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THE COPYRIGHT CONUNDRUM IN MODERN TECHNOLOGY COPYRIGHT ISSUES REGARDING INTERNET SERVICE PROVIDERS AND LIVE SPECTATOR SPORT EVENTS

John J. Leppler*

INTRODUCTION

The Internet is a worldwide system of interconnected network constantly expanding. Since the 1990s, the United States tried to regulate the internet, but Congress has yet to find a solution to stopping Internet piracy and copyright infringement.1 As a remedial measure, Congress enacted the 1998 Digital Millennium Copyright Act ("DMCA").2 The DMCA was enacted to protect copyright owners for original work of authorship and Internet service providers ("ISPs," ) from infringement lawsuits; however, the act has only succeeded in the latter thus limiting ISPs’ legal liability for copyright infringement claims. The Internet and technological advancements make it relatively simple to upload copyrighted works, but fail to account for the rights of the copyright holder.3

Courts have determined that ISPs should constantly be held accountable against original copyright holders for piracy actions, yet the courts have been reluctant in finding any liability.4 The most recent decision is Viacom International Inc. v. YouTube, where Viacom sued the leading video-sharing site owned by Google alleging that YouTube engaged in "brazen and massive" copyright infringement by allowing users to upload and view thousands of videos owned by

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3. Id.

Viacom without permission.5 In 2010, the U.S. District Court for the Southern District of New York granted Youtube’s owner Google Inc.’s motion for summary judgment against Viacom.6 Viacom then appealed the summary judgment ruling to the United States Court of Appeals for the Second Circuit and on April 18, 2013, the Second Circuit’s Judge Stanton again granted summary judgment in favor of Google Inc.7 Judge Stanton ultimately upheld that “low threshold” ISPs must meet for protection under the DMCA’s “safe harbor” provisions from copyright infringement.8 Viacom has appealed the Second Circuit’s decision and the case is currently pending.9

Copyright challenges by holders against ISPs are mainly for music and entertainment.10 There are two grounds that live spectator sports events have yet to be challenged on.11 First, a court has yet to determine whether a live spectator sports event is copyrightable by a stadium, arena, or teams.12 Second, a court has yet to distinguish what activities are within the scope of what “reasonably occurs” during a live sports event.13 “Facts” and “news” are non-copyrightable under the First Amendment, so distinguishing these occurrences from “sports events related activates” are important for copyright distinction.14

Part II of this article summarizes the 1998 DMCA and its “safe harbor” provisions in relation to ISPs. Further, this section will discuss recent case law that demonstrates the “low threshold” that ISPs must meet to be granted protection through the DMCA “safe harbor” provisions.

12. Id.
13. Id.
14. Id.
Part III of this article addresses the legal issue in determining what content is “facts” or “news” both of which are non-copyrightable under the First Amendment, and distinguishing those from a “live spectator sports event.” A copyright owner, one who owns an exclusive copyright license, is the only person or entity who may sue an ISP for copyright infringement. It is unclear whether a stadium, arena, or team would own a copyright uploaded by a spectator onto an ISP. This section will analyze a legal issue that is split amongst the United States Circuits regarding who the correct copyright holder is of a taped and uploaded segment of a live sports event—the sport’s governing body or the spectator who filmed the segment.

Internet expansion is a mainstay, and telling people not to bring cell phones to live sporting events is a virtual impossibility. Monetizing uploaded and downloaded content will decrease potential lawsuits that may arise from copyright-protected content. The “safe harbor provisions” in the DMCA has afforded ISPs a “low threshold” to meet to be protected from copyright infringement. The lobbied ideas of Internet insurance and an “Internet fund” may mutually benefit the ISPs and copyright holders, but this article concludes showing why courts must give definitive answers to certain legal questions before creating financial models that mutually benefits ISP expansion and copyright protection.

I. Background

A. Overview of American Copyright Law

Copyright is protection provided by United States’ Federal law to authors of “original works of authorship,” including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works. Section 106 of the Copyright Act, amended in 1976, gives the owner of the copyright work the exclusive right to do and to authorize others to

16. See Wiser supra note 1 at 31.
19. Id. at 865.
reproduce the work in copies or phonograph records, prepare derivative works based upon the owner's work, distribute copies of the work in any form to the public by sale, and to perform the owner's work publicly in literature, motion picture, pantomime, musical, and other audiovisual forms of the work.\(^{20}\)

Copyright protection exists from the time the work is created in fixed form.\(^{21}\) The copyright in the work of the authorship immediately becomes the legal property of the author who created the work.\(^{22}\) An exception would be a "work for hire," where the employer or commission party is the owner.\(^{23}\) Only the author or those deriving their rights through the author can lawfully claim copyright.\(^{24}\) However, two parties can expressly agree in a written instrument signed by both that the original work is owned by one or the other as the sole copyright holder.\(^{25}\) The parties can contract the time, form and duration of the original work protected by copyright, with the rest of the work considered "fair use."\(^{26}\)

B. The Digital Millennium Copyright Act of 1998

The Digital Millennium Copyright Act ("DMCA") is a federal statute that criminalizes the production and dissemination of technology, devices, or services intended to circumvent measures that control access to copyrighted works of "authorship."\(^{27}\) The DMCA heightens the penalties for copyright infringement by the Internet.\(^{28}\)

20. Id. at 857
22. KESEY, LLC, an Oregon Limited Liability Company, Plaintiff, v. Michele FRANCIS aka Mischelle Mcmindes, an individual; Mike Hagen, an individual; Katherine Wilson, an individual; Sundown & Fletcher, Inc.; an Oregon corporation; Associates Film Producers Services, an Oregon partnership or other business entity; and Does 1 through 100, inclusive, Defendants., 2008 WL 4155948 (D.Or.) Under certain narrowly-defined conditions, however, the "author" of a work is deemed to be the employer or commissioning party of the person who created the work, but only if it is a "work for hire," which requires: (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned ... if the parties expressly agreed] in a written instrument signed by them that the work shall be considered a work made for hire. CCNV, 490 U.S. at 737-38; 17 U.S.C. § 101 (emphases added).
23. See Id.
24. Id.
27. Viacom, 676 F.3d at 27. .
28. Id.
1. Internet Service Providers under the DMCA

For a party to be immune from copyright infringement liability under the DMCA's "safe harbor" provision, the party must first be considered an ISP. A service provider is defined under Section 512(k)(1)(A) of the DMCA as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification of the content of the material as sent or received." An ISP is a provider of "online services or network access, or the operator of facilities." The definition appears narrow, but the Courts have interpreted the meaning of an "ISP" broadly. The cases Viacom v. YouTube and Perfect 10, Inc. v. Cybernet Ventures, Inc. first demonstrate a the courts' reluctance to broadly interpret an ISP under the DMCA "safe harbor provisions, but since such cases, broader interpretation of whether ISP is entitled to the "safe harbor" provisions have been applied. Two recent cases, The Football Association Premier League Ltd. Et. Al v. Youtube (2012) and Capital Records, Inc. v. MO3tunes, LLC (2013,) show lower courts have considered any website that stores, sends or receives electronic information but does not modify the information, an ISP. The Youtube and Perfect 10 decisions are regularly scrutinized amongst legal scholars, but in those cases the courts held that an ISP regularly performs these four activities:

1. Transitory communication;
2. System caching;
3. Storage of information on systems or networks at the direction of users; or
4. Information location tools.

Once a service provider has met the qualifications and is classified as to have engaged in the above four conducts, that entity is then classified as an ISP under the DMCA and can only be immune from copyright infringement by meeting the standards under section 512(i). The ISP must also (1) adopt and reasonably implement a policy of terminating, in appropriate circumstances, the accounts of subscribers who are repeat infringers; and (2) accommodate and not interfere with 'standard technical measures.' Courts have further broken down both conditions into separate tests or interpretations:

The first condition has been broken down into three requirements. The ISP must: (1) adopt a policy that provides for the termination of access to service for repeat copyright infringers in appropriate circumstances (2) implement that policy in a reasonable manner and (3) inform its subscribers of the policy.

The second condition, standard technical measures, is defined as, "measures that copyright owner[s] use to identify or protect copyrighted works, that have been developed under a broad consensus of copyright owners and service providers in an open, fair and voluntary multi-industry process, are available to anyone on reasonable nondiscriminatory terms, and do not impose substantial costs or burdens on service providers." Even if the provider is an ISP under the DMCA, three conditions must be met for the ISP to be given immunity from copyright infringement liability:

1. The provider must not have the requisite level of knowledge of the infringing activity;
2. If the provider has the right and ability to control the infringing activity, it must not receive a financial benefit directly attributable to the infringing activity; and
3. Upon receiving the proper notification of the claimed copyright infringement, the ISP must expeditiously take down or block access to the material.

If the "knowledge" condition is met, it is hard to argue that an ISP would have actual or apparent knowledge of infringing material and

38. Ellison v. Robertson, 357 F.3d 1072, 1080 (9th Cir. 2004).
40. See Wiser, supra Note 1 at 39.
financially benefit from that material on its website. The “knowledge” element is either “actual” or “apparent.” Under Section 512(A) of the DMCA, an ISP will not be liable for copyrighted material on its website, uploaded by a third party user if the ISP:

(i) Does not have actual knowledge that the material or an activity using the material on the system or network is infringing; or

(ii) Absent such actual knowledge, the ISP is not aware of facts or circumstances from which infringing activity is apparent.

Courts have construed a narrow meaning of “actual knowledge,” having interpreted it as “definitive and confirmed” knowledge of specific copyright protected content on its server. On the other hand, an ISP’s “general knowledge” as opposed to “actual,” of copyright protected material on its server immunes the ISP from copyright infringement liability. Courts have yet to determine the “knowledge” requirement for ISPs when a copyright owner provides notice of copyright protected content on their server. Contrarily after notice is given, the ISP has an “affirmative duty” to search for that content and take “reasonable measures” to block or take down the content.

42. Liliana Chang, The Red Flag Test for Apparent Knowledge Under the DMCA § 512(c) Safe Harbor, 28 CARDOZO ARTS & ENT. L.J. 195, 203 (2010). See also Capitol Records, Inc. v. MP3tunes, LLC, 821 F. Supp. 2d 627, 644 (S.D.N.Y. 2011) (A website’s use of the terms “free,” “mp3,” or “file-sharing” was not tantamount to “red flag” knowledge of infringement that would disqualify an Internet service provider from safe harbor protection under the Digital Millennium Copyright Act (DMCA); terms were ubiquitous among legitimate sites offering legitimate services.) See also 17 U.S.C.A. §§ 512(c)(1)(A), (d)(1) (West, 2010).

43. Arista Records, LLC v. Usenet.com, 633 F. Supp. 2d 124,142 (2d Cir. 2010) (Recording companies brought action against operators of file distribution service that made music available for download, alleging direct infringement of exclusive right of distribution, inducement of copyright infringement, contributory copyright infringement, and vicarious copyright infringement. Plaintiffs moved for termination due to discovery abuse, and cross-motions for summary judgment were filed. The District Court, Harold Baer, Jr., J., held that imposition of sanction precluding operators from asserting affirmative defense of protection under DMCA’s safe harbor provision was warranted for discovery abuse and that the operators actively engaged in conduct which allowed direct infringement of recording companies’ copyrights.)

44. UMG Recordings, Inc. v. Veoh Networks Inc., 665 F. Supp. 2d 1099 (C.D. Cal. 2009) aff’d sub nom. UMG Recordings, Inc. v. Shelter Capital Partners LLC, 667 F.3d 1022 (9th Cir. 2011). The fact that internet video-sharing website hosted an entire category of content-music-that was subject to copyright protection did not establish that website had actual knowledge of infringement, as required to prove website was not entitled to coverage under safe harbor provision of Digital Millennium Copyright Act (DMCA). See 17 U.S.C.A. § 512(c)(1)(A)(i) (West 2010).

45. Viacom,676 F.3d at 31. (Under the Digital Millennium Copyright Act (DMCA) safe harbor, the difference between actual and red flag knowledge is not between specific and generalized knowledge, but instead between a subjective and an objective standard; in other words, the actual knowledge provision turns on whether the provider actually or “subjectively” knew of specific infringement).

46. See Wiser, supra note 1 at 43.
Although the ISP lacks actual knowledge, it may know facts or circumstances that establish "apparent" knowledge of the copyrighted content on its server which would satisfy the knowledge requirement as well. Determining if an ISP has apparent knowledge is also known as the "red flag" test. This test has a subjective and an objective element; the subjective relates to the ISP and the objective depends on "whether the copyrighted material on the ISP would have been apparent to a reasonable person operating under similar circumstances." If a court finds that there is a subjective or objective element, then apparent knowledge is found, and the ISP is therefore liable for copyright infringement.

II. DISCUSSION

A. "Facts" and "News" Under the First Amendment in Relation to Live Sports Events

In 2006, the U.S. Court of Appeals in NBA v. Motorola Inc. never addressed whether live sports events are awarded copyright protection, but considered occurrences during live sports events not granted copyright protection. The defendant, Motorola Inc., provided a service that allowed parties to get the scores of NBA games while the game was in progress. There was a lag of two to three minutes between the events of the games and when the information appeared on the pager screen. When the NBA gained knowledge of Motorola's transmission of "hot news" material of their professional basketball games to direct Motorola subscribers over the phone, the NBA sought a permanent injunction against Motorola, which the District Court granted against Motorola for transmitting the NBA scores to their subscribers. Motorola appealed to the United States Court of Appeals for the Second Circuit, where it reversed the district court's decision and held that Motorola did not commit copyright infringement and NBA stats and scores did not meet the constitutional and statutory requirements required for copyright protection. The Court of Appeals for the Second Circuit said,

47. Supra note 1 at 42.
48. See Viacom, 676 F.3d 19.
49. See Id. at 29-31.
50. Id. NBA v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).
51. Id. at 843.
52. Id at 844.
53. Id. at 852.
54. Id. at,854 .
“Hot-news” misappropriation claim that survives preemption under Copyright Act is limited to cases where: plaintiff generates or gathers information at a cost; information is time sensitive; defendant’s use of information constitutes free ride on plaintiff’s efforts; defendant is in direct competition with product or service offered by plaintiff; and ability of other parties to free ride on efforts of plaintiff and others would so reduce incentive to produce product or service its existence or quality would be substantially threatened. Therefore, professional basketball games were not “original works of authorship” entitled to copyright protection.”

The final sentence of the Second Circuit’s Opinion raises an important legal question which courts have not yet addressed. The Second Circuit held that “professional basketball” is not an “original work of authorship,” and neither are the games’ statistics and scores. Spectators and teams alike are weary about going to the United States Patent and Trademark Office to certify a copyright over live spectator sports events. Courts have yet to rule on this issue and this important a legal question remains unanswered.

B. Questions Unanswered in Copyright Law’s Relationship to Live Sport Events

A copyright protects literary, musical, pictorial, graphic or sculptured works, motion pictures, and other audiovisual works, sound recordings, and architectural works from being reproduced, distributed, revised, or publicly performed or displayed without the permission of the copyright owner or as otherwise permitted by law. The original work created by the person is protected however the First Amendment of the United States Constitution protects “facts” and “news” as long as they are not in the “featured trend or arrangement as the original person’s authored work.” Feist Publications Inc. v. Rural Telephone Service Company (“Feist Publications”) illustrates the court’s
allowance of "fair use" and the First Amendment's protection of "facts" and "news" from copyright. In *Feist Publications*, a telephone utility company brought a copyright infringement action against a publisher of an area-wide telephone directory for the publisher's use of listings in the utility's local white pages. The case reached the U.S. Supreme Court and the Court held that the substance in the telephone book's white pages could not have copyright protection.

Segments of live spectator sports events that are considered "facts" or "news" were not protected by copyright law; this was contested in 2009 when a spectator at a soccer game in the United Kingdom filmed a 37 second video on his phone of footage of the soccer game, and uploaded it on YouTube. The following day YouTube took the video down, and when the spectator was asked about YouTube's rationale, he knew the football (soccer in America) leagues in the United Kingdom were angered over their content being "web-cast." A webcast is a transmission of media over the Internet using streaming technology, it is essentially "Internet broadcasting."

This incident has legal questions that courts have left unanswered. First, whether a live spectator sports event is awarded copyright protection, and second, since live spectator sports events in the United States are copyright protected, which occurrences during these events are "facts" or "news" and, therefore, not copyright protected?

C. Application of Current Copyright Law Precedent to An Uploaded Youtube Video of a Live Spectator Sports Event

In 2013, U.S. legal scholars analyzed the copyright issue of the 2009 United Kingdom incident, when a spectator at NASCAR's Daytona 500 filmed parts of the race. The video was one minute and sixteen seconds long; thirteen seconds of the actual race (the cars racing against each other around the track) and one minute and three seconds of a car crash with debris floating around the track and

61. Id.
62. Id.
63. Id. at 363-64.
65. Supra.
67. McCann, supra note 9.
screaming fans.\textsuperscript{68} YouTube took down the video immediately at the request of NASCAR, but NASCAR at the time never filed for legal copyrights of the video.\textsuperscript{69} Before uploading the video to YouTube, the spectator did not notify the United States Patent and Trademark Office to establish himself as the copyright holder of his video, neither did NASCAR at the time they requested YouTube to take the video down.\textsuperscript{70}

In one respect, NASCAR could argue that because the spectator filmed the one minute and sixteen second segment inside of Daytona 500 arena, where the spectator needed a ticket to enter, the entry into the event from the ticket stated that NASCAR owns all intellectual property of their event.\textsuperscript{71} However, this is not definitive for a retransmission or rebroadcast of the live events over another venue, and in a different time place or form. In the 1997 case \textit{Chicago Professional Sports Partnership v. NBA}, a professional team and television network sued the NBA, claiming the contract between the NBA and the broadcast network was an unreasonable restraint of trade.\textsuperscript{72} The District Court held that the nominal transfer to league of game copyrights held by individual teams did not immunize league from antitrust laws.\textsuperscript{73} This shows courts recognize the ability of third parties to reproduce live sports events in their own form, whether at a different time over the television or in “game track”—following the game through statistics and scores rather than watching the basketball players perform.\textsuperscript{74}

Another issue courts must address is the contractual relationship between spectators and sports leagues and its respective, sanctioning bodies. A contract is a binding agreement between parties as long as each party mutually assents to the agreement, and there exists an offer,\textsuperscript{75} acceptance,\textsuperscript{76} and consideration.\textsuperscript{77} However, it is common in

\begin{itemize}
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Id.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} \textit{Chi Prof'l Sports Ltd. P'ship v. NBA}, 874 F. Supp. 844 (N.D. Ill. 1995) vacated, 95 F.3d 593 (7th Cir. 1996).
\item \textsuperscript{73} Id.
\item \textsuperscript{75} \textit{Johnson v. Whitney Metal Tool Co.}, 96 N.E.2d 372, 376-77 (Ill. App. Ct. 1950) (Unless the offeror limits the time for an offeree to accept, an offer is generally open until it is accepted or rejected, provided that an answer is given within a reasonable time. An offeree's acceptance after the time period has extinguished, or an offeree's lack of response in absence of an express limitation will not bind offeror).
business transactions for one party to have greater bargaining power due to its superior position over the other party. As long as the parties mutually, freely, and voluntarily assent to the terms, the contracts will likely be enforceable. A property right gives the owner the “right to exclude” anyone from entering the property or acting in certain ways on that property. Stated another way, a person is granted a possessory right to real property, which includes the right to exclude and the right to enjoy the property. Further, if a third party behaves in such a way that adversely affects the owner’s ability to exclude others and enjoy his property, these distinct property interests allow the owner to bring causes of action respectively of trespass and nuisance against such third party who infringed on the owner’s property rights.

Unless the ticket to enter the sports event expressly states that the sanctioning body of the event owns the Intellectual Property rights to it, spectators may create their own work of authorship by filming parts of the event on a mobile device as a paid ticket holder.

In American Copyright jurisprudence, the copyright of an original work attaches at the moment the work of authorship is created, but in

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76. *Cheverie v. Geisser*, 783 So. 2d 1115, 1119 (Fla. Dist. Ct. App. 2001) ("Generally, the acceptance of an offer which results in a contract must be absolute and unconditional, identical with the terms of the offer, and in the mode, at the place, and within the time expressly or impliedly stated within the offer; thus, an acceptance must contain an assent to the same matters contained in the offer").

77. *Margeson v. Aris*, 776 N.W. 2d 652, 655 (Iowa 2009) ("Generally, the element of consideration ensures the promise sought to be enforced was bargained for and given in exchange for a reciprocal promise or an act").

78. *Hanson v. Maxfield*, 23 So. 3d 736,739 (Fla. Dist. Ct. App. 2009) ("The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs; not on the parties having meant the same thing but on their having said the same thing").

79. *Bresnik v. Beulah Park Ltd. P'ship, Inc.*, 617 N.E.2d 1096 (Sup. Ct. Ohio 1993) (Racetrack owner had common-law property right to exclude jockey agent from its business premises. This right was not abrogated or abolished by statute permitting racing commission to exclude jockey agents from racetracks or by rules authorizing track stewards to do so; these statutes and rules supplemented common law by extending this common-law right held by racetrack owners to commission and to stewards).


82. *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663 (7th Cir. 1986).
order for a copyright owner to bring an action for copyright infringement, the author must first register the copyright. Therefore, the sports event spectator could argue that because the video was recorded on his mobile device, the recording qualifies as an "original work of art," and belongs exclusively to the spectator. Further, the First Amendment acts as a safeguard for facts and news. "Facts" and "news" by themselves may not be copyrighted because the person or entity merely discovered the content rather than created the content into their own original and descriptive form. It was therefore reasonable for the spectator and NASCAR to never contact the United States Patent and Trademark Office for copyright registration. Both parties were uncertain as to who owned the copyright to the one minute and sixteen second video. Would the one minute and thirteen seconds of the car crash and screaming fans be considered "facts" or "news" so the spectator would own that portion, leaving NASCAR with ownership to the copyright of the thirteen remaining seconds of race footage?

D. Legal Implications of the DMCA Act and Copyright Ownership of Live Spectator Sports Events

The DMCA discussed in Part II of this article gives Internet Service Providers broad means of satisfying the safe harbor provision in the act; making itself immune from a majority of copyright infringement claims. The Internet Service Provider must have "actual" or "apparent" knowledge of the infringing material on its site in order to be held liable for infringement. ("General" knowledge has been determined by the court to not be enough to hold an ISP liability for copyright infringement).


84. McCann, supra note 9. See also Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972)

85. Ellison v. Robertson, 357 F.3d 1072, 1081 (9th Cir. 2004) (internet service provider's storage of copyright infringer's posts on its USENET servers for fourteen days constituted "intermediate and transient storage" that was not "maintained on system or network for longer period than is reasonably necessary for transmission, routing, or provision of connections," within meaning of Digital Millennium Copyright Act's safe harbor provision).

86. McCann, supra note 9.

87. Id.


Cell phones and other technological advancements raise further issues that are detrimental to future sports sanctioning bodies if courts do not decide definitively on two issues:

1) Who is the correct copyright holder of a live sports event if a spectator films segments of their event with a cellphone?

2) Even if certain segments of the live sports events may be considered “facts” or “news” rather than part of the live sports event (a car crash at a NASCAR race), will this be considered part of the live sports events?90

If a court addresses the first issue it may analyze the Intellectual Property protections recognized to sports leagues and sanctioning bodies—disclaimers on the back of live sports events tickets and the fact that the sports leagues and sanctioning bodies are providing the entertainment for the events.91 A court will weigh those protections against copyright protections awarded to spectator filming a segment of the event on their cell phone, since the spectator’s copyright attaches at the moment the filmed segment is created.92 The second condition is a classic, legal, slippery slope, weighing perhaps in favor of the spectator owning the copyrighted material as a whole.

Courts should take a case-by-case approach in determining what circumstances should encompass “regular instances of a particular sport,” and establish a set of rules for each particular sport. If the created “work of authorship” is only a segment of the live sporting event with no small section of “facts” or “news” in that segment, then the interests of the sports sanctioning bodies outweighs the interests of the spectator. Therefore, the sanctioning bodies most likely own that copyright. Unlike in NBA v. Motorola where statistics and scores were the only information re-broadcasted over the Internet, the spectator here filmed a segment of cars racing at full speed on his cell phone, uploaded it onto a computer, and re-broadcasted it over the Internet.93 The First Amendment safeguard of “facts” and “news” most likely outweighs the competing interest a sports sanctioning body would have in the video, as long as the video was a compilation of both the live sports event, “facts,” and “news.”94

90. McCann, supra note 9.
91. Id. See also Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 850 (2d Cir. 1997).
92. Twentieth Century Fox Film Corp. v. Entm’t Distrib., 429 F.3d 869, 877 (9th Cir. 2005). See also Golan v. Gonzales, 501 F.3d 1179, 1194 (10th Cir. 2007).
93. McCann, supra note 9. See also Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 850 (2d Cir. 1997).
94. Pac. & S. Co., Inc. v. Duncan, 744 F.2d 1490, 1499 (11th Cir. 1984). The fact that the infringing tape was the only copy of copyrighted television news broadcast still in existence did
The problem is the "low threshold" ISPs must meet to receive immunity from copyright infringement under the DMCA's safe harbor provision.\textsuperscript{95} If an ISP meets this threshold, it is free of any liability for any infringing content on its server, as long as the ISP was not put on notice by the copyright holder of potential infringement.\textsuperscript{96} Or, if it was put on notice, it took reasonable measures to "expeditiously" take down or block the content.\textsuperscript{97} \textit{Viacom v. Youtube} illustrates the court's reluctance to hold an ISP liable for copyright infringement when the ISP takes reasonable steps to remove the material once it has "actual" or "apparent" knowledge of the copyright protected content.\textsuperscript{98}

The Perfect 10 Court made two important determinations; one affecting a copyright owner and the other affecting an ISP. First, a copyright owner's notice to an ISP is effective, within the meaning of DMCA, if it substantially fulfills the statutory requirements under Section 512(c)(3)(A).\textsuperscript{99} Absolute compliance with the statutory provision is not required if the copyright owner substantially fulfills the requirements set forth.\textsuperscript{100} Second, once the ISP receives such notice, it need not find the specific person responsible for the copyright infringement, but must reasonably implement its termination policy to protect itself from future, potential copyright infringement claims.\textsuperscript{101} Courts have narrowed the scope of ISP liability and their relationship with the DMCA. Courts have determined ISPs' infringement liability to be: (1) the "knowledge" of the commercial benefit the ISPs derive at the detriment of the copyright holder, and (2) whether the ISPs

\textsuperscript{95} \textit{Perfect 10, Inc. v. CCBill LLC}, 488 F.3d 1102, 1115 (9th Cir. 2007).
\textsuperscript{96} \textit{Ellison v. Robertson}, 357 F.3d 1072, 1076 (9th Cir. 2004).
\textsuperscript{98} \textit{Viacom Int'l, Inc. v. YouTube, Inc.}, 676 F.3d 19 (2d Cir. 2012). Under the common law vicarious liability standard, the ability to block infringers' access of to a particular environment for any reason is evidence of the right and ability to supervise.
\textsuperscript{99} 17 U.S.C.A. § 512(c)(3)(A) (2010); \textit{Perfect 10, Inc. v. CCBill, LLC}, 340 F. Supp. 2d 1077 (C.D. Cal. 2004) aff'd in part, rev'd in part and remanded, 481 F.3d 751 (9th Cir. 2007) opinion amended and superseded on denial of rehe'g, 488 F.3d 1102 (9th Cir. 2007) and aff'd in part, rev'd in part and remanded, 488 F.3d 1102 (9th Cir. 2007)
\textsuperscript{100} \textit{Perfect 10, Inc. v. CCBill, LLC}, 340 F. Supp. 2d 1077 (C.D. Cal. 2004) aff'd in part, rev'd in part and remanded, 481 F.3d 751 (9th Cir. 2007) opinion amended and superseded on denial of rehe'g, 488 F.3d 1102 (9th Cir. 2007) and aff'd in part, rev'd in part and remanded, 488 F.3d 1102 (9th Cir. 2007)
\textsuperscript{101} 512(c)(3)(A)(ii) and (iii); \textit{Perfect 10, Inc. v. CCBill, LLC}, 340 F. Supp. 2d 1077, 1089 (C.D. Cal. 2004) aff'd in part, rev'd in part and remanded, 481 F.3d 751 (9th Cir. 2007) opinion amended and superseded on denial of rehe'g, 488 F.3d 1102 (9th Cir. 2007) and aff'd in part, rev'd in part and remanded, 488 F.3d 1102 (9th Cir. 2007)
have tried to "induce" third party users to continue to distribute the content to other users.\textsuperscript{102} Courts will first determine whether the ISP is a centralized or decentralized server, and will then analyze the "inducing conduct" for future piracy towards its users.\textsuperscript{103}

\textbf{E. The Court's Reasoning in A&M Records v. Napster in Determining whether an ISP is Centralized of Decentralized}

Napster Inc. began as a peer-to-peer ("P2P") company launched in 1999. Napster’s software connected users by using a centralized server.\textsuperscript{104} Users uploaded a file to the Napster database, allowing other users to download the file from the central server.\textsuperscript{105} Napster had over sixty million users who actively contributed and it was reluctant to decline any file distributed by its users to its central server.\textsuperscript{106} Napster included a central server that indexed connected users and files available on their machines, creating a searchable list of music available across Napster’s network.\textsuperscript{107} Napster quickly became a popular service for music lovers to find and download quickly digital song files for no charge.\textsuperscript{108} Fearful of the economic loss of approximately $3 billion, the recording industry sued Napster for copyright infringement.\textsuperscript{109} The Ninth Circuit affirmed the lower court’s decision and enjoined Napster from running its software distribution business.\textsuperscript{110}

A subsequent case dealt with a decentralized P2P review file-sharing system.\textsuperscript{111} In \textit{MGM Studies v. Grokster Ltd.} ("Grokster,"') a service provider, Grokster Ltd., ("Grokster") allowed users to connect and trade files with each other, thus eliminating a need for a centralized server.\textsuperscript{112} The district court held in favor of the software distribu-


\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{A&M Records, Inc. v. Napster, Inc.}, 239 F.3d 1004, 1012 (9th Cir. 2001).

\textsuperscript{105} \textit{Id.}


\textsuperscript{107} \textit{A&M Records, Inc. v. Napster, Inc.}, 239 F.3d 1004 (9th Cir. 2001)

\textsuperscript{108} Janelle Brown, \textit{MP3 free-for-all}, Salon (Feb 3, 2000).

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{A&M Records}, 239 F.3d at 1029.

\textsuperscript{111} \textit{Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.}, 259 F. Supp. 2d 1029, 1035 (C.D. Cal. 2003). [hereinafter Grokster I]; Grokster II, 380 F.3d at 1160 ("The Copyright Owners allege that over 90% of the files exchanged through use of the 'peer-to-peer' file-sharing software offered by the Software Distributors [defendants] involves copyrighted material . . . .").

\textsuperscript{112} \textit{Id.}
tors after the recording industry brought suit again. The record industry sued Grokster. Similar to the claim they sued Napster under for copyright infringement. The Ninth Circuit found Grokster not liable for copyright infringement, and distinguished Grokster’s behavior from Napster. Grokster’s software utilized a decentralized server that connected users to each another in order to exchange files, while Napster used a centralized server that connected users directly to files. While both software servers are peer-to-peer networks, a decentralized network avoids liability due to its passive server structure. The Court in *Grokster* reasoned that the company, unlike in *Sony*, had no control over its users’ conduct when the infringing conduct occurred. Because Grokster’s server allowed any user to upload any material—infringing or not—Grokster could not be held liable for contributory copyright infringement. The Chief Judge for the Ninth Circuit in his opinion stated that the infringement liability of the ISP server, even if it is a decentralized server, depends on the knowledge that the ISP has over its users uploading infringing material. If the ISP failed to act after having received that “knowledge,” it would most likely be liable for copyright infringement.

Even though only ten percent of the files exchanged amongst Grokster’s users were “non-infringing,” the court ruled this satisfied the “substantial or commercially significant non-infringing use” requirement. Further, the court held MGM must show that Grokster had “reasonable knowledge” of specific infringement and failed to act on

113. *Grokster II*, 380 F.3d at 1162 (“[T]he copyright owners were required to establish that the Software Distributors had ‘specific knowledge of infringement at a time at which they contributed to the infringement, and failed to act upon that information.’”) (alteration in original) (quoting *Grokster I*, 259 F. Supp.2d at 1030.

114. Id.

115. *Grokster I*, 259 F. Supp. 2d at 1035; *Grokster II*, 380 F.3d at 1160 (“The Copyright Owners allege that over 90% of the files exchanged through use of the ‘peer-to-peer’ file-sharing software offered by the Software Distributors [defendants] involves copyrighted material . . . .”).

116. *Grokster II*, 380 F.3d at 1162 (“[T]he copyright owners were required to establish that the Software Distributors had ‘specific knowledge of infringement at a time at which they contributed to the infringement, and failed to act upon that information.’”) (alteration in original) (quoting *Grokster I*, 259 F. Supp.2d at 1030.

117. *Grokster I*, 259 F. Supp. 2d at 1038 (“The question, however, is whether actual knowledge of specific infringement accrues at a time when either [d]efendant materially contributes to the alleged infringement, and can therefore do something about it.”).


119. Id. at 1038.

120. *Grokster I*, 259 F. Supp. 2d at 1035.

121. Id at 1038. (“The question, however, is whether actual knowledge of specific infringement accrues at a time when either defendant materially contributes to the alleged infringement, and can therefore do something about it.”).
that knowledge to prevent infringement. In determining whether Grokster failed to act on its “reasonable knowledge,” the Ninth Circuit focused on when it received notice from copyright owners of the infringing activity. The court said Grokster received knowledge after it submitted copyright infringing material, and could take no action until after the infringing conduct occurred. Grokster allowed its users to exchange files, even if Grokster’s internal software was shut down; destroying the point of disallowing users to view infringed material via the Internet for free. The court further held even though the company received profits from advertising, imposing vicarious liability was improper. Grokster never stated it would control users or their conduct. The burden is on the copyright owner to show that the peer-to-peer server had the right of control over its users. Because MGM failed to show this fact, Grokster was immune from copyright infringement liability.

F. Application of the “Inducement Theory” to ISPs Distribution of Live Sports Events

Previously, ISPs had to have “knowledge” before it could be held liable for copyright infringement. The Ninth Circuit’s “reasonable knowledge” inquiry would not apply to decentralized P2P servers because they “lack the control required” over the users on their site who share copyrighted material. The Grokster court also applied a “balancing test;” having balanced the technological and financial benefits of the service provider against the detriment of the copyright holder.

122. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936-37 (2005). (“[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement is liable for the resulting acts of infringement by third parties.”).

123. Grokster I, 259 F. Supp. 2d 1029, 1038 (C.D. Cal. 2003) (“The question, however, is whether actual knowledge of specific infringement accrues at a time when either [d]efendant materially contributes to the alleged infringement, and can therefore do something about it.”).

124. Id.

125. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 936-37 (2005). (“[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”).

126. Id.

127. Id.

128. Id. at 939.

129. Ellison v. Robertson, 357 F.3d 1072 (9th Cir. 2004)

130. Id.

On an appeal from MGM, the U.S. Supreme Court reversed the Ninth Circuit's decision and held Grokster liable for copyright infringement after applying the "inducement theory." The Court said *Sony v. Universal* did not preclude inculpating intent if there was evidence available to demonstrate that a software distributor should be liable. In *Sony v. Universal*, the question before the court was whether Sony's sale of "Betamax" videocassette recorders ("VTR") to the general public constituted contributory copyright infringement. Those who owned a "Betamax" VTR had the ability to record Universal's copyrighted works, fast-forward, rewind, and shift the time they wanted to watch the content. The Supreme Court ultimately held Sony not liable for contributory copyright infringement. Justice Stevens delivered the Opinion, harkening to the district court's reasoning that the sale of copyright equipment does not constitute contributory copyright infringement if the product is widely used for legitimate, unobjectionable purposes, or, indeed, is merely capable of substantial non-infringing uses.

Using the reasoning in *Sony*, the Court in *MGM v. Grokster* ultimately applied the "inducement theory," finding a third party liable for contributory copyright infringement if it promotes the use of its tool to infringe copyright "as shown by clear expression or other affirmative steps." Grokster's software induced copyright infringement and evidence showed that actual infringement did occur. The evidence showed that Grokster actively induced known copyright infringers from Napster to join its network. Additionally, email correspondence between Grokster's high level officers demonstrated the assent between the officers that "if copyrighted material were available for download, higher revenues would ensue for increased user traffic." Further, Grokster provided guides instructing users on how to upload infringing material when placed on notice by rightful copyright holders, and failed to take any steps necessary to remove the

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133. Id.
135. Sony Corp. of Am., 464 U.S. at 423.
136. Id. at 498.
139. Grokster, 545 U.S. at 940.
140. Id.
infringing material or block the material from being downloaded by other users.\textsuperscript{142} Sufficient evidence showed that Grokster had and used that knowledge of infringing material for its own financial benefit at the detriment of the copyright holders and was found liable to MGM for contributory copyright infringement.\textsuperscript{143}

G. \textit{In re: Aimster} and the Costs-Benefits Analysis as it Applies to ISPs' Broadcasts of Live Sports Events

Federal courts have moved toward a cost-benefit analysis after it was first applied in \textit{In re: Aimster Copyright Litigation}.\textsuperscript{144} Recording industries brought both contributory and vicarious copyright infringement claims against an Internet website operator.\textsuperscript{145} Chief Judge Posner granted the plaintiff's preliminary injunction to enjoin the way the ISP operated.\textsuperscript{146} Judge Posner held Aimster did not meet the prerequisites to receive protection under the DMCA safe harbor provision because the company had not taken "reasonable measures" under Section 512(i)'s requirement to "establish a policy to terminate repeat infringers and instead even encouraged repeat infringement."\textsuperscript{147} This can rise to the level of intent, where it is virtually impossible to conceive of a situation where an ISP is not "financially benefiting" from recurring copyright protected material available for viewer-ship on its website.

I. Application of \textit{In re Aimster} to Live Spectator Sports Events

It will be difficult for a court to rule an ISP must take down copyrighted material uploaded on to it, even when the correct copyright owner is uncertain. It is still unclear as to who the correct legal copyright holder of a live spectator sports event is when it is uploaded by a spectator who taped a segment, or the entire sports event, while in attendance. It may take several years coupled with several court decisions to definitively balance all of the competing interests.

If future courts hold that the rightful copyright holder of live sporting events, the actual competition as opposed to circumstances that could be deemed "facts" or "news" (the car crash example discussed when the spectator filmed a segment of the Daytona 500) the interests would most likely balance in favor of the ISP as opposed to in copy-

\textsuperscript{143} Id.
\textsuperscript{144} \textit{In re Aimster Copyright Litig.}, 334 F.3d 643 (7th Cir. 2003).
\textsuperscript{145} Id.
\textsuperscript{146} \textit{In re Aimster Copyright Litig.}, 334 F.3d 643, 656 (7th Cir. 2003).
\textsuperscript{147} Id. at 655.
right holder the sole spectator. If the person who recorded the event is deemed the copyright owner and that material is uploaded, he or she would suffer minimal financial consequences. It may be considered “undue hardship” for an ISP to implement “take-down or blocking” procedures for copyright-protected content every time a copyright owner (the spectators) uploads content. It is moot whether the ISP is a centralized or decentralized distributor. One issue usually addressed with decentralized distributors is inconsistent policies and procedures. However, this may be irrelevant in balancing competing interests of the ISP benefiting commercially at the detriment of the copyright holders. Decentralized distributors have different points of control and policy, but when these multiple points are working together for their own commercial benefit, this may be no different than one “centralized” point, and should therefore be held equally liable.

An advantage for ISPs allowing access infringed content is the advertisements partnerships they can foster due to the voluminous user activity on their websites. Corporate sponsors recognize users’ free viewership when visiting the ISPs’ websites. For instance, Youtube provides corporate sponsors’ advertisements on the “loading” screen of the selected videos. Corporate sponsors pay for the advertising air time varying from 20 to 90 seconds, depending on their desired exposure. These agreements with advertisers and sponsors are consistent revenue-generators for ISPs.

However, the analysis will be different in the future if courts consistently hold that the sports sanctioning bodies are the legal copyright holders of the live spectator sports events, even if spectators film portions of events on their cell phones and upload the content onto ISPs. “Non-statutory labor” exemption professional sports leagues, i.e. leagues that have a collective bargaining agreement between the league and a player’s union (such as the NBA, NFL, NHL, MLB), have large endorsements and television contracts. Included in the endorsement contracts, sponsors attach themselves to equipment, uniforms, arenas and merchandise of the respective leagues. Further, these contracts allow the sponsors to advertise their brand on national and local television networks. Sponsors will get massive exposure from consumers seeing the sponsors’ commercial advertisements during the sports events on television.

Sports sanctioning bodies such as NASCAR, the PGA, and ATP tennis will be even more affected because the sports events are primarily financed by corporate sponsors. A sharp decline in consumer attendance or viewership may result in the loss of future agreements with corporate sponsors. Additionally, corporate sponsors that are
currently under contract may try to breach it because it sees little return on investment due to the loss of consumer viewership of the live events.

The ISPs’ interest is similar to that of the leagues and sanctioning bodies; consumer viewership directly leads to contracts with corporate sponsors. However, if a future court were to hold that leagues and sanctioning bodies are the copyright owners of all occurrences at their live sports events, whether a regular part of the game or not, the ISPs’ “corporate sponsorship agreement” benefit is outweighed by the detriment the sports leagues and sanctioning bodies would suffer.

All issues related to ISPs’ copyright infringement liability of live spectator sports events are costly. Attorneys’ fees that result from first determining the copyright holder, and second determining copyright infringement culpability of ISPs, decreases the ISPs’ business efficiency. Sports leagues and sanctioning bodies will also suffer financially due to the potential years of litigation.

No solutions are available that would mutually benefit all parties or prevent costly litigation. The following solutions have been lobbied by Congress in order to both adapt to technological advancement and Internet expansion, and mutually benefit all parties involved in these copyright legal questions.

III. Solutions

A. Solutions Lobbied by Congress

1. Partnerships

ISPs continue to benefit financially from the infringing material on their servers, even though this benefit belongs to the copyright owners.148 A possible solution to the issue between copyright owners and ISPs promotes partnerships or agreements between the two, which will ultimately allow both parties to profit from the material.149 YouTube’s website has a partnership program in place where qualified copyright owners collaborate with the ISP to create “channels.”150 None of the partnerships are with any sports leagues or sanctioning bodies but rather with companies involved in the music entertainment

industry.\textsuperscript{151} The owners of these channels share in the profits YouTube makes off of the advertisements posted to these channels.\textsuperscript{152} One of the more well-known channels is the music channel, Vevo, LLC ("VEVO").\textsuperscript{153} VEVO is a video hosting service owned and operated by a joint venture of Universal Music Group, Google Inc., Sony Music Entertainment, and Abu Dhabi Media.\textsuperscript{154} EMI Records licensed its content to the service before being purchased by Universal Music group in 2012.\textsuperscript{155} It was launched on December 8, 2009.\textsuperscript{156} VEVO’s videos are sold to other companies across the web,\textsuperscript{157} one of which is a partnership with Google Inc., where VEVO and Google Inc. split the advertising revenues generating from consumer traffic from VEVO’s music video played on Google’s owned service, Youtube.\textsuperscript{158} This partnership between VEVO and Google Inc. demonstrates how prominent names can partner together to maximize profits.\textsuperscript{159} Google benefits from VEVO’s music videos because YouTube’s users prefer the high-quality video on the VEVO channel as opposed to the poorer quality infringing videos.\textsuperscript{160} The owners of VEVO benefit from the partnership because it increases the exposure and viewer-ship its videos receive.\textsuperscript{161}

There is a problem with the "partnership agreements" as it relates to live spectator sports events. The users that search videos on YouTube or other ISPs for sports material are usually looking for a short video segment rather than a full length live sports event.\textsuperscript{162} The partnership between YouTube and VEVO works because of the content VEVO provides. VEVO is exclusively a music entertainment channel that rebroadcasts music videos over the Internet.\textsuperscript{163} The music videos last for the duration of the song. . .only about three to five minutes.\textsuperscript{164} Compare that to two sports events where the average of full length

\begin{itemize}
  \item \textsuperscript{151} Id.
  \item \textsuperscript{152} Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012).
  \item \textsuperscript{153} Partner with YouTube, YOUTUBE, http://www.YouTube.com/partners.
  \item \textsuperscript{154} Id.
  \item \textsuperscript{155} Broad. Music, Inc. v. DMX Inc., 683 F.3d 32 (2d Cir. 2012).
  \item \textsuperscript{156} Id.
  \item \textsuperscript{157} Carr, Austin. Vevo CEO on MTV, Jersey Shore, Google TV, Music Videos. Fast Company.com, October 27, 2010.
  \item \textsuperscript{158} Vevo Quickly Dominates Online Music Videos, BLOGGERSBLOG,(Jan. 21, 2010), http://www.bloggersblog.com/vevo-quickly-dominates-online-music-videos-121101.
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} Id.
  \item \textsuperscript{161} Wiser, supra note 1, at 63.
  \item \textsuperscript{162} Wiser, supra note 1, at 63-64.
  \item \textsuperscript{163} Vevo Quickly Dominates Online Music Videos, BLOGGERSBLOG,(Jan. 21, 2010), http://www.bloggersblog.com/vevo-quickly-dominates-online-music-videos-121101.
  \item \textsuperscript{164} Id.
\end{itemize}
sports events are between 2.5 to 3 hours. The users of ISPs are looking for that winning touchdown, slam dunk or home run that only lasts a few seconds, not to watch a full game. In the time being it is difficult for corporations, who own the television rights to broadcast live spectator sports events, to partner with an ISP, either Youtube or an ISP similar to the operations of Youtube, to develop channels and only select certain clips to be placed on their specific channel. There would be nothing "easy" about executing such agreements. It would be painstaking every time to determine exactly which type of material would be encompassed by the agreements, which material is selected, and to what duration that material will be protected.

2. Insurers for Large ISPs

A novel idea for ISPs to protect themselves from lawsuits initiated by copyright holders is Internet Insurance. As previously stated, the ISP may not in itself be infringing, but if one of its users engages in infringing activity, the ISP can be liable for contributory or vicarious copyright infringement. With the expansion of Internet and the great potential for lawsuits to arise, ISPs will inevitably need somewhere to turn to protect their financial interests. For instance, suppose a case reached a court that involved a lucrative ISP such as YouTube, where it was being sued for billions of dollars in damages. If a court held YouTube liable, such a ruling could result in severe financial consequences for YouTube, including bankruptcy. A situation as such is likely to occur due to the endless infringing material placed on ISPs. As noted in a Pace University Law Review article that covered the futuristic nature of the Internet's relationship with the DMCA, the current field of protection afforded to ISPs comprises:

Any content on websites has the potential to raise issues about copyright and trademark infringement and defamation and invasion of privacy issues. Often an offline liability policy will not cover online applications. Sites that provide information such as financial information, health-related information, and virtually any sort of information that visitors may rely on can be subject to claims. These claims against the owner can arise whether the owner is the creator of that content or a licensee of some third party content. As with the offline world, any acquisition agreements with writers, artists, licensors, and other should contain appropriate warranties and in-

165. Id.
166. Id.
167. Wiser, supra note 1, at 34.
demnities but these are often illusory if the warrantor has no or little assets to protect the owner. The need for insurance arises.\textsuperscript{168}

For persons to protect themselves from major financial hits, insurance companies are readily available that act as protective umbrellas to allow people to take those risks.\textsuperscript{169} It allows a person to pay an insurance company a premium to collect a certain amount of money to collect a specified amount from the company if the event specified in the insurance policy occurs.\textsuperscript{170} The policy amount is calculated by the insurance company for taking on the financial risk.\textsuperscript{171} Several United States insurance companies and underwriters in the London market have issued policies providing first and third party insurance coverage to meet the market demand.\textsuperscript{172} Policyholders have readily increased their presence on the Internet as more insurers are entering the field and establishing themselves as solely Internet-specific policies or custom endorsements.\textsuperscript{173}

Internet Insurance will not immediately come to fruition as a mainstay in America. Internet insurance must differ from most other insurances. Insurance companies use algorithms based on the members in an insured pool and the likelihood that the number of actual losses will be close to the number of expected losses.\textsuperscript{174} A few Internet insurance policies have flourished but none have set the industry standard in the average amount an ISP can expect when purchasing such insurance.\textsuperscript{175}

Insurance companies may be too overwhelmed by the potential losses ISPs could subject themselves to copyright infringement suits. It has been suggested that a system similar to that of the Securities Investor Protection Corporation ("SIPC") would make good sense.\textsuperscript{176} SIPC is the first line of defense in the event a brokerage firm fails and owes customers cash and securities that are missing from customer


\textsuperscript{169} In re Ins. Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010).

\textsuperscript{170} Id.

\textsuperscript{171} Everson v. Blue Cross & Blue Shield of Ohio, 898 F. Supp. 532 (N.D. Ohio 1994)


\textsuperscript{173} Id.


\textsuperscript{175} Id.

\textsuperscript{176} Id. at 228. See also SIPC: Who We Are, SECURITIES INVESTOR PROTECTION CORPORATION, http://www.sipc.org/How/Covers.aspx.
accounts.\textsuperscript{177} If there was a regulatory body similar to the SIPC for ISPs, it could operate similarly.\textsuperscript{178} The new model would allow for ISPs to contribute a specific percentage of revenue annually to the regulating body.\textsuperscript{179} This idea is in an early stage but Congress is creating legislation for this new "Internet fund".

Court cases that have dealt with ISPs and their relation to the DMCA forced Congress to lobby ways that allows ISPs to take risks in line with continuous Internet expansion and contemporaneously protect the rights of copyright owners.\textsuperscript{180} Insurance companies would calculate probabilities with statistical analysis, similar to how other types of insurance policies are calculated and used as a premium. However, even if a traditional insurance premium model coupled with Congress' idea of an "Internet Fund," is implemented, the willingness for insurance companies to provide premiums to big market ISPs is speculative at best.\textsuperscript{181} The ability to insure ISPs will in theory give ISPs incentive to innovate and expand. This may take several years, and different courts' interpretations of like policies could vary by millions of dollars.\textsuperscript{182}

These questions remain unanswered but play an intricate role for the possibility of implementing Internet insurance policies and an "Internet Fund." Both have been lobbied by Congress and will be further discussed because they will mutually benefit ISPs and copyright owners.

\textbf{B. The Future of the "balancing interests" of ISPs’ Expansion and A Copyright Holder’s Protected Rights}

The solutions discussed will only be successful if future courts' decide definitively who the correct copyright holders are regarding live sports events and what occurrences in sports events are "facts" or "news." If ISPs purchase Insurance policies and distribute revenue to

\begin{itemize}
\item \textsuperscript{178} SIPC Protection Versus Federal Deposit Insurance, \textsc{Integrated Publishing}, \url{http://www.tpub.com/content/cg2001/d01653/d016530021.htm}
\item \textsuperscript{179} \textit{Id.} The actual language is as follows: Annual assessments on all member firms – periodically set by SIPC and interest generated from its investments in U.S. Treasury notes. If the SIPC fund becomes or appears to be insufficient to carry out the purposes of Securities Investor Protection Act (SIPA), SIPC may borrow up to $1 billion from the U.S. Treasury through SEC (i.e., SEC would borrow the funds from the U.S. Treasury and then re-lend them to SIPC). In addition, SIPC has a $1 billion line of credit with a consortium of banks.
\item \textsuperscript{180} \textit{Id.}
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} \textit{Id.}
\end{itemize}
an "Internet Fund," the Internet business model will change forever. Would there be any reason for a sports enthusiast to attend a live sports event anymore? In theory, ticket sales will drop and ISPs revenue will continue to sky rocket.

Further, ISPs will take new risks knowing insurers will cover them with respect to copyright lawsuits. The willingness for these companies to allow any material on the Internet from their users will destroy the market for sports leagues and sanctioning bodies.

The current state of ISPs' "easily attainable" immunity from copyright infringement liability has been awarded by the courts. The evolution of ISPs' copyright immunity under the DMCA's safe harbor provision and future court decisions of the legal copyright owners or live sports events, if filmed and retransmitted onto ISPs, determine how ISPs' must create their business models in conjugate with using "free viewer-ship" of live spectator sports events.

IV. Conclusion

Technological advancement has made it difficult to strike down big market ISPs that have taken advantage of this opportunity and has given ISPs copyright infringement immunity, even though most have knowledge of protected content on their server available for "free viewer-ship." The music and entertainment industry has failed in the past to argue its detriment from this in court. Sports leagues and sports sanctioning bodies are a unique animal; sports are unpredictable, and ticket sales are important for the financial stability of all sports entities.

Legal questions surrounding copyright and live spectator sports events are to date unanswered. Who is the copyright holder? What material should be outside the scope of the live sports events? "Facts" and "news" are granted First Amendment Protection for copyright ownership, what aspects of sports events will be constitutionally protected? Courts' answers to these questions should be answered before Congress chooses to enact legislation addressing these issues.

Insurance policies that use the same statistical analysis as other types of insurance coupled with an "Internet fund" similar to the SIPC to mutually benefit the ISPs and the copyright holders. Internet expansion incentivizes ISPs to take risks for advancing its business, but questions remain whether it can proceed at the detriment of undetermined copyright owners, and this determination will directly affect ISPs' advancement and the future relationship between copyright and all parties involved.