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."[1] The words of Laura Martin, entertainment & internet analyst at Needham & Co., sum up the direction of television programming in the United States. For decades, pay-TV consumers have been subjected to the reality of the "bundle."[2] Monthly over-charges and consumer choice limited to very similar bundles have both been par for the course.[3] Content distributors are unable to compete on price in a meaningful way because the contracts they have with content creators essentially dictate their own bottom lines.[4] The emergence of millennials in the marketplace, coupled with heightened animosity towards the anti-competitive structure of the way pay-TV is developed and distributed to consumers, paint the picture of an industry on the brink of drastic and certain change.[5] Whether it be through anti-trust litigation, legislative action, FCC intervention, or the eventual decay of the current business model by consumers who independently choose to "cut the cord" with cable, a new landscape of content distribution will emerge.[6]

Currently, sports programming accounts for much of a pay-TV monthly bill regardless of whether a consumer has any interest in sports.[7] A Los Angeles subscriber, for example, is charged roughly $5 per month for Dodger

1. Charlie Frankel, *Media Execs Believe OTT Nets are Here to Stay, But Questions Remain About the Future*, SPORTS BUS. DAILY (Oct. 29, 2015), http://www.sportsbusinessdaily.com/Daily/Issues/2015/10/29/SMT-Conference/OTT.

2. Warren Grimes, *How Your Rising Cable Bill is Making Teams and Star Players Rich*, L.A. TIMES (Mar. 31, 2014), http://articles.latimes.com/2014/mar/31/opinion/la-oe-grimes-dodgers-cable-tv-time-warner--20140331.

3. Warren Grimes, *The Distribution of Pay Television in the United States: Let an Unshackled Marketplace Decide*, 5 J. INT'L MEDIA & ENT. LAW 1, 2 (2014).

4. *Id*. at 11-12.

5. *See* Grimes, *supra* note 2.

6. *Id*.

7. Grimes, *supra* note 3, at 9.

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] Out of the average pay-TV subscriber's monthly bill of $90[9] we've already accounted for nearly 25% of the cost amongst six networks and have not yet begun to discuss the dozens of other networks subscribers are paying for and, for the most part, not watching.[10] Once the concept of bundling is dismantled, those sports networks will at the very least be faced with the onerous challenge of maintaining comfortable profit margins.[11] This article will explore the future facing sports programming specifically through the lens of the industry leader, ESPN.[12] As sports content providers are forced to offer more à la carte options to consumers, how can a provider like ESPN survive and continue to innovate?

In this case study I will explore how ESPN can and should respond to a changing business and regulatory climate. I will first describe the impact that cable "un-bundling" (be it in the form of federal action or natural decay due to cord-cutting) will have on the market for sports content. While systemic intervention in the form of federal action may be the quickest vehicle for dismantling the bundle, even without such intervention, cord-cutting and competition from non-cable video streaming will force industry adaptation.[13] Second, I will critique three major examples of the future of live sports programming and discuss how ESPN could utilize a portfolio of all three to remain an industry leader. Finally, I will note the various ways in which sporting leagues and future competitors of ESPN have begun to gain leverage in contract negotiations for sports content rights. I ultimately conclude that if ESPN wishes to continue to be a valuable jewel in Disney's war chest, it must seek to do the same through innovation and creativity. By anticipating the legal realities more effectively than their competitors, ESPN will be able to thwart calls for heavy-handed regulation and continue to serve as the industry leader.

And ESPN aside, this article will relay one overarching message: the change in landscape can only bring good; good for the consumer, good for the athletes, coaches and leagues who tirelessly work to develop live sports

8. Grimes, *supra* note 3, at 20.

9. Grimes, *supra* note 3, at 8.

10. *See* Grimes, *supra* note 3, at 5 (noting that "[t]oday, seven powerful programmers account for about 95% of all television viewing hours in the United States").

11. *See* Grimes, *supra* note 3, at 9 (noting that with its current share in roughly 90% of all pay-TV bundles, ESPN generates yearly revenues of nearly $6 billion from subscription fees alone).

12. *See* ESPN, http://www.espn.go.com (last visited Oct. 24, 2016).

13. *See generally* Grimes, *supra* note 2.

in the United States, and good for the adapting and rising companies who creatively seek ways to deliver this content to the masses. ESPN can be the leader that navigates the uncharted waters of delivering the most important live content left for television audiences, but it must adapt now or risk losing its grip as the rest of the industry surpasses expectations.

I. THE INEVITABILITY OF "UN-BUNDLING," AND THE IMPACT ON SPORTS PROGRAMMING AS IT EXISTS TODAY THROUGH FCC RECOGNITION AND CORD-CUTTING

In 2004, the Federal Communications Commission (FCC) prepared a report at the request of the U.S. House of Representatives to discuss the impact that an à la carte programming model would have on market participants and consumers.[14] The report concluded that while offering à la carte programming options to consumers would increase consumer choice, the increased costs to content creators and distributors would off-set any economic benefit hoped for by consumers in such a model.[15] Unfortunately, the original report relied heavily on "problematic assumptions and presented incorrect and biased" results.[16] A new report[17] correcting the mistakes of the original was issued in 2006, the response to which was eye-opening. For example, the original report suggested that networks considered "niche" would fail under an a la carte system because the decrease in revenues would not enable the small network to cover its production costs.[18] However, the Further Report found evidence that this prediction was erroneous.[19] Niche networks with small, yet dedicated, audiences do not appeal to large cable providers under the current model because they often do not generate enough revenue to be profitable for the entire package.[20] Under an à la carte model, dedicated consumers may actually be willing to pay higher subscription fees that would be more than enough to cover production costs.[21] Such a model has worked for premium programmers like Home Box Office and Showtime,

14. FCC, REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC, at 1 (2004).

15. FCC, FURTHER REPORT ON THE PACKAGING AND SALE OF VIDEO PROGRAMMING SERVICES TO THE PUBLIC, at 3 (2006).

16. *Id*.

17. *Id*.

18. *Id*. at 27.

19. *Id*.

20. *Id*.

21. *Id*. at 28.

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.

in the near future.[31] However, a gradual erosion of the bundle may already be well underway.

Bundling, as it exists today, creates incentives for MVPDs to "include or exclude programming in a manner inconsistent with consumer preference."[32] Because the choice of whether or not to carry a network as part of a large package is based almost completely on the overall revenue generating power of the bundle itself, and not on the popularity of each channel in the bundle, consumers have found themselves purchasing bundles that include programming they have no interest in watching.[33] Once consumers began to realize they were paying for programming they neither desired, nor was worth the added cost, the idea of "cutting the cord" with large MVPDs arose.[34] In 2015 nearly 100 million U.S. households participated in the pay-TV economy.[35] Monthly costs to these consumers averaged roughly $90 per month for packages of cable networks and are expected to rise to $125 per month over the next few years.[36] Younger generations continue to choose alternative options from traditional cable programming in an effort to be more efficient with their spending and the time they allocate to entertainment.[37] Time Warner Cable Executive Vice President and Chief Content Officer Melinda Witmer noted that cord cutting is accelerating and taking people by surprise.[38] Various industry execs have noted that the trend in the coming years will revolve around customization and curation of content—allowing consumers to pick and choose not only what they watch, but on which devices.[39] As we unbundle the TV ecosystem, we're moving into chaos, which will breed innovation.[40]

Certainly there are costs associated with unbundling which will be passed along to the consumer.[41] The estimated cost of each "over the top" (OTT) channel is $10-$15 per month.[42] Consumers will likely still have the option to purchase the "big bundle" at $70 per month for 500 channels, but

31. Note the reason for both reports in the first place. *Id*. at 35.

32. *Id*. at 31.

33. *Id*. at 31.

34. Daniel Kaplan, *Cord Cutting is Accelerating, But Cable Execs Say That Allows Ways to Engage Consumers*, SPORTS BUS. DAILY (Oct. 28, 2015), http://www.sportsbusinessdaily.com/Daily/Issues/2015/10/28/SMT-Conference/Cord-Cutting.

35. Grimes, *supra* note 3, at 9.

36. *Id*. at 8.

37. *See* Kaplan, *supra* note 34.

38. *Id*.

39. *Id*.

40. *See* Frankel, *supra* note 1.

41. *Id*.

42. *Id*.

all of these new options will create consumer confusion, which will in turn induce a need for more spending on marketing and advertising.[43] Essentially this amounts to a tax on the ecosystem that didn't exist previously.[44] "The consumer pays for it all in the end."[45]

Media executives are well aware that they must innovate in order to be successful in the coming years.[46] In a one-on-one discussion at the 2015 NeuLion Sports Media & Technology Conference, CBS President & CEO Les Moonves acknowledged that indeed the TV landscape is changing rapidly: "More has changed over the last two years than the last two decades."[47] However, he was not so quick to concede that network television was on its way out.[48] Digital media is certainly a very important part of CBS's business model, earning the giant hundreds of millions of dollars every year from digital advertising and subscription fees.[49] However, Moonves believes that all the digital traffic is not taking away from traditional broadcasting, but rather from print, and niche providers that target smaller demographics than the larger networks.[50] Moonves may have a point regarding the broad relevance of network television today but certainly understates the issue in referring to digital taking away from "niche" cable networks. Perhaps the most obvious "niche" network is ESPN, the self-proclaimed World Wide Leader in Sports.

Since 2014, ESPN has entered into broadcast rights deals for major sporting events significantly above the events' average annual values.[51] The following table is a representation of the amount ESPN paid for exclusive rights to content. The drastic increase in payment over each average agreement annual value signifies just how important carrying the rights to these events was to ESPN when the deals were agreed to.[52]

43. *Id*.

44. *Id*.

45. *Id*.

46. *See* Charlie Frankel, *Les Moonves Talks Media Landscape at SMT Conference, Says Network TV Isn't Dead*, SPORTS BUS. DAILY (Oct. 29, 2015), http://www.sportsbusinessdaily.com/Daily/Issues/2015/10/29/SMT-Conference/Moonves.

47. *Id*.

48. *Id*.

49. *Id*.

50. *Id*.

51. John Ourand, *The Moves That Forced ESPN's Cuts*, SPORTS BUS. J., (Oct. 26, 2015), http://www.sportsbusinessdaily.com/Journal/Issues/2015/10/26/Media/ESPN.aspx.

52. *See id.*

ESPN's Increasing Rights Payments[53]

LEAGUE / EVENT	AvG Annual Value	Amount ESPN Paid	Overpayment	Year Deal Inked
NFL	$1.1 billion	$1.9 billion	+$800 million (+73%)	2014
NBA	$575 million	$1.4 billion	+$825 million (+143%)	2016
MLB	$296 million	$700 million	+$404 million (+136%)	2016
College Football Playoff	$123.8 million	$608.3 million	+$484.5 million (+391%)	2014
MLS	$8 million	$75 million	+$67 million (+838%)	2015

Clearly ESPN expects a large increase in popularity to this content, and especially has an expectation that the MLS will grow rapidly.[54] Such premium prices, no doubt had their negative effects.[55] Recognizing the challenges that face the sports media provider after investing such substantial amounts in broadcasting rights that will only continue to decline in value over the next few years, ESPN found themselves facing the undesirable decision to lay off over 300 employees.[56] In a spring 2015 interview with CNBC, Disney CEO Bob Iger foreshadowed that ESPN's business model may face some challenges over the next few years.[57] The comments led to a decline in many media stocks over the summer, and without the proper cash on hand to continue business as usual, some very talented ESPN employees lost their jobs.[58] Carriage of live sports is at an all-time high, but the uncertainty of the best way for content creators to distribute the events forces ESPN and

53. *Id*.

54. My assertion here rests on the premise that ESPN, as a savvy negotiator, would not pay more than eight times the average value for a content package without first projecting the package's value into the future for the life of the deal. Part of the price is of course an effort to ensure they win any bidding war against other interested distributors, but even such tactics have logical limitations.

55. *Id*.

56. Ourand, *supra* note 51.

57. *Id*.

58. *Id*.

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 industry are not seen as disrupters, but rather opportunities for innovation.[70] After all, for the first time in North American spectator sport history, the $64 billion value of the market will be realized mostly from media rights fees

59. *Id*.
60. *Id*.
61. *Id*.
62. *Id*.
63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*.
67. *Id*.
68. *Id*.
69. *See generally* Grimes, *supra* note 3.
70. *See id.*

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 BOTH LINEAR AND NON-LINEAR CONTENT

"What we're trying to do is set ourselves up for the person who wants the 180 channels, the person who wants 15 channels, or the person who wants to buy a la carte."[75] The words of Les Moonves speak volumes. As the industry changes, so must the leaders if they hope to continue to enjoy strong market share. Ad-supported streaming, over-the-top content, and diversified programming options will be the keys to that success.[76]

A. Ad-Supported Streaming In The New Marketplace

For a clear example of emerging platforms for live broadcast outside of the traditional cable stronghold, one need look no further than Yahoo's groundbreaking broadcast of an NFL game in October 2015.[77]

71. *See* Sara Germano, *NBA to Put Kia Logo on Front of All-Star Jerseys*, WALL ST. J., (Oct. 28, 2015), http://www.wsj.com/articles/nba-to-put-kia-logo-on-front-of-all-star-jerseys-1446071503.

72. *Id*.

73. *See* Frankel, *supra* note 46; Ourand, *supra* note 51.

74. Eric Fisher & John Ourand, *Yahoo Signs Up More Than 30 Advertisers for Sunday's Live Stream of Bills-Jaguars*, SPORTS BUS. DAILY (Oct. 22, 2015), http://www.sportsbusinessdaily.com/Daily/Issues/2015/10/22/Marketing-and-Sponsorship/Yahoo-streaming-sponsors.aspx

75. Frankel, *supra* note 46.

76. *See* John Ewoldt, *Playstation Vue Streams into the Area*, STAR TRIBUNE, Mar. 22, 2016, at A1; Fisher & Ourand, *supra* note 74; Terry Lefton & John Lombardo, *Verizon Close to NBA Deal*, SPORTS BUS. J. (Nov. 2, 2015), http://www.sportsbusinessdaily.com/Journal/Issues/2015/11/02/Marketing-and-Sponsorship/NBA-Verizon.aspx; James Macsmith, *NRL Boss Dave Smith Will Deliver TV Goods Says Leading Digital Media Expert*, STUFF (Aug. 27, 2015), http://www.stuff.co.nz/sport/league/71490665/nrl-boss-dave-smith-will-deliver-tv-goods-says-leading-digital-media-expert.

77. Fisher & Ourand, *supra* note 74.

In the deal inked between the National Football League and Yahoo!, Yahoo! would broadcast the game being played between the Buffalo Bills and the Jacksonville Jaguars and be responsible for filling 96% of the ad inventory for the game with the NFL retaining the standard 4%.[78]

Consumer interest in the NFL is strong, but nearly all aspects of the game seemed to set the deal up for failure.[79] Regular season matchups in the NFL typically have positive viewership ratings, but Sunday morning games compete even against themselves and generate ratings that pale in comparison to Thursday, Sunday, and Monday evening games.[80] Further, NFL games broadcast from London attract an even less impressive viewership.[81] The game was broadcast at 9:30am ET / 6:30am PT with the traditional slate of Sunday NFL games starting nearly four hours later.[82] Given the circumstances, ad support for the stream was met with skepticism.[83] After initially not providing viewer guarantees, Yahoo is estimated to have guaranteed advertisers a minimum of 3.5 million U.S. streams.[84] The resulting deals represented one of the largest collections of sponsors ever assembled for a live sports stream.[85] More than 30 advertisers signed with Yahoo for 30 second spots ranging from $50,000 to $200,000.[86]

Yahoo delivered.[87] The site reportedly notched 15.2 million unique viewers and 33.6 million streams for the game—a number that, experts estimate, makes it "the most streamed sporting event in U.S. history."[88] To put the numbers in context compared to other special NFL broadcasts, the 15.2 million unique views alone would place this game ahead of the average Monday Night Football game, and just behind the average Thursday Night Football matchup.[89] And, given the fact that the game was broadcast over-the-air in Buffalo, Jacksonville, and London, not to mention also streamed live in China, it is likely that the streaming numbers could have been even

78. *Id*.

79. *See id.* (noting skepticism from advertisers who negotiated for viewership guarantees).

80. *See* Rick Kissel, *CBS, NFL Network Combine to Draw 20.8 Million for Thursday Night Football*, VARIETY (Sep. 12, 2014, 7:58AM), http://variety.com/2014/data/ratings/cbs-nfl-network-off-to-strong-ratings-start-for-thursday-night-football-1201304499/.

81. *See id.*

82. *See* Fisher & Ourand, *supra* note 74.

83. *Id*.

84. *Id*.

85. *Id*.

86. *Id*.

87. John Ourand, *Bills-Jaguars Game Earns Close to 34 Million Live Streams Via Yahoo*, SPORTS BUS. DAILY (Oct. 26, 2015), http://www.sportsbusinessdaily.com/Daily/Morning-Buzz/2015/10/26/yahoo.aspx.

88. *Id*.

89. *Id*.

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, you need the NFL."[92]

Maybe so. But what the Yahoo stream shows more than the NFL's ability to attract viewers is that to be successful in negotiating for broadcasting rights in the future, distributors like ESPN must be open to ad-supported live streams. Yahoo was able to generate an enormous audience at a less-than-desirable time slot simply by using their massive online presence to drive viewers to the content.[93] ESPN can do the same by utilizing their streaming ability to guarantee content creators high levels of viewership through multiple platforms (including ABC and Disney when appropriate). Advertisers have shown their affinity for high-volume online traffic,[94] and if ESPN does not utilize this avenue moving forward, they will lose that traffic to those who will utilize it.

B. OTT Partnerships In The New Marketplace

The FCC defines Over-the-Top ("OTT") programming as any linear video service that travels over the public Internet and that cable operators do not treat as managed video services on any cable system.[95] Essentially, OTT refers to any content distributed to consumers (typically via an internet stream) that does not require that consumer to be a paying customer of the MVPD distributing the content over their cable infrastructure.[96] Networks carrying content can, in one sense sell the distribution rights to a cable provider, and in some instances also offer the content over the internet at little or no (extra) cost to consumers.

For example, Verizon Wireless, in an effort to provide competitive content for its recently launched over-the-top platform go90, is close to a deal

90. *Id*.
91. *Id*.
92. Frankel, *supra* note 46.
93. *See* Ourand, *supra* note 87.
94. *See id*.
95. FCC, *supra* note 23, at 32.
96. *Id*. at 36.

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*.

Once bundling as it stands today becomes obsolete, ESPN will need to have already established a strong group of OTT users that rely on the provider for sports content. Otherwise it will be easy for audiences with more inelastic demand to choose a competing OTT provider, which may be the league itself.[109]

C. Diverse Offerings Of Linear And Non-Linear Programming

Increasingly, streaming content providers are finding success with "non-linear," or time-delayed, programming. Netflix, Amazon, and Hulu all offer viewers the choice of what to watch, and when to watch it, rather than subjecting them to scheduled programming.[110] But sports fans have been among those most reluctant to switch completely to non-linear services.[111] After all, live sports are best consumed in a linear fashion. Fans want to witness their team hit a last-second buzzer beater in real time. ESPN has thrived for decades on being able to provide their viewers with both the live action and the highlights following the game, but as distributors become less necessary with à la carte programming, ESPN will need to continue investing in both linear and non-linear content to maintain relevancy. Current and future competitors of the World Wide Leader are implementing this strategy already.[112]

In Australia, streaming content giant Netflix has grown to the point that they have emerged as a key player in negotiations for the digital rights of the National Rugby League.[113] With nearly AU$925 million already locked up in television revenue for the league, media experts predict that NRL's CEO Dave Smith will easily be able to match that figure with a digital streaming deal with an over the top provider like Netflix.[114] And even as extraordinary as the value of the NRL's digital rights seem to be now, they are only expected to increase in value over the next two years as the value of television broadcasting rights dwindles.[115] Strategic Agency Common Venture's Lead

109. *See id.* ESPN has been in discussions about and bought rights for some NBA content to deliver OTT. However, the NBA realizes it has a product that is rapidly growing in value and already offers its own direct-to-consumer option with "NBA League Pass." I imagine that the NBA recognizes its growing negotiating power and is in no hurry to license away rights to its games, even to ESPN, because distribution of the content no longer requires such a corporation to do most of the legwork. *Id*.

110. Ewoldt, *supra* note 76.

111. *Id*.

112. *See generally id.* (discussing how PlayStation Vue offers consumers the choice of whether to watch live linear programming or select their content from a wide library of non-linear options).

113. Macsmith, *supra* note 76.

114. *Id*.

115. *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 distributors.[119] In fact, one of Australia's most beloved teams has already begun to provide some content, albeit not live game footage, free-to-air for its fans.[120] Fox Sports is in charge of the game coverage as it exists now, but the team recognizes that they miss out on a larger audience by not providing other options when they are not contractually spoken for.[121]

ESPN has the advantage of experience over its emerging competitors. Their recent and seemingly simple investment into Indian Premier League Cricket is a prime example of how the sports network aims to invest in non-linear programming to maintain audience size.[122] ESPN recognizes that just because a specific audience may not be large enough to justify coverage on one of their linear networks, the cost of making it available and gaining loyal fans from their streaming services makes sense.[123] Beyond Cricket, the company is focused on exploring new direct-to-consumer services that not only entertain current subscribers, but that attract new audiences.[124] In order to stay relevant as content producers recognize the ease of online distribution,

116. *Id*.

117. *Id*.

118. *Id*.

119. *Id*.

120. Chris Dutton, *ACT Brumbies Recruit Stephanie Brantz to Launch Free-to-Air TV Show for Super Rugby*, SYDNEY MORNING HERALD (Feb. 18, 2016), http://www.smh.com.au/rugby-union/union-news/act-brumbies-recruit-stephanie-brantz-to-launch-freetoair-tv-show-for-super-rugby-20160218-gmxeqt.html.

121. *Id*.

122. *See ESPN Announces Launch of "Cricket Pass" Subscription-Streaming Service*, WALT DISNEY COMPANY (Mar. 17, 2016), https://thewaltdisneycompany.com/espn-announces-launch-of-cricket-pass-subscription-streaming-service.

123. *Id*.

124. *Id*.

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.

each player's jersey. The NBA experimented with a similar revenue generating tactic for the 2016 All-Star game in Toronto.[133] In a modest attempt to try the marketing technique, the NBA placed a 3.25 inch by 1.6 inch patch with the logo of Kia Motors Corporation on the upper left chest of each player's jersey.[134] Advertisements (other than apparel logos) had yet to be utilized in the United States in the four major sports partially because such endeavors create logistical concerns.[135] How would the sponsorship revenue be divided amongst the league, the team owners, and broadcasters?[136] Such questions naturally can only be answered through experimentation. In the present case, the NBA was able to negotiate the possibility for jersey sponsorships with Turner Sports when it originally inked the broadcasting rights for the game itself.[137] In doing so, the league was able to bypass approval from team owners which made the experiment more logistically feasible.[138] As to the possibility of adding jersey sponsorships for regular season games, the NBA clearly recognizes the financial impact such a move could have on the league, and their ability to cover the costs of distributing content on their own.[139] ESPN will have to be willing to recognize league incentives to operate in such a manner, and negotiate accordingly.[140]

Of course, it would ultimately be in ESPN's best interest to simply own the content outright. Such a radical idea may not be easily attainable in the United States, but ESPN is rapidly earning competition worldwide, and some of the new market participants have developed a powerful strategy to create and distribute live sports content all on their own.[141] China's largest online video provider, Le Holdings, has been aggressively fundraising to infuse capital into its sports offerings through its subsidiary, Le Sports.[142] One billion USD was raised in the latest financing round conducted by the giant with the goal of purchasing copyright resources so that Le Sports can

133. Germano, *supra* note 71.

134. *Id*.

135. *Id*.

136. *Id*.

137. *Id*.

138. *Id*.

139. *Id*.

140. Related to this notion is the NBA's consistent goal of international expansion. Talks of playing an All-Star game in Australia to promote the game and ultimately increase the value of the entire entity are being explored often by league officials. *See* Paul Suttor, *NBL Looks at All-Stars Off-Season Plan in Bid to Attract NBA Teams*, THE SYDNEY MORNING HERALD (Feb. 27, 2016), http://www.smh.com.au/sport/basketball/nbl-looks-at-allstars-offseason-plan-in-bid-to-attract-nba-teams-20160226-gn53yy.html.

141. Wang Jiamei, *Le Sports Scores $1 Billion in New Funding*, GLOBAL TIMES (Feb. 15, 2016), http://www.globaltimes.cn/content/968640.shtml.

142. *Id*.

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 while the price networks will earn from distributors may decline as plans move closer to a completely à la carte model, there is likely plenty of competition to keep leagues incentivized to produce a high quality product.[151] But even outside of the online stream so many expect to be the norm in the near future, advancing technology will allow leagues and teams to interact with fans on many more profitable platforms, and ESPN can position itself as the best facilitator of this

143. *Id*.
144. *Id*.
145. *Id*.
146. *Id*.
147. *Id*.
148. *Id*.
149. *See generally* FCC, *supra* note 23.
150. *Id*.
151. *See generally id*.

relationship by continuing to operate on the cutting edge.[152] On October 27, 2015, the NBA in partnership with Turner Sports, virtual reality company NextVR, and Samsung created an opportunity for some fans to experience the Golden State Warriors face off against the New Orleans Pelicans via a virtual reality cast on Samsug's VR headset.[153] Providers knew the game wasn't going to be watched by millions in this format, but recognized that Virtual Reality presented the opportunity for fans to feel like they were actually at the game, and if the trial was a success, they'd be better positioned to implement the technology as it becomes more mainstream.[154] The experience tested by the Warriors and Pelicans allowed for simple arena noise to serve as the audio aspect of the experience, but options for announcer commentary and in-game graphics will become more readily available as the technology becomes more advanced.[155] The NBA currently has no immediate plans to broadcast future games in virtual reality, but after a successful first attempt, there is no reason to believe the option won't continue to grow in the future and even draw attention from other sports and live events.[156] As discussed earlier, with world-wide reaching companies like Yahoo! getting involved in the live sports business, virtual reality potentially offers the incredible opportunity for fans around the globe to experience a professional sporting event they otherwise would not have dreamed of being able to attend.[157]

Virtual Reality is just one example of the emerging technology that ESPN, sports leagues, and content providers will be forced to grapple with over the coming years. When the last cable bundle is undone and content providers have settled on the most cost effective way to distribute live sporting events and original sports content to consumers, those who have shown the ability to adapt, listen to their subscribers, find new revenue streams, and negotiate for quality deals will remain as industry leaders. ESPN stands today as the entity with the strongest ability to take on this new and changing landscape, but must move quickly but tread carefully. Emerging competitors will learn from their mistakes, and draft off of their successful ventures. There may, of course, come a day where Disney no longer sees the value in its prized sports provider, but if that day comes, it

152. *NBA Offering Live-Streamed Version of Tonight's Pelicans-Warriors In Virtual Reality*, SPORTS BUS. DAILY (Oct. 27, 2015), http://www.sportsbusinessdaily.com/Daily/Issues/2015/10/27/NBA-Season-Preview/NBA-Virtual-Reality.

153. *Id*.

154. *Id*.

155. *Id*.

156. *Id*.

157. *Id*.

will be because the company refused to move away from its traditional pay-TV model and instead focus on creating a diverse array of platforms for distribution that the leagues would not want to work without.

Whether ESPN falls, or soars to new heights, it will be because the consumer has dictated so, through their new found power of choice. And that, ultimately, is good for sports, and great for the fans who love it most.

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