



August 23, 2023

SUBMITTED VIA FEDERAL E-RULEMAKING PORTAL

United States Patent and Trademark Office
Office of Policy and International Affairs
Mail Stop OPIA
P.O. Box 1450
Alexandria, VA 22314

Re: Ultimate Fighting Championship, NBA Properties, Inc. and NFL Productions LLC Joint Submission in Response to Docket No. PTO-C-2023-0006, Office of Policy and International Affairs, Comment Request; Future Strategies in Anticounterfeiting and Antipiracy

To Whom It May Concern:

We write jointly on behalf of the Ultimate Fighting Championship (“UFC”), NBA Properties, Inc. (“NBAP”) and NFL Productions LLC (“NFLP”) in response to the United States Patent and Trademark Office (“USPTO”)’s request for public comment on Future Strategies in Anticounterfeiting and Antipiracy. We submit this letter to shed light on the shared experiences of UFC, NBAP and NFLP in addressing growing challenges associated with live piracy of our popular sporting event content. Specifically, this submission is intended to respond to Items 1, 2, and 11 of the USPTO’s Request for Information.¹

UFC, NBAP and NFLP market and distribute video of highly anticipated and beloved live sporting events. UFC’s content centers on live mixed-martial-arts competitions. The core competitions, called UFC “numbered events,” feature UFC’s top talent. They occur approximately once a month and are available to watch in the United States on pay-per-view via ESPN+. UFC also offers additional live content in the form of “UFC Fight Night” competitions, which often feature up-and-coming talent and are broadcast on network television and streaming services. In addition to UFC’s domestic programming, UFC events are broadcast in over 170 countries and in 50 languages.

¹ UFC is also submitting a separate response detailing UFC’s antipiracy efforts and potential solutions more broadly.

NBAP is the exclusive marketing and licensing arm of the National Basketball Association (“NBA”), a global sports and media business comprised of 30 teams across North America featuring the best basketball players in the world. The NBA is a major international presence with game telecasts and other programming in 215 countries and territories in 50 languages. NBA games are organized into “preseason” games and “postseason” games, culminating in a best-of-seven final championship competition, and are available to be viewed on linear television, NBA TV, NBA.com, the NBA App, and NBA League Pass.

NFLP is the authorized representative of the National Football League (“NFL”) and its thirty-two teams for the licensing and protection of the NFL’s copyrighted game content, including the annual Super Bowl game. The NFL and its teams are extremely popular and well known. The Super Bowl LVII game, which took place on February 12, 2023, was watched by approximately 200 million viewers—or 60% of all people in the United States—on television and digital platforms. Globally, more than 56 million fans, from Mexico to China, from Australia to Brazil, and in many other countries around the world, watched the Super Bowl LVII game. It also has been reported that in 2022, NFL games accounted for 82 of the 100 most-watched television programs.

In sum, UFC’s, NBAP’s and NFLP’s respective content attracts millions of viewers who pay for that content or otherwise access it lawfully through the many safe and secure offerings available to them, including pay-per-view, subscription channels, streaming networks, free over-the-air broadcasts, and digital media and mobile offerings.

Like so many purveyors of live content, however, UFC, NBAP and NFLP all face the growing and pervasive challenge of piracy. Specifically, bad actors create unauthorized and illegal livestreams of live UFC, NBA and NFL sports events, and distribute those streams on social media and other platforms for viewers to access at no or little cost, thereby depriving UFC, NBAP and NFL of significant revenue. Live piracy sometimes takes the form of rudimentary “screen-capturing” where someone uses their phone to record live content while it is playing on another screen, and livestreams it from their cell phone. In recent years, however, pirates have shown increasing sophistication in terms of the quality of their livestreams and now display livestreams in a way that often renders the final product indistinguishable from the legitimate feed.² To garner maximum viewership of the pirated content, enterprising pirates will post “advertisements” on major social media platforms that drive traffic to off-platform sites where people can watch unlawful livestreams of live sports event content without paying a dime. Pirates will even target sports fans by setting up sophisticated websites dedicated to providing fans of a particular sport access to live sporting events featuring that sport, then generate revenue by charging a subscription fee and/or selling advertising.

Although there is not yet a reliable model to quantify the scope of piracy with precision, recent trends show that the piracy of live sports continues to grow, both domestically and globally. Piracy particularly increases during high-interest events, including the Super Bowl, other NFL post-season games, NBA All-Star Weekend, the NBA Playoffs, the NBA Finals and UFC numbered events featuring a championship fight or particularly prominent fighters.

² One common technique is device “mirroring,” which allows viewers to see what is playing on the pirate’s own device.

The rampant piracy of live sports events causes tremendous harm to our companies. To address this rampant piracy of live events, UFC, NBAP and NFLP expend considerable resources to closely monitor piracy during the live events and to promptly submit takedown notices to online service providers (“OSPs”) so that OSPs “expeditiously” remove the infringing live content as required under the copyright law to be eligible for a safe harbor from liability for infringement (as discussed in more detail below). Unfortunately, UFC, NBAP and NFLP’s shared experience is that *many OSPs frequently take hours or even days to remove content in response to takedown notices*—thus allowing infringing live content to remain online during the most anticipated moments, or even the entirety, of a UFC event or an NBA or NFL game.

This is particularly damaging to our companies given the unique time-sensitivity of live sports content. The value of live sports content predominantly comes from being able to view the sports event contemporaneously with the live broadcast itself. When would-be UFC, NBA or NFL fans know that they will be able to view a live event or game in its entirety for free on a pirated stream, many are less likely to pay for that content (through pay-per-view on ESPN+ in the case of UFC or through one of the NBA’s or NFL’s direct-to-consumer offerings) or to subscribe to a pay television package and watch the content via a legitimate broadcast, where viewership numbers ultimately redound to the benefit of UFC, NBAP or NFLP in the form of advertising and subscription revenue and negotiating positions. The financial impact cannot be ignored: by one estimate, the global sports industry is losing up to \$28 billion in additional potential annual revenue from sports fans who would be “converting” from pirated content to paid content, even when excluding viewers who are least likely to pay for sports content.³

The shared experiences of UFC, NBAP and NFLP with live piracy has made abundantly clear that current U.S. laws and regulations do not adequately address the unique time-sensitivity of live content. The Digital Millennium Copyright Act’s (“DMCA’s”) notice-and-takedown regime requires an OSP to remove infringing content “expeditiously” in response to a takedown request in order to be eligible for a safe harbor from liability based on infringement by its users. *See* 17 U.S.C. § 512(c)(1)(C). The DMCA thus recognizes that it is not enough *that* content comes down; it also matters *when* content comes down. However, the DMCA does not define “expeditiously,” and OSPs have exploited this ambiguity in the statutory language to delay removing content in response to takedown requests. While this is also a problem with “static,” recorded content, the impact of the delay is exacerbated when it comes to live content, as discussed above. With live content, the value of the content derives from consumers viewing it in real time, and allowing the infringing livestream to stay up for any period undermines the rights of copyright holders and the purpose of the DMCA’s safe harbor. Moreover, the value of live content is often significantly diminished after it first airs.

It should be no surprise that the notice-and-takedown regime established by the DMCA, which was enacted before widespread internet-based livestreaming became available, is not well-suited to address the present-day particular piracy issues surrounding the infringement of live content. But live content is an entrenched and growing mode of piracy and will continue to be so as pirate technology and the quality of illicit livestreams improves, further evidencing the need for the

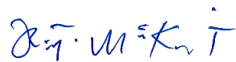
³ Synamedia & Ampere Analysis, Pricing Piracy: The Value of Action 4 (2021).

current DMCA framework to be modernized. In addition, every major social media platform now offers livestreaming, which continues to lower the access bar to upload and watch infringing livestreams of UFC, NBAP and NFLP content. It has become critical that lawmakers and regulators address these present-day piracy issues surrounding infringement of live content.

This should take the form of clarifying Section 512 to establish that, in the case of live content, the requirement to “expeditiously” remove infringing content means that content must be removed “instantaneously or near-instantaneously” in response to a takedown request. This would be a relatively modest and non-controversial update to the DMCA that could be included in the broader reforms being considered by Congress or could be addressed separately. OSPs also should be required to impose particular verification measures before a user is permitted to livestream. Those include limiting livestream capabilities to users that have cleared certain verification measures; limiting the ability of newly created accounts to livestream; restricting viewership of livestreams posted by newly created accounts or accounts with few subscribers; and/or limiting livestream capabilities to users with a certain number of subscribers. Certain OSPs already impose measures like these, demonstrating that the measures are feasible, practical and important tools to reduce livestream piracy. Both of these reforms are needed.

We hope that this submission assists the USPTO in evaluating the current piracy landscape and in understanding the unique harms that piracy poses with respect to live content. UFC, NBAP and NFLP would be happy to provide additional information or to work with the USPTO on developing solutions to this issue.

Sincerely,



Riché T. McKnight
General Counsel, Ultimate Fighting Championship
Executive Vice President, Deputy General Counsel & Co-Head of Litigation, Endeavor



Ayala Deutsch
Executive Vice President & Deputy General Counsel
NBA Properties, Inc.



Dolores F. DiBella
Senior Vice President, Legal Affairs
NFL Productions LLC