regulate almost all audiovisual content distributed via online platforms, potentially including foreign streaming services.²⁸² This reflects the view that streaming services should follow similar regulatory obligations to conventional radio and television broadcasters.

Conclusion

²⁷⁵ *Ibid* at 5.

²⁷⁶ Pennington, *supra* note 31 at 14.

²⁷⁷ Sawchik, *supra* note 1 at Part 2.

²⁷⁸ *Broadcasting Act*, *supra* note 135.

²⁷⁹ *Broadcasting and Telecom Regulatory Policy*, CRTC 2011-288, online: <crtc.gc.ca/eng/archive/2011/2011-191.htm> [perma.cc/E62L-6T2G].

²⁸⁰ Bill C-11, *An Act to amend the Broadcasting Act and to make related and consequential amendments to other Acts*, 1st session, 44th Parliament, 2021.

²⁸¹ Davis, *supra* note 273 at 2.

²⁸² Bill C-11, *supra* note 280.

There is a discrepancy between how sports are being broadcasted and consumer expectations. Currently, consumers who switch to online streaming services face challenges with affordability and access, which leads to a rise in illegal streaming. Sports media rights holders are especially susceptible to streaming over P2P networks, indexing sites, and social media live streaming.

There are significant limitations to the existing copyright laws in Canada and the U.S. that make it challenging to tackle the growing problem of illegal sports streaming. Both countries have inadequate measures for rights holders to enforce their rights against primary or secondary infringement. Moreover, the NAN and NAT regimes are limited due to difficulties in monitoring and removing infringing content, and intermediaries may be protected from liability when infringement occurs. While site-blocking orders and injunctions offer a potential solution for sports rights holders to combat online piracy, these measures may be circumvented by users or replaced by new infringing sites.

A potential solution for sports industry copyright holders to combat piracy and increase customer satisfaction could be a centralized streaming service offering "a la carte" pricing. The primary advantage of this approach is that it does not rely on ineffective legal measures to hold infringers responsible, but rather enables leagues to adjust to consumers' preferences in the digital era while simultaneously reducing the need for digital piracy. It may also increase coverage and access to women's sports. There are concerns about such a service's feasibility, especially given the broadcasting requirements in Canada. Furthermore, sports leagues may be hesitant to implement such a service due to the considerable revenue that traditional broadcasting continues to generate. Additionally, multinational corporations could exploit the technological capabilities of a centralized platform to quickly establish a monopoly, resulting in media imperialism on an international scale. Since the current model of sports broadcasting is ineffective, sports media rights holders must find a practical solution that considers consumer preferences, benefits society, and addresses the ongoing issue of digital piracy of their copyrighted content. In any event, we need a practical solution that aligns with consumer preferences, benefits society, strengthens existing legal measures, and mitigates digital piracy.