

# SOCIAL MEDIA AND PROFESSIONAL SPORT: THE BALANCE BETWEEN THE PROTECTION OF COPYRIGHT ON YOUTUBE AND THE BENEFITS OF USER-GENERATED CONTENT

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## Introduction

Social media continues to have a significant impact on the way that individuals view and interact with professional sport. The broadcasting of copyrighted content on websites such as YouTube poses a unique challenge to professional sport leagues and teams. In order to develop an approach to protect their content online, leagues must balance technological, social and economic considerations. This article will examine the various strategies that professional sport associations ('leagues') can utilise to deal with social media. It begins by exploring intellectual property rights in relation to broadcasting live sport and the different approaches available in response to the challenges posed by social media, and user-generated content in particular. There are clear benefits and disadvantages to the strategies that are currently being applied by copyright owners. The law in this area has developed most significantly in North America, and thus it is necessary to position these competing perspectives in the context of the law in the United States. Entertainment producers and broadcasters are facing many of the same challenges that professional sport must address. The recent decision in *Viacom v YouTube*<sup>1</sup> is likely to have global implications for online copyright protection.

Social media technology is advancing at a remarkable pace. With the emergence of new communication platforms such as Twitter, sport administrators must be adaptable and ready to develop unique approaches in order to benefit from the technology. The traditional legal position in relation to broadcasting sport was developed during a time when television was the only game in town. While free to air and pay television will continue to be the primary broadcasting options, fans are searching out new ways to interact with their favourite teams online. Sports administrators must be responsive to these changes and develop content in order to meet these new needs while also using sites such as YouTube to grow the connection between their sports and their fans. Non-commercial user-generated content is at the forefront of this evolution.

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<sup>1</sup> 2010 US District Court LEXIS 62829, 14 and 15–16 (SDNY 2010).

In Australia, the Australian Football League ('AFL') must develop a consistent approach to the enforcement of its copyright over broadcasts of the sport. The best way to develop a strategy may be to consider the disparate alternatives taken in North America. The National Football League ('NFL') and Major League Baseball ('MLB') have opted to take a strict position in policing their content on YouTube, while the National Basketball Association ('NBA') and the National Hockey League ('NHL') are taking a more permissive approach, with the view that there is long-term economic benefit in working with social media to develop its fan base. These are two distinctly different strategies that result in opposing outcomes for professional sport. This examination will ultimately suggest that a permissive and collaborative strategy towards policing broadcast copyright online has the potential to result in long-term economic benefit for professional sport.

Like other leagues, the AFL has attempted to protect its broadcast copyright by restricting re-distribution of content through postings on websites such as YouTube. It is well within its rights to object to the free posting of highlights and classic matches to the Internet when there is no profit in it. However, there are significant benefits to the sport through the promotion of user-generated content sites. Indeed, the '[o]ptions in new media such as online streaming video, web transmission, video on demand, WAP, 3G and MMS mean there are a multitude of ways to view matches and highlights', while '[a]lternative platforms are emerging on a daily basis'.<sup>2</sup> Going forward, the AFL must decide whether to aggressively protect its copyright material from being re-broadcast as user-generated content, or to consider more progressive options, such as entering licensing agreements while also developing superior content of its own. The NBA and NHL have taken the latter approach, with significant success. This article will compare and contrast the two approaches taken in North America in order to better inform potential strategies for Australian sport.

### **User-Generated Content and the Rise of YouTube**

YouTube is the leader in the technology of user-generated content broadcasting. The site began in 2005 as a destination where users could upload and share video online. Users must create a profile before posting content, and are encouraged to actively participate in the YouTube 'community'. This community is unique in that 'YouTube's users are called upon to manage the site's content, either through the terms of use which delegate responsibility for policing copyright to the individual user or in the practice of flagging inappropriate content for review by the site's administrators'.<sup>3</sup> This technology allows 'members of the public

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<sup>2</sup> Deborah Healey, *Sport and Law* (4th ed UNSW Press, 2009) 23.

<sup>3</sup> Kylie Jarrett, 'Beyond Broadcast Yourself™: The Future of YouTube' (2008) 126 *Media International Australia* 132,134.

to originate the public communication of works of authorship'.<sup>4</sup> The site is tremendously successful.<sup>5</sup> So much so that Google purchased YouTube for the staggering price of US\$1.65 billion in Google stock.<sup>6</sup> This was especially significant since YouTube had no pure commercial function. Besides some rather crude advertising, the site did not post significant earnings in 2006. However, Google found that 'the value of the site is in its potential, not based on any actual current earnings'.<sup>7</sup> The significance of the site is not based on the quality of the content being uploaded by its users. Instead, it is based on its amazing popularity, and the consistently high number of visits it receives.<sup>8</sup> With millions of hits daily, YouTube has a unique reach that is unrivalled elsewhere on the Internet.

However, there are significant legal problems presented by the user-generated content platform. Much of the content is not necessarily 'user-produced', but is instead the intellectual property of various producers and broadcasters. In addition to homemade videos, users upload content produced by music companies, television broadcasters, film producers and sports broadcasters. Indeed, YouTube is 'an issue for all content providers as they allow users to freely share videos by uploading and viewing content. Many users have posted copyright materials such as television shows and sports broadcasts'.<sup>9</sup> Much of the total revenues of professional sport are derived from the sale of exclusive television broadcasting rights. These revenues hinge to a large degree on the legal ability of the sports entity to control and to sell the rights to televise its games to broadcasters.<sup>10</sup> For example, 'by the late 1990s, almost all of the revenues of the National Collegiate Athletic Association ('NCAA'), over two-thirds of the total revenues of the NFL, and over half of the revenues of the NBA and MLB came from television'.<sup>11</sup> It is important to recognise the significance of broadcast revenue in order to understand the perceived danger of websites like YouTube. If viewers abandon television broadcasts in favour of free services on the Internet, the economic consequences could be dire, especially since the trend of online popularity is not one that is likely to wane. User-generated content sites could easily replace the economic and cultural role once played by broadcast media.<sup>12</sup>

<sup>4</sup> Jane Ginsburg, 'User-Generated Content Sites and Section 512 of the US Copyright Act' (Working Paper No 10-255, Columbia Law School Public Law & Legal Theory Working Paper Group, 2010), 183.

<sup>5</sup> The website was named 'invention of the year' by Time magazine in 2006.

<sup>6</sup> Jarrett, above n 3, 132.

<sup>7</sup> Amy Mellow, '... And The Ruling On The Field Is Fair: A Fair Use Analysis Of Uploading NFL Videos Onto YouTube And Why The NFL Should License Its Material To The Website', (2007) 17 *Southern California Interdisciplinary Law Journal* 173, 183.

<sup>8</sup> See Jarrett, above n 3, 133; 'The high monetary value of YouTube is thus based not on the quality of the content available on the site, nor the advances of its particular technological system, but on the economic potential of the eyeballs it has attracted'.

<sup>9</sup> Glenn Wong, *Essentials of Sports Law* (Greenwood Press, 3rd ed, 2002) 738.

<sup>10</sup> Gary Roberts, 'The Scope of the Exclusive Right to Control Dissemination of Real-Time Sports Event Information' (2004) 15 *Stanford Law and Policy Review* 167, 167.

<sup>11</sup> *Ibid.*

<sup>12</sup> Jarrett, above n 3, 133.

Leagues are left with a narrow proposition: they can either position themselves to maximise the value of their content on the Internet or attempt to exercise a prohibition on the appearance of their content on YouTube. These two options are distinctly different, and could determine the future success of the league.

### **Economic challenges and benefits**

Mark Cuban is an Internet billionaire and the owner of an NBA franchise. He is perhaps best placed to understand the opportunities that the Internet can present. However, he also understands the difficulties of working in an environment that is constantly and quickly evolving. The problem is that while the Internet has become a primary source for the dissemination of information, there are still difficulties in recouping a significant financial benefit from online content. As Cuban notes, everybody 'is trying to figure out how to monetize content on the Internet ... we either sue YouTube to get it, or sue somebody to get it, or we'll put ads before or around it'.<sup>13</sup> This succinctly summarises the approach favoured by many content producers. For example, the US broadcaster NBC aggressively protected the clip of a sketch from the comedy program 'Saturday Night Live' called 'Lazy Sunday'. The video clip was recorded from the original broadcast of the program and then uploaded to YouTube. 'Lazy Sunday' quickly went viral, with more than 5 million views.<sup>14</sup> In response, NBC sent a notice to YouTube demanding that they remove the clip from their site, despite the possible positive repercussions of the immense popularity of the sketch.<sup>15</sup> For NBC, it was preferable to have the clip removed since there was no direct financial benefit from the YouTube views. However, in the context of professional sport, the reality is that the relationship between the viewer and the producer is distinctly different. A highlights package or a classic match is different than a music video or a clip from a popular television show. While both producers need to gain some sort of economic benefit from the re-broadcast of their original content, there is a greater opportunity for the forward-thinking leagues to use YouTube to develop a fan base and derive a greater return long-term.

### **Copyright and User-managed content**

Generally, the majority of sport clips that appear on YouTube take the form of short videos of highlights from matches, or compilations of notable and exciting play. These short clips are taken from the original broadcast of the match and

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<sup>13</sup> Peter Dekom, Interview with Mark Cuban (ABA Entertainment and Sports Forum Annual Meeting, 2008) in (2009) 27(1) *The Entertainment and Sports Lawyer*, 2.

<sup>14</sup> Christina Scelsi, 'YouTube: The World of Viral Video', (2006) 24 *Entertainment & Sports Law* 10, 10.

<sup>15</sup> *Ibid.* This popularity included testimonials from college students as to how watching the sketch on YouTube had made them consider watching Saturday Night Live again.

uploaded by the user. Broadcasts are generally protected under copyright law, and are treated as 'subject matter other than Works'.<sup>16</sup> Copyright is necessary, and serves the prevailing public interest by providing incentive for people to create original artistic and literary works. 'The issue with respect to the specific contours of copyright law is always how much protection provides the optimal degree of creative incentive'.<sup>17</sup> In Australia, the broadcast of a sporting event falls under the protection of the *Copyright Act* 1968 (Cth), and Australian Leagues are within their rights to aggressively protect their property. The difficulty is that the content is not being re-broadcast by YouTube. Instead, users are uploading the content, so YouTube itself is not making the editorial decisions – in essence, they are not making the determination to broadcast the content, which presents a number of legal difficulties for content owners attempting to enforce their copyright. Yet, YouTube is able to exercise editorial control. For example, pornographic material is vigorously and actively prohibited. While it is also prohibited to upload material that infringes copyright, YouTube does not 'police copyright infringement ... as vigorously as it does pornography'.<sup>18</sup> Instead, it has become the duty of the copyright owner to police the abuse of their copyright content.

YouTube has deliberately chosen not to take reasonable precautions to deter the rampant infringement on its site. Since YouTube can attract more viewers from the availability of popular works on its site, it has pushed to shift the burden onto copyright owners to monitor the YouTube site in order to identify user-generated clips that violate their copyright. They must then 'send notices to YouTube demanding that it "take down" the infringing works.'<sup>19</sup> This issue has angered many content producers who contend that it should be YouTube's responsibility as the host of the website to ensure that no infringing material is uploaded. And since the purchase of the site, 'the lure of Google's growing pockets has made it a viable litigation target and offers greater purchase for established media producers to apply pressure over the presence of copyrighted materials.'<sup>20</sup> Many copyright owners argue that if YouTube is able to police the content, they should be responsible for doing so, since it is a costly and inefficient exercise for a league to police the content themselves.

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<sup>16</sup> Section 103 of the *Copyright Act* 1968 (Cth) makes it an infringement of copyright in relation to subject matter other than works to sell or distribute articles if the person distributing the articles has knowledge that their distribution constitutes an infringement of copyright; Colin Golvan, *Copyright Law and Practice* (Federation Press, 2007) 51; William Van Caenegem, *Intellectual Property Law in Australia*, (Kluwer Law International, 2010) 64; See *RCA v Custom Cleared Sales* (1978) 19 ALR 123.

<sup>17</sup> Roberts, above n 10, 186.

<sup>18</sup> David J Brennan, 'YouTube and the Broadcasters' (Speech delivered at the Asia-Pacific Broadcasting Union Copyright Seminar, Tokyo, 15 March 2007) in (2007) *Melbourne Law School Research Series* 4.

<sup>19</sup> *Ibid.*

<sup>20</sup> Jarrett, above n 3, 138.

This issue has been tested in the United States, where YouTube relies on a section of the *US Copyright Act* which excludes copyright remedies being awarded against a service provider which stores, at the direction of a user, material on a system controlled or operated by the service provider.<sup>21</sup> This is part of the ‘safe-harbour’ regime, and was introduced into the *US Copyright Act* in 1998 with the *Digital Millennium Copyright Act*<sup>22</sup> (‘DMCA’) reforms. While the DMCA prohibits the infringement of copyright, it also shields websites from charges of copyright infringement if they act quickly to take down infringing material once notified by the copyright holder.

As a result, YouTube and similar file sharing sites are in compliance with the law so long as they remove highlights when asked to by MLB, the NFL, or other leagues, despite the fact that YouTube has the ability to prevent the highlights, and any content it wishes, from ever being posted from the start.<sup>23</sup>

This is an ideal situation for YouTube, since it is not required to actively search out and block copyright content. It gets the benefit of broadcasting copyright content as long as it responds to a notice to take the content down once the copyright owner realises that it is online. The policing function falls onto the copyright owner, while YouTube derives a benefit. This situation is unsatisfactory for many copyright owners, and YouTube was recently taken to court in the United States to challenge the validity of the law.

### **Viacom v YouTube<sup>24</sup>**

In February of 2007, Viacom, a large entertainment content company, issued an infringement notice to YouTube, demanding that it remove hundreds of thousands of copyright video clips from their website, and began litigation challenging the validity of the DMCA ‘safe harbour’ protection.<sup>25</sup> Viacom contended that ‘the DMCA is not meant to protect companies like YouTube and actually results in harming the copyright owners by forcing them to spend money “hunting [clips] down and asking that they be removed”.’<sup>26</sup> In the initial lawsuit, counsel for Viacom argued that ‘YouTube is selling advertising in competition with us, using our own content. This is not a fair business model – for a multi-billion dollar corporation to appropriate material for their own profit.’<sup>27</sup> Furthermore, Viacom wanted clarification as to who was responsible for policing and monitoring content in order to prevent infringement. In fact, this was a serious

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<sup>21</sup> Brennan, above n 19.

<sup>22</sup> *Digital Millennium Copyright Act* 1998, Pub. L. No. 105–304, 112 Stat. 2860 (1998).

<sup>23</sup> Wong, above n 9, 738.

<sup>24</sup> 2010 US District Court LEXIS 62829, 14 and 15–16 (SDNY 2010).

<sup>25</sup> ‘YouTube culls Viacom videos’, *Sydney Morning Herald* (online), 3 February 2007 <<http://www.smh.com.au/news/web/youtube-culls-viacom-videos/2007/02/03/1169919576489.html>>.

<sup>26</sup> Mellow, above n 7, 179.

<sup>27</sup> Brennan, above n 19.

contention, which led to the breakdown of negotiations between the parties.<sup>28</sup> Despite the arguments of Viacom, the decision

indicates that the statutory safe harbor established by section 512 of the US copyright act may shield the entrepreneur who anticipates – and even “welcome(s)” – infringements so long as the entrepreneur lacks “actual or constructive knowledge of specific and identifiable infringements of individual items.”<sup>29</sup>

If a provider knows of specific instances of infringement, the provider must promptly remove the infringing material. If not, the burden is on the owner to identify the infringement – general knowledge that infringement is ‘ubiquitous’ does not impose a duty on the service provider to monitor or search for infringements.<sup>30</sup> The decision effectively reads s 512(c) as a notice and takedown provision. The DMCA is clear that ‘as long as YouTube is eligible by virtue of implementing compliant Notice and Take- Down procedures, the burden rests squarely on the shoulder of Viacom’.<sup>31</sup> Ultimately, the law in the United States does not impose a duty on providers like YouTube to police user-generated content for copyright infringements. This decision will likely have far-reaching implications. For example, Canada is considering the implementation of a similar safe harbour provision into domestic legislation in the form of Bill C-32 (*The Copyright Modernization Act*), which would create an exception for ‘Non-commercial User-generated Content’.<sup>32</sup> This decision leaves content producers, such as professional sport leagues, responsible for policing their copyright content on YouTube. Different leagues have taken distinctly different approaches to dealing with these circumstances. This article now compares and contrasts the two approaches taken in North America in order to better inform potential strategies for Australian sport.

## **The National Football League and Major League Baseball**

When it comes to sport in the United States, the NFL is king. The ‘annual sales of NFL endorsed merchandise in the early 2000s (more than \$3.5 billion), coupled with the huge revenues generated by television, have made the ownership of intellectual property rights a critical and growing part of the business of most of the major sports entities in the United States.’<sup>33</sup> The NFL enjoys an intensely loyal and large fan base. Perhaps because of this, it has taken an aggressive position in defence of its copyright. ‘In the fall of 2006, the NFL demanded that

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<sup>28</sup> Charles Sims and Elizabeth Figueira, ‘YouTube, Google Find Safe Harbor in New York Court’, *Communications Lawyer: Publication of the Forum Committee on Communications Law, American Bar Association*, 27(3), 4.

<sup>29</sup> Ginsburg, above n 4, 185.

<sup>30</sup> *Ibid.*

<sup>31</sup> Sims & Figueira, above n 29, 5.

<sup>32</sup> Bill C-32, s 29.21.

<sup>33</sup> Roberts, above n 10, 168.

YouTube remove over 3000 video clips of NFL games posted on the website, claiming that the postings constituted copyright infringement'.<sup>34</sup> It is very difficult to find any NFL content on YouTube as it assertively polices the user-generated videos. The NFL prefers to stock its own website, NFL.com, with its own video, as it has not found 'a business model with YouTube that makes "strategic or economic sense"'.<sup>35</sup> While the anti-YouTube policy of the NFL has led some fans to dub them the 'No Fun League',<sup>36</sup> it is able to take a hard line approach since it has such a large, loyal and passionate fan base that it would be difficult to alienate. Other leagues are not so lucky. For instance, MLB is facing declining interest among fans, with average attendance dropping for the third straight year.<sup>37</sup> The game, which cites tradition as one of its strengths, has followed the NFL's approach by strictly prohibiting any copyright infringement. MLB 'pulls every video it can off YouTube, claiming copyright infringement under the usage rights of MLB Advanced Media'.<sup>38</sup> Critics cite this approach as backwards for a league that is rapidly losing fans. One might think that allowing classic matches and highlights to be re-broadcast on YouTube would play into the tradition of which the sport is deservedly proud. Instead, the league has aggressively policed the content uploaded by users, who are usually fans themselves. In order to enforce their policies, 'the leagues have been forced to hire full-time employees to monitor the Internet for unlicensed use of copyrights materials'.<sup>39</sup> While the NFL may be able to afford a strict copyright infringement policy against their fans without impacting on profits, MLB is missing an opportunity to develop young fans and foster a connection to the sport. In the long-term, this strategy could have dire effects on professional baseball.

## **The NBA and NHL**

On the other end of the spectrum, the NBA and the NHL are utilising social media to nurture their fan bases, and both have recently experienced significant rises in popularity. Both leagues have decided to work with YouTube and identify user-generated content as a valuable aspect of their strategy for growth. The NHL has a dedicated channel on YouTube, and the league actively encourages fans to post their own 'mash-up' videos of their favourite highlights, using original broadcasts to build the content. The idea is to actively engage with fans,

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<sup>34</sup> Mellow, above n 7, 174.

<sup>35</sup> Richard Sandomir, 'YouTube Has New Fans in League Offices', *The New York Times* (online), 27 February 2007 <[http://www.nytimes.com/2007/02/27/sports/basketball/27sandomir.html?\\_r=1](http://www.nytimes.com/2007/02/27/sports/basketball/27sandomir.html?_r=1)>.

<sup>36</sup> Mellow, above n 7, 179.

<sup>37</sup> Associated Press, 'MLB attendance down 1 percent', *ESPN* (online), 4 October 2010 <<http://sports.espn.go.com/mlb/news/story?id=5645950>>; See also, 'Falling MLB Attendance', *Sports Business News* (online), 27 April 2011 <[http://www.sportsbusinessnews.com/\\_news/news\\_420557.php](http://www.sportsbusinessnews.com/_news/news_420557.php)>.

<sup>38</sup> Paul M. Banks, 'MLB Losing Legions of Fans with Backward Internet Media Policies' on Chicago Sports Guru, *Chicago Now* (8 February 2011) <<http://www.chicagonow.com/chicago-sports-guru/2011/02/mlb-losing-legions-of-fans-with-backward-internet-media-policies/>>.

<sup>39</sup> Wong, above n 9, 738.



especially those who are new to the sport. The development of the clips directly involves the fan, and allows the leagues to develop the story of their sport. Steve Grimes, Vice President for Interactive Services for the NBA, says that '[w]e're looking for new and interesting ways to engage our fans, and YouTube has a fabulous audience'.<sup>40</sup> Both the NBA and the NHL have entered into licensing agreements with YouTube, which will be examined in greater detail below. The deals create dedicated channels through which the leagues can post authorised video. As a part of the strategy, the leagues sanction fans' uploads, while still allowing for the rejection of unsuitable content. The channels also let users post videos that show their best moves, which are compiled into a weekly top 10 and shown on the channel.<sup>41</sup> In the NBA context, this approach has seen positive results, with the league experiencing a boost in popularity.<sup>42</sup> Indeed, the recent emergence of 'Rookie of the Year' player Blake Griffin is a demonstration of the inherent value of utilising user-generated content.

Blake Griffin just completed his first season with the Los Angeles Clippers in the NBA. His high-flying play is exciting, and has captivated basketball fans around the world. He is the perfect player for the rise of social media. Instead of rushing to their televisions to watch highlights of his acrobatics, fans boot up their computers and smart phones to witness the latest clips online. As Chad notes, 'Griffin is must-see NBA TV. He is a YouTube sensation ... It's quickly become a hoops habit: Wake up, power on the laptop, Google "Blake Griffin dunk" and click on the newest clip'.<sup>43</sup> Griffin has become the poster child of user-generated sports content on YouTube. For example, a user-generated compilation of his highlight dunks from November 2010 has been viewed almost 4 million times.<sup>44</sup> A short advertisement for the NBA precedes the content, and of course venue and league sponsors get the added benefit of greater exposure. This kind of excitement engages fans and allows the NBA to develop related content that can generate further revenue. When Griffin is mentioned alongside other NBA greats, fans can look up highlights of Michael Jordan or Julius Erving on YouTube. This kind of instant access integrates the fan in to the larger story of the game, building loyalty and legacy.

The NBA is perceived as being at the forefront of Internet sport broadcasting. It has developed an online broadcasting service call 'NBA League Pass' which is an online subscription service that broadcasts High-Definition quality matches on demand. The platform works on laptops, tablet computers and smart-phones,

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<sup>40</sup> Sandomir, above n 36.

<sup>41</sup> Ibid.

<sup>42</sup> An increase in overall popularity to 54.7 per cent from 48.0 per cent at the same time last year; 'Popularity poll shows Lebron decline, NBA boost', *ESPN* (online), 1 June 2011 <<http://sports.espn.go.com/nba/truhoop/miamiheat/news/story?id=6600000>>.

<sup>43</sup> Norman Chad, 'Blake Griffin transcends Clippers' bleak past', *Washington Post* (online) 21 February 2011 <[http://www.washingtonpost.com/opinions/couch-slouch-blake-griffin-transcends-clippers-bleak-past/2011/02/20/ABYG3YQ\\_story.html](http://www.washingtonpost.com/opinions/couch-slouch-blake-griffin-transcends-clippers-bleak-past/2011/02/20/ABYG3YQ_story.html)>.

<sup>44</sup> 'Blake Griffin's Top 10 Dunks of Nov.' <[www.youtube.com/watch?v=6gG4W0L41FI](http://www.youtube.com/watch?v=6gG4W0L41FI)>.

and represents an additional revenue stream for the league. Viewers who seek out content on YouTube are identified as technologically confident and are driven to the NBA League Pass platform to get the best online broadcasting experience. In fact, the NBA is so confident in its online strategy that it has entered into talks with YouTube to stream select matches live.<sup>45</sup> The NHL has a similar online platform called 'NHL Gamecenter Live'.<sup>46</sup> Like the NBA, it is using the popularity of YouTube to develop online relationships with fans while gaining revenue from licensing agreements and their superior online subscription platforms. Both leagues continue to police the online content, but their more permissive attitude encourages a positive relationship with fans, and has led to increased popularity of the leagues. Additionally, this online strategy has not impacted the traditional television broadcasting revenues. The NHL recently signed its largest sponsorship and broadcast deals in history.<sup>47</sup> The strategies employed by the NBA and NHL effectively balance the need to protect and police copyright while also using new technology to develop broadcast revenue and fan loyalty.

### **Which Path Should the AFL Take?**

It is not clear which approach the AFL will take in relation to managing user-generated online content.<sup>48</sup> Of course, the AFL will continue to police its copyright in relation to broadcast footage. Fans have posted notices online that they have received from the league demanding that they remove user-generated content from their YouTube accounts. The AFL has a responsibility to honour the agreements for the distribution of content online and the AFL's corporate partners must be protected. Recently, the English Premier League approached the AFL to join them in a lawsuit against YouTube.<sup>49</sup> The AFL did not join the class action suit, in which the English professional soccer league joined several music companies, 'alleging copyright violations against YouTube for allowing copyrighted clips to be posted on the site without permission.'<sup>50</sup> The lawsuit was ultimately unsuccessful, and the AFL's reluctance to join may symbolise a prevailing attitude of waiting on the sidelines for the legal environment to

<sup>45</sup> Jun Yang, 'Google's YouTube in Talks to Stream NBA, NHL Games Live' *Bloomberg* (online), 24 February 2011 <<http://www.bloomberg.com/news/2011-02-22/google-s-youtube-says-it-s-negotiating-to-broadcast-live-nba-nhl-games.html>>.

<sup>46</sup> See <<https://gamecenter.nhl.com>>.

<sup>47</sup> Gary Bettman, NHL Commissioner, Stanley Cup Final News Conference, 2 June 2011 <<http://www.youtube.com/user/NHLvideo?blend=1&ob=5>>.

<sup>48</sup> Although, it is clear that the AFL will continue to defend its broadcasting agreements, as evidenced by the recent appeal of the decision in *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd* (No 2) [2012] FCA 34. The AFL and NRL challenged Optus's TV Now service together, in order to protect their broadcast rights. This action certainly suggests that the AFL and NRL will take a hardline approach, not unlike that of the NFL in policing their content.

<sup>49</sup> 'Premier League asks NRL, AFL to sue YouTube', *The Sunday Telegraph* (online), May 13, 2007 <<http://www.news.com.au/top-stories/premier-league-asks-nrl-afl-to-sue-youtube/story-e6frfkp9-111113522527>>.

<sup>50</sup> See *Association of Premier League Ltd. V YouTube, Inc*, 633 F.Supp.2d 159 (SDNY 2009); Wong, above n 9, 738.

develop. However, with the Viacom decision and the success of the progressive strategies of the NBA and NHL, it may be time for the AFL to get in the game by utilising the opportunities that user-generated content sites present instead of simply prohibiting the uploading of all AFL content.

### **The Advantages of Entering Licensing Agreements with YouTube**

This article favours a permissive position in terms of websites like YouTube, but leagues must continue to take measures to protect their rights. Perhaps the best way is to pursue licensing agreements with YouTube. As mentioned above, ‘YouTube has revenue-sharing arrangements with the NBA and NHL.’<sup>51</sup> Entertainment content producers are quickly following their lead. ‘Last year, Warner entered into an agreement with YouTube which licensed its users to ‘*‘mash-up’* video clips with soundtracks that use music from the Warner catalogue ... [t]he agreement obliged YouTube to use the Audible Magic system to identify such videos and give Warner a share of the revenue for any advertisements that appear alongside these videos’.<sup>52</sup> Such agreements allow copyright owners to generate an economic benefit without alienating fans by imposing ‘a strict interpretation of copyright law which will ... negatively intervene in the socialisation practices of the site.’<sup>53</sup> It is important to note the significance of supporting an online fan base as opposed to alienating them. The existence of user-generated content online develops sport fans beyond the local, opening up additional revenue for the league. As Mellow notes, ‘the clip acts as a springboard for dialogue not only between friends, but also among strangers around the world. The clip no longer solely entertains, but now serves as “raw material” from which to create “new insights and understandings”.’<sup>54</sup> Passionate and engaged fans present a much stronger consumer base than casual individuals. The development of a global audience should be of primary importance for leagues. The AFL should look to Mellow’s argument that the NFL should pursue a licensing agreement with YouTube. As she notes, ‘[r]ather than fight the legal battle over fair use, particularly because the League would presumably fail, the NFL should enter into a licensing agreement with YouTube.’<sup>55</sup> Ultimately, ‘the sports industry must find creative ways to protect the integrity of their media content while embracing new technology.’<sup>56</sup> Through the development of online content platforms and licensing agreements with user-generated content websites, leagues such as the AFL can balance the enforcement of their copyright with the development of new economic opportunities.

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<sup>51</sup> Sandomir, above n 36.

<sup>52</sup> Brennan, above n 19.

<sup>53</sup> Jarrett, above n 3, 139.

<sup>54</sup> Mellow, above n 7, 181.

<sup>55</sup> *Ibid* 199–200.

<sup>56</sup> Wong, above n 9.

## **Conclusion**

Ultimately, the permissive and collaborative strategies enacted by the NHL and the NBA towards policing broadcast copyright online have the potential to result in long-term economic benefits for professional sport. Each sport has a unique relationship with its fans and consequently must develop its own approach to enforcing its copyright. However, this article advocates that leagues which keep pace with the rapid developments in technology will be best placed to benefit from them. Leagues are uniquely placed in that they are able to generate long-term, sustainable relationships with their fans – this is a consideration that is not generally available to other producers of entertainment content. As a result, leagues have an exceptional opportunity to use a relaxed approach to enforcing their copyright in order to generate goodwill with their fans. This goodwill results in loyalty, and as new technology is developed to monetise online content, progressive leagues will be best placed to profit. Through limited policing and licensing agreements, in conjunction with the development of superior subscription based content, leagues can effectively protect copyright and increase revenue. The best strategy for leagues like the AFL is to embrace YouTube as an effective tool to cultivate its fan base. Alternatively, the prohibition of all user-generated content presents no clear advantage in the context of professional sport.