COMPETITIVE ADVANTAGE: THE ACTIONS ESPN MUST TAKE IN ORDER TO MAINTAIN A LEADERSHIP POSITION IN THE WAKE OF CABLE UN-BUNDLING

"What's going on here is we're redefining the nature of choice."

broadcasts, $5.50 for the ESPN family of networks, $4 for Laker games, and $2 for the PAC-12 sports network, not to mention the fees associated with rising sports networks like Fox Sports 1, the NBC Sports Network and others.[8]

and recognizes that even though audiences are relatively small, they tend to be loyal and less sensitive to price increases.[22]

The 2006 Report was not without its own issues, however, mostly due to the rapid change in the distribution of original content over strictly streaming services (the original "à la carte" options). Technology continued to evolve faster than the FCC could report, and the Commission was once again put in a position to re-evaluate their treatment of multichannel video programming distributors ("MVPDs") with a proposal of rulemaking in 2014.[23] The Commission recognized that innovation must be encouraged in order to support the best outcome for consumers, and changed its definition of MVPDs to include any entity that "makes available for purchase, by subscribers or customers, multiple channels of video programming."[24] Thanks to this change, providers that offer only online content to consumers would of course be subject to FCC regulation, but also benefit greatly from its support of fair competition.[25]

For context, imagine that niche networks include every piece of small-market sports programming previously thought by MVPDs to not be worth the carrying costs because of their small audience size. Under the new model, whether you are a diehard cricket fan, or simply can't get enough of the World Dart Tour, à la carte programming will make it possible for you to watch (and pay for) only what you want out of a wide universe of options thanks to the FCC's protection and support of such innovation.[26]

Of course, MVPDs need to carry networks that increase the number of subscribers they have in order to maximize profit.[27] When analyzed effectively, the à la carte model only serves to benefit MVPDs in assessing each network's value.[28] Networks with large numbers of viewers may find it easier to get higher license fees and advertising revenues because they respond to consumer demand with more precision and certainty.[29]

An à la carte system of providing content to viewers is much more aligned with the principles of fairness and consumer protection the FCC strives for.[30] Absent other avenues of unbundling, it is fair to say that the FCC, following the Canadian example, may step in to regulate the industry

22. *Id*.
23. FCC, Notice of Proposed Rulemaking, FCC 14-210 (Dec. 19, 2014).
24. *Id*. at 8.
25. *See id.*
26. *See id.*
27. FCC, *supra* note 14, at 35.
28. *See id.*
29. *Id*.
30. *See generally* FCC, *supra* note 14.

others like it to change and adapt quickly.[59] The sports provider still finds itself in over 92 million homes and as long as cable bundles exist in their current form, they enjoy a hefty $6.50 per subscriber.[60] However, it is exactly that substantial fee they negotiated so strongly for that will cause them to hemorrhage funds as consumers with no interest in sports revolt and bundles get smaller.[61] In 2012, ESPN negotiated long term deals with major broadcast distributors Comcast, Cablevision, and Cox.[62] In order to achieve that high fee per subscriber per month, ESPN had to agree to lower their "penetration" level from packages that reach nearly ninety percent of consumers to a level that reaches 80 percent and falling.[63] In the years since the deals were inked, cable providers began experimenting with lower cost skinny bundles and started marketing them without ESPN.[64] ESPN got the high rate they wanted but left themselves much more vulnerable to customer loss than did other networks.[65] Thanks to ESPN's noticeable decline, start-up networks like NBC Sports Network and Fox Sports 1 were able to gain notoriety and penetrate more of the market early on in their existence.[66] Perhaps "it's not cord cutting; it's cord shaving," as one media executive put it, but regardless "ESPN is losing subscribers at a faster rate than others."[67]

The company knows that even with their strong market position and long-term broadcasting contracts in place, they must begin to change now to be ready for the future. ESPN CEO John Skipper noted, "[T]hese changes are part of a broad strategy to ensure we're in a position to make the most of new opportunities to build the future of ESPN."[68] Experts agree that sports will remain a crucial element of many video packages moving forward, however slim they become.[69]

Despite the view of ESPN and other current market participants, from the consumer's point of view new entrants into the programming provider rather than ticket sales.[71] The fees remain strong and continue to grow even as the opportunities in traditional cable delivery diminish.[72] And with this dramatic shift in the way programming, and specifically live sporting events are consumed, so too will shift the tactics of negotiation, value of deals, and streams of revenue for those who produce and those who deliver the content.[73] No example of this shift is more currently relevant than the October 27, 2015 match-up between the Jacksonville Jaguars and the Buffalo Bills, an example addressed below.[74]

II. THE FUTURE OF SPORTS CONTENT DISTRIBUTION MUST INCLUDE A SUCCESSFUL MARRIAGE OF AD-SUPPORTED STREAMING, 'OVER-THE-TOP' PARTNERSHIPS, AND A DIVERSE OFFERING OF B

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higher if they were exclusive in the areas where the fan bases were strongest.[90] The stream received nearly a third of its views from over 180 international markets highlighting the amazing opportunity to reach brand new audiences with online streams.[91]

CBS President Les Moonves noted the industry sentiment towards the NFL, and with the positive numbers achieved by Yahoo, streaming providers will also have similar feelings: "The NFL is pretty important to the networks. I must say, they use their leverage appropriately, and you take it with a smile because, guess what, - -r el- -FL with the NBA that would allow the service to stream NBA content OTT to its subscribers.[97] The service is mobile-first with a stated goal of attracting the "growing audience of millennial cord-cutters."[98] The rights to live NBA games have already been spoken for in nine-year agreements with ESPN/ABC and Turner Sports that take effect after the 2016/2017 season, but any creative NBA content and rights to live affiliate games (WNBA, D-League, USA Basketball) could certainly be streamed through go90.[99]

This type of deal is another example of the type of hybrid agreements likely to emerge in the near future.[100] Wireless service providers like Verizon and AT&T are the natural providers of mobile content and with "AT&T's recent acquisition satellite TV provider DirecTV," the competition between carriers has become a "content arms race."[101] Verizon already has team-level sponsorship agreements with the Phoenix Suns, Portland Trailblazers, Sacramento Kings, and Los Angeles Lakers,[102] relationships which will undoubtedly be leveraged in the future as Verizon continues to take on content.[103] To be sure, however, as more and more content is streamed over various devices, former AT&T executive director of sponsorships Tim McGhee said it best, ultimately "it's not going to matter what platform they deliver content to as much as the content itself."[104]

ESPN has already publicly committed to produce more OTT content.[105] Though CEO John Skipper has been hesitant to suggest it may be feasible to offer the entire ESPN network to online users without cable subscriptions, the company's leader has recognized that there must exist OTT content that is direct to consumers from ESPN.[106] Again, consumers are trading down either to lighter cable packages, or cutting the cord altogether.[107] ESPN can use the OTT avenues to specifically target new entrants into the pay-TV market who tend to already purchase content a la carte, or in skinny bundles, and rely on this new loyalty to drive viewership as they adapt and change.[108]

97. Lefton & Lombardo, *supra* note 76.

98. *Id*.

99. *Id*.

100. *Id*.

101. *Id*.

102. *Id*.

103. *See id.*

104. *Id*.

105. Amol Sharma & Shalini Ramachandran, *Deeper with ESPN's John Skipper on Apple, Sling and Sports Rights*, WALL ST. J. (Jan. 19, 2016), http://www.wsj.com/articles/deeper-with-espns-john-skipper-on-apple-sling-and-sports-rights-1453229424.

106. *Id*.

107. *See id.*

108. *Id*.

Strategist Damien Damjanovski put it this way: "Music is crowded, they can't make money out of news, so sport is the next big revenue stream for the megaplayers such as Amazon, Google, and Apple."[116] Evidence supporting Damjanovski's bullish attitude towards streaming is supported by the rapid growth of Netflix in Australia amassing over 1 million Australian subscribers within the first 12 months of its availability in the country.[117] But Damjanovski also predicts that once the league becomes stable enough in its own ability to produce and deliver content, there will be no need for a middle man: "From 2023 onwards there won't be any more negotiations, the NRL will deliver its product directly to the patron."[118] That means that fans will purchase their rugby directly from the NRL, ideally paying a reasonable fee to a league that no longer has to incur the expenses of licensing the rights of its product to third party distributo.12 Tc[7-32(117(st)-6(r)-14(i)17(but)-4(o 0 1 13e)9(n)22(c31(s)-34(o)

ESPN must show that it adds value to the content and that the price paid for partnership comes with a guarantee of viewership.[125] This notion clearly extends far beyond the NFL and NBA, and must include recognition of the modern viewer's affinity for non-linear programming.

III. MAINTAINING BARGAINING POWER IN FUTURE RIGHTS NEGOTIATIONS MAY BE DIFFICULT WITH OTHER MARKET POWERS EMERGING

ESPN is still the "Worldwide Leader in Sports,"[126] but as distribution becomes easier for each content creator to do on its own, ESPN's negotiating power will diminish. Other large entities recognize the vulnerability in the marketplace, and will attempt to take advantage of an opportunity to grow quickly. Their negotiation tactics will be competitive, and in order for ESPN and others to still drive a manageable bargain, they will need to rely on their proven ability to understand and relate to their loyal audiences in various ways, but also be open to offsetting expenses in other ways.

For example, when negotiating deals for content in the future, networks will want to argue that program ratings, especially those produced overnight, have little significance when determining contractual value.[127] And when applied to traditional programming, this premise will continue to become more and more valid as content shifts to digital streaming.[128] In a panel discussion at the 2015 NeuLion Sports Media & Technology Conference, CBS President & CEO Les Moonves expressed skepticism about overnight ratings: "Obviously, if it's a very high number or an extremely low number, you take note of that. But [overnight ratings] are far less significant than they were a few years ago."[129] However, even with CBS, this disregard for overnight ratings is not so easily dismissed when contracting for live sporting events which often require viewership guarantees, or at least have escalator clauses attached to various rating levels.[130]

But leagues can gain negotiating leverage as well, especially with the help of advertisers,[131] even if live sports are headed for a completely subscription-based model.[132] For decades European soccer leagues have earned substantial revenue by selling advertising space across the front of

125. *See generally id*.
126. ESPN, http://www.espn.com (last visited Oct. 24, 2016).
127. *See* Frankel, *supra* note 46.
128. *Id*.
129. *Id*.
130. Fisher & Ourand, *supra* note 74.
131. Germano, *supra* note 71.
132. FCC, *supra* note 15, at 27.

continue to pursue its strategy of building a complete sports ecosystem.[143] The funding will allow Le Sports to run athletic events, offer a content platform for distribution, and service smart devices subscribed to the content.[144] Because the streaming market is still relatively young, such a big bet on streaming content especially directed solely at sports programming is not expected to pay off immediately. As streaming sites mature, Le Sports will experience notable gains because the large initial investment has allowed them to already connect with the largest sports consumer base in China.[145] Le Sports is not alone.[146] Other worldwide conglomerates like Hangzhou-based Alibaba, have also begun heavily investing in sports content with an eye on the future of content distribution.[147] With their collection of funds, groups like Le Holdings and Alibaba can purchase content distributors, sports teams/clubs, associated copyrights, other events and the associated ticketing for all of it.[148] They represent a strong indicator of the content providers of the future, where an à la carte subscription would give the consumer access to their voluminous libraries of sports content.[149]

IV. INNOVATION WILL SERVE AS ESPN'S GREATEST ASSET IF THEY ARE TO FIND CONTINUED SUCCESS. THE END RESULT WILL BENEFIT CONSUMERS.

It is clear that professional leagues will have more options in the near future when it comes to distributors for their content including their own personal channels.[150] And wh