Professional Sports Broadcasting and the Slingbox: Profitability Through License, Not Litigation

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INTRODUCTION

One of the hottest technologies over the past two years is the Slingbox, a "place-shifting" device that allows users to stream broadcasts live from their home televisions onto laptops, cellular phones, and other Internet-ready devices. For the traveling sports fan, the Slingbox proves a significant upgrade from radio broadcasts, Internet Gamecasts, video recordings, and other methods of following a sporting event.[1] For the professional sports league (PSL), however, the Slingbox threatens the profitability of television rights agreements by enabling users to circumvent proximity controls on which the contracts are based.[2]

For both Slingbox users and PSLs, the Slingbox raises a host of legal and economic questions. For example, does the Slingbox user commit copyright infringement by streaming a PSL's officially licensed broadcast? What if the user streams a game beyond its limited local broadcasting region? Could PSLs utilize the Slingbox, or similar technologies devised by Slingbox creators, Sling Media, to increase their viewer base and profitability?

This article seeks to answer these and similar questions through the lens of the PSL by examining: (1) Major League Baseball's (MLB) claim that Slingbox technology violates the Copyright Act, as well as both (2) the National Hockey League's (NHL) and (3) DirecTV's recent licensing agreements with Sling Media.[3] Part I of the article outlines the nature of television proximity controls, the functionality of the Slingbox, and the basic protections of copyright law.[4] Part II examines the various courses of action the PSL can take: (1) ignore the Slingbox altogether; (2) sue Sling Media for copyright infringement; (3) enter into a licensing agreement with Sling Media; or (4) allow an already-licensed provider to enter into a licensing agreement with Sling Media.[5] Part III weighs the benefits and drawbacks of the options presented in Part II to determine that both developing PSLs and well-established, highly-profitable PSLs are better off seeking licensing agreements with Sling Media than pursuing copyright infringement lawsuits.[6] Finally, Part IV concludes the article.

BACKGROUND: PROXIMITY CONTROLS, THE SLINGBOX, AND THE COPYRIGHT ACT

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1 Sling Media founders, Blake and Jason Krikorian, two brothers from the Bay Area, originally devised the Slingbox in 2002 after missing several San Francisco Giants playoff games while traveling on international business.

2 For a brief overview of proximity controls, *see infra* note 7.

3 *See infra* notes 32-52.

4 *See infra* notes 6-15.

5 *See infra* notes 16-52.

6 *See infra* note 53.

Proximity Controls

Implemented to create numerous nationwide markets for broadcasts, proximity controls enable the content owner to restrict the distribution of content by region and broadcast time. With regard to MLB, the NHL, and the National Football League (NFL), the profitability of distribution contracts with broadcasting stations nationwide depends on limiting those broadcasts to a team's regional geographic area. Contracts with proximity controls also help set premium rates on PSLs' prime time and nationally televised games.[7]

The Slingbox

Technologically speaking, the Slingbox is fairly simple: a Slingbox captures a signal through the S-Video connection on a television or cable box,[8] converts the signal into a digital MPEG-4 signal[9] and streams the MPEG-4 signal over the Internet to a personal computer. With SlingPlayer software (SlingPlayer) installed on her computer, the user can then view the video stream and even remotely change channels on the home television. Essentially, with the Slingbox a user can place-shift the home television signal to another location. Where a PSL has established broadcast proximity controls, only airing games in specific regions of the country, the Slingbox enables a user out of the local area to watch an otherwise unavailable broadcast.

Following the Slingbox's commercial arrival in late 2004, Sling Media released a host of accessories and software updates designed to boost its user base and technology performance. In April 2006, Sling Media released a Windows Mobile version of its SlingPlayer for use on Pocket PCs and Smartphones.[10] In September 2006, Sling Media released two high-definition versions of the Slingbox, the Slingbox Solo and the Slingbox Pro, the latter of which enables users to watch up to four television programs simultaneously. In January 2007, Sling Media released both Apple and Palm OS-compatible software packages.[11] Additionally, in January 2007, Sling Media announced a "Clip + Sling" feature which allows users to edit clips of Slingbox streams and post the clips on a Sling Media website for all other Slingbox users to watch.[12]

The Copyright Act

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[7] Greg Sandoval, *Major League Baseball Takes Swing at Sling Media,* CNET News, at http://www.news.com/2100-1025_3-6080665.html (last updated June 6, 2006). *See also* Andrew Wallenstein, *Slingbox Could Spark New Lawsuits,* Hollywood Reporter,(July 6, 2005), available at http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id= 1000973572. In the interest of space and time, the specific proximity controls which PSLs employ are not discussed in this paper. Rather, for the scope of this paper, it is more important to recognize proximity controls as a driving force for PSLs' concern over the Slingbox.

[8] *See* Slingbox, http://en.wikipedia.org/wiki/Slingbox.

[9] *See* MPEG-4, http://en.wikipedia.org/wiki/MPEG_4. The number of content encoding standards and storage format for file-based video is dizzying. Commonly seen formats include: Moving Picture experts Group MPEG-1, MPEG-2, MPEG-4, AVI, ASK, WindowsMedia, Apple Quicktime, RealVideo, Google Video, Macromedia Flash, DV 25/50, HDV, and others.

[10] Slingbox, *supra* note 8.

[11] *Id.*

[12] *Id. See also infra* notes 46-47.

Copyright law protects "original works of authorship fixed in any tangible medium of expression."[13] Copyright owners enjoy exclusive rights of (1) reproduction, (2) adaptation, (3) performance, (4) display, and perhaps most pertinent to television sports broadcasting, (5) distribution.[14] A company or person that violates any of the aforementioned rights, without first obtaining the permission of the copyright owner, may be held liable for copyright infringement. A company may also face liability for the direct acts of copyright infringement committed by third parties under the doctrines of vicarious liability and contributory infringement by inducement.[15] Where a defendant has engaged in a fair use of copyrighted material, however, an infringement claim will not prevail.[16]

THE ALTERNATIVES: IGNORE, SUE, OR PARTNER WITH SLINGBOX

Generally, in working with or against Sling Media, PSLs can (1) allow the Slingbox to exist and develop independently, (2) sue Sling Media for Copyright infringement, or (3) partner with Sling Media through a licensing agreement.

Ignoring the Slingbox

A number of potential arguments exist as to why PSLs should not pursue litigation against Sling Media. First, a PSL may reason that the Slingbox does not alter current legal television viewing practices. Where video cassette recorders (VCRs) and digital video recorders (DVRs) allow a viewer to record broadcasts and watch them at a later time, the Slingbox merely enables a user to watch live, as opposed to prerecorded, any game which the user has already paid for and would otherwise be watching at home. Furthermore, where cable purchasers have the ability to view sports broadcasts on as many home televisions as the user owns, the Slingbox allows the user to watch a purchased broadcast on multiple screens. Consequently, PSLs may conclude that, since the Slingbox does not significantly alter the way consumers watch television, it cannot be illegal.

Second, a PSL may argue that the Slingbox will not alter future viewing practices and should therefore be ignored. Currently, several companies, including Orb, Avvenu, Sharpcast, CMWare, Oxy Systems, SageTV, TV2Me, and Sony, have developed consumer place-shifting

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[13] 17 U.S.C. § 102 (2002). Under the Copyright Clause of the United States Constitution, Congress has the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. 1, § 8, cl. 8.

[14] 17 U.S.C. § 106 (2002).

[15] 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 12.04 (2003). See generally *Kelly v. Arriba Soft Corp.*, 280 F.3d 934 (9th Cir. 2002); *Nunez v. Caribbean Int. News Corp.*, 235 F.3d 18 (1st Cir. 2000); *Castle Rock Entm't, Inc. v. Carol Publ'n Group, Inc.*, 150 F.3d 132 (2d Cir. 1998); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994).

[16] 17 U.S.C. § 107 (2000). In determining what constitutes a fair use, courts look to a series of factors, including: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. *Id.* Ultimately, each of these factors must be considered individually in a fact-driven, case-by-case assessment in light of the purposes and goals of copyright law. *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 577-78 (1994).

technologies.[17] PSLs may argue that as the place-shifting gains popularity, it will eventually be implemented by major cable-providers and become standard in all households. In such a scenario, a PSL may argue the Slingbox does not depart from the way Americans watch television, but simply characterizes the way Americans will soon legally watch television, and should therefore be left alone.

Finally, a PSL may reason that even if the Slingbox is or ultimately will be *illegal*, suing Sling Media may prove too risky. Courts have yet to rule on the legality of place-shifting, setting the stage for a high stakes copyright infringement suit on a matter of first impression in which PSLs face a substantial risk of an unfavorable outcome. Under the free rider problem, less profitable leagues such as the NHL have a greater incentive to await the outcome of a similar suit brought by a more profitable league such as the MLB or NFL.[18]

Despite the three preceding arguments, ignoring the Slingbox may prove more costly for PSLs than either litigation or partnership. Unregulated, the Slingbox can be used in a number of prohibited ways. A user could hack the Slingbox to send broadcasts to friends who have not purchased the original sports broadcasting package, or direct the Slingbox stream to a high volume venue, such as a sports bar, thereby enabling potentially hundreds of viewers to watch the broadcast intended for the eyes of one household.[19] Already, bloggers have posted advertisements on Craigslist and sports blogs advertising "Slingbox swapping," by which users trade the pass codes — and hence, access to out of market games — to each other's Slingboxes.[20] As Sling Media continues to release new functionalities such as Clip + Sling, users will be able to find additional ways to divert the very proximity controls on which PSLs' television distribution contracts rely. Failure to aggressively patrol these proximity controls may lead to their partial or complete erosion.[21] PSLs, therefore, should avidly seek to keep these boundaries in place, either by suing Sling Media over the legality of place-shifting or by partnering with Sling Media.

Bringing a Copyright Infringement Claim Against Sling Media

Over the past two years MLB has fervently claimed that place-shifting constitutes copyright infringement.[22] Under the Copyright Act, MLB can sue Sling Media for two claims:

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[17] *See* Placeshifting, http://en.wikipedia.org/wiki/Placeshifting.

[18] *See* Sports Industry Overview, http://www.plunkettresearch.com/Industries/Sports/SportsStatistics/tabid/273/Default.aspx. The NFL generated revenues in excess of $6 billion in 2007. The NHL, on the other hand, generated revenues of $2.2 billion. These discrepancies may be attributed to stadium capacity, season length, and popularity of the sport. The free rider problem exists when people enjoy the benefits of state or industry provided goods independent of whether they pay for them. Free riders are actors who take more than their fair share of the benefits but do not shoulder their fair share of the costs of their use of a resource. Here, a group of PSLs can potentially confer the benefits of litigation without the cost of litigation.

[19] In accordance with the Sling Media user agreement.

[20] This behavior is outside the terms of the Sling Media user agreement.

[21] PSLs may need to actively regulate place-shifting to properly maintain regional broadcasting boundaries.

[22] *See* Larry Dignan, *Why the MLB is Really After Slingbox*, ZDNet, at http://blogs.zdnet.com/BTL/?p=5245 (last updated June 1, 2007). MLB's adamant copyright infringement accusations are perhaps due to MLB's broadcasting business model, which is composed of two forms of revenue generation. First, MLB, like other sports leagues, owns exclusive rights and proximity controls over televised broadcasts. Additionally, MLB has an online media outlet, MLB.com, through which users can pay to watch games outside their local market area. Under MLB's current

vicarious liability for third parties' to infringing MLB's copyrights, and contributory copyright infringement for inducing third parties to violate MLB's copyrights.[23] Under a vicarious liability claim, a plaintiff must prove that the defendant has (1) the right and ability to supervise the third party's conduct and (2) a direct financial interest in the exploitation of copyrighted materials.[24] Under a contributory copyright infringement claim, a plaintiff must prove that the defendant (1) knew about and (2) induced or materially contributed to the infringing conduct.[25]

In the landmark case, *Sony Corp. of America v. Universal City Studios, Inc*., the Supreme Court carved out an important exception to contributory copyright infringement claims where a manufacturer creates a device capable of "substantial non-infringing use."[26] In *Sony Corp.,* Sony created and sold the Betamax recorder, which consumers could use to record television broadcasts in their own home.[27] Universal Studios soon thereafter brought suit against Sony for vicarious liability and contributory copyright infringement, claiming the Betamax recorder allowed users to illegally record, or "time-shift," Universal's copyrighted material onto video for later use.

The Supreme Court, however, held otherwise on both claims. First, the Supreme Court, finding that Sony had no right to supervise or control the actions of Betamax owners, quickly dismissed the vicarious liability claim for failing the first prong of the vicarious liability test.[28] On the contributory copyright infringement claim, the Supreme Court, citing the necessity of innovation,[29] held that contributory infringement does not exist where (1) a staple article of commerce is (2) capable of commercially significant non-infringing uses.

In analyzing the first prong of the carve-out, the Supreme Court applied patent law principles, defining "staple article of commerce" as any product whose sole purpose was not to

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model, a fan will pay to subscribe to the local cable channel to watch games at home, as well as to the online broadcast site to watch games when outside the local broadcasting area. Essentially, the fan pays *twice* under the MLB model. The Slingbox model, on the other hand, allows fans to sidestep paying for Internet broadcasts yet still watch the game on the Internet. Perhaps to insure against Sling Media turning potential customers away from MLB.com, MLB has repeatedly claimed that the Slingbox infringes upon the broadcasting copyrights of the official licensee.

[23] *See* 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 12.04 (2003). Traditionally, technology that enabled copying and distribution were fairly expensive and only available to larger businesses. Consequently, copyright owners could protect their rights simply by suing direct infringing users. Where the technology is available to millions of users, however, direct suits are much more burdensome for copyright holders. To help copyright owners protect their rights courts developed secondary liability doctrines under which a third party can face secondary liability for another's act of direct copyright infringement based on either vicarious liability or contributory infringement. This paper does not discuss the Digital Millennium Copyright Act. For an overview of the act, *see* http://en.wikipedia.org/wiki/Digital_Millennium_Copyright_Act**.** While not currently applicable to place-shifting, the Digital Millennium Copyright Act might be a claim as they embed more DRM into their technology.

[24] *Shapiro Bernstein & Co. v H.L. Green Co.*, 316 F..2d 304, 307 (2d Cir. 1963). It should be noted that the defendant may be found vicariously liable even in the absence of any knowledge of the wrongdoing by the third party.

[25] *Gershwin Publ'g Corp v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

[26] *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417 (1984).

[27] The Betamax recorder was later replaced by the VHS recorder.

[28] Nimmer on Copyright*, supra* note 23.

[29] *See Id.*

commit copyright infringement.[30] As such, the Supreme Court found that the Betamax's purpose was not to illegally copy and sell television programs, but rather to allow users to watch a multitude of recorded programming. As such, the Betamax constituted a staple article of commerce.

The Supreme Court's analysis of the second prong was more complex, as it required an examination of the legality of time-shifting. Holding that the Betamax satisfied the second prong, the Supreme Court found that the Betamax's functionality, time-shifting, was a fair use because (1) it did not contribute to a diminished marketplace for the broadcast, and (2) the technology was for noncommercial home use.[31] Under the carve-out, Sony was not liable for contributory infringement, *even* where duplication of copyrighted material was unauthorized.[32]

While *Sony Corp.* has remained good law, the Supreme Court in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* refused to apply the "capable of commercially significant non-infringing uses" carve-out to cases of inducement, where "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression . . . is liable for the resulting acts of infringement by third parties."[33]

In *Grokster*, Grokster Ltd. (Grokster) distributed peer-to-peer file-sharing computer networking software which enabled users to upload songs to and download songs from a central server.[34] In holding that Grokster was liable for copyright infringement by inducement, the Supreme Court highlighted Grokster's intent to promote infringement by asking advertisers to market on a platform that encourages the mass sharing of copyrighted works.[35] In the ruling, however, the Supreme Court failed to provide a definitive test for analyzing intent. Consequently, the intent test may fail to distinguish between a company's intent to innocently

[30] *Sony Corp.*, 464 U.S. at 442. Courts have interpreted "staple articles of commerce" in accordance with patent law principles. Patent Law defines a "staple article of commerce" in the negative, defining a non-staple article as barring noncommercial use except in connection with a patented invention. *See also* Matthew Helton, *Secondary Liability for Copyright Infringement: Bittorrent as a Vehicle for Establishing a New Copyright Definition for Staple Articles of Commerce,* 40 Colum. J.L. & Soc. Probs. 1, 5 (2006). Consequently, a staple article of commerce appears to be any good that is not designed solely for infringing use. The Betamax videotape recorder, for example, is a staple article of commerce because it enables users to record shows for their personal enjoyment, not solely for sale or redistribution.

[31] *Sony Corp.*, 464 U.S. at 442.

[32] *Id.*

[33] *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005). The Supreme Court ruling reversed the Ninth Circuit's holding that under the "significant non-infringing use" test from *Sony Corp.* and concluded that Grokster Ltd. was not liable vicariously or for contributory infringement.

[34] *Id.*

[35] *Id.* Much of the *Grokster* opinion is dedicated to underscoring (1) the companies' advertising of their products as avenues for infringement, and (2) their business models, which rely on selling advertising space to profit off of massive infringement. In *Sony Corp.*, the Supreme Court reasoned that time-shifting was a fair use because (1) it did not contribute to a diminished marketplace for its product and (2) the use was noncommercial home use. *Sony Corp.*, 417 U.S. at 425. In *Grokster*, the Supreme Court effectively reasoned that the Grokster platform effectively diminished the marketplace for its product by enabling mass copying and downloading of songs. By contrast, the Betamax in *Sony Corp.* at the time did not provide a platform for mass duplication and sharing of otherwise purchasable media.

promote a product that might have infringing capabilities and a company's intent to actually promote infringement.[36]

Vicarious Liability for Copyright Infringement

For a court to find Sling Media vicariously liable for the copyright infringement of a third party, a PSL must prove that the Sling Media has both (1) the right and ability to supervise the third party's conduct and (2) a direct financial interest in the exploitation of copyrighted materials.[37] Most likely, a PSL will be unable to satisfy the first prong of the test. As the extent of the plaintiff's relationship with consumers in *Sony Corp.* was the sale of the Betamax recorder, likewise, Sling Media merely sells the Slingbox to consumers for unsupervised, unmonitored use. Since the Supreme Court in *Sony Corp.* quickly held that such distribution did not give rise to a vicarious liability claim, courts should also refuse to find Sling Media vicariously liable for copyright infringement based solely on its distribution of Slingboxes.

Contributory Copyright Infringement Under the Inducement Theory

Under *Sony Corp.*, Sling Media is generally protected from a contributory copyright infringement claim if the Slingbox is a staple article of commerce capable of a substantially non-infringing use. However, under *Grokster*, Sling Media may nevertheless be found liable for contributory infringement under the inducement theory if it intended that consumers use the Slingbox to commit copyright infringement.[38] To determine if the Slingbox is a staple article of commerce —namely, if its fundamental purpose is something other than to infringe copyrighted material, and second, if the Slingbox is capable of substantially non-infringing use — a court must find that place-shifting, the Slingbox's fundamental purpose, is considered a non-infringing use.[39]

Place-Shifting: A Non-Infringing Use?

At present, courts have yet to determine whether or not place-shifting constitutes fair use. However, if courts analyze place-shifting utilizing the factors weighed in *Sony Corp.* to determine that time-shifting is fair use, it is likely that the courts will also consider place-shifting fair use.[40] The Slingbox should satisfy the first factor, for rather than diminishing the marketplace for television programming, the Slingbox arguably *increases* the demand for it by enabling consumers to watch programming while they are away from their television sets. In the same way, courts should find the Slingbox a noncommercial use. While the Betamax

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[36] Hopefully, in the near future, case law will develop which provides a narrower interpretation of "intent" for more definite analysis.

[37] *Shapiro Bernstein & Co. v H.L. Green Co.*, 316 F..2d 304, 307 (2d Cir. 1963). It should be noted that the defendant ma be found vicariously liable even in the absence of any knowledge of the wrongdoing by the third party.

[38] *See Grokster,* 545 U.S. 913 (2005).

[39] While one could think of a number of non-infringing uses, such as watching the programming in your own home on your home computer, that do not literally place shift the signal outside of the viewer's home, the substantially advertised purpose of and inspiration for the Slingbox is to allow the user to watch his favorite programs while outside the confines of his own home.

[40] *See supra* note 30.

(mentioned in *Sony Corp.*) allowed the user to copy and repeatedly watch shows in *any* home equipped with a Betamax, the Slingbox is more restrictive, permitting the user to watch live television solely on his *own* portable devices. Furthermore, the Slingbox features password-encrypted software and limited application to five personal devices, user restrictions far exceeding that of the Betamax. While PSLs may argue that the Slingbox promotes "out of home use" over "home use," the essence of the use, personal use, remains the same as that outlined in *Sony Corp*.[41] As a result, courts which apply the two-factor test in *Sony Corp.*, appear likely to deem place-shifting a fair use.[42]

Sling Media: No Intention to Promote Copyright Infringement

Even where a staple article of commerce is capable of a substantially non-infringing use, a court will find contributory infringement if the defendant induced a third party to use a device in an infringing way.[43] Under *Grokster's* vague "intent" test for inducement, Sling Media — assuming place-shifting is a fair use based on examinations in the last section — has taken significant measures to promote lawful use of its product. As previously stated, the Slingbox features a password-encryption system to limit the stream recipient to the Slingbox owner. Also, the Slingbox limits the Slingbox owner's streams to five Internet-ready devices. Finally, Sling Media has already entered into licensing agreements with the NHL to legally allow Slingbox users to save, edit, and post NHL clips to a Sling Media-operated website. Collectively, these efforts establish conscious attempts to avert users' potential infringing uses of sharing or redirecting streams.

Recently, however, Sling Media representatives have been accused of logging on to various online sports blogs and suggesting Slingbox owners trade username and password information to enable users to swap out of market sports broadcasts.[44] While such a guerilla marketing campaign may in and of itself satisfy a claim of inducement, currently, these allegations lack factual support. As a result, a PSL will likely not succeed on an inducement claim. This outcome, compounded by a strong likelihood that Sling Media will (1) not be found vicariously liable for third-party infringement and (2) the Slingbox will be considered a staple article of commerce capable of non-infringing use, suggests PSLs are not likely to win copyright infringement claims against Sling Media.

Forming a Licensing Agreement

By foregoing a copyright infringement claim against Sling Media, PSLs must instead monitor thousands of individual Slingbox users for infringement.[45] To avoid the difficulty of

[41] *Id.*

[42] Even if the court may ultimately deem place-shifting an infringing use, the time and expense of pursuing such a ruling may bar its occurrence; *Sony* was the culmination of a five-year legal battle proceeding through the Federal District Court, Ninth Circuit Court of Appeals, and U.S. Supreme Court.

[43] *See supra*, note 35.

[44] Numerous sports messaging boards have raised concerns of Slingbox swapping. *See generally,* http://britishexpats.com/forum/showthread.php?t=477214; http://www.techliberation.com/archives/042415.php

[45] Without a valid claim against Sling Media, PSLs will have to bring individual copyright infringement suits against perpetrating Slingbox users.

doing so, PSLs may instead sign licensing agreements with Sling Media seeking to harness place-shifting technology for the benefit of the PSL. Recently, two PSLs have taken this route.

The NHL's Licensing Agreement with Sling Media

In June 2007, the NHL became the first major PSL to enter into a licensing agreement with Sling Media (the NHL Agreement). Under the NHL Agreement, both current and future Slingbox users can use Sling Media's Clip + Sling technology to create highlight reels of exclusive NHL content and share the clips on a Sling Media video website.[46]

While the NHL Agreement may be limited, it nevertheless proves highly beneficial as a distribution and marketing tool for a league seeking to rebuild its fan base following the 2004-05 season-long strike. In particular, the Clip + Sling feature should attract both formerly disenchanted fans as well as a younger fan base growing up in the age of online social networking and file sharing. These fans will in turn utilize the Slingbox's Clip + Sling feature to create and post NHL highlight reels to the Sling Media website, thereby exposing potentially millions of online viewers to the most exciting clips the NHL has to offer. For the NHL, whose ratings for Game 7 of the 2007 Stanley Cup were the lowest in 12 years, partnership with Sling Media and the Slingbox will hopefully create renewed interest in the league.[47]

Despite these benefits, the NHL Agreement fails to protect PSL proximity controls. Instead, the NHL Agreement essentially either concedes that Slingbox users will watch games via the Slingbox, or encourages them to do so by providing the Clip + Sling feature. As a result, television broadcasters may negotiate lower contracts with the NHL, arguing that the NHL Agreement has worked to erode the proximity controls the NHL and broadcasters rely on to set contract prices. Be that as it may, for a developing PSL, or a PSL on the rebound, the short-term benefits of league survival may very well outweigh the long-term costs that television contract margins lower than those of other PSLs impose.

The NFL and DirecTV's Licensing Agreement with Sling Media

For a PSL such as the NFL, which already has in place multi-billion-dollar television distribution contracts,[48] an agreement designed to boost the profitability of the contracts is far more appealing than an NHL Agreement designed to boost the popularity of the league. For PSLs, this may mean allowing licensed broadcasters to partner with Sling Media. The NFL, for instance, has recently allowed one pre-existing distributor, DirecTV, to form an agreement with Sling Media (the DirecTV Agreement) to stream online all games available under DirecTV's

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[46] This will essentially create a YouTube-type destination site comprised of television clips.

[47] Television ratings for the game were surpassed by Fox's "So You Think You Can Dance?" *See* Wayne Friedman, *Pucked: Stanley Cup Ratings Lowest in 12 Years,* Media Daily News,(June 8, 2007), available at http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=62039.

[48] For further details of NFL broadcasting contracts, *see* ESPN.com news services*, Late Season Games Can Be Moved to Monday Nights*, ESPN.com, available at http://sports.espn.go.com/nfl/news/story?id=1918761(last updated Nov. 9, 2004).

Sunday Ticket package.[49] Under the DirecTV Agreement, DirecTV NFL Sunday Ticket SuperFan subscribers shall have access to the streams on a DirecTV-owned website.

The DirecTV Agreement provides two significant benefits to the NFL. First, it allows the NFL to study the profitability of relatively new place-shifting technology, yet forgo the time, expense, and other resources otherwise required to negotiate with Sling Media directly. In so doing, the NFL also helps insure against any claim that the league is eroding proximity controls, a claim which may ultimately limit the profitability of broadcasting contracts with the NHL.[50]

Most importantly, though, and perhaps most exciting to the NFL, the DirecTV Agreement eliminates the necessity of the Slingbox. Under the DirecTV Agreement, only DirecTV SuperFans will be able to watch NFL games on a DirecTV website; Sling Media will simply provide the video streaming technology enabling DirecTV to do so.[51] Where the Slingbox takes another distributor's content and redirects it over the Internet, here, DirecTV will simply redirect its *own* content with the help of Sling Media software. Consequently, NFL fans will no longer need the Slingbox to view games remotely. For the NFL, the result parallels the consequences of a favorable outcome in a copyright infringement suit against Sling Media — elimination of the Slingbox — though without the expense. In fact, the arrangement may even spur greater league profits, as the DirecTV Agreement may significantly grow DirecTV's subscribers and profits, which in turn may provide leverage for NFL to demand higher rates in future television contract negotiations.

While the DirecTV Agreement appears to have a large upside for the NFL, it poses a significant risk of forgone profits. Currently, DirecTV will retain its exclusive right to broadcast all NFL games through 2010. Over the next three years, in a society increasingly driven to the Internet for both commerce and entertainment, the DirecTV Agreement may prove tremendously profitable for DirecTV. Yet at the same time, if bound by terms failing to contemplate these developments, the NFL may find itself left out of significant profits until contract renewal talks arise in three years.[52]

WEIGHING THE ALTERNATIVES

For PSLs, such as MLB and the National Basketball Association (NBA), which have yet to sign licensing agreements with Sling Media, the question remains ─ what is the best course of action? Simply ignoring the Slingbox seems both contrary to the PSL's intent and desire to

[49] Currently, the NFL licenses broadcast distribution to several local access and cable media outlets. For an overview of the NFL broadcasting landscape, as well as the problems currently facing it, *see* Greg Easterbrook, *It's Time to Open up NFL Sunday Ticket to Everyone,* ESPN.com, at http://sports.espn.go.com/espn/page2/story?page=easterbrook/071030 (last updated Nov. 1, 2007). DirecTV enjoys the most extensive agreement with the NFL, allowing DirecTV to broadcast 14 games per week to DirecTV users signed up for the "NFL Sunday Ticket" package. Even though its broadcasting package runs through 2010, DirecTV's services viewer base seems limited due to both the package's $250 price tag and significant signal restrictions requiring viewers to have a southwestern-facing satellite dish.

[50] This appears to be a long-term drawback of the NHL Agreement.

[51] The user will not have a Slingbox interface on his computer to watch the game, but rather a DirecTV specific interface.

[52] Without seeing the NFL's contract with DirecTV, it is impossible to tell whether such events were foreseen.

control broadcasts of its game. Ignoring the Slingbox is also potentially very costly.[53] Similarly, combating Sling Media with a host of copyright infringement claims appears to be an uphill battle, as place-shifting lacks judicial precedent and the combination of *Sony Corp.* and *Grokster* suggest place-shifting is a fair use. Seemingly, PSLs are best off utilizing Sling Media technologies through license agreements.

In working with Sling Media, what type of licensing agreement should a PSL seek? For up-and-coming or less popular PSLs, the NHL Agreement, enabling fans to watch and share league highlights in new and exciting ways with the Clip + Sling and other technologies, should help the league gain exposure and popularity. Under an NHL Agreement, a PSL may encourage Slingbox use, but can nevertheless profit from the technology.

For the already dominant PSL such as MLB or the NBA, allowing television networks to form agreements similar to the DirecTV Agreement may prove significantly beneficial in boosting league profits with relatively little time and energy while simultaneously eliminating the fan's need for a Slingbox. Concededly, encouraging broadcasting companies to partner with Sling Media may mean the PSL's eventual abandonment of league-owned online streaming television packages, but PSLs may nevertheless find greater profits in demanding more lucrative television contracts from broadcasters with streaming capabilities. More importantly, though, such an agreement will work to eliminate the appeal of the Slingbox to the PSL's fans.

CONCLUSION

The Slingbox's place-shifting technology has opened up an entirely new television experience, one which allows the viewer to sidestep traditional proximity controls established by the PSLs. This technology proves particularly problematic to PSLs, whose pre-established television distribution contracts and Internet streams thrive on these proximity controls. Yet Sling Media also serves as a potentially enormous profit-generating tool for PSLs. While the copyright lawsuit remains an arrow in the PSLs' quiver, with an adequate harness on place-shifting technology, PSLs are much more likely to prosper by partnering with Sling Media than they are by attempting to cut it down through litigation.[54]

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[53] *See supra* notes 17-21.

[54] A number of interesting analyses on place-shifting remain yet have not been examined due to both the page limitation requirement of this paper and current lack of factual data. For instance, the growth in popularity of place-shifting technology and the likelihood a major cable carrier is going to develop a standard place-shifting system appear to be key points which will surely affect a PSL's attitude toward the Slingbox in the future. Additionally, the development and success of PSLs' own online streaming broadcast systems may play a significant role in shaping their attitude towards "outside" place-shifting technology. With many of the PSL streaming packages in development or only recently been commercialized, PSLs may have to wait a number of years before trying to gauge the revenue lost from place-shifting competitors. It will be very interesting to see if and how this issue gets resolved.