ARE OUR PASTIMES PAST THEIR TIME?

HOW WILL THE MEDIA INDUSTRY DISRUPTION AND CHANGES TO THE LEGAL ENVIRONMENT AFFECT THE SPORTS INDUSTRY?

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> *I cannot, just by telling you about it, convince you of the pleasure of what happens at such a festival as well as you would learn for yourself, sitting in the middle of the crowd, watching the* arete *of men and physical beauty, amazing conditioning and great skill and irresistible force and daring and pride and unbeatable determination and indescribable passion for victory. I know that you would not stop praising and cheering and applauding.*[1]

INTRODUCTION

Sports have occupied a special place in human activity[2] and the recent history of the U.S. professional sports industry[3] has seen an enormous increase in revenues and asset values.[4] This robust growth has been fueled largely by aggressive competition among media companies for sports programming, resulting in repeated record payments to leagues

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1. LUCIAN, ANACHARSIS (c. 190 C.E.), *reprinted in* ARETE: GREEK SPORTS FROM THE ANCIENT SOURCES 78 (Stephen G. Miller ed., U.C. Press, Ltd., 3d ed. 2012).

2. The allure of athletic contests is documented in Homer's *The Iliad* in the eighth century B.C. HOMER, THE ILLIAD 395–401 (Erwin Cook, ed., Edward McCrorie trans., The John's Hopkins University Press 2012) (c. 762 B.C.E.).

3. "U.S. professional sports industry," "professional sports leagues," or "leagues" in this Article refer to the National Football League (NFL), National Basketball Association (NBA), Major League Baseball Association (MLB), and the National Hockey League (NHL).

4. Darren Heitner, *Sports Industry to Reach $73.5 Billion by 2019*, FORBES (Oct. 19, 2015, 7:15 AM), http://www.forbes.com/sites/darrenheitner/2015/10/19/sports-industry-to-reach-73-5-billion-by-2019/#596a686c1585.

and teams for the right to telecast games.[5] This escalation of rights fee payments has, through league-wide revenue sharing paradigms, redistributed payments from high to lower-revenue generating teams, ushering in an era of relative competitive parity among the teams.[6] Greater on-field competitiveness has resulted in higher attendance and enhanced local media rights values of many smaller market franchises, further contributing to their revenue growth and asset value.[7] Finally, this increased level of payments from the media industry to leagues and teams have also increased the payments to players.[8]

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5. John Ourand, *How High Can Rights Fees Go?*, STREET & SMITH'S SPORTS BUS. J., June 6–11, 2011, at 1, 1, 16, 17.

6. Stefan Késenne, *Revenue Sharing and Competitive Balance in Professional Team Sports*, 1 J. SPORTS ECON. 56, 56 (2000), SAGE, File No. 10.1177/152700250000100105; John Lombardo, *Inside NBA's Revenue Sharing*, STREET & SMITH'S SPORTS BUS. J., Jan. 23–29, 2012, at 1, 1; David Jacobson, *MLB's Revenue-Sharing Formula*, CBS NEWS (July 14, 2008, 3:00 AM), http://www.cbsnews.com/news/mlbs-revenue-sharing-formula/; Darren Rovell, *NFL Teams Split $6B in Revenue*, ESPN (July 10, 2014), http://www.espn.com/nfl/story/_/id/11200179/nfl-teams-divided-6-billion-revenue-according-green-bay-packers-financials; *David Stern Says Labor Deal Means Profitable Teams, Better Competitive Balance*, SPORTING NEWS (May 8, 2012), http://www.sporting news.com/nba/news/2780344-david-stern-nba-commissioner-labor-deal-collective-bargaining-agreement; William Van Noll, *All Leagues Share Revenue, but NFL Is Best at It*, FIELDS GREEN (July 25, 2014), http://thefieldsofgreen.com/2014/07/25/all-leagues-share-revenue-but-the-nfl-is-by-far-the-best-at-it/.

7. *See, e.g.*, Van Noll, *supra* note 6 (discussing how revenue-sharing has increased parity by allowing teams like the Green Bay Packers and Pittsburgh Steelers to secure "stronger financial footing" despite their small markets). The principal professional sports team revenue streams are as follows: distribution from league-wide revenues, primarily the national media rights fees paid for the telecast/streaming of games and the licensing of the teams' trademarks for apparel and other commercial products; local media revenues; stadium-related revenues (e.g., tickets, venue-naming rights, food and beverages, suite and club fees, signage, and parking); and sponsorship and advertising revenues. Other elements that can affect the asset value are the value of the franchise's brand and revenues derived from ancillary businesses (e.g., real estate ventures in proximity to the stadium). Jeff Phillips & Jeremy Krasner, *Professional Sports: The Next Evolution in Value Creation*, SRR J., Fall 2008, at 16, 17–18.

8. *See, e.g.*, Kevin Arnovitz, *Why Bigger Pie is Not Enough for All*, ESPN (July 15, 2015), http://www.espn.com/nba/story/_/id/13258707/even-revenue-pie-gets-bigger-some-get-enough (explaining that under the collective bargaining agreement in the NBA, roughly fifty percent of all revenue is distributed to the players); Matt Calkins, *Want More Money? NFL Players Union Needs to Demand it Like NBA Counterparts Did*, SEATTLE TIMES (July 6, 2016, 8:26 PM), http://www.seattletimes.com/sports/nba/want-more-money-nfl-players-union-needs-to-demand-it-like-nba-counterparts-did/ (stating that NFL players receive fifty percent of the League revenue); *Drop the Puck: NHL, Players Settle Labor Dispute*, CNBC (Jan. 6, 2013, 7:36 AM), http://www.cnbc.com/id/100357051 (describing how under the latest collective bargaining agreement, NHL players receive fifty percent of league revenues); Rob Neyer, *Will Players Hold Out for Bigger Piece of Dollars Pie?*, FOX SPORTS: BASEBALL JOE (Nov. 13, 2015), http://www.foxsports.com/mlb/just-a-bit-outside/baseball-joe/blog/mlb-union-cba-salary-cap-floor-revenues-split-111315 (discussing how MLB players receive forty percent of team revenues (down from fifty-five percent)).

During this period, there have been challenges confronting the media industry that are substantial, multifactorial, and, arguably, irrevocable.[9] The industry's business model for the creation, packaging, distribution, and monetization of content to consumers (the "Ecosystem") has been altered, if not shattered, by these challenges.[10] While the industry has continued to represent an important creator of revenues in the U.S. and global economy,[11] nearly every major media company has been affected by these dislocations.[12] Nearly all have changed their operating models. Many have seen their revenues, profitability, and, ultimately, their value, shrink.[13] These changes to the Ecosystem are not cyclical, but are structural in that the economic model has been permanently altered.[14] It is projected that the rate and impact of the technological changes that powered many of the structural changes are increasing.[15] The principal open questions are, what form will these

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9. OOYALA, 2015 STATE OF THE BROADCAST INDUSTRY 4, 11 (2015), http://boletines.prisadigital.com/Ooyala-State-Of-The-Broadcast-Industry.pdf.

10. DEBORAH BOTHUN & CHRISTOPHER A. H. VOLLMER, 2016 ENTERTAINMENT & MEDIA INDUSTRY TRENDS 3 (2016), http://www.strategyand.pwc.com/media/file/2016-Entertainment-and-Media-Trends.pdf.

11. *See* STEPHEN SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2014 REPORT 2–3, 5 (2014), http://www.iipawebsite.com/pdf/2014CpyrtRptFull.PDF (concluding that the core domestic content creating industry (movies, publishing, television, music, radio and software) generated $1.1 trillion in 2013 and created 5.5 million direct jobs); s*ee also* BOTHUN & VOLLMER, *supra* note 10, at 5 (noting that video advertising and subscription fees from distributors alone accounted for $420 billion in 2015).

12. *See, e.g.*, *Counting the Change*, ECONOMIST, Aug. 17, 2013, at 53, 53–54 (describing the Internet's detrimental impacts on DVD and CD companies, the television industry, and entertainment conglomerates such as NBCUniversal).

13. *See, e.g.*, KEN AULETTA, GOOGLED: THE END OF THE WORLD AS WE KNOW IT 129–30 (2009); NEERAJ AGGARWAL ET AL., BOS. CONSULTING GRP., THE DIGITAL REVOLUTION IS DISRUPTING THE TV INDUSTRY 4 (2016), https://www.bcgperspectives.com/Images/BCG-The-Digital-Revolution-Is-Disrupting-the-TV-Industry-Mar-2016_tcm80-206409.pdf ("Will current industry leaders retain their winning positions, or will they crash and burn?"); Mark Hoelzel, *The U.S. Digital Media Ad Spend Report: Mobile Will Fuel Strong Growth Formats as Desktop and Traditional Spend Slow*, BUS. INSIDER (Aug. 5, 2015, 3:10 PM), http://www.businessinsider.com/how-ad-spending-on-mobile-will-grow-faster-than-on-any-other-advertising-channel-2015-7 (predicting that in the period 2015 to 2020 revenues for traditional media will slow to a 0.4% growth rate, while revenues of digital media will grow at an 11% rate). Rhys Grossman, *The Industries that Are Being Disrupted the Most by Digital*, HARV. BUS. REV. (Mar. 21, 2016) (noting that seventy-two percent of executives anticipate moderate or massive digital disruption in the media industry, more than any other sector).

14. ERIC SWANSON, FED. RESERVE BANK OF S.F., ECON. LETTER 2012-18, STRUCTURAL AND CYCLICAL ECONOMIC FACTORS 1 (2012), http://www.frbsf.org/economic-research/files/el2012-18.pdf ("A structural change in the economy is one that is permanent or very long-lived, while a cyclical disturbance tends to return to its previous level over a few years.").

15. *See, e.g.*, Rita McGrath, *The Pace of Technology Adoption Is Speeding Up*, HARV. BUS. REV. (Nov. 25, 2013), https://hbr.org/2013/11/the-pace-of-technology-adoption-is-speeding-up (describing how statistics regarding electricity, telephone, and smart phone use

changes ultimately take, and who gains, and who loses.

Part I of this Article examines the role that the payment streams from the entertainment industry have played in contributing to the revenues and asset values of the major U.S. professional sports. Part II identifies the challenges to the Ecosystem that the entertainment industry is confronting and, consequently, the threats to the continued level of rights fee payments to the sports industry. Part III analyzes recent changes in the legal environment also affecting the media and sports industry. Part IV discusses how the impact to the entertainment industry might affect the major U.S. sports.

I. THE INCREASED REVENUES AND ASSET VALUES OF SPORTS TEAMS HAVE BEEN DRIVEN LARGELY BY INCREASES IN THE RIGHTS FEES PAID BY MEDIA COMPANIES

In the first half of this decade, the professional sports leagues and teams enjoyed substantial increases in revenues and asset value.[16] For example, in two years (2014–2016), the estimated value of MLB franchises jumped sixty-six percent[17] and total MLB revenues increased in three years from $8 billion (2013), to $9 billion (2014), and to $9.5 billion (2015).[18] Since 1995, MLB revenues have grown 321%.[19] In 2016,

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show that the rates of new product introduction and adoption are speeding up in all types of industries).

16. W.B. HAMBRECHT & CO., THE U.S. PROFESSIONAL SPORTS MARKET & FRANCHISE VALUE REPORT 3 (2012) [hereinafter HAMBRECHT REPORT]; Jason Belzer, *Thanks to Roger Goodell, NFL Revenues Projected to Surpass $13.3 Billion in 2016*, FORBES (Feb. 29, 2016, 11:00 AM), http://www.forbes.com/sites/jasonbelzer/2016/02/29/thanks-to-roger-goodell-nfl-revenues-projected-to-surpass-13-billion-in-2016/#7021d6632783; Heitner, *supra* note 4. The professional sports leagues are private organizations and, consequently, the financial information that is available is largely from third party researchers and writers who analyze information generated from a range of sources for clients or for publications. *See, e.g.*, Chris Isidore, *NFL Revenue: Here Comes Another Record Season*, CNN MONEY (Sept. 10, 2015, 7:25 PM), http://money.cnn.com/2015/09/10/news/companies/nfl-revenue-profits/.

17. *Forbes Releases 19th Annual MLB Team Valuations*, FORBES (Mar. 23, 2016, 12:03 PM), http://www.forbes.com/sites/forbespr/2016/03/23/forbes-releases-19th-annual-mlb-team-valuations/#5498b1f57c24.

18. Maury Brown, *MLB Sees Record Revenues for 2015, Up $500 Million and Approaching $9.5 Billion*, FORBES (Dec. 4, 2015, 4:40 PM), http://www.forbes.com/sites/maurybrown/2015/12/04/mlb-sees-record-revenues-for-2015-up-500-million-and-approaching-9-5-billion/#551e0d152307; Michael Oz, *Report: MLB Gross Revenues Reach a Record $9 Billion in 2014*, YAHOO! SPORTS (Dec. 10, 2014, 4:06 PM), http://sports.yahoo.com/blogs/mlb-big-league-stew/report—mlb-gross-revenues-reach-a-record—9-billion-in-2014-210652796.html.

19. Maury Brown, *Major League Baseball Sees Record $9 Billion in Revenue for 2014*, FORBES (Dec. 10, 2014, 7:00 AM), http://www.forbes.com/sites/maurybrown/2014/12/10/major-league-baseball-sees-record-9-billion-in-revenues-for-2014/#7b78a5d06cb2; *see also* MORGAN STANLEY, NORTH AMERICA INSIGHT: SPORTS CONTENT IS KING . . . AND PERHAPS A

the NFL is estimated to increase its year-over-year total revenues by 50% to $13.3 billion.[20] A portion of this increase is driven by a 50% increase of its *Thursday Night Football* revenues in its 2016 deal with NBC and CBS.[21] In 2014, the NBA entered into a nine year television rights deal valued at $24 billion, nearly a 300% increase on the prior deal and league revenues are expected to reach $8 billion this year.[22] In 2014, the annual national broadcast rights fees paid to the major sports leagues were reported to be as follows: NFL, $6 billion; MLB, $1.6 billion; NBA, $ 900 million; NHL, $600 million.[23]

The increase in revenues received by the sports leagues and teams from the recent rounds of fees for the right to telecast games has been the driver of the escalation in asset value.[24] *Forbes* had previously reported that:

> [In 2014, MLB] saw revenues double for new broadcast deals with their national network partners FOX, ESPN, and TBS that added an additional $788.3 million a year to the league's coffers. Add that to additional local media rights deals such as the Los Angeles Dodgers (between $7 billion and $8 billion annually that sees over 30 percent distributed as revenue sharing) and multi-billion dollar deals for the Rangers, Angels, Mariners, Padres, Phillies, and soon-to-be Astros . . . and you get a significant bump.[25]

A PricewaterhouseCoopers study confirms the growth of sports media revenue in anticipating that the value of media rights for the entire

DESPOTIC RULER 1 (2016) [hereinafter MORGAN STANLEY, SPORTS CONTENT IS KING] ("Led by the NFL and NBA, sports rights growth of ~8%/yr is growing 2x faster than TV network revenue growth—currently at 4–6% and expected to moderate from here.").

20. Belzer, *supra* note 16.

21. John Ourand, *Does Media Rights Bubble Have a Leak?*, STREET & SMITH'S SPORTS BUS. J., May 2–8, 2016, at 1, 1.

22. DEL. N., THE FUTURE OF SPORTS 10 (2015), http://futureof.org/wp-content/uploads/The-Future-of-Sports-2015-Report.pdf; John Lombardo, *NBA Begins New Season Flush with Cash as Revenue Expected to Hit $8B*, STREET & SMITH'S SPORTS BUS. J., Oct. 24–30, 2016, at 1, 16; Liz Mullen, *Jump in NBA Cap Leaves Six Teams Under Minimum Spending Limit*, STREET & SMITH'S SPORTS BUS. J., Sept. 5–11, 2016, at 1, 10.

23. Cork Gaines, *The NFL Makes $6 Billion Annually Just from National Television Contracts*, BUS. INSIDER (Sept. 11, 2004, 4:36 PM), http://www.businessinsider.com/chart-national-tv-contracts-nfl-mlb-nba-nhl-2014-9.

24. The National Cable Television Association reported that in 2014, the cable programmers paid $9.9 million for sports rights fees. NAT'L CABLE TELEVISION ASS'N, AMERICA'S CABLE INDUSTRY: WORKING FOR OUR FUTURE 24 (2015), https://www.ncta.com/sites/prod/files/Impact-of-Cable-2014-NCTA.pdf; *Forbes Releases 19th Annual MLB Team Valuations*, *supra* note 17 ("The financial strength and big value increases of MLB illustrated in Forbes' valuations is due to new, or anticipated, richer national broadcasting deals.").

25. Oz, *supra* note 18 (quoting Brown, *supra* note 19).

U.S. sports industry in this decade will double from ten to twenty billion dollars.[26] The average individual franchise in the major sports leagues is now valued at $1.97 billion (NFL), $1.3 billion (MLB), $1.25 billion (NBA), and $505 million (NHL), with some teams valued in excess of $3 billion.[27] The dramatic increase in sports asset values is reflected in prices for acquisitions of franchises.[28]

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26. PRICEWATERHOUSECOOPER, SPORTS OUTLOOK: AT THE GATE AND BEYOND: OUTLOOK FOR THE SPORTS MARKET IN NORTH AMERICA THROUGH 2019, at 1 (Adam W. Jones ed., 2015), http://www.pwc.com/us/en/industry/entertainment-media/publications/assets/ pwc-sports-outlook-2016.pdf.

27. Kurt Badenhausen, *New York Knicks Head the NBA's Most Valuable Teams at $3 Billion*, FORBES (Jan. 20, 2016, 9:57 AM), http://www.forbes.com/sites/kurtbadenhausen/2016/01/20/new-york-knicks-head-the-nbas-most-valuable-teams-at-3-billion/#6f5f3812d3a5. The value of the average NBA franchise is estimated to be $1.25 billion and has increased by 33% over last year. *Id.* Also, the NBA's most recent national television rights deals done in October 2014 totaled $24 billion over nine years. *Id.* In 2015, the average NFL team was worth $1.97 billion, 38% more than the prior year, led by the Dallas Cowboys with a valuation of $4 billion. Mike Ozanian, *The Most Valuable Teams in the NFL*, FORBES (Sept. 14, 2015, 9:51 AM), http://www.forbes.com/sites/mikeozanian/2015/09/14/the-most-valuable-teams-in-the-nfl/#1d8f798e326f. "The average NHL team [was] worth $505 million" in 2015, which was a 3% increase from 2014. "Revenue averaged $133 million per team for the 2014–15 season, 8% more than the previous season." Mike Ozanian, *The NHL's Most Valuable Teams*, FORBES (Nov. 24, 2015, 9:54 AM), http://www.forbes.com/sites/mikeozanian/2015/11/24/the-nhls-most-valuable-teams-2/#4fe9960c3920. The increase for MLB was up 7% from the prior year and 59% from 2014. *Forbes Releases 19th Annual MLB Team Valuations*, *supra* note 17.

28. Reported valuations in recent franchise acquisitions:

MLB	NBA	NFL	NHL
Dodgers, $2B ('12)	Hawks, $730M ('15)	Bills, $1.4B ('14)	Coyotes, $305M ('14)
Padres, $800M ('12)	Clippers, $2B ('14)	Browns, $987M ('12)	Devils, $320M ('13)
Astros, $610M ('11)	Bucks, $550M ('14)	Jaguars, $770M ('12)	Panthers, $160M ('13)
Rangers, $593M ('10)		Rams, $750M ('10)	Dallas, $265M ('11)
Cubs, $845M ('09)		Dolphins, $1.1B ('08)	

HAMBRECHT REPORT, *supra* note 16, at 25; *Sports Franchise Valuation & Appraisal Services*, APPRAISAL ECON.: INDEP. VALUATION EXPERTS, https://www.appraisaleconomics.com/sports-team-valuation-appraisal/ (last visited Jan. 31, 2017); Kurt Badenhausen, *Record $550 Million Milwaukee Bucks Sale Highlights NBA's Prosperity*, FORBES (Apr. 17, 2014, 11:23 AM), http://www.forbes.com/sites/kurtbadenhausen/2014/04/17/record-550-million-milwaukee-bucks-sale-highlights-nbas-prosperity/#d28288531275; *Atlanta Hawks*, FORBES, http://www.forbes.com/teams/atlanta-hawks/ (last visited Jan. 31, 2017); *Buffalo Bills*, FORBES, http://www.forbes.com/teams/buffalo-bills/ (last visited Jan. 31, 2017); *Cleveland Browns*, FORBES, http://www.forbes.com/teams/cleveland-browns/ (last visited Jan. 31, 2017); *Dallas Stars*, FORBES, http://www.forbes.com/teams/dallas-stars/ (last visited Jan. 31, 2017); *Florida Panthers*, FORBES, http://www.forbes.com/teams/florida-panthers/ (last visited Jan. 31, 2017); *Jacksonville Jaguars*, FORBES, http://www.forbes.com/teams/ jacksonville-jaguars/ (last visited Jan. 31, 2017); *Miami Dolphins*, FORBES, http://www. forbes.com/teams/miami-dolphins/ (last visited Jan. 31, 2017); *New Jersey Devils*, FORBES, http://www.forbes.com/teams/new-jersey-devils/ (last visited Jan. 31, 2017); Ronald Grover & Eric Kelsey, *Ex-*

Another recent measure of the value of the assets is the price of admission to join one of the elite leagues.[29] The NHL has recently awarded an expansion franchise to Las Vegas for an expansion fee of $500 million, an increase of 625% since the last expansion in 2000.[30] In addition to the fees paid for the national telecasts of games (principally by the broadcast networks and ESPN),[31] in varying degrees from sport to sport (the NFL controls the lion's share of the telecast rights and individual NFL teams have limited rights in their own market), there are also significant rights fee payments made to teams for the telecast of games by local programmers.[32] Either a local programmer telecasts a single sport, or a regional sports network (RSN) packages more than one sport for distribution within a telecast market.[33] With increasing frequency, sports teams are retaining their rights and telecasting their own games (as a single sport outlet or as an RSN) in their local market in direct deals with distributors.[34] The values of these local rights, and correspondingly the asset value for teams that own their local television programmer or RSN, have also increased exponentially.[35]

In recognition of the explosion in value and import of digital platforms, some of the major sports leagues are judiciously carving out their rights for distribution on digital platforms.[36] Disney just invested

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Microsoft CEO Ballmer Buys NBA's LA Clippers for $2 Billion, REUTERS (May 30, 2014, 4:27 AM), http://www.reuters.com/article/us-laclippers-ballmer-idUSKBN0E92GK20140530; Mike Ozanian, *Andrew Barroway Now Owns 54% of Arizona Coyotes*, FORBES (Mar. 10, 2016, 4:19 PM), http://www.forbes.com/sites/mikeozanian/2016/03/10/andrew-barroway-now-owns-54-percent-of-arizona-coyotes/#309b48e87632.

29. Darren Rovell, *NHL Franchise Fees: Is Price Right*?, ESPN (Aug. 9, 2002), http://a.espncdn.com/nhl/s/expansion4a.html.

30. Helene Elliott, *Jackpot: Las Vegas is Awarded an NHL Expansion*, L.A. TIMES (June 22, 2016, 4:47 PM), http://www.latimes.com/sports/ducks/la-sp-nhl-expansion-elliott-20160622-snap-story.html; Rovell, *supra* note 29.

31. *See* DEL. N., *supra* note 22, at 10; *see also* HAMBRECHT REPORT, *supra* note 16, at 11; Ourand, *supra* note 5, at 16 (explaining how the fees for telecasting by ESPN and other television networks are rising).

32. HAMBRECHT REPORT, *supra* note 16, at 19.

33. *See* Diana Moss, *Regional Sports Networks, Competition, and the Consumer*, 21 LOY. CONSUMER L. REV. 56, 56 (2008).

34. *See id.* at 57–58.

35. Based on Kagan's 2016 revenue data and an eight times cash flow multiple, the top twenty RSNs have an average asset valuation of slightly over twenty billion dollars, led by YES Network at $4.9 billion. SNL Kagan RSN Data (Sept. 19, 2016) (unpublished Excel file) (on file with author); *see also* Oz, *supra* note 18; *Forbes Releases 19th Annual MLB Team Valuations*, *supra* note 17.

36. *See* Brooks Barnes, *Disney Bets on Streaming, Joining with Major League Baseball*, N.Y. TIMES (Aug. 9, 2016), http://www.nytimes.com/2016/08/10/business/media/disney-bamtech-video-streaming.html.

one billion dollars in MLB's technology platform,[37] and in 2015 the NFL licensed some of its games for exclusive distribution via streaming only on Yahoo's sports channel.[38] Recently, Twitter entered into exclusive licenses to live-stream games from the NFL for the 2016 season, adding to its existing live streaming deals with the NHL, NBA, and MLB.[39]

What is responsible for the demand for sports programming such that it has become "must have" programming?[40] The major sports leagues have enjoyed some success in widening the demographic of their fans, and therefore their television audience.[41] Football is now watched by almost as many women as men.[42] Similarly, basketball has broadened its audience to appeal to more women.[43] Both of those sports have continued to attract millennials as well as an older demographic, thereby positioning themselves as favorable advertiser targets and laying the foundation for a fan base that is less susceptible to cyclicality.[44] Some of the sports leagues have successfully expanded their appeal to the growing Hispanic audience: "The 2015 World Series gave MLB fans a matchup of powerhouses on both sides of the plate. While average viewership saw a

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37. *See id.*

38. Julia Boorstein, *Yahoo Attracts 15M Viewers for Live-Streamed NFL Game*, CNBC (Oct. 26, 2015, 1:18 PM), http://www.cnbc.com/2015/10/26/yahoo-attracts-15m-viewers-for-live-streamed-nfl-game.html.

39. John Ourand, *NFL-Twitter Alliance Top Execs' List of Media Stories to Watch*, STREET & SMITH'S SPORTS BUS. J., Aug. 15–21, 2016, at 10, 10; *Bills-Jets Game Reaches 2.1 Million Viewers on Twitter Broadcast*, ESPN (Sept. 16, 2016), http://www.espn.com/nfl/story/_/id/17565438/twitter-broadcast-buffalo-bills-new-york-jets-game-thursday-night-reaches-21-million-viewers; Mike Isaac, *With the N.F.L. Deal, Twitter Live-Streams Its Ambitions*, N.Y. TIMES (Aug. 14, 2016), http://www.nytimes.com/2016/08/15/technology/with-nfl-deal-twitter-live-streams-its-ambitions.html.

40. NIELSEN, YEAR IN SPORTS MEDIA REPORT 5 (2013) (stating that although sports account for just barely 1% of all TV programming, it accounts for 7% of the total cost of pay-TV, and 50% of tweets about television); Derek Thompson, *Which Sports Have the Whitest/Richest/Oldest Fans*?, ATLANTIC (Feb. 10, 2014), http://www.theatlantic.com/business/archive/2014/02/which-sports-have-the-whitest-richest-oldest-fans/283626/ ("Although sports account for just barely 1 percent of all TV programming, it accounts for 7 percent of the total cost of pay-TV, and 50 percent of the Tweets about television, according to Nielsen's 2013 Year in Sports Media Report.").

41. *See* Drew Harwell, *Women Are Pro Football's Most Important Demographic. Will They Forgive the NFL?*, WASH. POST (Sept. 12, 2014), https://www.washingtonpost.com/business/economy/women-are-pro-footballs-most-important-market-will-they-forgive-the-nfl/2014/09/12/d5ba8874-3a7f-11e4-9c9f-ebb47272e40e_story.html.

42. *See id.*

43. Rob Mahoney, *The NBA's Forgotten Demographic*, NBC SPORTS (Mar. 23, 2010, 7:05 PM), http://nba.nbcsports.com/2010/03/23/the-nbas-forgotten-demographic/.

44. *Cf.* Harwell, *supra* note 41 ("Female fans, a group beloved by advertisers, represent the league's biggest opportunity for growth."); Mahoney, *supra* note 43 ("The NBA makes all kinds of concerted efforts to . . . appeal to their target demographics. . . . There are efforts to reach out, . . . and to flat out earn.").

6% increase from the 2014 World Series, what is more notable is the 30% increase from Hispanic viewers of English-language World Series telecasts."[45]

Sports content, due to its live character, is less susceptible to certain technology changes (e.g., copying, time-shifting) that have altered the entertainment industry Ecosystem.[46] As discussed in detail in Part II, among the most profound and Ecosystem-threatening changes have been the ability of viewers to record, copy, and fast-forward programming. This capability allows viewers both to time-shift and watch content when the viewer, not the programmer, wants and to skip ads.[47] Additionally, the copying functionality allows viewers to share the content with other viewers without additional payment for content.[48] For the reasons described in detail in Part II, each of these features has been responsible for a significant reduction in revenues for the participants in the entertainment industry. One of the distinguishing attributes of viewing a sports event is the desire to experience an athletic competition in real time.[49] Thus, sports content, due to its live character, is much less susceptible to either of these revenue-threatening, functions:

> While the rise in time-shifted viewing largely altered viewership trends for most program genres, live viewing remains the standard for sports. According to TV data from Q4 2015, 95% of total sports program viewing happened live. In comparison, only 66% of "General Drama" viewers watched live, likely as a result of the increased number of outlets that are now available to catch up on a missed episode.[50]

Not only is sports consumption increasing on TV and digital outlets,[51] but sports radio listenership is on the rise as well: "From 2011 to 2015, the Average Quarter-Hour (AQH) share increased 12% (4.1% to 4.6%), and showed steady increases year over year."[52]

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45. NIELSEN, YEAR IN SPORTS MEDIA REPORT 15 (2015) [hereinafter NIELSEN, SPORTS MEDIA REPORT 2015]. *See supra* Section II.C.2.

46. *See id.*; Jack Loechner, *Time Shifted TV Viewing Is the Default*, MEDIAPOST (Apr. 16, 2015, 6:15 AM), http://www.mediapost.com/publications/article/247581/time-shifted-tv-is-the-default.html.

47. Loechner, *supra* note 46.

48. *Time Shifting*, INTERACTIVE TELEVISION DICTIONARY & BUS. INDEX, http://www.itvdictionary.com/personal_tv.html (last visited Jan. 31, 2017).

49. *See* NIELSEN, SPORTS MEDIA REPORT 2015, *supra* note 45, at 4.

50. *Id.*

51. *See, e.g.*, *id.* at 4–5 ("In 2015, there were over 127,000 hours of sports programming available on broadcast and cable TV and 31+ billion hours spent viewing sports, which is up 160% and 41% respectively from 2005. . . . In 2015, there was over 69 billion minutes, or 1.2 billion hours, spent on sports sites via smartphones. This is up an impressive 22% from 2014.").

52. *Id.* at 6.

The demand for sports programming has expanded to include the use of sports as a storyline or as the context for both scripted and non-scripted dramatic programming.[53] While deviating from the distinguishing feature of "live" sports content, television networks are using sports teams or athletes as the focal point for thirty or sixty minute shows (e.g., *Hard Knocks*, *A Football Life*, *Undrafted*, *Ballers*, *Friday Night Lights*, and *Pitch*).[54] Arguably, this continues the continuity of the narrative of the brand value of the major sports leagues. In sum, rights holders pay a premium for sports programming because, relative to other categories of entertainment content, it attracts and retains its audience.[55]

The four major U.S. professional sports differ in the percentage of central and local revenue contribution to franchise revenues and value and in the structural limits on player expense, the largest cost category.[56] All four leagues distribute central revenues (e.g., national telecast fees) to each of their teams and most sports teams from larger markets generally benefit from more lucrative local media, ticket, advertising, and other revenues than their small market counterparts.[57] The NFL represents the most centralized model, followed by the NBA and MLB; the NHL has the greatest proportion (eighty percent) of local revenue streams constituting individual club operations.[58] As a result, there is a

53. *See generally* Greg Braxton, *'Ballers' on HBO Aims to be Rare Sports-Themed Series with Winning Game Plan*, L.A. TIMES (June 17, 2015, 3:15 AM), http://www.latimes.com/entertainment/tv/la-et-st-ballers-sports-tv-shows-20150617-story.html (discussing the use of the Miami Dolphins as context for new scripted drama).

54. *See id.*

55. In 2016, eighty-eight of the 100 most watched TV shows were sports events. *See* Austin Karp & John Durand, *Sports Leaves Little Room for Debate on Who Rules Viewership*, STREET & SMITH'S SPORTS BUS. J., Jan. 16–22, 2017, at 15, 15. *See also supra* notes 51–52 and accompanying text.

56. *See* DUANE W. ROCKERBIE, THE ECONOMICS OF PROFESSIONAL SPORTS 1 (2013), http://classes.uleth.ca/201103/econ2120a/SportsText.pdf.

57. *See, e.g.*, Ozanian, *The NHL's Most Valuable Teams*, *supra* note 27 (discussing how the New York Rangers' "cash rich area," big market, ticket sales and advertising allowed the team to be the most valuable team in the NHL); Charlie Zegers, *Revenue Sharing and North America's Major Pro Sports Leagues*, ABOUT.COM, http://basketball.about.com/od/nba-vs-nbapa/ss/Revenue-Sharing-And-North-Americas-Major-Pro-Sports-Leagues.htm (last visited Jan. 31, 2017) (follow "Show All" hyperlink).

58. *See* Ozanian, *The NHL's Most Valuable Teams*, *supra* note 27. Based on the public filings of the Green Bay Packers (a public company) in 2015 the NFL distributed $226.4 million to each club, up 20.6 % from the prior year. The Packers had local revenue of $149.3 million, player costs of $150 million, total expenses of $336.3 million, profit from operations: $39.4 million and net income of $29.2 million. Richard Ryman, *Packers' Record-Setting Financial Run Continues*, GREEN BAY PRESS-GAZETTE (July 20, 2015, 4:00 PM), http://www.greenbaypressgazette.com/story/money/2015/07/21/green-bay-packers-record-setting-financial-run-continues/30429525/.

> [In the NBA,] [a]ll teams contribute annually a fixed percentage of their total local

much wider range among revenues and asset values of hockey and baseball teams than football teams.[59] To promote competitive parity, leagues have adopted systems to address disparities among teams in revenues, supporting the ability of smaller-market teams to absorb higher player payrolls.[60] Another mechanism to promote competitive balance, and arguably profitability, is the imposition of limits or disincentives on team spending on player salaries, which takes the forms of caps and minimums on spending in the NFL, NBA, and NHL, and a "luxury tax" on the highest spenders in the NBA and MLB.[61]

Another implication of the increase in local team revenues is the avoidance or minimization of team sharing of these revenues among fellow teams who are competitors.[62] Like tax avoidance, teams can structure deals to shelter as much of their revenues as possible from the league pool.[63] It is beyond the scope of this Article to examine the efficiency or policy consequences of these safe harbors regarding the corporate and operational arrangements that have been disclosed (e.g., investment in new stadia, equity in RSNs) teams have employed to reduce

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> revenue, roughly 50 percent, minus certain expenses such as arena operating costs, into a revenue-sharing pool. That money is then divided back out among the league's 30 clubs in such a fashion that some end up as net recipients while others are net payers.

John Lombardo, *NBA's Revenue Sharing Getting Re-Evaluation*, STREET & SMITH'S SPORTS BUS. J., Oct. 6–12, 2014, at 4, 4.

59. Kelly Smith, *Valuing Professional Sports Franchises: An Econometric Approach*, ABOUT.COM, http://economics.about.com/library/weekly/aa043004g.htm (last visited Jan. 31, 2017).

60. ROCKERBIE, *supra* note 56, at 126–32. In MLB, all teams contribute thirty-four percent of their defined revenues to a pool that gets redistributed to teams in inverse order of their revenues. *See* Craig Davis, *Marlins Missing Out on Local TV Bonanza*, SUN SENTINEL (Mar. 10, 2013), http://articles.sun-sentinel.com/2013-03-10/sports/fl-marlins-tv-deal-0310-20130308_1_fox-sports-florida-tv-money-market-value.

> [In the NHL,] [t]he top ten money-making teams contribute to the pool. The bottom 15 money-making teams are eligible to collect from it. The amount of money contributed by the top ten teams is set by a formula that includes a percentage of overall league revenues and some playoff revenues. The exact number isn't worked out until the season is over and all revenues have been counted.

Zegers, *supra* note 57. In the NFL, "teams share close to 61 percent of total revenues." Howard Bloom, *NFL Revenue-Sharing Model Good for Business*, SPORTING NEWS (Sept. 5, 2014), http://www.sportingnews.com/nfl/news/nfl-revenue-sharing-television-contracts-2014-season-business-model-nba-nhl-mlb-comparison-salary-cap/gu0xok7mphu01x3vu875oeaq6.

61. *See* Mullen, *supra* note 22, at 10 (noting that NBA cap increased from seventy to ninety-four million dollars per team and each team must spend at least ninety percent of the cap).

62. Davis, *supra* note 60, at 1.

63. *Id.*

their "tax" by the league.[64] For example, as part of the Dodgers purchase in 2012, the league agreed that only eighty-four million dollars (increasing four percent per annum) of its annual local media rights fee would be contributed toward the league revenue pool.[65] *Forbes* estimates the Dodgers' local revenues to be $438 million, of which the local rights fee is the largest component.[66] As the President of the Miami Marlins, has said, "The biggest danger in our game today is the ability of teams to avoid revenue sharing through their TV deals and how they are putting them together."[67]

There are several significant implications of the increased media revenues for sports teams. The programmers who are paying for these rights must recover these costs from their two revenue streams: (1) the fees they charge multichannel video program distributors (MVPDs), and (2) the sales of advertising to advertisers.[68] One report indicates that the fees paid by distributors for sports programming accounts for one-third of the total costs of the programming bundle that distributors charge to subscribers.[69] Another analysis suggests the cost of sports rights fees may account for as much as fifty percent of the cable bundle.[70] Thus, as a result of the increase in content costs distributors pay for sports programming, subscribers (and potentially advertisers) are paying more for their programming bundle, whether they are sports viewers or not.[71]

There are indicators that this halcyon era of appreciating sports revenues and asset value powered by double-digit growth of rights fees, however, may be moderating or ending. The most recent cycle of television rights deals, albeit not in the major U.S. sports, have yielded lower fees (reduction in fees for Conference USA) or no deal at all, as in the case of the French Open (Tennis Channel).[72] The

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64. *See id.*

65. *See id.*; John Helyar et al., *L.A. Dodgers Secret TV Deal with MLB Fuels Spending Spree*, BLOOMBERG (Sept. 27, 2012, 5:07 PM), http://www.bloomberg.com/news/articles/2012-09-27/l-a-dodgers-secret-tv-deal-with-mlb-fuels-spending-spree.

66. *Los Angeles Dodgers*, FORBES, http://www.forbes.com/teams/los-angeles-dodgers/ (last visited Jan. 31, 2017).

67. Davis, *supra* note 60.

68. *See* MORGAN STANLEY, WALT DISNEY CO.: ESPN SLOWDOWN OFFSETS SUCCESS AT THE MOVIES 4 & tbl.2. (2016) [hereinafter MORGAN STANLEY, WALT DISNEY CO.].

69. *Id.* at 14 tbl.15, 15 tbl.16. One market indicator of the relative value and importance of sports content is the price MVPDs pay (per sub per month) ABC Disney for ESPN versus what they pay other programmers for channels (e.g., $6.10 for ESPN, next highest channels are TNT, $1.50; NFL Network, $1.22; FOX News, $1.04). SNL KAGAN, ECONOMICS OF BASIC CABLE NETWORKS 2015, at 71 (2015) [hereinafter SNL KAGAN 2015].

70. OOYALA, *supra* note 9, at 9.

71. *See id.*

72. Ourand, *supra* note 21, at 1; Sam Cooper, *beIN Sports to Broadcast 10 C-USA Games*

PricewaterhouseCoopers *Sports Outlook*'s findings lend additional credibility to this hypothesis, as their study anticipates a de-acceleration of the growth rate of television rights fee revenues for the sports industry.[73] While predicting an average growth of 7.2% in the industry's media rights revenues for the five-year period, the compounded annual growth rate drops to an average rate of 3.83% for the last three years and forecasts a growth rate of just 3.4% for 2019 (i.e., the annual growth rates for the media rights fees over the five years are 12.1%, 12.6%, 3.9%, 4.2%, and 3.4%).[74] Further evidence that MVPDs may no longer view sports as a "must-have" category of content are the impasses between several distributors and teams for the carriage of games in major markets, including New York and Los Angeles.[75]

Since the summer of 2013, ESPN has lost seven million and FS1 two million subscribers.[76] NBC Sports, however, gained two million subscribers in 2016,[77] perhaps due to the launch of its NASCAR coverage and popularity of its carriage of the European Premiere League. While there are many other indications that demand for sports programming remains robust, and indeed eclipses virtually all other categories of content, what poses a risk to the traditional media companies is the age dispersion of the viewership losses.[78] There is, however, a less dire explanation: the demand for sports viewing is still strong in the millennial audience but the mode of experiencing sports (e.g., on mobile devices) is shifting in greater numbers than in other age groups.[79] In addition, due to ESPN's reported high minimum penetration guarantees in its carriage agreements with MVPDs, it appears to be as well positioned as any cable network to withstand the possibility of further viewer erosion.[80]

(Update), YAHOO SPORTS (May 24, 2016, 4:50 PM), http://sports.yahoo.com/blogs/ncaaf-dr-saturday/dwindling-c-usa-tv-deal-reportedly-includes-bein-sports-212636675.html ("As for C-USA's contract as a whole, . . . it's slated to be $7 million 'at the most,' a significant reduction in allocated money from previous years.").

73. PRICEWATERHOUSECOOPER, *supra* note 26, at 1.

74. *Id.*

75. *See infra* Section II.C.5.

76. Ourand, *supra* note 21, at 17.

77. SNL KAGAN 2015, *supra* note 69, at 519.

78. *See infra* note 162 and accompanying text.

79. David Katz, *Mobile, Millennials and (Social) Media: What They Mean for Sports Content*, STREET & SMITH'S SPORTS BUS. J., June 20–26, 2016, at 28, 28; *see also infra* Part IV.

80. SNL KAGAN 2015, *supra* note 69, at 29, 35–46. However, Disney Corp's recent earnings (Feb. 7, 2017), reflect "some erosion" (decline by 11% in the Cable Division's Operating Income) in ESPN due to decreased advertising fees, migration of subscribers to Skinny Bundles, fewer new subscribers, and some cord cutting. *See Fast Money: Interview by Julia Boorstin with Robert Iger, CEO, The Walt Disney Co.* (CNBC television broadcast

An additional concern is that nearly all of the MVPDs offering consumers the option to choose a smaller number of cable networks in their subscription package (a "Skinny Bundle")[81] exclude sports networks from their Skinny Bundle.[82] All of the networks carrying sports programming have confronted the issue of escalating rights fees payment.[83] However, the sports networks face a more acute dilemma than the other programmers because the cost of sports programming has been increasing at a higher rate than the cost of other programming.[84] Accordingly, on a competitive basis, this puts the sports-themed programmers at a financial disadvantage unless they can pass these costs along to subscribers and advertisers.[85]

What is not clear is whether these recent data points are symptomatic of an industry in the process of resetting the "new normal" caused by dislocations in the entertainment industry, or they are isolated occurrences that will be subsumed by more robust deals consistent with the trend of the first half of the decade.

II. Disruptions to the Ecosystem of the Entertainment Industry

The changes to the Ecosystem have altered the fundamental process of creating, packaging, and distributing entertainment product to consumers. Every aspect of the business is affected—from the content creators to their audience, and every participant in between. It is beyond the scope of this Article to predict how the entertainment industry's Ecosystem will be transformed. However, several things are indisputable: the changes will continue to wreak havoc and will result in many companies shrinking and disappearing, and this will occasion vast transfers of capital among the entities left standing in the industry.[86] In stark contrast, however, are the benefits to the consumers. At the end of

Feb. 7, 2017), http://www.cnbc.com/2017/02/07/bob-iger-disney-ceo-on-espn-future-of-tv.html.

81. *See* OOYALA, *supra* note 9, at 9.

82. MORGAN STANLEY, WALT DISNEY CO., *supra* note 68, at 5 tbl.3.

83. *See, e.g.*, Craig Edwards, *Is There an Upcoming TV Bubble for MLB?*, SB NATION PINSTRIPE ALLEY (Apr. 9, 2013, 3:00 PM), http://www.pinstripealley.com/2013/4/9/4190718/is-there-an-upcoming-tv-bubble-for-mlb (discussing how several networks have faced challenges with escalating rights fees for baseball teams).

84. *See supra* note 5 and accompanying text.

85. *See* MORGAN STANLEY, SPORTS CONTENT IS KING, *supra* note 19, at 8–9, 9 fig.14, 10 fig.15.

86. *See* Kevin Draper, *Is the Live Sports Bubble Finally Bursting?*, DEADSPIN (May 3, 2016, 6:10 PM), http://deadspin.com/is-the-live-sports-rights-bubble-finally-bursting-1774516030; *see generally* Anthony Crupi, *CBS, NBC to Share 'Thursday Night Football' Rights*, ADVERTISINGAGE (Feb. 1, 2016), http://adage.com/article/media/hold-publish-cbs-retains/302445/ (noting that Thursday Night Football "wreak[ed] havoc" on scheduling).

the content pipeline, consumers have been and will be the beneficiaries of unparalleled choices in content offerings, advances in device technology, and control over when, where, and how to view content.[87]

Part II of the Article catalogues the principal factors that are responsible for the changes to the Ecosystem.[88]

This transformational epoch in the entertainment industry has its roots in a fundamental change in technology: the creation of content in a digital format.[89] The shift from analog to digitized data precipitated the sea-change in the storage, organization, retrieval, copying, distribution, and sharing of data. What followed was nothing short of a Copernican Revolution[90] in the shift from a system with the creator/distributor as its focus to a consumer-centric universe.[91] For example, the proliferation of video channels;[92] the portability of content devices;[93] the availability of programming on-demand;[94] the availability of music on an individual song basis;[95] the ability to record, copy, and view on a time-shifted basis and share content of all platforms and media (e.g., music, video, print);[96] and the elimination (or reduction) of geographic and political barriers to

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87. *See* Julie Liesse, *How Cable's New Golden Age of Content Is Changing the Game*, ADVERTISINGAGE (May 1, 2015), http://adage.com/lookbook/article/cable-broadcast/cable-s-golden-age-content-changing-game/298363/; *see also* Tom Impallomeni, *How You Watch Sports Is About to Change Forever with Virtual Reality*, SINGULARITYHUB (Aug. 19, 2015), http://singularityhub.com/2015/08/19/how-you-watch-sports-is-about-to-change-forever-with-virtual-reality/.

88. Part II is not intended to be an exhaustive list, but captures the prime movers of the changes that have transformed the business model.

89. *See generally* Raghav Bahl, *How the Media Will Rise in the Face of the Digital Revolution*, TECHCRUNCH (July 28, 2016), https://techcrunch.com/2016/07/28/how-the-media-will-rise-in-the-face-of-the-digital-revolution/#comments (discussing potential for future of digital content).

90. For a comprehensive treatment of paradigmatic shifts in thinking, see Thomas Kuhn, *The Structure of Scientific Revolutions*, *in* 2 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE 103 (Otto Neurath et al. eds., 2d. ed., enlarged 1970) ("[T]he differences between successive paradigms are both necessary and irreconcilable. . . . As a result, the reception of a new paradigm often necessitates a redefinition of the corresponding science.").

91. *See supra* note 87 and accompanying text.

92. *See* Amanda Walgrove, *The Explosive Growth of Online Video, in 5 Charts*, CONTENTLY (July 6, 2015), https://contently.com/strategist/2015/07/06/the-explosive-growth-of-online-video-in-5-charts/.

93. *See* Sheau Ng, *A Brief History of Entertainment Technologies*, 100 PROCEEDINGS IEEE 1286, 1288–89 (2012).

94. *Id.* at 1288.

95. *See* Frank Woodworth, *Unbundling the Album: A Business Case for Releasing Single Songs*, MUSIC THINK TANK (Feb. 8, 2012), http://www.musicthinktank.com/blog/unbundling-the-album-a-business-case-for-releasing-single-so.html.

96. *See* Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 62 (2010).

the availability of information, are just some of the changes that have placed more content and control in the hands of the consumer.[97] Like most revolutions, the digital revolution has also caused bloodshed. The creators and distributors of entertainment content have seen the eradication of a time-tested system that created financial incentives for their creative output and the evisceration of the profitability of their craft or business.[98] To evaluate more accurately how the changes may affect the sports industry, it is necessary first to understand the Ecosystem that has been in place in the television industry[99] for nearly a century.

The broadcast television business model was predicated on content being created ("programmed") to a mass audience to deliver commercial advertising messages, or as one commentator summarized, "Strictly speaking, commercial broadcasters sell time that is used for dissemination of advertising messages. In actuality, though, what is sold is access to the thoughts and emotions of people in the audience."[100] The commercial broadcast model was used to reach consumers over various spectrum frequencies established by Congress first in the Radio Act of 1912,[101] and later regulated by the Federal Radio Commission, created by the Radio Act of 1927.[102] Under the 1927 Act, the Radio Commission was chartered to issue licenses for the radio spectrum based upon the standard of "public interest, convenience and necessity."[103] Congress enacted the Communications Act of 1934 to create a commission for the oversight of radio, telephone, and telegraph, and since then broadcasting has been administered and licensed by the Federal Communications Commission (FCC).[104] The scope of the FCC's authority to regulate broadcast television includes the power to determine who can use the public airwaves through its awarding of spectrum licensing.[105] The FCC determines whether the prospective broadcast licensee is qualified, the

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97. Bill Gates, *Shaping the Internet Age*, MICROSOFT (Dec. 1, 2000), https://news.microsoft.com/2000/12/01/shaping-the-internet-age/#sm.0000tty6vklm8dr2x8i 21vhi9dxpi.

98. *See* Bahl, *supra* note 89.

99. The business model for the television industry bears most of the critical elements of the models for the other entertainment industry business models and for purposes of this Article serves as a proxy for the other industry sectors.

100. HAROLD VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 312–13 (9th ed. 2015).

101. Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302.

102. Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162.

103. *Id.* § 11, 44 Stat. at 1167.

104. Communications Act of 1934, Pub. L. No. 73-416, § 1, 48 Stat. 1064, 1064 (codified as amended at 47 U.S.C. § 151 (2012)).

105. MEDIA BUREAU, FED. COMMC'NS COMM'N, THE PUBLIC AND BROADCASTING: HOW TO GET THE MOST SERVICE FROM YOUR LOCAL STATION 8 (rev. ed. 2008), https://apps.fcc.gov/edocs_public/attachmatch/DA-08-940A2.pdf.

specific radio frequency assigned to the licensee, and other operational and programming requirements.[106]

Programmers could transmit commercial advertising embedded in audio-video programming via television (first over UHF then VHF) or audio programming to radio receivers (first AM then FM).[107] For both the radio and later the television industry, the broadcast model depended on advertising as its sole revenue stream.[108] The ability of a programmer to reach consumers was measured by the ratio of viewers (listeners, in the case of radio) of the program as a percentage of total TV or radio households.[109] This measurement, known as ratings points,[110] determines the cost per advertising spot on the program,[111] and thus the success or failure of a program. Advertisers utilize the cost per thousand households (CPM) to measure the relative efficiency of purchasing commercials on different programs for the delivery of their ad messages to consumers.[112] Obviously, the selection of programming genres influences the success of delivering specific commercial messages to specific audiences (i.e., historically laundry products were sold during daytime programming on radio, which also led Proctor & Gamble to sponsor these shows, resulting in the expression "Soap Operas").[113] Consequently, advertisers became more nuanced in the selection of program content to serve as the vehicle for commercial spots of its products and evaluated the choices based upon the CPM within specific demographics (e.g., age, gender, race).[114] In an alternative financial arrangement, the sponsorship model, advertisers are more deeply associated and involved with the production of programming that serves as an efficient promotional pipeline for its products.[115] In the broadcast model, the significant number of viewers per network meant that the advertiser's expectation could be met if a

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106. *Id.* at 8–9.

107. *See* Douglas W. Webbink, *The Impact of UHF Promotion: The All-Channel Television Receiver Law*, 34 L. & CONTEMP. PROBS. 535, 538–44 (1969) (discussing the FCC's attempts to transition television from VHF to UHF transmission); Christopher Sterling et al., *Radio*, BRITANNICA ACAD., http://academic.eb.com/levels/collegiate/article/345387 (last updated May 15, 2014) (discussing radio's transmission history).

108. *See* VOGEL, *supra* note 100, at 59 ("Indeed, it might further be said that advertising has substantively subsidized the production and delivery of news and entertainment throughout the last century.").

109. *Id.* at 315.

110. *Id.*

111. *Id.* at 315–16.

112. *Id.* at 317.

113. VOGEL, *supra* note 100, at 316.

114. *Id.*

115. *See id.* at 364 ("As may be inferred, commercial sponsorship of cable programming has become increasingly attractive to advertisers . . . .").

relatively small percentage of these consumers would actually be influenced by ads.[116]

With the advent of cable television systems, an MVPD could deliver substantially more channels than the spectrum bandwidth the FCC licensed to television stations over the terrestrial airwaves (e.g., the average number of channels available to cable subscribers went from 281 in 2000 to 565 in 2006).[117] Cable television is regulated by the FCC, as provided by the Cable Communications Policy Act of 1984,[118] and subsequently amended by the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act"), and the 1996 Telecommunications Act.[119] Consumers who subscribed to cable television could choose from a much wider range of programming alternatives than was offered by broadcast television.[120] More importantly, cable networks could segment the consumer marketplace based upon demographic or other characteristics.[121] For example, Lifetime Network was programmed for women,[122] Nickelodeon served children,[123] and ESPN was designed to target primarily male viewers.[124] In 1994, several Direct Broadcast Satellite (DBS) operators (DirecTV, PrimeStar, USSB, and later EchoStar) entered the consumer video market and, like cable distributors, offered viewers more channels.[125]

Thus, the economic model for television evolved from programming serving as the delivery conduit for commercial messages to a wide broadcast audience to one that targeted a segment of the audience through niche-focused cable networks.[126] Another distinguishing characteristic was that unlike the ad-supported broadcast model, the cable television

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116. *See id.* at 316, 364.

117. *See* Amendment of the Comm'n's Rules Related to Retransmission Consent, 26 FCC Rcd. 2718, 2769 (2011) (statement of Comm'r Meredith Atwell Baker, Member, Federal Communications Commission); VOGEL, *supra* note 100, at 321.

118. 47 U.S.C. § 521 (2012).

119. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460; Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Additionally, within each marketplace, cable franchises are awarded by local regulators. *See Cable Television*, FED. COMM. COMMISSION, www.fcc.gov/media/engineering/cable-television (last updated Dec. 15, 2015).

120. *See* TIMOTHY A. BORCHERS, PERSUASION IN THE MEDIA AGE 94 (2002).

121. *Id.* at 94–95.

122. *See* LIFETIME, http://www.mylifetime.com (last visited Jan. 31, 2017).

123. *See* NICKELODEON, http://www.nick.com (last visited Jan. 31, 2017).

124. *See* ESPN, http://www.espn.com (last visited Jan. 31, 2017).

125. VOGEL, *supra* note 100, at 380 n.37 and accompanying text. Unlike cable television, which is confined to its franchise territory, DBS is transmitted to a nationwide footprint. *See id.* at 370–71.

126. *Id.* at 312–15, 354–56.

economics were supported by dual revenue streams: fees from the sale of advertising spots plus subscriber payments to the cable systems (and later DBS operators) that delivered the program content to the home.[127] The allocation of advertising spots between the programmer and the distributor was negotiated as part of the overall economics of the agreement to carry the content (the "Carriage Agreement").[128] In the typical Carriage Agreement, the fees paid to the programmer for its content would be established and the distributor would receive a small number of "local ad avails" to sell to advertisers or to use to promote its service.[129]

A. Technological Disruptions to the Entertainment Industry Ecosystem

1. Audience Fragmentation

The introduction of digitized video content accelerated the evolution from telecasting to a broad audience, then to niche cable channels and more recently to the delivery of highly specialized programs tailored to a selected audience.[130] The shift from analog to digital television, compression technology of the video signal, MP3 format for audio signals, and deployment of fiber-optic cable, to name a few, have allowed cable, satellite, audio, and broadband system providers to carry significantly more content at a lower cost over their distribution systems.[131] This has provided the storage and economic capacity for the delivery of more channels of programming, with more functionality associated with those program offerings.[132] Viewers who could once access only three or four broadcast networks,[133] which were eventually supplemented with a relatively modest bundle of approximately a dozen cable channels,[134] now receive hundreds of channels including premium channels (generally featuring recently released movies and pay-per-view

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127. *Id.* at 374.

128. *See* Shalini Ramachandran, *Comcast Sued Over Its Grip on Local Cable TV Ads*, MARKETWATCH (May 23, 2016, 7:07 PM), http://www.marketwatch.com/story/comcast-sued-over-its-grip-on-local-cable-tv-ads-2016-05-23.

129. *See Cable Carriage of Broadcast Stations*, FED. COMM. COMMISSION, https://www.fcc.gov/media/cable-carriage-broadcast-stations (last updated Dec. 9, 2015).

130. *See* JONATHAN LEVY ET AL., OFFICE OF PLANS & POLICY, FED. COMMC'NS COMM'N, WORKING PAPER NO. 37, BROADCAST TELEVISION: SURVIVOR IN A SEA OF COMPETITION 62 (2002).

131. *See id.* at 77.

132. *Id.*

133. Thomas R. Eisenmann, *Cable TV: From Community Antennas to Wired Cities*, HARV. BUS. SCH. (July 10, 2000), http://hbswk.hbs.edu/item/cable-tv-from-community-antennas-to-wired-cities.

134. *Id.*

sports or other live events),[135] non-linear,[136] or video on demand (VOD),[137] and some channels in high-definition quality.[138] Most MVPDs offer options for their subscribers to include in their cable set top box (STB) enhanced functionalities, such as a digital video recorder (DVR).[139] A DVR, whether in an STB or purchased separately by the consumer, allows the viewer to record programs and view them at a later time.[140]

This proliferation of content offerings, channels, and platforms has transformed the Ecosystem from mass to niche programming.[141] Advertisers have sought the ability to target their commercials more precisely to the consumers who will be most susceptible to their messaging.[142] With the data available from online click-throughs, digitized search engines, and STBs, programmers and advertisers are able to identify more accurately the likely buyers to align with their products.[143] However, the full potential of addressable, targeted advertising and programming for individual consumers has not been realized.[144]

There are still significant investments in the creation of quality content, but a wide disparity exists between traditional media and digital media in the capital needed to create an infrastructure to distribute the content.[145] The cable industry reports that since 1996 it has incurred a $230 billion investment in capital projects to improve and expand the

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135. *See* Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, 80 Fed. Reg. 2078, 2079–80 (proposed Jan. 15, 2015) (proposed amendments to 47 C.F.R. pt. 76).

136. *See id.* at 2080.

137. *See id.*

138. *See MVPDS and Pay TV Operators*, COMCAST TECH. SOLUTIONS, https://www.comcastwholesale.com/solutions-industry/mvpds (last visited Jan. 31, 2017).

139. *DVR*, TECHTERMS, http://techterms.com/definition/dvr (last visited Jan. 31, 2017).

140. *Id.*

141. *See supra* notes 120–125, 130–140, and accompanying text.

142. *See* Bobby White, *Watching What You See on the Web*, WALL STREET J. (Dec. 6, 2007, 12:01 AM), http://www.wsj.com/articles/SB119690164549315192; *see also* Shira Ovide, *Cable TV Puts New Spin on Ads*, WALL STREET J. (May 16, 2007, 12:01 AM), http://www.wsj.com/articles/SB117928330711804439.

143. *See* Jeanine Poggi, *Dear TV: We Love You. You're Perfect. Now Change. (But Not Too Much.)*, ADVERTISINGAGE (Apr. 18, 2016), http://adage.com/article/media/future-tv-advertising/303565/.

144. *See* Steve Lohr, *With the TV Business in Upheaval, Targeted Ads Offer Hope*, N.Y. TIMES (Sept. 29, 2015), http://www.nytimes.com/2015/10/05/business/media/with-the-tv-business-in-upheaval-targeted-ads-offer-hope.html.

145. NAT'L CABLE TELEVISION ASS'N, AMERICA'S CABLE INDUSTRY, *supra* note 24, at 11; *see also* Bahl, *supra* note 89.

distribution systems, versus near-zero marginal cost in digital.[146] By comparison, the cost of distributing content via digital platforms (e.g., *Google*, *Facebook*) is low and has had the effect of driving the price of all but the most sought after content near zero.[147] Traditional packagers (networks) and distributors (MVPDs) who in the past have been able to earn far higher returns on revenue due to the ability to aggregate and scale content and drive down their costs, have to compete against digital distributors with marginal distribution costs approaching zero.[148] The marginal cost of creating high production value content will always be relatively high.[149] A key disruptive effect of digital distribution is that the return on investment in the content creation process has become even more unpredictable when the price for content is declining.[150]

2. Disintermediation

In economic terms, disintermediation refers to the concept of eliminating the middleman.[151] With the expansion of the digital marketplace, in the retail Ecosystem the parties dealing directly with the consumer are increasingly the target of disruptive innovations and are being marginalized or displaced.[152] For example, Netflix developed an over the top (OTT) service that gained consumer traction very quickly and is now distributed to more subscribers than any MVPD.[153] As sellers like Netflix begin to develop original content with audience appeal, their necessity to license content declines and they can eliminate the licensors

146. *See* NAT'L CABLE TELEVISION ASS'N, AMERICA'S CABLE INDUSTRY, *supra* note 24, at 26; *cf.* Bahl, *supra* note 89 ("[B]roadcasters . . . now have a far cheaper distribution system. . . . [T]he audience is no longer trapped in a demographic or geographic bubble—it can be global.").

147. *See* JEFFERY A. EISENACH, NERA ECONOMIC CONSULTING, THE ECONOMICS OF ZERO RATING 6 (2015); *see also* VOGEL, *supra* note 100, at 54.

148. David Waterman et al., *The Economics of Online Television: Industry Development, Aggregation, and "TV Everywhere,"* 37 TELECOMM. POL'Y 725, 728 (2013); *see* Gillian Doyle, *From Television to Multi-Platform: Less from More or More for Less?*, 16 CONVERGENCE 431, 433 (2010).

149. *See* John M. Newman, *Copyright Freeconomics*, 66 VAND. L. REV. 1409, 1415 (2013).

150. VOGEL, *supra* note 100, at 65.

151. Kevin Zhu, *Internet-Based Distribution of Digital Videos*, 11 ELECTRONIC MARKETS 273, 276 (2001).

152. *Id.*

153. VOGEL, *supra* note 100, at 370. As reported in its financial statement for the second quarter, 2016, Netflix, Inc. had over 47 million domestic subscribers. *Compare* Letter from Netflix, Inc. to Shareholders 1 tbl.1 (July 18, 2016) (stating that Netflix had 47.13 million memberships), *with* Mike Farrell, *Eat or Be Eaten*, MULTICHANNEL NEWS, Aug. 17, 2015, at 8, 8 (stating that AT&T had 26.3 million subscribers).

(studios) in the supply chain.[154] Another example of entertainment industry disintermediation is the displacement of the television networks.[155] As programs become more commoditized and, due to technologic enhancements, available from services such as iTunes on an a la carte basis, the economic viability for an intermediary to aggregate and package content and license to a distributor declines.[156] Similar efforts have been attempted in the music industry for artists to eliminate the record label as the intermediary and directly produce sound recordings on the Internet, and in publishing, some writers have sought direct printing and distribution on the web to remove the publisher and the retailer from the food chain to the reader.[157]

3. Shifting Viewership Choices

The trend lines are clear: there are substantial shifts in the way different categories of people experience content.[158] People ages eighteen and older are now watching twenty minutes less televised content per day than two years ago, a drop of seven percent.[159] From 2015 to 2016, the total amount of entertainment content watched by Americans increased by ten percent to an average of ten hours and thirty-nine minutes per day, but the amount of viewing on live television declined by one percent.[160] The Nielsen television viewing data over the past five years tells a

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154. *See generally* Nellie Andreeva, *It's Official: Netflix Picks Up David Fincher-Kevin Spacey Series 'House Of Cards,'* DEADLINE (Mar. 18, 2011, 10:00 AM), http://deadline.com/2011/03/its-official-netflix-picks-up-david-fincher-kevin-spacey-series-house-of-cards-115257/ (reporting Netflix's entry into original productions with the acquisition of *House of Cards*); Todd Spangler, *Netflix Targeting 50% of Content to Be Original Programming, CFO Says*, VARIETY (Sept. 20, 2016, 1:39 PM), http://variety.com/2016/digital/news/netflix-50-percent-content-original-programming-cfo-1201865902/ (reporting Netflix's intent to increase its library of original productions).

155. *See* Wayne Friedman, *Fear TV Displacement—And Then Realize That Everything Will Probably Be The Same*, MEDIAPOST (Jan. 11, 2016, 2:39 PM), http://www.mediapost.com/publications/article/266375/fear-tv-displacement-and-then-realize-everythin.html.

156. *See* VOGEL, *supra* note 100, at 374–75 ("Cable companies—originally only in the business of buying programming feeds wholesale and selling them retail—have become centers for distribution of digital communications systems of all kinds . . . . Simply put, there will be a diminishing need for cable channels to be packaged by wholesalers.").

157. *See id.* at 280, 299 n.27. Amazon promotes itself as enabling users to "[s]elf-publish eBooks and paperbacks for free with Kindle Direct Publishing, and reach millions of readers on Amazon." *Kindle Direct Publishing*, AMAZON.COM, https://kdp.amazon.com/ (last visited Jan. 31, 2017).

158. *See* Jack Loechner, *40% of Youths' TV Viewing Migrates to Streaming Video*, MEDIAPOST (July 14, 2016, 6:15 AM), http://www.mediapost.com/publications/article/279963/40-of-youths-tv-viewing-migrates-to-streaming-vi.html.

159. NIELSEN, THE NIELSEN TOTAL AUDIENCE REPORT: Q1 2016, at 10 (2016) [hereinafter NIELSEN, TOTAL AUDIENCE REPORT Q1 2016].

160. *Id.* at 4.

dramatic story, when the numbers are broken down by age groupings[161]:

- *Teens (12–17)* watched 15 hours and 29 minutes of traditional TV per week in Q1, a rather large 13.3% drop year-over-year and a 36.4% contraction over the past 5 years;
- *Older Millennials (25–34)* watched 23 hours and 26 minutes per week in Q1, a modest 3% decrease year-over-year but a more expansive 21.9% drop over five years;
- *Gen Xers (35–49)* watched 32 hours and 7 minutes per week, just a 2.4% decrease year-over-year but an 11.7% decline over a 5-year period;
- *Adults aged 50–64* watched 44 hours and 6 minutes per week, representing a 0.6% *increase* year-over-year, though a 1.8% drop over 5 years; [and]
- *Adults ages 65 and older* watched 51 hours and 32 minutes per week, up 0.6% from the previous year and up almost 5% over 5 years.[162]

Traditional content creators are also confronting challenges from new forms of content that have gained traction with consumers.[163] Videogames and social media now occupy a significant portion of consumers' (especially millennials') time, and this viewing appears to be growing at the expense of traditional program content.[164] Most importantly, through the end of this decade, the revenue growth rates of content viewership on television versus digital devices are expected to be 0.9% and 21.9%, respectively, or put another way, digital program revenues are expected to grow twenty-four times faster.[165]

As discussed above, the media consumption behavior of teens, millennials, and Gen Xers is dramatic and telling.[166] They still have a healthy appetite for entertainment viewing, but their device of choice is increasingly not live television.[167] They are more likely than not to be watching multiple screens, further diluting the perceived value of

161. Loechner, *supra* note 158.

162. *Id.*

163. *Cf.* NIELSEN, TOTAL AUDIENCE REPORT Q1 2016, *supra* note 159, at 4 ("With more choices, there is more competition in the media landscape.").

164. *Id.*

165. *See supra* note 13 and accompanying text; *see also* Margaret Boland & Mark Hoelzel, *Here's What Happened in Digital Media This Week*, BUS. INSIDER (July 18, 2015, 12:34 PM), http://www.businessinsider.com/heres-what-happened-in-digital-media-this-week2-2015-7.

166. *See supra* notes 158–162 and accompanying text.

167. *See* NIELSEN, TOTAL AUDIENCE REPORT Q1 2016, *supra* note 159, at 6.

advertising messages on the primary screen, if not from all devices.[168] Compounding the migration of millennials away from traditional modes of viewing content is the effect of installed "ad-blocking" technology.[169] There is a clear generational divide.[170] The implication for the future is clear: less live and overall television viewing, and less advertising revenue.[171] What is not as clear is the new source of revenues to support the television Ecosystem.[172]

4. Ad-Skipping

The capability, by automated and manual means, to eliminate (or fast-forward through) advertising from consumers' viewing has depressed the main source of revenue for the entertainment industry.[173] With the proliferation of DVRs, viewers could record programs for time-shifted viewing.[174] What quickly became an attractive function was that in the playback mode, a viewer could fast-forward past the commercial spots.[175] This transformed the viewing experience. No longer compelled to have a program interrupted for the twenty commercial spots in an hour-long primetime show, the DVR allowed nearly seamless episodic continuity, compromising the value of the ads supporting the program.[176]

To mitigate the damage of ad-skipping, programmers are seeking, in carriage negotiations with MVPDs, some adjustments in non-linear (e.g.,

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168. *See* Adam Flomenbaum, *Accenture Report: 87% of Consumers Use Second Screen Device While Watching TV*, LOSTREMOTE (Apr. 20, 2015, 11:30 AM), http://www.adweek.com/lostremote/accenture-report-87-of-consumers-use-second-screen-device-while-watching-tv/51698 (discussing GAVIN MANN ET AL., ACCENTURE, DIGITAL VIDEO AND THE CONNECTED CONSUMER 2 (2015)).

169. Thirty-two percent use ad blockers on desktops and seventeen percent on mobile devices. ANATOMY MEDIA INC., MILLENIALS AT THE GATE 6 (2016), http://anatomymedia.com/wp-content/uploads/2016/09/ANATOMY_MILLENNIALS_at_the_GATE_FALL2016.pdf.

170. NIELSEN, TOTAL AUDIENCE REPORT Q1 2016, *supra* note 159, at 6.

171. *See* Tim Stenovec, *Traditional TV Just Got Bashed by an Influential Expert*, BUS. INSIDER (Aug. 20, 2015, 1:05 PM), http://www.businessinsider.com/traditional-tv-is-in-decline-2015-8.

172. *See* Alan Wolk, *When Netflix and Other On-Demand Services Killed the TV Ad Golden Goose*, GUARDIAN (Feb. 5, 2015, 4:51 AM), https://www.theguardian.com/media-network/2015/feb/05/netflix-subscription-services-television-ad-revenues.

173. Stenovec, *supra* note 171.

174. Doug Gross, *Ad-Skipping DVR Prompts Fight for the Future of TV*, CNN (May 25, 2012, 4:21 PM), http://www.cnn.com/2012/05/25/tech/gaming-gadgets/dish-tv-skip-ads/.

175. *Id.*

176. *See* Joe Flint & Meg James, *CBS, NBC and Fox Head to Court over Dish Ad-Skipping Feature*, L.A. TIMES (July 2, 2012), http://articles.latimes.com/2012/jul/02/business/la-fi-ct-commercial-skip-20120702.

VOD) viewing.[177] Programmers try to reduce their leakage of ad revenues by attempting to negotiate with the distributors their imposition of limits on the ability of their subscribers to fast forward over ads in a current or prior season's episodes of programming on non-linear viewing.[178] These negotiations between the content creators and distributors collided with the launch by Dish Network of a technology empowering the consumer to skip ads in programs of the four broadcast networks, ABC, CBS, NBC, and FOX.[179]

On May 12, 2012, Dish Network (the DBS provider over the Echostar system) introduced into the marketplace an STB with automatic ad-skipping functionality.[180] Dish began selling this device, the Hopper DVR, and subsequently the Auto-Hop, by aggressively marketing it as an innovation to allow Dish subscribers to automatically program their STB on a weekly basis to record the entire broadcast television primetime viewing schedule, Primetime Anytime, and skip all commercial spots in this schedule.[181] The broadcast networks demanded that Dish cease selling the Hopper, and on May 24, 2012 Dish filed a declaratory judgment action seeking an adjudication that there were no contractual or copyright prohibitions against selling the ad-skipping technology to their subscribers.[182] The broadcast networks filed litigations in various jurisdictions alleging both copyright infringement and breach of their carriage contracts.[183] Challenges were also made to Dish's Slingbox technology, a device permitting Dish subscribers to stream television programming from their home to devices accessible via the Internet (e.g., mobile devices or an Internet-connected television).[184]

On March 2014, Disney, and on December 5, 2014, CBS, settled

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177. *See* Lucas Shaw, *TV Networks Offering More on Demand to Reduce Ad-Skipping*, BLOOMBERG (Sept. 24, 2014, 11:55 AM), https://www.bloomberg.com/news/articles/2014-09-24/tv-networks-offering-more-on-demand-to-reduce-ad-skipping.

178. *See* Karl Bode, *Dish Agrees to Cripple Its Ad-Skipping DVR to Settle Fox Lawsuit*, TECHDIRT (Feb. 12, 2016, 11:39 AM), https://www.techdirt.com/articles/20160211/10423633579/dish-agrees-to-cripple-ad-skipping-dvr-to-settle-fox-lawsuit.shtml.

179. *See* Flint & James, *supra* note 176.

180. David Goldman, *Broadcasters Sue Dish Over Ad-Skipping DVR*, CNN MONEY (May 25, 2012, 11:34 AM), http://money.cnn.com/2012/05/25/technology/dish-auto-hop-lawsuit/.

181. *Id.*

182. *See* Declaratory Judgment Complaint at 12, Dish Network, LLC v. Am. Broad. Cos. (*In re AutoHop Litigation*), 2014 U.S. Dist. LEXIS 110612 (S.D.N.Y. filed May 24, 2012) (No. 12-CV-04155).

183. NBC Studios LLC v. Dish Network Corp., CV 12-04536, 2012 U.S. Dist. LEXIS 186946 at *1 (C.D. Cal. 2012); Fox Broad. Co. v. Dish Network, LLC, 905 F. Supp. 2d 1088, 1096 (C.D. Cal. 2012); Complaint at 21–22, CBS Broad. Inc. v. Dish Network Corp., No. 1:12-cv-06812 (C.D. Cal. filed May 24, 2012).

184. *Fox Broad. Co.*, 905 F. Supp. 2d at 1094.

their lawsuits with Dish, reaching new distribution agreements with Dish in which Dish agreed to limit the Hopper's recording and ad-skipping features to three days after the ABC broadcasts and seven days after the initial CBS broadcast.[185] On February 11, 2016, FOX and Dish reached a settlement limiting the commercial-skipping functionality in the FOX-owned and operated television stations to seven days after a FOX station's initial airing of a program; they also reached an agreement on the Slingbox technology.[186] On June 17, 2016, NBCUniversal and Dish reached an agreement as to the Hopper and Slingbox technologies as part of a broader carriage renewal agreement with Dish and settled the litigations between the companies.[187] These settlements allowed measurement by Nielsen of the ad spots associated with the broadcast programming viewed three and seven days after initial airing.[188]

5. Time-Shifting

The DVR also shifted control to the consumer of when to view programming, and therefore commercial spots.[189] As a result, the ability to record and play back programming disrupted the basic industry measurement system of overnight ratings provided the day after a show was run.[190] The overnight ratings were used to value the actual delivery, and economic value, of the spots that had been sold to advertisers.[191] Thus, the system had to be adapted to reflect the changed viewing patterns. As a result, Nielsen created alternative ratings measurements that added a three-day and a seven-day ratings window after the initial telecast of the program to capture the time-shifting viewing habits.[192]

185. Shalini Ramachandran, *Dish to Curtail Ad Skipping on Hopper Devices for ABC Shows*, WALL STREET J. (Mar. 3, 2014, 7:44 PM), http://www.wsj.com/articles/SB10001424052702304585004579417633645843344; Emily Steel, *CBS and Dish End Dispute, Resolving a 12-Hour Blackout*, N.Y. TIMES (Dec. 6, 2014), http://www.nytimes.com/2014/12/07/business/media/cbs-and-dish-resolve-dispute-ending-blackout.html.

186. *See Fox Broad. Co.*, 905 F. Supp. 2d at 1096; *see also* Jonathan Stempel, *Dish, Fox Settle Litigation Over Hopper Ad-Skipper*, REUTERS (Feb. 11, 2016, 2:07 PM), http://www.reuters.com/article/us-dish-network-twenty-first-fox-idUSKCN0VK27E.

187. Ted Johnson, *Dish, NBCUniversal Settle AutoHop Ad-Skipping Lawsuit*, VARIETY (June 17, 2016, 8:32 AM), http://variety.com/2016/biz/news/dish-nbc-autohop-lawsuit-settled-1201797895/.

188. *See infra* at Section II.A.5.

189. Kenneth C. Wilbur, *How The Digital Video Recorder (DVR) Changes Traditional Television Advertising*, 37 J. ADVERT. 143, 143 (2008).

190. *See generally TV Ratings*, NIELSEN, http://www.nielsen.com/us/en/solutions/measurement/television.html (last visited Jan. 31, 2017) (discussing the evolving approaches for measuring television ratings).

191. *Cf.* VOGEL, *supra* note 100, at 315–16 (discussing Nielsen's rating system).

192. *TV Ratings*, *supra* note 190.

That time-shifting has become the new normal among viewers is no longer an issue—what is, however, is the extent to which viewers still view live television at all.[193] From an Ecosystem perspective, what is even more important and difficult to quantify is the extent to which viewers watch commercials at all.[194]

For the purposes of this Article, the critical dynamic continues of innovations being made available by the distributors of content to consumers to shift control over the exhibition of the content from the established supply chain (i.e., manufacturers, wholesalers, and retailers) to the consumers of the product. What has not sufficiently been rationalized is how this shift to consumers will re-rationalize the Ecosystem since the consumer preference for the innovative features (like the ability to skip commercials) alters and diminishes the value and, therefore, the revenues in the system.

Efforts to counter the threats to the traditional advertising-supported revenue streams have included product placement, sponsorship, and native advertising.[195] As discussed above, sponsorship is an established model for advertisers.[196] The core principle of sponsorship is the creation of an association between the company and its products with the content it is supporting.[197] Historically, sponsors of television shows may have had their name included as part of the program and lead-in and lead-out spots, may have had an exclusive right to the commercial spots in the show, and may have financed the production costs of the program.[198]

Product placement is the integration into the program content (in any medium) of references to products or their advertisers.[199] The history of deceptive practices and abuses of in-program references to products, culminating in the "Payola" scandal, resulted in legislation to govern this practice.[200]

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193. Wolk, *supra* note 172.

194. *Cf.* VOGEL, *supra* note 100, at 315–16 (discussing differences in a station's share, which is based on devices turned on, and Nielsen's efforts to measure if commercials are watched).

195. Wilbur, *supra* note 189, at 145.

196. *See generally* Cynthia B. Meyers, *From Sponsorship to Spots: Advertising and the Development of Electronic Media*, *in* MEDIA INDUSTRIES: HISTORY, THEORY, AND METHOD 69, 70 (Jennifer Holt & Alisa Perren eds., 2009) (analyzing advertiser's methods of using media to promote their products throughout history).

197. *See id.* at 70.

198. *Id.* at 71.

199. *See Product Placement*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/product%20placement (last visited Jan. 31, 2017).

200. Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927–1963*, 56 FED. COMM. L.J. 329, 355–56 (2004).

> All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person . . . .[201]

FCC regulations contain similar, related provisions.[202] Consequently, advertisers and programmers have to disclose the relationship with the source of the products when consideration has been received for the in-program use of the product.[203]

Native advertising is the creation by an advertiser of a program-like format for imbedding advertising content.[204] It is generally used online and is created to match the style, format, and function of the specific platform upon which it appears with the specific intent to promote a product.[205] Thus, native advertising is a deeper, more contextual extension of product placement because it integrates the product and content in a more organic fashion.[206] Because this combination of advertising and content may not be apparent to the viewer, legal rules have been established to regulate native advertising.[207] With the proliferation of online advertising, social media, and blogging, in 2009 the Federal Trade Commission released their Endorsement Guidelines specifically to increase consumer awareness of endorsements and testimonials in advertising.[208]

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201. 47 U.S.C. § 317(a)(1) (2012).

202. 47 C.F.R. § 73.1212 (2015).

203. 47 U.S.C. § 508(b) (2012); *see also* Kielbowicz & Lawson, *supra* note 200, at 363.

204. Amar Bakshi, *Why and How to Regulate Native Advertising in Online News Publications*, 4 J. MEDIA L. & ETHICS 1, 3 (2015).

205. *Id.*

206. *Id.* at 4–5.

207. *Id.* at 22. The ambiguity around native advertising prompted the Federal Trade Commission to hold a workshop on advertorials and other disguised advertising. *See generally Blurred Lines: Advertising or Content?—An FTC Workshop on Native Advertising*, FED. TRADE COMMISSION, https://www.ftc.gov/news-events/events-calendar/2013/12/blurred-lines-advertising-or-content-ftc-workshop-native (last visited Jan. 31, 2017) (discussing how the FTC has historically approached native advertising). The FTC has required disclosure with disguised advertising to protect consumers from being deceived, and to assist audiences in distinguishing between sponsored and regular content. The forms of disclosure identified by the FTC include visual cues, labels, and other techniques. Letter from Mary K. Engle, Assoc. Dir., Fed. Trade Comm'n, to Search Engines 3–4 (June 24, 2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-consumer-protection-staff-updates-agencys-guidance-search-engine-industryon-need-distinguish/130625searchenginegeneralletter.pdf.

208. *See* 16 C.F.R. § 255.0(a) (2016); FED. TRADE COMM'N, THE FTC'S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING (2015) (reviewing guidelines for endorsements on social media and other online platforms).

It is clear that there is an overall reduction in ad viewing, and that this will continue and be a significant, systemic issue for the future of the media industry.[209] What is not clear is how these changes will impact the sports industry. The few data that exist on this specific issue suggest that as a programming category, sports programming continues to be viewed differently—and fares better: if one examines the data from Nielsen, 95% of all sports programming is viewed live; by comparison, "only 66% of 'general drama'" is watched live.[210]

6. Copying of Content

Digitization of content has made copying and sharing seamless, cheap, and fast.[211] For content creators, the effects can be the death knell for their business. Napster was the most infamous of the disruptors that changed the content landscape by popularizing "peer-to-peer file-sharing," which it justified as fair use under the Copyright Act.[212] Napster was sued by the record labels, among others, and was found liable for copyright infringement and vicarious liability.[213] However, in that process, Napster substantially set in motion the changes in, among other things, consumers' attitudes about the morality and legality of copying content. In a recent study, more than fifty percent of people between the ages of eighteen and thirty-four admitted to watching "pirated" content.[214] More tangibly, the effect of unfettered sharing of content without compensation for the creator of the work is to dilute or eliminate the payment system supporting the creation and distribution of content.[215] The cataclysmic effects were first manifest in the music industry and subsequently in the publishing and television industries.[216] The collateral damage to related industries (e.g., music and book retailers) has been no

209. *See* Brian Steinberg, *If the 30-Second TV Ad Is Dying, TV Networks Are Helping to Kill It*, VARIETY (Jan. 19, 2016, 11:39 AM), http://variety.com/2016/tv/news/tv-advertising-tv-networks-kill-commercials-1201682729/.

210. NIELSEN, SPORTS MEDIA REPORT 2015, *supra* note 45, at 4.

211. *Cf. Benefits of Digital Information and Records Management*, NAT'L ARCHIVES AUSTL., http://www.naa.gov.au/information-management/digital-transition-and-digital-continuity/benefits-of-digital-information.aspx (last visited Jan. 31, 2017) (extoling the benefits of digital record management).

212. *See generally* 17 U.S.C. § 107 (2012) (outlining what constitutes fair use); Clyde Haberman, *Grappling With the 'Culture of Free' in Napster's Aftermath*, N.Y. TIMES (Dec. 7, 2014), http://www.nytimes.com/2014/12/08/technology/grappling-with-the-culture-of-free-in-napsters-aftermath.html.

213. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013, 1023–24 (9th Cir. 2001); *see also* M.G.M. Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 919 (2005).

214. *See* DEL. N., *supra* note 22, at 13.

215. *See* Haberman, *supra* note 212.

216. *See id.*

less devastating.[217]

The copying of entertainment content has profound implications for the television and motion picture industries. A 2013 report concluded that 11.4% of all U.S. Internet use took place on infringing sites and "the overall proportion of [I]nternet users engaged in infringement rose by more than a third, from 21.6% in November 2011 to 29.6% in January 2013."[218] In 2012, it was estimated that 432 million Internet users infringed on copyrights.[219] As discussed above, the entertainment industry is an important creator of jobs and revenue in the United States, and the motion picture and television industry has been identified as a significant export category adding a positive trade surplus of $13.4 billion in 2013.[220] Theft of content threatens to jeopardize the engine for artistic and job creation by displacing the basic arrangement whereby creators of content are compensated by the producers and ultimately, consumers of their work.[221]

The Ecosystem's pay-for-content model, juxtaposed against providers of free content, creates the ultimate asymmetry in pricing. To be clear, the businesses that are not charging a fee to the consumer and are not paying for the content are generating revenues primarily by the sale of advertising.[222] One study estimated in 2014 that Internet sites that exploited other's content without compensation generated $220 million in advertising revenues.[223] The implications for the businesses that are charging consumers a fee to compete with those that are not are obvious, as are the ripple effects through the media Ecosystem.

7. Non-Linear Viewing (VOD)

Due to improvements in STBs and the deployment of fiber-optic cable as a replacement for coaxial copper cable, the number of addressable households has increased.[224] With the cost of computing power decreasing,[225] interactive services such as VOD and pay-per-view

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217. *See id.*

218. DAVID PRICE, NETNAMES, SIZING THE PIRACY UNIVERSE 8 (2013).

219. *Id.* at 84; *see also supra* note 6 and accompanying text.

220. Fact Sheet, Motion Picture Ass'n of Am., The Economic Contribution of the Motion Picture & Television Industry to the United States (2015), http://www.mpaa.org/wp-content/uploads/2015/02/MPAA-Industry-Economic-Contribution-Factsheet.pdf.

221. *See* Haberman, *supra* note 212.

222. *Id.*

223. DEL. N., *supra* note 22, at 13.

224. NIELSEN, TOTAL AUDIENCE REPORT Q1 2016, *supra* note 159, at 9 (stating that at the end of the first quarter 2016, sixty-four percent of U.S. television homes were equipped with a VOD service).

225. *See, e.g.*, Thomas L. Friedman, Opinion, *Moore's Law Turns 50*, N.Y. TIMES (May

have proliferated and developed into an important revenue stream.[226] Fifty percent of households subscribe to subscription VOD (SVOD) services.[227] In the first quarter of 2016, SVOD penetration equaled DVR penetration.[228] In addition, seventy-two percent of homes have either a DVR or access to SVOD.[229] Significantly, in the year-over-year comparison of technological uses of content, SVOD services saw an increase of nineteen percent in the one-year period.[230]

The threat to the media industry will be the degree these services cannibalize basic cable and premium services. Nielsen reports that sixty-five percent of global multi-channel subscribers watch VOD on a daily basis and forty-three percent say they watch at least once a day.[231] This issue is exacerbated by the competition coming from SVOD services, which charge consumers a fixed rate per unit of time for a library of titles (e.g., Amazon and Netflix).[232] The non-linear challenges are another example of technology shifting more content control to consumers and disrupting the Ecosystem.[233] As noted below, transferring to the viewer the ability to select the time to experience content also carries measurement and ad-skipping challenges.[234]

B. Digital Distribution of Content: The Competitive Alternative to Traditional Platforms

Since the advent of the Internet, the deployment and applications of digitized entertainment content have increased exponentially.[235] Digital

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13, 2015), http://www.nytimes.com/2015/05/13/opinion/thomas-friedman-moores-law-turns-50.html (explaining how Moore's Law predicted the doubling of computer power every two years).

226. STANDING COMM. ON COPYRIGHT & RELATED RIGHTS, WORLD INTELL. PROP. ORG., CURRENT MARKET AND TECHNOLOGY TRENDS IN THE BROADCASTING SECTOR 19 (2015), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_5.pdf.

227. NIELSEN, TOTAL AUDIENCE REPORT Q1 2016, *supra* note 159, at 9.

228. *Id.* at 8.

229. *Id.*

230. *Id.* at 9.

231. NIELSEN, VIDEO ON-DEMAND: HOW WORLDWIDE VIEWING HABITS ARE CHANGING IN THE EVOLVING MEDIA LANDSCAPE 9 (2016) [hereinafter NIELSEN, VIDEO ON-DEMAND].

232. Nelson Granados, *Battle of the Giants: Amazon Joins Hulu in the War Against Netflix*, FORBES (Apr. 19, 2016, 7:30 AM), http://www.forbes.com/sites/nelsongranados/2016/04/19/battle-of-the-giants-amazon-joins-hulu-in-the-war-against-netflix/#25fda3ea4fa2.

233. Erik Gruenwedel, *Nielsen: SVOD Eroding Traditional TV-Watching Audience*, HOME MEDIA MAG. (Nov. 13, 2014), http://www.homemediamagazine.com/streaming/nielsen-svod-eroding-traditional-tv-watching-audience-34599.

234. *See generally* Wilbur, *supra* note 189 (describing the DVR's impact on the advertising industry).

235. DELOITTE, DIGITAL MEDIA: RISE OF ON-DEMAND CONTENT 5 (2015), https://www2.

ad-spending surpassed cable TV ad-spending in 2012, and according to a recent report, the rate of proliferation of digital media (both on Internet and mobile platforms) is such that by 2017, digital media will surpass TV as the largest single category of entertainment content, and will account for more than fifty percent by 2019.[236] Another report documents that video streaming has eclipsed live viewing as the predominant mode of viewing, fifty-five to forty-five percent.[237] In the music industry, streaming has surpassed physical product and downloads as the primary platform for music consumption.[238] The implications for traditional media companies are staggering: they are losing consumers and market share every day.[239] Verizon's acquisitions of Yahoo and AOL (including The Huffington Post) suggest that traditional media companies may address this trend by acquiring digital content companies.[240]

The principal reasons for the shift to digital media originate with the devices for consumers that offer the viewer more control over content.[241] The optionality and mobility of the devices are major factors, allowing the viewer to enjoy content on a portable basis on a computer, tablet, or smartphone.[242] As discussed above, the various forms of digital

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deloitte.com/content/dam/Deloitte/in/Documents/technology-media-telecommunications/in-tmt-rise-of-on-demand-content.pdf.

236. MCKINSEY & CO., GLOBAL MEDIA REPORT 2015, at 5 (2015), http://www.mckinsey.com/~/media/mckinsey/industries/media%20and%20entertainment/our%20insights/the%20state%20of%20global%20media%20spending/mckinsey%20global%20media%20report%202015.ashx (demonstrating that digital media is on the rise and will surpass cable television); PRICEWATERHOUSECOOPERS & INTERACTIVE ADVERT. BUREAU, IAB INTERNET ADVERTISING REVENUE REPORT: 2012 FULL YEAR RESULTS 19 (2013), https://www.iab.com/wp-content/uploads/2015/05/IABInternetAdvertisingRevenueReportFY2012POSTED.pdf (showing that Internet advertisement revenue surpassed cable television).

237. DEL. N., *supra* note 22, at 10.

238. Janko Roettgers, *Streaming Overtakes Downloads, CDs as Top Music Revenue Driver*, VARIETY (Mar. 22, 2016, 12:57 PM), http://variety.com/2016/digital/news/riaa-streaming-downloads-cd-revenue-2015-1201736441/.

239. Gerry Smith & Scott Moritz, *Pay-TV Losing 300,000 Users Is Good News Amid Cord-Cutting*, BLOOMBERG (Oct. 19, 2015, 12:01 AM), https://www.bloomberg.com/news/articles/2015-10-19/pay-tv-losing-300-000-customers-is-good-news-in-cord-cutting-era.

240. *See supra* note 37 and accompanying text (discussing ESPN/Disney announcement of a one billion dollar investment in the digital arm of MLB); *see also* Romain Dillet, *Verizon Buys Yahoo for $4.83 Billion*, TECHCRUNCH (July 25, 2016), https://techcrunch.com/2016/07/25/verizon-buys-yahoo-for-4-83-billion/; Paul Melvin, *The Walt Disney Company Acquires Minority Stake in BAMTech*, ESPN MEDIAZONE (Aug. 9, 2016), http://espnmediazone.com/us/press-releases/2016/08/walt-disney-company-acquires-minority-stake-bamtech/; *AOL Agrees to Acquire the Huffington Post*, HUFFINGTON POST (Feb. 7, 2011, 12:01 AM), http://www.huffingtonpost.com/2011/02/07/aol-huffington-post_n_819375.html.

241. *See generally* NIELSEN, TOTAL AUDIENCE REPORT Q1 2016, *supra* note 159, at 4 (showing increase in average time spent watching television through various devices per adult per day).

242. Bruce Tuchman, *Viewpoint: SVOD's Niche Future*, TELEVISION BUS. INT'L (Sept. 30,

functionality that provide the ability to time-shift, fast forward, interact, and copy, give consumers a degree of flexibility and control not available on analog television.[243] Another phenomenon that has influenced the transition to digital media is the change in the viewing experience. Increasingly, the experience of leisure viewing is a two (or more) screen experience.[244] A growing percentage of television viewers are simultaneously watching their smartphone and tablets.[245] Coupled with this, is the shift to "binge-viewing" (i.e., viewing sequential episodes of the same program in a narrow time window) and the use of social media to communicate with friends or family about programming both are watching.[246]

The implication for the media industry is that the viewing of content on digital platforms is changing leisure time from a solitary, linear activity to a collective, interactive experience, involving multiple screens.[247] The challenge will be to identify the opportunities this creates for more compelling content and a context in which to experience it.

1. OTT Distribution Services

New modes of distribution of video content are being deployed over the Internet, allowing businesses to reach consumers and bypass the MVPD pipeline and thereby avoid significant capital investment. According to PricewaterhouseCoopers, seventy-eight percent of U.S. consumers subscribe to at least one OTT service (e.g., Netflix, Hulu, Amazon Prime).[248] The adoption by consumers of OTT, either as a supplement or alternative to video distributed by an MVPD, is viewed by the traditional distributors as a major threat to their subscriber base.[249] Many of the programmers were encouraged by the addition of more buyers of their content and licensed their content to OTT services.[250]

2016), http://tbivision.com/features/2016/09/viewpoint-svods-niche-future/653501/.

243. *See supra* Sections II.A.4–6.

244. *Action Figures: How Second Screens Are Transforming TV Viewing*, NIELSEN (June 17, 2013), http://www.nielsen.com/us/en/insights/news/2013/action-figures—how-second-screens-are-transforming-tv-viewing.html.

245. *Id.*

246. Jhih-Syuan Lin et al., *Social Television: Examining the Antecedents and Consequences of Connected TV Viewing*, 58 COMPUTERS HUM. BEHAV. 171, 176 (2016); Tom Huddleston, Jr., *Survey: Pretty Much Everybody is Binge-Watching TV*, FORTUNE (June 30, 2015), http://fortune.com/2015/06/30/binge-viewing-study/.

247. *Action Figures*, *supra* note 244.

248. BOTHUN & VOLLMER, *supra* note 10, at 5.

249. *See generally id.* (discussing the disruptive nature of OTT service on traditional television subscriptions).

250. *Id.* at 3.

However, the long-term implication is that the OTT services will grow their brands and relationships with consumers and drive the prices paid to content creators lower in the process.[251]

2. Other Emerging Technologies

With the reduction in barriers to entry and cost for new technologies to reach consumers, incumbent distributors will confront additional challenges to remain profitable.[252] One such technology, Aereo Television, launched in May 2012, presented a significant threat to the business model of the broadcast television industry.[253] Aereo retransmitted the over-the-air signals of the four broadcast networks over the Internet without licensing the content, and Aereo charged its subscribers a fee.[254] Aereo, financed by Barry Diller's IAC,[255] defended its service on the basis that there was no "public performance" under the Copyright Act[256] since they were redirecting and sharing over the Internet individual signals that they transmitted to each subscriber via antennae.[257]

Television producers, marketers, distributors, and broadcasters (collectively "Broadcasters") sued Aereo, asserting copyright infringement and violation of the Cable Act of 1992.[258] The Cable Act requires distributors to secure from the broadcast networks retransmission consent to re-distribute the broadcast signals on their cable systems.[259] Section 106(4) of the Copyright Act confers an exclusive right to the copyright owner to "perform the copyrighted work publicly."[260] However, a compulsory licensing regime was established by Congress (section 111 of the Copyright Act) to permit cable companies to re-transmit broadcast programming containing copyrighted content over their systems in exchange for the payment of copyright royalties.[261] The

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251. *Id.* at 5.

252. *See id.* at 15.

253. *See generally* Am. Broad. Cos. v. Aereo, Inc. (*Aereo III*), 134 S. Ct. 2498, 2503 (2014) (describing how Aereo brings television programming to subscribers).

254. Memorandum of Points & Authorities in Support of Plaintiffs' Joint Motion for a Preliminary Injunction at 5, Am. Broad. Cos. v. Aereo, Inc. (*Aereo I*), 874 F. Supp. 2d 373 (S.D.N.Y. filed May 29, 2012) (Nos. 12 Civ. 1540, 12 Civ. 1543).

255. Christopher S. Stewart & Merissa Marr, *High Noon for Diller's Aereo*, WALL STREET J. (May 24, 2012, 7:50 PM), https://www.wsj.com/articles/SB10001424052702304065704577424373775083522.

256. 17 U.S.C. § 106(4) (2012).

257. *Aereo I*, 874 F. Supp. 2d at 385.

258. *Id.* at 376.

259. 47 U.S.C. § 325(b)(1)(A) (2012).

260. 17 U.S.C. § 106(4).

261. 17 U.S.C. § 111(d)(1)(B) (2012).

Broadcasters also viewed Aereo to be part of the phenomenon of cord-cutting that represents a threat to the Broadcasters' Ecosystem.[262]

The district court denied the Broadcasters' motion for a preliminary injunction to enjoin Aereo,[263] and the Second Circuit Court of Appeals affirmed.[264] The Broadcasters sought review by the Supreme Court and the Court granted certiorari.[265] Significantly, the major U.S. sports leagues filed amicus briefs joining the Broadcasters' characterization that the use of program content without a license violated the Copyright Act.[266]

The Court ruled that the Aereo service infringed the Broadcasters' copyrights, holding the following:

> Aereo's practices [are] . . . similar to those of the [community antenna television] systems in *Fortnightly* [*Corp. v. United Artists Television, Inc.*, 392 U. S. 390 (1968)] and *Teleprompter* [*Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974)]. And those are activities . . . within the scope of the Copyright Act. Insofar as there are differences, those differences concern not the nature of the service that Aereo provides so much as the technological manner in which it provides the service. We conclude that those differences are not adequate to place Aereo's activities outside the scope of the Act.[267]

While the content creators prevailed in *Aereo*, the rapid rate of technological innovation and the lack of confidence that courts will interpret the existing legal paradigm to prevent future Aereos, all but assures that there will be new OTT entrants to test the boundaries of the existing legal rules.

3. Cord Cutting/Cord Shaving

Since, 2012, the growth of multi-channel TV households has stopped and many distributors are experiencing decreases in their total number of video subscribers; in 2015 the pay TV industry lost another 1.1 million subscribers.[268] A recent report determined that twenty-five

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262. Greg Sandoval, *A Bet that Diller-Backed Aereo TV Startup Wins its Day in Court*, CNET (June 3, 2012, 9:00 PM), https://www.cnet.com/au/news/a-bet-that-diller-backed-aereo-tv-startup-wins-its-day-in-court/.

263. *Aereo I*, 874 F. Supp. 2d at 405.

264. Thirteen v. Aereo, Inc. (*Aereo II*), 712 F.3d 676, 696 (2d Cir. 2013), *rev'd sub nom.*, 134 S. Ct. 2498 (2014).

265. *See Aereo III*, 134 S. Ct. 2498, 2504 (2014).

266. Brief of Nat'l Football League and Major League Baseball as Amici Curiae in Support of Petitioners at 2, *Aereo III*, 134 S. Ct. 2498 (No. 13-461).

267. *Aereo III*, 134 S. Ct. at 2511.

268. Mike Farrell, *Kagan: Pay TV Lost 1.1M Subs in 2015*, MULTICHANNEL NEWS (Mar. 14, 2016, 1:30 PM), http://www.multichannel.com/news/telco-tv/kagan-pay-tv-lost-11m-

percent of late millennials have opted to go without cable television.[269] As discussed below, there are also non-industry factors (e.g., more post-college students living at home) influencing the decline in cable television subscriptions.[270] It is also well understood that an important influence in the decision to forego cable service is the ready accessibility and relative affordability of OTT services, as well as the access to pirated content.[271] Increasingly, millennials elect a mix of an OTT service coupled with a premium service (e.g., HBO or Showtime), and perhaps a Skinny Bundle (or even broadcast TV without a STB) from their MVPD to view certain services on their laptop, tablet, or smartphone.[272]

4. User-Generated Content

One of the attributes of digital media is the ease with which consumers can create content to be disseminated on the Internet. This functionality permits the creation of text in the posting of blogs, and the uploading of audio, photographs, video, and "mash-ups" (integrating two or more separate pieces of content), among other forms of user-generated content.

At the outset of user-generated content's popularity, the principal platform for users to share content was *YouTube*, which became the principal destination for videos, from user-created pet videos to copies of professionally produced programs.[273] As the latter category began to divert viewers from the intended distribution channels, the content creators registered their objections.[274] YouTube defended its distribution of copyrighted material as inadvertent and invoked the "safe harbor" of the Digital Millennium Copyright Act (DMCA) as a defense,[275] asserting

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subs-2015/403296.

269. DEL. N., *supra* note 22, at 10; *see also* OOYALA, *supra* note 9, at 3 (describing how millennials have transitioned toward digital platforms).

270. *See supra* Part II.

271. *See generally* BOTHUN & VOLLMER, *supra* note 10, at 5 (describing the accessibility of OTT services and the changing dynamics of the cable services); Miriam Gottfried, *T-Mobile: Who Needs a Cable Company Anyway?*, WALL STREET J., http://www.wsj.com/articles/t-mobile-who-needs-a-cable-company-anyway-1451576712 (last updated Dec. 31, 2015, 11:28 AM).

272. DEL. N., *supra* note 22, at 12; OOYALA, *supra* note 9, at 3–5; Jason Lynch, *How Millennials Consume TV Depends on Which Stage of Life They're In*, ADWEEK (Mar. 24, 2016), http://www.adweek.com/news/television/how-millennials-consume-tv-depends-which-stage-life-theyre-170393.

273. Matthew Holehouse, *How YouTube Changed the World*, TELEGRAPH (Feb. 9, 2015), http://s.telegraph.co.uk/graphics/projects/youtube/.

274. Bobbie Johnson, *Viacom Sues Google and YouTube*, GUARDIAN (Mar. 13, 2007, 11:18 AM), https://www.theguardian.com/media/2007/mar/13/broadcasting.usnews.

275. 17 U.S.C. § 512(c)(1) (2012).

that when a copyright owner notified YouTube of a claimed infringement, YouTube would issue a "take down notice" under the DMCA to the party who had uploaded the claimed infringing work.[276]

Viacom filed a copyright infringement lawsuit against YouTube on March 13, 2007, asserting that it had put YouTube on notice that its practice of distributing Viacom programming that had been uploaded to YouTube was infringing Viacom's copyrighted works.[277] Viacom further claimed that YouTube's conduct was pervasive and that its continued use of their programming, in the face of knowledge that Viacom had not consented, was "willful."[278] The district court granted summary judgment for YouTube under the DMCA's safe harbor,[279] but on appeal the Second Circuit reversed the grant of summary judgment and remanded for further fact findings on YouTube's take downs and its DMCA's safe harbor defense.[280] Subsequently, the district court re-entered summary judgment for YouTube and, prior to another appeal, the parties settled.[281] Thus, the issue of the DMCA's safe harbor for repeated use of copyrighted material was not definitively resolved in *Viacom International, Inc. v. YouTube, Inc.*[282]

In many respects, the pervasiveness of user-generated content simply outpaced the legal challenge.[283] User-generated content has turned the traditional Ecosystem on its head, upending two pillars: investment in professionally produced content and legal protection thereof.[284] The amount of user-generated content has exploded.[285] Perhaps more profound is the growing treatment among viewers of user-generated content (e.g., self-produced "viral" videos) as equivalent (or even preferable) to professionally produced content.[286] This functionality has

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276. *See* Viacom Int'l, Inc. v. YouTube, Inc. (*Viacom I*) 718 F. Supp. 2d 514, 519 (S.D.N.Y. 2010), *aff'd in part*, *vacated in part*, 676 F.3d 19 (2d Cir. 2012).

277. *See* Complaint for Declaratory & Injunctive Relief & Damages at 3–4, *Viacom I*, 718 F. Supp. 2d 514 (S.D.N.Y. filed May 13, 2007) (No. 1:07CV02103).

278. *Id.* at 5.

279. *Viacom I*, 718 F. Supp. 2d at 527, 529.

280. Viacom Int'l, Inc. v. YouTube, Inc. (*Viacom II*), 676 F.3d 19, 41–42 (2d Cir. 2012).

281. Viacom Int'l, Inc. v. YouTube, Inc. (*Viacom III*), 940 F. Supp. 2d 110, 123 (S.D.N.Y. 2013); Leslie Kaufman, *Viacom and YouTube Settle Suit Over Copyright Violations*, N.Y. TIMES (Mar. 18, 2014), http://www.nytimes.com/2014/03/19/business/media/viacom-and-youtube-settle-lawsuit-over-copyright.html.

282. *See id.*

283. *See id.*

284. *See generally id.* (discussing YouTube and Viacom's use of Viacom's content).

285. Monica Anderson, *5 Facts About Online Video, for YouTube's 10th Birthday*, PEW RES. CTR. (Feb. 12, 2015), http://www.pewresearch.org/fact-tank/2015/02/12/5-facts-about-online-video-for-youtubes-10th-birthday/.

286. *Id.*

fundamentally changed the content creation landscape.[287]

5. TV Everywhere

TV Everywhere—the availability of network content on in-home devices connected to the STB—began in 2009.[288] The goal was to keep consumers linked to the content on the STB and serve as a deterrent to switching to an OTT.[289] TV Everywhere has not lived up to its potential.[290] The user experience has been disappointing, due to a lack of awareness and a complicated authentication process.[291] "[F]ewer than one in seven U.S. pay-TV households actively uses TV [Everywhere]."[292] In addition, TV Everywhere exemplifies one dilemma of the new media Ecosystem: the accommodation of a technologic innovation to benefit the consumer in the absence of incremental revenue associated with the platform.[293] Whether intended or not, this has largely become a defensive, audience-preservation investment.[294]

6. Smartphones

There is no more profound development than the worldwide growth in deployment, consumer use, and advertiser focus of smartphones. As indicated in the most recent Nielsen Report, except TV and radio (226 and 240 million, respectively), smartphones in the United States (191 million) have surpassed all other devices for accessing content.[295] In terms of average media consumption time spent per day, the smartphone lags only behind radio and television, but it is growing at a rate of sixty percent.[296] According to Nielsen, "Millennials have officially become the

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287. *See generally* Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863 (2008); Steven Hetcher, *User-Generated Content and the Future of Copyright: Part Two—Agreements Between Users and Mega-Sites*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 829 (2008).

288. VOGEL, *supra* note 100, at 382 n.50.

289. BOTHUN & VOLLMER, *supra* note 10, at 5; VOGEL, *supra* note 100, at 382 n.50.

290. OOYALA, *supra* note 9, at 6.

291. *Id.*

292. BOTHUN & VOLLMER, *supra* note 10, at 5.

293. *See generally id.* (discussing the industry's inability to convert TV Everywhere into a long-term revenue stream).

294. Todd Spangler, *How Critical Is TV Everywhere?*, MULTICHANNEL NEWS (Oct. 17, 2011, 12:01 AM), http://www.multichannel.com/news/cable-operators/how-critical-tv-everywhere/327229.

295. NIELSEN, TOTAL AUDIENCE REPORT Q1 2016, *supra* note 159, at 3. *eMarketer* reports that as of December 2015 there are 207 million smartphones users. EMARKETER, US DIGITAL MEDIA USAGE: A SNAPSHOT OF 2016 (2015), https://www.emarketer.com/public_media/docs/eMarketer_Digital_Media_Usage_Snapshot_2016.pdf.

296. NIELSEN, TOTAL AUDIENCE REPORT Q1 2016, *supra* note 159, at 4.

mobile-first generation" since 2016 was the first year for any age group that consumption of content on smartphones surpassed television.[297] According to PricewaterhouseCoopers's *2016 Entertainment & Media Industry Trends* report, smartphones are where "users spend two out of every three minutes of their digital media time and where apps dominate. Users spend 71 percent of their time on mobile devices using apps."[298] Not surprisingly, ninety-one percent of United States millennials have a smartphone, and they are connected.[299] A recent study found that forty-nine percent of millennials check their smartphones more than fifty-one plus times a day.[300] On a worldwide basis, there are two billion smartphones currently in use and by the end of the decade that number is projected to increase to five billion.[301]

Furthermore, ninety percent of millennials (and seventy-seven percent of adults ages 30–49) use at least one social networking site.[302] Social media activity is driving broadband usage on a global basis,[303] and by 2017 broadband availability is expected to reach fifty percent of the world's population driven by smartphone and tablet usage.[304]

While the growth on the digital platforms has been robust and the monetization of digital activity has developed more slowly, it is beginning to catch up.[305] In 2016, mobile is expected to account for 22.7% of United States ad spending, trailing television's 36.8%, and by 2020 it is projected to equal television ad spending.[306]

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297. NIELSEN, YEAR IN SPORTS MEDIA REPORT 6 (2017). For age group 18 to 34: digital devices, 39%; TV, 29%; radio, 17%; TV connected devices, 15%. For age group 35 to 49: digital devices, 36%; radio, 17%; TV, 35%; TV connected devices 11%. NIELSEN, TOTAL AUDIENCE REPORT Q1 2016, *supra* note 159, at 6.

298. BOTHUN & VOLLMER, *supra* note 10, at 9.

299. BI INTELLIGENCE, GENERATION DIGITAL (2015).

300. *Id.*

301. DEL. N., *supra* note 22, at 23.

302. ANDREW PERRIN, PEW RESEARCH CTR., SOCIAL MEDIA USAGE: 2005–2015, at 4 (2015), http://www.pewinternet.org/files/2015/10/PI_2015-10-08_Social-Networking-Usage-2005-2015_FINAL.pdf.

303. EMARKETER, *supra* note 295 (noting that Instagram usage has been growing at a 15.1% rate). *eMarketer* reports that as of December 2015 there are 207 million smartphone users. *Id.*

304. OOYALA, *supra* note 9, at 4.

305. *See generally Digital Ad Spending to Surpass TV Next Year*, EMARKETER (Mar. 8, 2016), http://www.emarketer.com/Article/Digital-Ad-Spending-Surpass-TV-Next-Year/1013671 (discussing the increase in advertisement spending on digital platforms).

306. *Id.*

C. Macro, Demographic, and Other Structural Changes Affecting the Media Industry

1. Declines in New Households

As a result of several economic factors and structural shifts in the marketplace, a much higher percentage of college graduates are returning to their parents' homes to live as they start their careers.[307] One explanation for this is the increased amount of student debt.[308] The average 2015 graduate had thirty-five thousand dollars in debt and the average starting salary is thirty-four thousand dollars.[309] There has also been a decline in real disposable income and in the marriage rate before thirty-five.[310] As a result, family members are consolidating their living situation to manage costs.[311] The hurdles for entrants to the job market are higher.[312] Several reasons have been given for this change, most notably the misalignment between education and available entry-level jobs.[313]

The effect of these structural factors is to slow the growth in the number of new households.[314] Like cord cutting or cord shaving, this dynamic exerts a downward gravitational pull on MVPD subscription revenues.[315]

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307. Gillian B. White, *The False Stereotypes About Millennials Who Live at Home*, ATLANTIC (May 29, 2016), http://www.theatlantic.com/business/archive/2016/05/millennials-who-live-at-home/484712/.

308. *Id.*

309. Jeffrey Sparshott, *Congratulations, Class of 2015. You're the Most Indebted Ever (For Now)*, WALL STREET J.: REAL TIME ECONOMICS (May 8, 2015), http://blogs.wsj.com/economics/2015/05/08/congratulations-class-of-2015-youre-the-most-indebted-ever-for-now/; White, *supra* note 307.

310. Richard Fry, *For First Time in Modern Era, Living With Parents Edges Out Other Living Arrangements for 18- to 34-Year-Olds*, PEW RES. CTR. (May 24, 2016), http://www.pewsocialtrends.org/2016/05/24/for-first-time-in-modern-era-living-with-parents-edges-out-other-living-arrangements-for-18-to-34-year-olds/.

311. *See id.*

312. PEW RESEARCH CTR., THE RISING COST OF *NOT* GOING TO COLLEGE 8–9 (2014), http://www.pewsocialtrends.org/files/2014/02/SDT-higher-ed-FINAL-02-11-2014.pdf.

313. Millennials make up forty percent of the unemployed. Leah McGrath Goodman, *Millennial College Graduates: Young, Educated, Jobless*, NEWSWEEK (May 27, 2015, 6:22 AM), http://www.newsweek.com/2015/06/05/millennial-college-graduates-young-educated-jobless-335821.html.

314. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, FIGURE HH-1 HOUSEHOLDS BY TYPE: 1940 TO PRESENT (2016), https://www.census.gov/hhes/families/files/graphics/HH-1.pdf.

315. *See supra* notes 268–272 and accompanying text (discussing the effect of cord cutting and cord shaving on MVPDs).

2. Demographic Changes

There are profound changes in the composition of the United States population that are causing shifts in the domestic economy and the consumption of entertainment content.[316] While many of these demographic trends had been previously identified, as their presence has begun to be felt, the response of the entertainment industry has been slow in adjusting to change.[317]

The most dramatic change has been the significant increase in the percentage of Hispanic households in the United States.[318] In 2014, there were 55.4 million Hispanics in the United States, and the estimates are that the rate of growth will continue—by 2060, it is projected that there will be 119 million, an increase of 115%.[319] An important question is how the increased representation of Hispanic households will affect the demand segmentation and the supply of programming.[320]

The Nielsen data also provide some insights into other significant demographic trends affecting the media industry. Total media consumption over-indexes for Black and Hispanic adults and under-indexes for Asian-Americans.[321] The overall measurement of United States adults shows an average daily total media consumption of ten hours, thirty-nine minutes.[322] However, the daily average for African-American viewers is thirteen hours, seventeen minutes; for Hispanics, nine hours, twenty-six minutes, and for Asian-Americans, five hours, thirty-one minutes.[323] Interestingly, media consumption by the total United States and African-American viewers increased by ten percent from 2015; but for Hispanic and Asian-American adults the increase was less, eight and three percent respectively.[324]

These demographic shifts are also influencing sports, both in terms of the composition of teams and the audience.[325] MLB has seen a dramatic change in the representation of racial and ethnic groups.[326] In

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316. BOTHUN & VOLLMER, *supra* note 10, at 13.

317. *Cf. id.* at 5 (discussing TV Everywhere's rise and its lackluster ability).

318. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, FIGURE HH-2 HOUSEHOLDS BY RACE AND HISPANIC ORIGIN OF THE HOUSEHOLDER: 1970 TO PRESENT (2016), https://www.census.gov/hhes/families/files/graphics/HH-2.pdf.

319. BOTHUN & VOLLMER, *supra* note 10, at 13.

320. *See generally* NIELSEN, TOTAL AUDIENCE REPORT Q1 2016, *supra* note 159, at 5 (providing detailed statistics regarding the media consumption of Hispanic populations).

321. *Id.*

322. *Id.* at 4.

323. *Id.* at 5.

324. *Id.* at 4–5.

325. NIELSEN, SPORTS MEDIA REPORT 2015, *supra* note 45, at 15.

326. *See generally* Jens Manuel Krogstad, *67 Years After Jackie Robinson Broke the*

2015 there was a year-to-year decrease of eight percent of African-American players. Since 1981 the decrease of African-American players on MLB teams has been fifty percent. As of the start of the current season, thirty percent of the MLB players are Hispanic.[327] In the 2015 World Series English-language telecast, MLB saw a one-year audience gain of thirty percent from Hispanic viewers.[328] Nielsen also noted that from 2014 to 2015 there was a shift in the composition of Hispanic viewers of the World Series from Mexican viewers to viewers from Puerto Rico and the Dominican Republic, postulating that the composition of the players on the respective 2014 and 2015 World Series teams may influence viewership dynamics.[329] The increasing composition of Hispanic players in the MLB may be attributable to the growth both in the percentage of Hispanics in the U.S. population and in the number of players from Latin and South America who are playing in MLB.[330] The decreasing representation of African-Americans in MLB may be as much attributable to the increase in Hispanic players as to other multifactorial influences.[331]

Baseball has been identified as the major U.S. sport that attracts a comparatively older demographic among viewers.[332] Recent data supports this; the average age of baseball viewership (MLB post-season games) has gone from forty-nine in 2009 to fifty-five in 2014.[333] By comparison, the average age of NBA game viewers at the start of the 2015 season was thirty-seven.[334] According to an article in *The Atlantic*, 45% of the NBA's viewers are Black, it has the youngest sports audience (45%

Color Barrier, Major League Baseball Looks Very Different, PEW RES. CTR. (Apr. 16, 2014), http://www.pewresearch.org/fact-tank/2014/04/16/67-years-after-jackie-robinson-broke-the-color-barrier-major-league-baseball-looks-very-different/ (discussing demographic changes in professional baseball since Jackie Robinson entered the league).

327. Jay Caspian Kang, *The Unbearable Whiteness of Baseball*, N.Y. TIMES MAG. (Apr. 6, 2016), http://www.nytimes.com/2016/04/10/magazine/the-unbearable-whiteness-of-baseball.html.

328. NIELSEN, SPORTS MEDIA REPORT 2015, *supra* note 45, at 15.

329. *Id.*

330. Palash Ghosh, *All-Star Game Highlights Heavy Latino Presence in Baseball*, INT'L BUS. TIMES (July 7, 2011, 3:29 PM), http://www.ibtimes.com/all-star-game-highlights-heavy-latino-presence-baseball-297961.

331. *See generally* Joanna Shepherd Bailey & George B. Shepherd, *Baseball's Accidental Racism: The Draft, African-American Players, and the Law*, 44 CONN. L. REV. 197 (2011) (discussing various reasons for the decline in African-American representation in MLB).

332. *See* Thompson, *supra* note 40.

333. Louis Menand, *Show Them the Money*, NEW YORKER (May 16, 2016), http://www.newyorker.com/magazine/2016/05/16/the-professional-sports-bubble.

334. Travis Tack, *NBA: A Model for Growth in the 21st Century*, POLITICUS SPORTS (June 4, 2015), http://sports.politicususa.com/2015/06/04/nba-a-model-for-growth-in-the-21st-century.html.

are under thirty-five), and it shares with MLB the most male-heavy audience at 70%.[335]

Football has successfully re-positioned itself among women viewers. From 2009 to 2013, the percentage of women watching NFL games grew twenty-six percent, compared to eighteen percent for male viewers.[336] In addition, female participation in fantasy football grew in 2013 to 6.4 million, a one-year jump of ten percent.[337] Women have also increasingly been viewing the premier events of the other major sports, comprising 46.5% of MLB, 40% of NHL, and 37% of NBA fans.[338]

The NHL has traditionally failed to attract minority viewers: "African[-]Americans made up between 1% and 5% of the audience for each game, Hispanics made up between 2% and 6%, and Asian viewers made up between 3% and 4%."[339] The NHL audience is the richest in pro sports—one-third of its viewers make more than one hundred thousand dollars per year.[340]

The fact of the changing demographics is clear, as are the implications for the media and sports industry. Programmers have always had to create content to appeal to their audience. The audience is changing. It is more diverse. Different segments of the audience have different appetites for different content. The more nuanced question is how nimble—and how diverse—are the programmers and distributors in adapting their business to the changing audience composition? Will there be content that is—both by its subject matter and delivery—attuned to the interests and availability of the new mix of consumers? Due to the rapid pace of these changes, we will know soon if the media industry is able to capitalize on the addition of new participants in the Ecosystem.

3. Reduction in the Size of the Programming Bundle

Whether by private agreement or potential government intervention, the traditional offering by distributors of a large bundle of programming content is changing.[341] Market forces, perhaps hastened by the potential

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335. Thompson, *supra* note 40.

336. Eric Chemi, *The NFL is Growing Only Because of Women*, BLOOMBERG (Sept. 26, 2014, 5:46 AM), http://www.bloomberg.com/news/articles/2014-09-26/the-nfl-is-growing-only-because-of-female-fans (discussing an Ebiquity study reviewing the NFL's viewership).

337. *Id.*

338. DEL. N., *supra* note 22, at 48.

339. Paulsen, *Demo Reel, Part 3: Except for NBA, Not Much Diversity in Sports TV Audience*, SPORTS MEDIA WATCH (Jan. 27, 2014), http://www.sportsmediawatch.com/2014/01/demo-reel-part-3-except-for-nba-not-much-diversity-in-sports-tv-audience/.

340. Thompson, *supra* note 40.

341. Dan Schechter, *Why Skinny Bundles Are a Big Fat Pain for Many Cable TV Networks*, WRAP (June 8, 2016, 8:30 AM), http://www.thewrap.com/why-skinny-bundles-

for statutory or regulatory restructuring, have impelled MVPDs to create a Skinny Bundle, allowing consumers to reduce the cost of paying for content by eliminating unwanted and unwatched channels in their package.[342]

In the past, significant effort was made in Congress, and the FCC, to mandate a full a la carte distribution model.[343] Prior efforts to impose through legislation or regulation an a la carte regime have failed.[344] The FCC has issued conflicting reports on the issue.[345] Significantly, for the sports industry, a major impetus for seeking government intervention on the MVPDs' bundles has been the relatively higher cost of sports channels to MVPDs, in turn passed on to consumers, and ESPN has frequently been cited as the poster child of the excessive cost of programming networks.[346]

As the deployment of Skinny Bundles by MVPDs and other distributors such as OTTs accelerates, it will put downward pressure on the overall level of revenues available to pay content creators for programming.[347] The implication is that this will make the purchase of content more efficient by allowing for an unimpeded demand and supply market, resulting in pricing for content more closely aligned with consumer demand.[348] Ultimately, this will result in the elimination of channels with generally low or specific niche consumer appeal.[349] While

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are-a-big-fat-pain-for-many-cable-tv-networks-guest-blog/.

342. *Id.*

343. *See* Television Consumer Freedom Act of 2013, S. 912, 113th Cong. § 3(c) (2013).

344. *See, e.g.*, *id.*; Brendan Sasso, *How 'A La Carte' TV Legislation Died in the Senate*, ATLANTIC (Sept. 10, 2014), http://www.theatlantic.com/politics/archive/2014/09/how-a-la-carte-tv-legislation-died-in-the-senate/456825/.

345. *Compare* FED. COMMC'NS COMM'N, REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC 26 (2004), https://apps.fcc.gov/edocs_public/attachmatch/DOC-254432A1.pdf (noting that consumers could save money by buying Skinny Bundles, which would include only what the consumer wanted), *with* FED. COMMC'NS COMM'N, FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC 18 (2006), https://apps.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf (criticizing 2004 report's statements regarding large bundle programming costing more than Skinny Bundle programming).

346. Dorothy Pomerantz, *Are You Willing to Pay $36 Per Month for ESPN?*, FORBES (Mar. 25, 2015, 5:11 PM), http://www.forbes.com/sites/dorothypomerantz/2015/03/25/are-you-willing-to-pay-36-per-month-for-espn/#217b4fef5798.

347. *Are Emerging Virtual MVPDs Real Competition to Cable Operators?*, EVOLUTION DIGITAL: BLOG (June 29, 2016), https://evolutiondigital.com/are-emerging-virtual-mvpds-real-competition-to-cable-operators/.

348. *See* Schechter, *supra* note 341.

349. *See* Jessie Karangu, *Will Skinny Bundles Become a Trend in 2016?*, COMEBACK (Mar. 16, 2016, 5:30 PM), http://thecomeback.com/pop-culture/will-skinny-bundles-become-a-trend-in-2016.html.

more efficient from a market standpoint and more cost-effective from a consumer perspective, there is a social cost to the elimination of marginally profitable channels.[350] Their absence will deprive consumers of the wide breadth of choice they now enjoy and, ultimately reduce diversity of content in the marketplace.

4. Consolidation in the Media Industry

There is a current trend toward mergers involving the largest MVPDs.[351] In the past three years, the following deals have been announced, and all but the Comcast merger with Time Warner Cable concluded[352]:

- Comcast/Time Warner Cable (discontinued)[353]
- AT&T/Direct TV[354]
- Charter/Time Warner Cable/Bright House[355]
- Altice N.V./Cablevision and Suddenlink[356]

Currently, seven MVPDs control delivery of the content to 92.4 million subscribers, representing 93% of the 99.44 million MVPD households.[357] This trend has implications for the content choices and the

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350. *See id.*

351. A possible merger between Verizon and Charter has widely been reported. Other significant mergers involving an MVPD and content companies have occurred or been announced recently. Verizon (with 4.7 million subscribers) acquired AOL and is in talks to acquire Yahoo. Comcast acquired DreamWorks. More recently, AT&T has been reported to be merging with Time Warner. Meg James & Jim Puzzanghera, *Surge in Media Mergers Is Expected under Trump's Pro-Business Agenda*, L.A. TIMES (Jan. 27, 2017, 3:00 AM), http://www.latimes.com/business/hollywood/la-fi-ct-media-mergers-charter-verizon-2017 0126-story.html.

352. *US Pay-TV Subscriptions Decline by 380,000 in Q2*, IHS MARKIT (Sept. 2, 2011), https://technology.ihs.com/394773/us-pay-tv-subscriptions-decline-by-380000-in-q2.

353. *See* Dorothy Pomerantz, *The Charter-Time Warner Cable Merger Isn't a Slam Dunk*, FORBES (May 26, 2015, 1:19 PM), http://www.forbes.com/sites/dorothypomerantz/2015/05/26/the-charter-time-warner-cable-merger-isnt-a-slam-dunk/#6dfe334942b2.

354. *See* Malathi Nayak, *AT&T's DirecTV Now Online Video Service to Cost $35 Per Month*, REUTERS (Oct. 25, 2016, 3:24 PM), http://www.reuters.com/article/us-timewarner-m-a-at-t-video-idUSKCN12P2LF.

355. Maane Khatchatourian, *Charter Officially Acquires Time Warner Cable, Bright House*, VARIETY (May 18, 2016, 6:17 AM), http://variety.com/2016/biz/news/charter-time-warner-cable-acquisition-official-1201777770/.

356. *See* Claude Solnik, *Altice Acquires Cablevision, Shuffles Execs*, LONG ISLAND BUS. NEWS (June 21, 2016), http://libn.com/2016/06/21/altice-acquires-cablevision-shuffles-execs/.

357. *See* Farrell, *Eat or Be Eaten*, *supra* note 153, at 8; Jon Lafayette, *Nielsen: Pay-TV Households Dip Below 100M*, BROADCASTING & CABLE (Mar. 24, 2016, 9:00 AM), http://www.broadcastingcable.com/news/currency/nielsen-pay-tv-households-dip-below-100m/154922; *Industry Data*, NCTA, www.ncta.com/industry-data (last visited Jan. 31, 2017).

fees to consumers.

One of the stated reasons for these combinations was the need to acquire more leverage to negotiate their carriage agreements with content creators.[358] Increasingly, the cost of licensing content has been the justification for increasing the cost to the consumer of the programming bundle.[359] Consequently, if MVPD consolidation continues, it would likely result in downward pressure on the cost of programming, reducing (or slowing the growth of) the revenues paid for content.[360] By extension, this constraint on the price paid for content suggests another structural reduction in the resources allocated in the Ecosystem for content creation, potentially including sports rights fees.[361]

5. Carriage Disputes

With increasing frequency, programmers and distributors are unable to agree on the renewal of carriage agreements.[362] When the parties reach an impasse, one or the other may decide that instead of attempting to continue negotiations it is preferable to "go dark" or "black out" (i.e., the programming goes off the air, either temporarily or permanently).[363] The number of such disputes has increased from twelve in 2010 to ninety-one

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358. *See* Mike Farrell, *Making the Right Moves: Distributors Strategize in a New Era of Programming*, MULTICHANNEL NEWS (Sept. 12, 2016, 8:00 AM), www.multichannel.com/making-right-moves/407636. In the Charter merger with Time Warner Cable, FOX News, Univision Communications, and Showtime are challenging Charter's interpretation that it can bring the programmers' carriage agreements with Time Warner Cable immediately under its Charter agreements and take advantage of lower pricing. *See id.*

359. *See, e.g.*, Marcia Breen, *Cable and Satellite TV Costs Will Climb Again in 2016*, NBC NEWS (Dec. 22, 2015, 4:19 PM), http://www.nbcnews.com/business/business-news/cable-satellite-tv-costs-will-climb-again-2016-n484531.

360. *See, e.g.*, Jon Brodkin, *AT&T/DirecTV and Comcast/TWC Mergers Could Put Small ISPs "Out of Business*,*"* ARS TECHNICA (June 24, 2014, 2:18 PM), http://arstechnica.com/business/2014/06/attdirectv-and-comcasttwc-mergers-could-put-small-isps-out-of-business/.

361. *Id.* At the consumer pricing level, to the extent the MVPDs enjoy monopoly or oligopoly pricing within the footprint of their subscriber base, they can continue to increase prices above their marginal costs and extract monopoly rent. *See* MARK COOPER, CABLE MERGERS AND MONOPOLIES 14 (2002).

362. *See, e.g.*, Daniel Frankel, *Comcast Dispute with YES Boils Down to 'Most-Favored Nation' Clause, WSJ Says*, FIERCE CABLE (Nov. 30, 2015, 11:12 AM), http://www.fiercecable.com/cable/comcast-dispute-yes-boils-down-to-most-favored-nation-clause-wsj-says. *But see* David Lieberman, *Discovery and Comcast Bury the Hatchet and Agree to Carriage Renewal Terms*, DEADLINE (July 27, 2015, 6:23 AM), http://deadline.com/2015/07/discovery-comcast-contract-renewal-1201485576/.

363. *See, e.g.*, *It's Official: Time Warner to Carry NFL Net*, DEADLINE (Sept. 22, 2012, 9:42 AM), http://deadline.com/2012/09/its-official-time-warner-to-carry-nfl-net-341524/ (noting that nine-year impasse between Time Warner Cable and the NFL over carriage of the NFL Network).

in 2012.[364] There are significant consequences for both parties to these disputes since the public reaction is predictably hostile toward both[365] (i.e., "a plague [upon] both your houses").[366]

The history of these disputes originates the advent of cable television.[367] Cable carriers maintained they had the right to retransmit terrestrial broadcasts through their cable system, and the broadcast networks contended that absent their permission, this commercial use constituted copyright infringement.[368] With the enactment of the Cable Act, Congress created a statutory solution making the carriage of local broadcast television an obligation for cable operators, but giving them the choice of carriage through the Act's "must carry" provision or "retransmission consent."[369] The history of retransmission consent negotiations has evolved and the compensation to broadcasters for carriage of their broadcast networks has shifted from various forms of non-cash consideration, such as carriage of non-broadcast channels, to payments totaling over a billion dollars per year.[370]

A significant proportion of these carriage disputes involve the price paid for sports programming.[371] Two of the largest media markets and

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364. Matthew A. Brill & Matthew T. Murchison, *How the FCC Can Protect Consumers in the Battle Over Retransmission Consent*, BLOOMBERG BNA (Sept. 11, 2013), http://www.bna.com/how-the-fcc-can-protect-consumers-in-the-battle-over-retransmission-consent/.

365. *See id.*

366. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 3, sc. 1, ll. 110–11 (Gordon McMullan, ed., W.W. Norton & Co. 2017) (1597).

367. *See Cable Carriage of Broadcast Stations*, *supra* note 129.

368. Niels B. Schaumann, *Copyright Protection in the Cable Television Industry: Satellite Retransmission and the Passive Carrier Exemption*, 52 FORDHAM L. REV. 637, 638–40 (1983).

369. *See* 47 U.S.C. § 325(b)(1)(A) (2012); 47 U.S.C. § 534(a) (2012).

370. NAT'L ASSOC. OF BROADS., ALLOW BROADCASTERS TO CONTINUE NEGOTIATING IN THE FREE MARKET (2017), http://www.nab.org/documents/advocacy/retransmissionConsent/RetransIssueSheet.pdf. Beginning approximately ten years ago, the broadcast networks switched from negotiating non-cash consideration (typically carriage of broadcaster-owned cable networks) and began requiring payments for cable retransmission of their broadcast signals. These fees have been escalating and according to SNL Kagan in 2015 amounted to $6.4 billion annually and projected to rise to $11.6 billion by 2022. *See SNL Kagan Releases Updated Retransmission Projections*, PR NEWSWIRE (June 29, 2016, 10:00 AM), http://www.prnewswire.com/news-releases/snl-kagan-releases-updated-retransmission-projections-300291457.html.

371.

> These Retransmission Consent disputes are painful for everyone involved, to be sure, but they are most acutely painful for consumers who can be denied access to programming like the World Series or the Academy Awards while broadcast and cable fight it out for the spoils.

Amendment of the Comm'n's Rules Related to Retransmission Consent, 26 FCC Rcd. 2718, 2764 (2011) (statement of Comm'r Michael J. Copps, Member, Federal Communications most prominent MLB teams are currently involved in long-term disputes, resulting in MLB games being withheld from viewers.[372] Contemporaneous with the Los Angeles Dodgers purchase by Guggenheim Partners, the team signed a twenty-five-year contract with Time Warner Cable to carry the Dodgers-owned RSN (SportsNet LA).[373] At that time, other than SportsNet's carriage agreements with Time Warner Cable and a few small distributors, its carriage to seventy percent of the region had expired.[374] The RSN has been seeking fees of four to five dollars (increasing after the first year) per month per subscriber, and the distributors (primarily DirecTV) have refused.[375] On the eve of the 2016 season, the RSN dropped the price to $3.50 but the parties remained at an impasse.[376] The result is that for two and a half years, seventy percent of the Dodgers fans have not been able to watch the games.[377] The YES Network, the New York Yankees RSN (owned eighty percent by FOX and twenty percent by an affiliate of the team),[378] has been at an impasse with Comcast throughout the 2016 season, depriving approximately nine hundred thousand viewers of the game telecasts.[379]

Programmers have begun to extend blackouts in these disputes to their content delivered by online streaming media.[380] In a 2013 dispute between Time Warner Cable for carriage of the CBS broadcast network, CBS blocked access to its streaming website to all Time Warner Cable subscribers.[381] In 2014, Viacom blocked streaming video access to Cable

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Commission).

372. Meg James, *Time Warner Cable Sweetens Deal Again for Dodger TV Channel—and Still no Takers*, L.A. TIMES (Mar. 29, 2016, 7:50 PM), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-time-warner-cable-sweetens-dodgers-channel-deal-no-takers-20160329-story.html.

373. Michael Hiltzik, *Time Warner Cable and the Dodgers Finally Discover the Limits of Greed*, L.A. TIMES (Apr. 1, 2016, 2:35 PM), http://www.latimes.com/business/hiltzik/la-fi-hiltzik-dodgers-greed-20160401-snap-htmlstory.html.

374. *See id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. Nicholas Carlson, *FOX Just Bought a Controlling Stake in the Yankees' Cable Channel*, BUS. INSIDER (Jan. 24, 2014, 5:58 PM), http://www.businessinsider.com/fox-buys-controlling-stake-in-yes-network-2014-1.

379. *Yankee and Dodgers Fans Could Be Blacked Out by Cable Disputes*, N.Y. POST (Mar. 30, 2016, 11:13 AM), http://nypost.com/2016/03/30/yankees-and-dodgers-fans-could-be-blacked-out-by-cable-tv-disputes/.

380. Joe Flint, *FCC Chairman Expresses Concern About TV Networks Blocking Websites*, L.A. TIMES (May 20, 2014, 2:30 PM), http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-fcc-chairman-expresses-concern-about-tv-networks-blocking-websites-20140520-story.html.

381. Ryan Lawler, *CBS Blocks Time Warner Cable Subscribers from Watching Full*

ONE customers.[382] Denial of access on the web has been justified by content providers on the grounds that it is necessary to cause MVPD subscribers to apply pressure on distributors that do not renew content.[383]

As the frequency and scope of these disputes with distributors increases, so does the risk for backlash. It is uncommon that distributors rebate monies to their subscribers for the value of blacked-out programming,[384] and consumers become more focused on the value of their cable bill.[385] In addition, sports viewers may "cut the cord" during a dispute and not return when the dispute is resolved.[386]

6. Challenges to the Advertising-Supported Marketplace

The confluence of the innovations shifting more viewing control to consumers, audience fragmentation, demographic changes, and macroeconomic changes affecting U.S. consumers has significantly impacted advertising revenues, the principal revenue stream supporting the television industry.[387] Like multiple currents in a river, some of these influences compound the effects of others. It is beyond the scope of this Article (and the abilities of the author) to assign relative weight to each of these causal factors. Similarly, it is not the intent to develop a quantitative theory to predict the effect that these changes in the media industry will have on the financial fortunes of the sports teams and leagues. I hope to address the transformational impacts that will influence the financial health of the sports assets in a directional and qualitative

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Episodes on CBS.com, TECHCRUNCH (Aug. 2, 2013), https://techcrunch.com/2013/08/02/cbs-blocks-time-warner-cable-subscribers-from-watching-full-episodes-on-cbs-com/.

382. Mike Farrell, *Viacom Blocks Online Access to CableOne Subs*, MULTICHANNEL NEWS (Apr. 30, 2014, 7:30 PM), http://www.multichannel.com/news/news-articles/viacom-blocks-online-access-cableone-subs/374283.

383. *See, e.g.*, Lawler, *supra note* 381 (stating that when News Corp and Cablevision were unable to agree on retransmission fees for FOX and other networks, Cablevision, including its online video site Hulu, resorted to a blackout. However, after a backlash from subscribers, access was quickly restored).

384. *See* Christopher Zara, *Fox News Dish Network Blackout: Customers Demand Refunds as Bitter Carriage Dispute Drags On*, INT'L BUS. TIMES (Dec. 26, 2014, 5:35 PM), http://www.ibtimes.com/fox-news-dish-network-blackout-customers-demand-refunds-bitter-carriage-dispute-drags-1767826.

385. *See* Brill & Murchison, *supra* note 364.

386. Further, teams that own RSNs have essentially "double-downed" on media and consequently are more vulnerable to the systemic challenges of the media industry outlined herein, as well as to carriage disputes. Joe Flint & Matthew Futterman, *Cost of Sports TV Raises Stakes in Yankees-Comcast Fight*, WALL STREET J. (Mar. 27, 2016, 2:18 PM), http://www.wsj.com/articles/cost-of-sports-tv-raises-stakes-in-yankees-comcast-fight-1459102726.

387. *See* Loechner, *supra* note 46.

way. One thing is clear, ad revenue is stagnant.[388]

III. Changes to the Legal Environment Affecting the Media and Sports Industry

There are two areas of profound attitudinal shifts that have started a process of altering the set of legal rules governing commercial and social behavior. One area involves how technology has altered the way consumers receive content and that, in turn, alters the way participants in the content process are regulated and compensated.[389] The second involves the rules in the sports content category regarding the relationship between athletes and their appropriate compensation and protection by the parties responsible for commercializing the sports in which the athletes participate.[390] History has shown that it is typical for changes in the social fabric to precede changes in the legal rules.[391] The justification often given for legal change to trail changes in other aspects of society is the desirability for the legal process to provide greater resiliency to cyclicality and impermanent changes.[392] It is clear that the legal rules are adjusting to meet the manifold changes in technology, media, and sports.

A. Net Neutrality

The phrase "network neutrality" was first popularized by Tim Wu,[393] who advocated that to achieve the goal of open and public access to information and ideas, all Internet traffic should be treated equally.[394] According to Wu, the way to maximize the likelihood that a public information network will be most useful is if all content, sites, and platforms are treated equally, and he analogized the justification of net neutrality as "preserving a Darwinian competition among every conceivable use of the Internet so that only the best survive."[395] In a net neutrality environment, broadband providers would be prohibited by regulation from slowing down or blocking the flow of traffic through the

388. *See* OOYALA, *supra* note 9, at 8 (discussing how ad-supported TV is declining).
389. *See infra* Section III.A.
390. *See infra* Section III.B.
391. *See* Harry V. Ball et al., *Law and Social Change: Sumner Reconsidered*, 67 AM. J. SOC. 532, 532 (1962).
392. *See id.* at 532.
393. Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 141 (2003).
394. *Id.*
395. *Id.* at 142.

pipe.[396] The Internet service providers (ISPs), such as Comcast and Verizon FiOS, argued that compelling the identical treatment of all content without regard for constraints on bandwidth will result in a misaligned industry, as compared to a marketplace approach in which pricing would be a function of efficiency.[397] The ISPs argue that broadband suppliers should be able to charge businesses more to distribute content that requires faster delivery.[398]

Following the direction of President Obama to implement net neutrality with "the strongest possible rules,"[399] the FCC issued a notice of proposed rulemaking to "find the best approach to protecting and promoting Internet openness."[400] On February 26, 2015, the FCC announced rules to implement the net neutrality policy in regulating the Internet.[401] The FCC reclassified high-speed Internet service as a telecommunications service instead of an information service, under Title II of the Communications Act.[402] Title II of the Communications Act and section 706 of the Telecommunications Act of 1996, which comes from the phone company era, treated the phone service as a "public utility" and by reclassifying the service as a "utility," the FCC premised its regulating of the Internet on its decades of regulating phone companies.[403] The FCC's net neutrality rules[404] prohibit ISPs from engaging in the following:

- No Blocking: broadband providers may not block access to legal content, applications, services, or non-harmful devices.
- No Throttling: broadband providers may not impair or degrade

396. *Id.* at 171.

397. Amy Schatz & Fawn Johnson, *Internet Providers Push Back Against 'Net Neutrality' Proposal*, WALL STREET J. (Sept. 22, 2009, 12:01 AM), http://www.wsj.com/articles/SB125354032776727741.

398. Robert E. Litan & Hal J. Singer, *Why Business Should Oppose Net Neutrality*, HARV. BUS. REV. (Aug. 13, 2010), https://hbr.org/2010/08/why-business-should-oppose-net-neutrality.

399. John Nichols, *Obama Tells the FCC to 'Implement the Strongest Possible Rules to Protect Net Neutrality*,' NATION (Nov. 12, 2014), https://www.thenation.com/article/obama-tells-fcc-implement-strongest-possible-rules-protect-net-neutrality-2/.

400. Protecting and Promoting the Open Internet, 79 Fed. Reg. 37,447, 37,448 (proposed July 15, 2014).

401. *Id.*

402. U.S. Telecomm. Ass'n v. FCC, 825 F.3d 674, 724 (D.C. Cir. 2015).

403. Brian Fung, *The Net Neutrality Court Decision, in Plain English*, WASH. POST (June 15, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/06/15/the-net-neutrality-court- decision-in-plain-english/.

404. The FCC also exercised its discretion not to use Title II to regulate pricing or engineering decisions of ISPs. *Open Internet*, FED. COMM. COMMISSION, https://www.fcc.gov/general/open-internet (last visited Jan. 31, 2017).

lawful Internet traffic on the basis of content, applications, services, or non-harmful devices.

- No Paid Prioritization: broadband providers may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind—in other words, no "fast lanes." This rule also bans ISPs from prioritizing the content and services of their affiliates.[405]

The net neutrality rule was challenged by the U.S. Telecommunications Association and several broadband providers.[406] The principal issue was whether broadband regulation is within the scope of the FCC's power to regulate.[407] The FCC premised its net neutrality rule on the proposition that broadband served the same function as telephony: a utility that was within the scope of the agency's statutory authority.[408] On June 14, 2016, the District of Columbia Circuit Court of Appeals rejected the challenge and ruled that the net neutrality rule was a lawful exercise of the FCC's regulatory authority under Title II of the Telecommunications Act.[409] The District of Columbia Circuit Court of Appeals held that the FCC's exercise of rulemaking was not arbitrary and capricious and approved of its reclassification of both fixed and mobile broadband Internet access service as "telecommunications services."[410] The court also rejected challenges to the net neutrality rule limiting an ISP's arrangements with other networks to exchange traffic.[411] The FCC also reclassified mobile broadband service, which it had previously deemed a "private mobile service," exempt from common carrier regulation, as a "commercial mobile service," subject to such regulation.[412]

In the absence of a successful appeal to an en banc panel of the District of Columbia Circuit Court of Appeals or the Supreme Court, this rule could constrain the ability of the ISPs that are media companies to compete against digital companies (e.g., Netflix, Facebook, or Google).[413] As one observer noted:

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405. *Id.*

406. *See* Protective Petition for Review, U.S. Telecom. Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2015) (No. 15-1063).

407. *Id.* at 2.

408. *U.S. Telecom. Ass'n*, 825 F.3d at 716.

409. *Id.*

410. *Id.* at 724.

411. *Id.* at 712.

412. *Id.* at 713.

413. *See* Brian Fung, *Internet Providers Won't Rest Until the Government's Net-Neutrality Rules Are Dead*, WASH. POST (July 27, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/07/27/internet-providers-wont-rest-until-the-

> Increasingly, broadband companies are looking to acquire their own online content and sell ads against it, much in the way Google sells ads alongside its search results and Spotify sells ads between songs. Verizon's recent announcement that it intends to acquire Yahoo reflects this industry shift. So does AT&T's acquisition last year of DirecTV and Comcast's acquisition in 2011 of NBCUniversal.
>
> Underlying this shift toward content, analysts say, is the broadband industry's hope that it will be able to turn what data it collects on subscribers—such as your browsing history and your mobile-location information—into tools for targeting ever more specific advertisements. These hyper-targeted ads are more lucrative and stand to make Internet providers even more money.

But the FCC's net-neutrality rules could put a damper on those plans.[414]

Commentators also point out that the net neutrality rule may also prevent the ISPs from charging more to the content providers that are funneling a disproportionate amount of data and as a result may stifle innovation by limiting the fees charged for those more content-rich services (e.g., Netflix, BitTorrent, Google, and Skype).[415] However, with a change in administration and chairmanship of the FCC, the fate of the net neutrality rule is in jeopardy.

B. Retransmission Consent and Carriage Disputes

As the disputes between programmers and distributors have increased, so have the demands for government intervention.[416] It has been argued that the retransmission consent rules, established in the Cable Act, are inadequate to police the arrangements between the broadcast providers and the distributors of content and as a consequence, consumers are victimized.[417] Similarly, consumers have demanded that the government regulate the frequent inability of cable providers and MVPDs to reach agreement.[418]

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governments-net-neutrality-rules-are-dead/.

414. *Id.*

415. David Pogue, *The Net Neutrality Debate in 2 Minutes or Less*, SCI. AM. (Apr. 1, 2014), https://www.scientificamerican.com/article/the-net-neutrality-debate-in-2-minutes-or-less/.

416. *See* John Eggerton, *Spokesman: FCC Ready to Take 'Appropriate Action' if CBS/TWC Dispute Continues*, BROADCASTING & CABLE (Aug. 7, 2013, 7:47 PM), http://www.broadcastingcable.com/news/washington/spokesman-fcc-ready-take-appropriate-action-if-cbstwc-dispute-continues/61724.

417. *See* Brill & Murchison, *supra* note 364.

418. *See* 17 U.S.C. § 122(a)(1)(A) (2012). Since 2001, broadcasters have also had mandatory carriage rights on DBS systems. The Satellite Home Viewer Improvement Act of

Under the Cable Act, retransmission consent negotiations are overseen by the FCC, which has promulgated regulations to impose a "good faith" standard in these renewals.[419] The FCC adopted seven factors, the violation of any one of which is considered a per se breach of the good faith negotiation obligation.[420] Alternatively, the FCC can find, based on the "totality of the circumstances," that a party failed to negotiate in good faith.[421]

Only a handful of complaints have been filed with the FCC alleging violations of the good faith rule, and there has been only one finding of a violation.[422] In response to petitions from MVPDs and consumer groups, in March 2011, the FCC issued the following notice for comments on a rulemaking to consider amending the rules:

> [C]onsumers have been concerned about other high profile retransmission consent negotiations that seemed close to an impasse. . . . We are concerned about the uncertainty that consumers have faced regarding their ability to continue receiving certain broadcast television stations during recent contentious retransmission consent negotiations.[423]

In July 2012, on the twentieth anniversary of the enactment of the Cable Act, Congress held hearings on whether or not to amend the retransmission consent rules.[424] MVPD representatives testified that the broadcasters' practice had distorted Congress's original intent of assuring that local broadcast stations be carried, and instead were demanding excessive payments for their signals.[425] The broadcasters' position is that the rule has provided a salutary purpose, assuring the availability of the broadcast content to viewers and providing a mechanism to compensate MVPDs for this content.[426] Congress added two per se violations to the "good faith" bargaining requirements: (1) joint negotiations by non-

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1999 gives satellite carriers a statutory copyright license to retransmit local broadcast stations to subscribers in the station's market, also known as "local-into-local" service. *Satellite Home Viewer Improvement Act*, LERMAN SENTER (Mar. 14, 2000), http://www.lermansenter.com/what-publications-45.html.

419. 47 C.F.R. § 76.65 (2015).

420. *Id.* § 76.65(b)(1).

421. *Id.* § 76.65(b)(2).

422. *See* Amendment of the Commission's Rules Related to Retransmission Consent, 76 Fed. Reg. 17,071, 17,074 (Mar. 28, 2011); *see also* 47 C.F.R. § 76.65.

423. Amendment of the Commission's Rules Related to Retransmission Consent, 76 Fed. Reg. at 17,075.

424. *See* Deborah Collier, *Retransmission and Must Carry Rules Must Go!*, CITIZENS AGAINST GOV'T WASTE, http://www.cagw.org/media/wastewatcher/retransmission-and-must-carry-rules-must-go (last visited Jan. 31, 2017).

425. *See id.*

426. *See* Brill & Murchison, *supra* note 364.

commonly owned stations within a market, and (2) blocking by a broadcaster of the importation of a significantly viewed signal into its market. Congress also directed the FCC to re-examine the retransmission rules.[427]

Subsequently, in 2015, the FCC amended the rules by providing that it is a violation of the duty to negotiate in good faith for any of the four top television broadcast stations in the same market to negotiate retransmission consent jointly.[428] The FCC declined to modify the rule in other ways sought by MVPDs, including imposing mandatory interim carriage pending the disposition of the retransmission negotiation or dispute resolution procedures.[429]

Because the retransmission consent arena remains a highly volatile and highly public battleground often involving the deprivation of viewers' choice content, it will not be surprising if the cries for increased government intervention turn the focus to Congress to put a heavier legislative finger on these scales.

C. Compensation of College Athletes

In the sports industry it is unlikely that there will be a subject for new legal rules with broader implications than the compensation of amateur athletes. The principal area of focus has been the use of player names, images, and likenesses (NILs) without consent, but it is not merely an intellectual property issue—it implicates labor law and antitrust issues, the premise of the intercollegiate athletic structure, and the billions in annual media revenues these athletes generate.[430]

The challenge to the antediluvian practice of the NCAA's commercial use of player NILs without compensating players is the

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427. *See* STELA Reauthorization Act of 2014, Pub. L. No. 113-200, sec. 103(a)–(c), § 325(b)(3)(C), 128 Stat. 2059, 2062 (to be codified at 47 U.S.C. § 325(b)(3)(C)).

428. 47 C.F.R. § 76.65(a) (2015).

429. Retransmission Consent Negotiations, 79 Fed. Reg. 28,615, 28,623 (May 19, 2014) (codified at 47 C.F.R. § 76.65(b)).

430. *Compare* Steve Berkowitz, *NCAA Nearly Topped $1 Billion in Revenue in 2014*, USA TODAY (Mar. 11, 2015, 3:42 PM), http://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/ (noting that the NCAA reported 2014 revenue of $989 million), *with* Brief & Request for Oral Argument for College Athlete Advocate Mr. Andrew A. Oliver as Amicus Curiae in Support of the Plaintiffs-Appellees at 7, O'Bannon v. NCAA (*O'Bannon II*), Nos. 14-16601, 14-17068 (9th Cir. 2015) ("[I]n 2013–14, college sports accounted for about $15BB in annual revenue, about $11BB of which comes from Division I, and within that Division, about $5.8BB or 52% of that money is generated by the Power Five Conferences and their members, with football and basketball combined constituting about $4.9BB or 84% of that amount . . . ." (citing *Equity in Athletics Data Analysis*, U.S. DEP'T EDUC. OFF. POSTSECONDARY EDUC., http://ope.ed.gov/athletics/ (last visited Jan. 31, 2017))).

O'Bannon v. NCAA (*O'Bannon I*), a class action brought by a former college basketball player.[431] The NCAA maintains that paying athletes would violate the tradition of "amateurism in sports."[432] The plaintiffs narrowed the case to former football and basketball players of either Division I or Football Bowl Subdivision and discontinued their damages claims (having settled with the defendant Electronic Arts, a videogame creator that uses player NILs).[433] The district court entered judgment for the plaintiffs, concluding that the NCAA's rules prohibiting student-athletes from receiving compensation for their NILs constitute an unreasonable restraint of trade in violation of section 1 of the Sherman Act.[434] The judge also entered a permanent injunction against the NCAA from prohibiting colleges from granting scholarships to student-athletes, limited to the full cost of attending the school plus up to five thousand dollars per year in compensation to be held in trust until the student leaves college.[435]

On appeal, the Ninth Circuit Court of Appeals affirmed in part and reversed in part, finding that the district court, "identified one proper less restrictive alternative to the current NCAA rules" (i.e., allowing NCAA members to give scholarships up to the full cost of attendance), but that the district court's other remedy, allowing students to be paid cash compensation of up to five thousand dollars per year, was erroneous.[436] Both parties have petitioned the Supreme Court for review and both petitions have been denied.[437]

However, the issue is broader than *O'Bannon I*, because that case was limited to football and basketball, and to the use of NILs challenged in that case. Student-athletes participating in other sports and whose NILs were used in other commercial applications presumptively will be following suit.[438] In recent years, Congress has shown interest in

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431. 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014), *rev'd*, 802 F.3d 1049 (9th Cir. 2015).

432. Zachary Stauffer, *NCAA President Defends Amateurism in College Sports*, PBS: FRONTLINE (June 19, 2014), http://www.pbs.org/wgbh/frontline/article/ncaa-president-defends-amateurism-in-college-sports/.

433. *O'Bannon I*, 7 F. Supp. 3d at 965 n.12.

434. *Id.* at 963.

435. *Id.* at 1008.

436. *O'Bannon II*, 802 F.3d 1049, 1053 (9th Cir. 2015).

437. O'Bannon v. NCAA *(O'Bannon III)*, 137 S. Ct. 277 (2016) (mem.).

438. Michael McCann, *O'Bannon v. NCAA: With Trial Over, What Comes Next?*, SPORTS ILLUSTRATED (June 30, 2014), http://www.si.com/college-football/2014/06/30/obannon-ncaa-antitrust-case-next-steps. Foreshadowing expanded litigation, the National Labor Relations Board's Office of the General Counsel issued a memorandum establishing that NCAA Division I football players are "employees under the [National Labor Relations Act ("NLRA")], with the rights and protections of the act." NLRB OFFICE OF THE GEN. COUNSEL, MEMORANDUM GC 17-01, GENERAL COUNSEL'S REPORT ON THE STATUTORY RIGHTS OF

scrutinizing the compensation and safety of intercollegiate athletes.[439] Given the continued increase in the compensation of athletes at the professional level and the attention given to the risk of injury and of death playing contact sports, it is likely that the drumbeat for legislation will intensify.[440]

D. Liability for Sports Injuries

Another issue that will have a profound effect on the future of the sports industry is how sports organizations address the risk of serious injury. Initially, the focus of the issue was football injuries, specifically concussions.[441] For years, evidence accumulated of a connection between concussions and serious/permanent health injuries, including death, arising principally from chronic traumatic encephalopathy, but the NFL denied any causal association.[442] Litigation was filed, on behalf of a class of former NFL players and their families, alleging serious physical injury due to concussions sustained while playing professional football.[443] On August 29, 2013, the litigation was settled for $765 million to provide medical help to former players, and the NFL established a fund of $10 million for research, safety, and education programs.[444]

UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 16 (2017). The memorandum stated that

> scholarship football players should be protected by Section 7 [of the NLRA] when they act concertedly to speak out about aspects of their terms and conditions of employment. This includes . . . any actions to: advocate for greater protections against concussive head trauma and unsafe practice methods, reform NCAA rules so that football players can share in the profit derived from their talents, or self-organize . . . .

Id. at 21–22.

439. *See, e.g.*, Megan R. Wilson, *NCAA Hires Lobbyists as Athletes Battle for Pay*, HILL (June, 18 2014, 12:08 PM), http://thehill.com/business-a-lobbying/lobbying-hires/209767-ncaa-hires-lobbyists-for-the-first-time-as-athletes-battle.

440. Gregory B. Bonds et al., *The Impact of Litigation, Regulation, and Legislation on Sport Concussion Management*, SPORT J., Mar. 23, 2015, at 2; Jim Peltz, *Sports Salary Inflation: $1-Million Man March*, L.A. TIMES (Dec. 18, 2012, 5:00 AM), http://www.latimes.com/sports/la-sp-sports-salary-inflation-20121218-htmlstory.html.

441. CALEB BARKER ET AL., FRONTIER TORTS, HARVARD LAW SCH., NFL CONCUSSION: THE CURRENT SITUATION AND POLICY IMPLICATIONS 7 (2012), http://learning.law.harvard.edu/frontiertorts/wp-content/uploads/2013/04/NFL-Concussions-White-Paper-2.pdf.

442. *Id.* at 1, 7.

443. Plaintiffs' Master Administrative Long-Form Complaint at 4, *In re* Nat'l Football League Players' Concussion Injury Litig., 842 F. Supp. 2d 1378 (E.D. Pa. filed June 7, 2012) (Nos. MDL 2323, 2:12-md-02323).

444. *NFL, Ex-Players Agree to $765M Settlement in Concussions Suit*, NAT'L FOOTBALL LEAGUE (Aug. 29, 2013, 12:42 PM), http://www.nfl.com/news/story/0ap1000000235494/article/nfl-explayers-agree-to-765m-settlement-in-concussions-suit; Press Release, Irell & Manella LLP, NFL, Retired Players Resolve Concussion Litigation; Court-Appoint Mediator Hails "Historic" Agreement (Aug. 29, 2013), http://static.nfl.com/static/content/public/

On December 3, 2013, five former NFL players filed a lawsuit against the Kansas City Chiefs seeking damages for personal injuries sustained from concussions when they played for the team during the period from 1987 to 1993, when there was no collective bargaining agreement (CBA) in the NFL.[445] St. Louis Cardinals players have filed a similar lawsuit against their former team.[446] The players opted out of the settlement of the multidistrict litigation and, with no CBA in effect, could bring actions directly against the team.[447] Under a unique feature of Missouri law, employees can sue employers, in this case the team, in civil court if the employees declined worker's compensation.[448]

Beginning in 2010, the NFL began changing playing rules to mitigate future injuries including

- prohibiting "a player from launching himself off the ground and using his helmet to strike a player in a defenseless posture in the head or neck";[449]
- requiring that a play is immediately whistled dead when a player loses his helmet on the playing field;[450]
- requiring defenders to "line up with their entire bodies on the outside of the snapper's body to protect the snapper while he is in a position of vulnerability" on field goals or extra points;[451]
- moving the ball "up from the 30-yard line to the 35-yard line" on kickoffs;[452] and
- outlawing the three-man wedge on kickoffs.[453]

In the middle of the 2010 season, the NFL put the teams on notice

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photo/2013/08/29/0ap2000000235504.pdf.

445. Peter Barzilai, *Ex-Kansas City Chiefs Sue Team Over Concussion Damage*, USA TODAY (Dec. 3, 2013, 2:32 PM), http://www.usatoday.com/story/sports/nfl/chiefs/2013/12/03/kansas-city-chiefs-concussion-lawsuit/3859149/.

446. Robert Patrick, *Former Football Cardinals File Lawsuit Over Concussions*, ST. LOUIS POST-DISPATCH (Jan. 3, 2014), http://www.stltoday.com/sports/football/former-football-cardinals-file-lawsuit-over-concussions/article_772a1d6d-1dbe-5e29-bd71-b3369f3b5d3a.html.

447. Barzilai, *supra* note 445; *see also* Patrick, *supra* note 446.

448. *See* State *ex rel.* KCP&L Greater Mo. Operations Co. v. Cook, 353 S.W.3d 14, 28 (Mo. Ct. App. 2011); *see also* MCANANY, VAN CLEAVE & PHILLIPS, P.A., THE CONTINUED EROSION OF THE EXCLUSIVE REMEDY DOCTRINE (2013), www.mvplaw.com/post/articles/Exclusive%20Remedy(1).pdf.

449. Thomas A. Drysdale, Helmet-to-Helmet Contact: Avoiding a Lifetime Penalty by Creating a Duty to Scan Active NFL Players for Chronic Traumatic Eucephalopathy, 34 J. LEGAL MED. 425, 439 (2013).

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

that "more significant discipline, including suspensions, will be imposed on players that strike an opponent in the head or neck area in violation of the rules."[454] In 2011, the NFL also required that "certified athletic trainers be available" during games to aid in diagnosing concussions.[455] In 2013, the NFL mandated that, "if a running back lowers the crown of his helmet while he is inside the tackle box or while he is less than three yards downfield and makes contact with a defender, the team will be given a 15-yard penalty."[456] Beginning with the 2016 season, the NFL and NFL Players Association have agreed to harsher penalties (fines and/or draft-pick penalties) if teams fail to follow the *NFL Game Day Concussion Protocol*.[457]

Lawsuits involving collegiate athletes asserting personal injury claims against the NCAA, alleging the organization was aware of the risk of serious injury and failed to protect the students, were consolidated as a multidistrict class action.[458] Unlike the NFL concussion case, this case involved an estimated 4.4 million athletes in forty-three different men's and women's sports.[459] On January 26, 2016, the action was preliminarily settled, and finally approved on July 15, 2016, with the NCAA agreeing to pay seventy million dollars to create a Medical Monitoring Fund over a minimum of fifty years and to provide five million dollars for concussion-related research.[460] The NCAA will also implement changes in managing concussions and "return-to-play" policies.[461]

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454. Drysdale, supra note 449, at 439; Goodell Issues Memo Enforcing Player Safety Rules, NAT'L FOOTBALL LEAGUE (Oct. 20, 2010, 5:51 PM), http://www.nfl.com/news/story/09000d5d81b7b9ef/article/goodell-issues-memo-enforcing-player-safety-rules.

455. Drysdale, supra note 449, at 440; Chris Mortensen, Trainer Will Oversee In-Game Testing, ESPN (Dec. 21, 2011), http://www.espn.com/nfl/story/_/id/7373562/nfl-adds-concussion-specific-trainers-team-games.

456. Drysdale, supra note 449, at 440; Bill Bradley, New NFL Rules: Crown-of-Helmet Change to Help Runner, Defender, NAT'L FOOTBALL LEAGUE (Sept. 5, 2013, 2:14 PM), http://www.nfl.com/news/story/0ap1000000238662/article/new-nfl-rules-crownofhelmet-change-to-help-runner-defender.

457. *NFL, Players Union Announce New Game-Day Concussion Protocol*, U.S. NEWS & WORLD REP. (July 25, 2016, 6:46 PM), http://www.usnews.com/news/sports/articles/2016-07-25/nfl-players-union-announce-new-game-day-concussion-protocol.

458. *In re* Nat'l Collegiate Athletic Assoc. Student-Athlete Concussion Injury Litig., Nos. MDL 2492, 13-cv-09116, 2014 U.S. Dist. LEXIS 174334, at *6–7 (N.D. Ill. Dec. 17, 2014) (noting that the cases were consolidated in the Northern District of Illinois by order of the Judicial Panel on Multidistrict Litigation).

459. Steve Berkowitz, *Judge OKs $75M Class-Action Concussions Settlement Against NCAA*, USA TODAY (July 14, 2016, 5:33 PM), http://www.usatoday.com/story/sports/ncaaf/2016/07/14/college-football-concussions-lawsuit-ncaa/87097982/.

460. *In re* Nat'l Collegiate Athletic Assoc. Student-Athlete Concussion Injury Litig., Nos. MDL 2492, 13-cv-09116, 2016 U.S. Dist. LEXIS 91866, at *4–5 (N.D. Ill. July 15, 2016).

461. *In re* Nat'l Collegiate Athletic Assoc. Student-Athlete Concussion Injury Litig., Nos. MDL 2492, 13-cv-09116, 2014 U.S. Dist. LEXIS 174334, at *16 (N.D. Ill. Dec. 17, 2014).

The scope of the problem transcends football. The challenge of protecting participants from traumatic brain injury confronts soccer, hockey, softball, boxing, basketball, wrestling, mixed martial arts, and many other sports.[462] The magnitude of the issue is immense. In a study reported in 2012, "there [were] 1.7 million documented [traumatic brain injury cases] each year, but are estimates closer to around 3.8 million."[463] Of these, 173,285 are sports and recreation related among children and adolescents.[464]

How leagues, organizing bodies, schools, and coaches handle sports injury education, prevention and management will be an important factor influencing the success or failure of the sport. The issue transcends liability management. Sports must make the protection of its athletes as much of a priority as providing a compelling entertainment event. For example, how football, where violence is a core aspect of appeal to its fans, dials back the risk of injury will have direct consequences on the future success of the sport.[465]

IV. IMPLICATIONS FOR THE SPORTS INDUSTRY

The fact that the entertainment industry is in the middle of a seismic change is well chronicled.[466] As described above, these changes are many, varied, and profound,[467] and have as their origin the transformation in how consumers receive, participate in, or even create content.[468] One effect is a fundamental re-orientation of control, so that consumers dictate

462. Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Class Settlement & Certification of Settlement Class at 9, *In re* Nat'l Collegiate Athletic Assoc. Student-Athlete Concussion Litig., Nos. MDL 2492, 13-cv-09116 (N.D. Ill. filed July 29, 2014). The NHL still explicitly denies an association between injuries sustained while playing hockey and chronic traumatic encephalopathy. John Branch, *N.H.L. Commissioner Gary Bettman Continues to Deny C.T.E. Link*, N.Y. TIMES (July 26, 2016), http://www.nytimes.com/2016/07/27/sports/nhl-commissioner-gary-bettman-denies-cte-link.html; Juliet Macur, *The N.H.L.'s Problem with Science*, N.Y. TIMES (Feb. 8, 2017), https://www.ny times.com/2017/02/08/sports/hockey/nhl-chronic-traumatic-encephalopathy-cte-juliet-macur.html.

463. Christopher S. Sahler & Brian D. Greenwald, *Traumatic Brain Injury in Sports: A Review*, REHABILITATION RES. PRAC., 2012, at 1, 4.

464. *Id.*

465. Another dimension to incidences of violence detracting from the health of sports is the separate, but arguably related issue of the increased frequency of off-field violence by athletes. *See, e.g.*, Harwell, *supra* note 41; Teresa M. Walker, *Experts Want to See NFL Act on Domestic Violence*, SAN DIEGO UNION-TRIB. (Aug. 27, 2014, 12:46 AM), http://www.sandiegouniontribune.com/sdut-experts-want-to-see-nfl-act-on-domestic-violence-2014aug27-story.html.

466. *See, e.g.*, BOTHUN & VOLLMER, *supra* note 10, at 5; MCKINSEY & CO., *supra* note 236, at 6; OOYALA, *supra* note 9, at 1.

467. *See supra* Part II.

468. *See supra* Sections II.A.1–5.

the time, location, and selection of their viewing of content.[469] The impact has been and will continue to be felt by every actor and in every facet of the industry. What is not clear is how these changes in the media Ecosystem will affect the sports businesses that have been the beneficiaries of unprecedented revenue growth from the entertainment industry.

Compounding the effect of the changes to the Ecosystem brought about by innovation are structural or legal changes to the Ecosystem.[470] With the totality of all of these changes, the ineluctable fact remains that content that is compelling—that causes authentic *engagement* with the viewer—will still command more consumer value.[471] Put another way, "*Good* content is king."[472] Despite all the changes and the challenges to the industry, consumer "thirst for unique, high-quality content does not show any signs of abating."[473]

As a content category, sports retain the potential to provide premium value relative to other forms of entertainment to consumers and therefore to media companies.[474] The inherent durability of sports as an entertainment category arises from its essential qualities: it is live, competitive, and (predominantly) involves teamwork.[475] These dimensions differentiate the sports category from other forms of entertainment and consequently the sports category continues to over-index as valued content in the minds of consumers.[476] Additionally, the sports category continues to out-perform other entertainment genres in its resilience to the major disruptive effects catalogued above.

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469. *See supra* Sections II.A.1–2.

470. *See supra* Sections II.A–C, Section III.

471. Miles Weaver, *The Future of Multi-Channel Networks (MCNs) and Their Direct-to-Consumer Video Model*, PIKSEL (Jan. 5, 2016), http://www.piksel.com/2016/01/the-future-of-multi-channel-networks-mcns-and-their-direct-to-consumer-video-model/.

472. Steven Bichimer, *Are Sports Ruining America's "Skinny Bundle" Dream?*, CAULDRON (May 25, 2016) (emphasis added), https://thecauldron.si.com/are-sports-ruining-americas-skinny-bundle-dream-f47dd88ebe2c#.9ot6o0y70.

473. BOTHUN & VOLLMER, *supra* note 10, at 5–6.

474. *See* OOYALA, *supra* note 9, at 8.

475. *Id.* Going back to ancient Rome, the appeal of sport was a public contest to see who, or which team, prevailed. *See Roman Gladiators: How They Compare to Modern Sporting Heroes*, ANTIQUITYNOW (Oct. 2, 2014), https://antiquitynow.org/2014/10/02/roman-gladiators-how-they-compare-to-modern-sporting-heroes/.

476. BOS. CONSULTING GRP., THE VALUE OF CONTENT 36 (2016), https://www.libertyglobal.com/pdf/public-policy/The-Value-of-Content-Digital.pdf.

A. Cord-Cutting

"[M]ore than ninety percent of sports fans are willing to pay for sports programming."[477] Significantly, despite the fall-off from traditional media in the under 35 audience and the use of ad-blocking programs, those ages 15 to 36 said they would pay the most for sports programming.[478] Additionally, according to a study in *MediaPost*, forty-three percent of U.S. adults cite live sports as the reason they will not cancel cable.[479]

B. OTT

Sixty-three percent of all sports fans (and seventy percent of fans with a child in the home) are willing to pay for a sports package on an OTT platform.[480] The recent deals by Disney to invest in digital sports programming,[481] as well as Twitter's multiple sports league deals,[482] reflect the emerging value proposition of sports on new delivery outlets.[483]

C. Time-Shifting

With respect to other core industry challenges, "[s]ports programming has proven resilient to time-shifted viewing, continues to be a reliable place for advertisers targeting the key A18-49 demographic, and provides TV networks with potential retransmission or affiliate fee leverage when negotiating with multichannel video programming distributors (MVPDs)."[484] Another report is even more emphatic on the continued value of sports due to its live character:

> Sports has never had it better; it's the one thing on television that hasn't been disrupted by DVR technology. People still watch sports live, so they don't skip through the commercials. This simple truth has drastically driven up the value of sports programming. In an increasingly fragmented media environment, sports are the one thing

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477. Katz, *supra* note 79, at 28.

478. *Id.*

479. OOYALA, *supra* note 9, at 9.

480. Katz, *supra* note 79, at 28.

481. *See* Todd Spangler, *Disney's $1 Billion Catch*, VARIETY, Aug. 16, 2016, at 22, 22.

482. *See* Todd Spangler, *Twitter to Live-Stream MLB, NHL Games for Free in Latest Sports Plays*, VARIETY (July 25, 2016, 6:00 AM), http://variety.com/2016/digital/news/twitter-mlb-nhl-free-live-games-1201821793/.

483. *Sports Fans Amplify the Action Across Screens*, NIELSEN (Mar. 10, 2014), http://www.nielsen.com/us/en/insights/news/2014/sports-fans-amplify-the-action-across-screens.html (showing that sports account for fifty percent of the tweets about television).

484. MORGAN STANLEY, SPORTS CONTENT IS KING, *supra* note 19, at 3.

that still grabs the attention of a widespread audience.[485]

D. Demographic Changes

As discussed above, the NFL, NBA, and MLB have made qualified progress in broadening their viewership and fan base.[486] Clearly, more effort needs to be directed to people of color, women, and younger audiences. This remains a critical area of challenge and opportunity that will contribute to the future success or failure of the sports leagues.[487]

E. Digital Platforms

According to a study reported by Yahoo's Flurry Analytics unit, time spent on sports apps grew 210% year over year in 2014, more than three times faster than other types of apps.[488] According to Nielsen, across all video platforms, in 2014 there was an annual increase of 473% of the total number of video streams of sports content.[489] "Not only is sports consumption increasing on TV and digital outlets, but sports radio listenership is on the rise as well."[490]

CONCLUSION

"A rising tide lifts all boats. But others will run aground,"[491] characterizes the challenge and opportunity confronting sports. Valuations of the major sports assets have risen because the demand for premium content from the buyers of their media rights has outstripped supply. To avoid "running aground," teams and leagues must understand the changes that are redefining how audiences relate to content, understand the legal rules defining the athletes' participation in the activity and the exploitation of the events, and they must reinvent the experience of their sport to adapt to the changes (i.e., "skate to where the puck is going to be, not where it has been").[492]

Emerging technologies and platforms provide opportunities for

485. DEL. N., *supra* note 22, at 24.

486. *See supra* Part I.

487. *See* Thompson, *supra* note 40.

488. OOYALA, *supra* note 9, at 9.

489. DEL. N., *supra* note 22, at 10.

490. NIELSEN, SPORTS MEDIA REPORT 2015, *supra* note 45, at 6. ("From 2011 to 2015, the Average Quarter-Hour (AQH) share increased 12% (4.1% to 4.6%), and showed steady increases year over year.").

491. Gene Sperling, *How to Refloat These Boats*, WASH. POST (Dec. 18, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/12/17/AR2005121700028.html.

492. Roy MacGregor, *Fortune Smiled Upon Us*, *in* TOTAL GRETZKY: THE MAGIC, THE LEGEND, THE NUMBERS 19 (Steve Dryden ed., 1999) (quoting Wayne Gretzky).

sports to create or participate in new businesses and revenue streams, offering new ways for consumers to engage with content. For example, sports should be at the forefront in driving adoption of technologies such as virtual reality, other immersive platforms and holograms, and devices or software that deepen the relationship between audiences and content. New businesses are being launched, built on the immense popularity of gaming and e-sports,[493] and sports must evolve to embrace these activities. Environments designed for sports viewing—"third venues"—must be integrated into the revenue and licensing mix to enhance fan engagement and team opportunities.[494]

Particularly if sports are going to capture the attention of millennials and Gen Zers, innovation must also transform the live experience into a more contemporary platform for both in and out of venue entertainment. Social media must become a mainstream mode of the presentation of sports so that fans are participants and involve their network of friends in the sport.[495] Sports teams must create contextual digital content for fans to access on mobile devices to augment the in-stadium and at-home experience. Teams can supply fans with pre- and post-game information to enhance and elongate the entire event experience and make future marketing a seamless extension of the event.

Sports must seize the opportunity to use its coveted position in the hierarchy of content to create a new narrative, which empowers the audience to use its technological control to be more engaged *as a participant* in the storyline. It must create excitement around multiple screens/devices and social collaboration networks, facilitating its audiences' creation of a social experience with the game, as well as providing a broader platform with related data and content.

Challenges unique to each sport remain to be surmounted for the sports to prosper: on and off-field violence in the NFL; the pace of the game and an aging fan base in MLB; the addition of more women fans in the NBA; and the expansion of the audience in the NHL. Perhaps most challenging for U.S. sports, is the need to translate its product to other countries through the global reach of digital platforms. Unlike sports such as European football, U.S. sports have only had limited success in

493. DEL. N., *supra* note 22, at 32.

494. *Id.* at 18.

495. Both Nielsen and McKinsey have reported that social media usage lifts program ratings for twenty-nine percent of shows. Cotton Delo, *Nielsen Study: Higher Tweet Volume Drives TV Tune-In 29% of the Time*, ADVERTISINGAGE (Aug. 6, 2013), http://adage.com/article/digital/nielsen-tweet-volume-drives-tv-tune-29-time/243512/. Thus, sports can make its programming more vital by creatively incorporating a multi-screen strategy to enhance audience engagement.

migrating their appeal to other countries.[496] As a consequence, U.S. sports have failed to participate in the Internet's globalization of brands.

A culture of innovation must replace adherence to tradition. To participate in the evolution of the audience and entertainment experience, the sports experience will have to evolve. To continue to over-index other forms of leisure activity, the leaders of sports will have to mirror leaders in other businesses where innovation is the differentiator between success and failure. Changes in the format, exhibition, and relationship among participants in sports to align with changing cultural and entertainment expectations will be necessary for continued financial success. These changes may require modifying traditional structures of the sport such as length of schedule, duration of games, delays, protection, and compensation of athletes.[497]

Demographic changes in audience composition will provide the opportunity for sports businesses to expand their traditional fan base. To remain such a central part of live entertainment, teams and leagues must embrace the attitude and culture of the new audiences. More importantly, adding new decision-makers, fans, and participants will infuse sports with new voices and experiences and contribute to their ability to capture future generations.

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496. NIELSEN, SPORTS MEDIA REPORT 2015, *supra* note 45, at 32.

497. For example, recent changes in the traditional format/rules of major international sports to make games faster and more telegenic have brought about a resurgence in fan interest. "Rugby sevens" (now an Olympic sport) and "Twenty20 cricket" have broadened the audience appeal of these sports. *See* Nate Scott, *Rugby Sevens Is Actually the Best Sport at the Olympics*, USA TODAY FOR WIN (Aug. 9, 2016, 11:29 AM), http://ftw.usatoday.com/2016/08/rugby-sevens-is-actually-the-best-sport-at-the-olympics; *Meet the Man Who Invented Twenty20 Cricket—the Man Missing Out on Millions*, DAILY MAIL, http://www.dailymail.co.uk/sport/cricket/article-1025831/Meet-man-invented-Twenty20-cricket--man-missing-millions.html (last updated June 11, 2008, 4:50 PM).