LET'S GET READY TO UNBUNDLE!
It's Time for the UFC to Offer Individual Fights for Purchase

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Abstract

A bedrock principle of U.S. Copyright law normally dictates that when a person steals your original work of authorship, a court should issue an injunction and require the violator to pay damages. For centuries this principle has sufficed; however, a lack of deep-pocket defendants and continued lobbying efforts by internet service providers have made this principle untenable when applied to illegal online streaming. This is especially true for the Ultimate Fighting Championship (UFC), a mixed martial arts promoter that has seen its live broadcasts pirated over the internet at an alarming rate, thereby threatening the bulk of its revenue.

This Comment advocates that the UFC unbundle its current pay-per-view business model in favor of charging market-based prices for each individual fight. The primary benefit of this approach includes increased revenue for the UFC by enticing consumers away from illegal online streaming with lower prices. Potential adjacent benefits include reforming fighter compensation schemes, incentivizing fighters to promote their own individual fights, easing controversies regarding unionization efforts by the fighters, and providing the UFC with greater marketing data. Therefore, by unbundling its business model, the UFC will ultimately be able to bypass the shortcomings of U.S. Copyright law and take the lead in a digital media landscape already changing at lightning speeds.

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Introduction

Mixed Martial Arts (MMA) is a full-combat sport that is a combination of boxing, Brazilian jiu-jitsu, and other martial arts disciplines.[1] MMA promotional companies such as the Ultimate Fighting Championship (UFC) and Bellator MMA air monthly fight cards on various cable television (TV) networks. These promoters also own online streaming networks and facilitate pay-per-view (PPV) services.[2] While technology allows promoters to provide their audiences with ever-increasing options to view these fights, it also opens opportunities for illegal live streaming over the internet.[3] Although U.S. Copyright law affords promoters a remedy for forcing Internet Service Providers (ISP) or web hosts to remove the illegal online content, this remedy (in the context of illegal live streaming) has been largely ineffective.[4] In turn, commentators argue Congress should reform U.S. Copyright law—namely the Digital Millennium Copyright Act (DMCA)—to provide MMA promoters with better remedies against ISPs engaged in illegal live streaming.[5] Contrary to these common calls for legislative reform, this Comment will advocate that promoters themselves should unbundle PPV events, thereby incentivizing consumers to refrain from illegally live streaming and instead purchase individual fights at lower prices.

Part I of this Comment provides an overview of the UFC, including its history and current business model. Part II looks at U.S. Copyright law as it relates to illegal live streaming and focuses on some of the unique legal aspects associated with MMA. Part III recommends that the UFC mitigate the effects of illegal streaming by unbundling its monthly PPV events. Part IV analyzes

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1. Jason J. Cruz, *Sport and Spectacle: Should MMA be Protected Under the First Amendment?*, 17 U. Denv. Sports & Ent. L.J. 63, 66 (2015).
2. Keith Black, *Technical Knockout: How Mixed Martial Arts Will Change Copyright Enforcement on the Web*, 21 Fordham Intell. Prop. Media & Ent. L.J. 739, 740–41 (2011).
3. *Id.* at 744–45.
4. Jeff Yostanto, Comment, *The Commercial Felony Streaming Act: The Call for Expansion of Criminal Copyright Infringement*, 20 Marq. Intell. Prop. L. Rev. 315, 319–21 (2016) ("In the case of live streaming, if there is infringing copyrighted material, it becomes somewhat impossible to go through with the DMCA takedown notice, because the damage was already done.").
5. Sepehr Shahshahani, *The Role of Courts in Technology Policy*, 61 J.L. & Econ. 37, 37 (2018) (presenting a general model that argues that in cases where a newcomer has developed technology that threatens established business models, courts should rule for a resource constrained party, even if an opposite ruling would be optimal as the Court's final choice or policy); Yostanto, *supra* note 4, at 316 (advocating for "proactively seek[ing] better ways to clarify current copyright laws in ways that do not also impede access to online content" as opposed to passing new legislation); Black, *supra* note 2, at 742 (supporting "a legislative scheme that holds websites liable for monetary, equitable and other relief when websites provide or host illegal live streams, so long as the websites have some knowledge, whether constructive or actual, of the infringing content.").

the merits of possible objections to this model. Finally, Part V shows how this same model can be applied to other companies' business models.

I. UFC Background

A. *Overview of the UFC*

MMA is a relatively new broadcast sport that struggled for both professional and financial legitimacy from the beginning. However, today's MMA—through the widely successful UFC—has blossomed in the new digital age, having found lucrative footholds in the current online streaming landscape. While so much progress having been made, the UFC continues to operate in a traditional PPV bundling business model. Additionally, fighter compensation has been one of complexity and mystery which must be explored in order to fully understand how an unbundling model may be beneficial not only to the UFC, but also to the fighters. These themes will be explored in the following Subparts.

1. A History of the UFC: From Human Cockfighting to a Multibillion Dollar Enterprise

Although the UFC's success as a leading MMA promoter is perhaps most evident in its current risk of becoming genericized with the sport itself,[6] the success of the sport (and its largest promoter) faced considerable barriers at its outset. The origins of MMA can be traced all the way back to the Olympic Games when it was called pankration.[7] In its modern form, MMA first aired on November 12, 1993 on PPV to 80,000 viewers,[8] where fighters from a variety of disciplines gathered in Denver, Colorado, to settle the age-old question of which fighting style was superior.[9] Organizers of the event, billed as the "Ultimate Fighting Championship," chose Denver as their venue because the UFC event had very few rules and Colorado did not have a boxing commission at the time to object to its organization.[10] This led to Arizona Senator John McCain's

6. Carl J. Gaul IV, Comment, *The Ultimate Fighting Championship and Zuffa: From 'Human Cock-Fighting' to Market Power*, 6 Am. U. Bus. L. Rev. 647, 648–49 (2017) ("The association of the sport with the organization is so prevalent that many consumers confuse the organization with the sport itself; the UFC is synonymous with MMA the way 'Kleenex' is synonymous with 'tissue.'").
7. Symposium, *Digital Entrepreneurship: The Incentives and Legal Risks: Student Work: Fighting for Respect: MMA's Struggle for Acceptance and How the Muhammad Ali Act Would Give it a Sporting Chance*, 112 W. Va. L. Rev. 269, 271 (2009) (pankration combined boxing, wrestling, and fighting with the feet and was described by ancient Greek philosopher Philostratos as "the most exciting and worthiest of all sports in ancient Olympia.").
8. *Id.* at 271–72.
9. *Id.* at 271.
10. *Id.* at 271–72. ("An early marketing campaign for the event declared that there were three ways to win, 'by knockout, submission, or death.'").

attempt to ban the UFC.[11] Many believed that McCain's opposition to the UFC was in part motivated by his close connection to Anheuser-Busch, one of the biggest boxing sponsors in the world, and thus a powerful supporter of UFC's main potential competitor.[12] Whatever McCain's motivations, his influence proved effective with a number of states passing legislation to ban MMA.[13]

Eventually, in an attempt to gain public acceptance, the UFC implemented new rules which came to be known as the Unified Rules of Mixed Martial Arts Combat (Unified Rules).[14] In 2000, New Jersey became the first state to legally sanction MMA.[15] A year later, the near-bankrupt UFC was bought by Las Vegas casino owners Frank and Lorenzo Fertitta for $2 million.[16] This sale provided the UFC with the financial backing and political support needed to succeed.[17] Nevada followed New Jersey and also adopted the Unified Rules on July 23, 2001.[18] The Fertitta brother's acquisition of the UFC proved to be a lucrative investment and in June 2016, the Fertitta brothers ultimately sold the UFC to the talent agency William Morris Endeavor-International Marketing Group while keeping Dana White as its president.[19]

2. Current UFC Broadcast Structure

In 2011, the UFC entered into a seven-year distribution contract with Fox Broadcast Company to broadcast live UFC events, as well as the UFC's reality series, *The Ultimate Fighter*.[20] After Fox Sports' exclusive negotiation window for the UFC's TV rights expired in late 2017, ESPN and the UFC entered into a

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11. *Id.* at 272–73. (In 1995, Senator McCain wrote to all fifty governors urging them to ban ultimate fighting which he compared to "human cockfighting").
12. *Id.* at 273 (Senator McCain's wife was the daughter of James Hensley, one of the nation's largest Anheuser-Busch distributors).
13. *Id.* at 274.
14. *Id.* at 275.
15. *Id.*
16. *Id.*
17. *Id.* ("Lorenzo Fertitta was a former member of the Nevada State Athletic Commission and knew the politics involved in the fight industry.").
18. *Id.* ("The new rules featured five weight classes, rounds, time limits, a list of over thirty-one fouls, and eight possible ways for the fight to end. The Unified Rules provided not only safety, but also uniformity in regulating MMA amongst the states.").
19. Daniel L. Maschi, Comment, *Million Dollar Babies Do Not Want to Share: An Analysis of Antitrust Issues Surrounding Boxing and Mixed Martial Arts and Ways to Improve Combat Sports*, 25 Jeffrey S. Moorad Sports L.J. 409, 422 (2018) (The sale price of $4 billion set a record for the largest purchase in sports history with the Fertitta brothers' company, Zuffa, (the UFC's parent company) netting a 2000 percent return on its original purchase price of $2 million in 2001).
20. Mike Whitman, *UFC, Fox Announce 7-Year Broadcast Deal*, Sherdog (Aug. 18, 2011), https://www.sherdog.com/news/news/UFC-Fox-Announce-7Year-Broadcast-Deal-34862 [https://perma.cc/Q8NR-6G6V]. Before partnering with Fox, the UFC had a longstanding relationship with Spike TV that produced 13 seasons of "The Ultimate Fighter," and 24 UFC Fight Night live specials. *Id.*

five-year deal for the UFC's broadcast rights, purported to be worth $150 million per year.[21] The current viewing landscape for UFC consumers includes a somewhat complicated mix of programming across ESPN's traditional cable broadcast and streaming services, as well as UFC's own streaming service.

For example, ESPN currently airs three "Fight Nights" each month viewable on ESPN's online streaming service, *ESPN+*.[22] These fight cards[23] typically consist of four preliminary fights followed by five main card fights.[24] All fights are scheduled for three, five-minute rounds, with a one-minute rest period between each round.[25] In addition to these "Fight Nights" on *ESPN+*, ESPN also hosts a monthly "UFC on ESPN" event aired on the ESPN cable network, which typically consists of a single fight card holding eleven fights.[26] Finally, the UFC airs a monthly numbered UFC event on its own streaming service, *Fight Pass*, consisting of four "Early Prelim" fights.[27] Once these fights are complete, viewers may then switch over to ESPN to watch four "Preliminary Card" fights.[28] Following

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21. A.J. Perez, *ESPN Wrestles UFC TV-Rights Deal from Fox Sports*, USA Today (May 23, 2018, 5:54 p.m.), https://www.usatoday.com/story/sports/ufc/2018/05/23/espn-ufc-TV-rights-deal/635801002 [https://perma.cc/N2GD-TNRH]. The deal, which began on January 1, 2019, includes "42 live events annually." *Id.*
22. *See UFC Events*, UFC (last visited Apr. 28, 2019), https://www.ufc.com/events [https://perma.cc/X7YA-Y3ZD]; Chris Welch, *ESPN+ Will Launch on April 12th for $4.99 per Month*, The Verge (Apr. 2, 2018, 12:38pm), https://www.theverge.com/2018/4/2/17188752/espn-plus-launching-april-12th-pricing-features-content [https://perma.cc/2QCM-YQUN]. At $4.99 per month or an annual price of $49.99, ESPN+ has been pitched as a direct-to-consumer streaming service that provides viewers with live sports, one free Major League Baseball (MLB) and National Hockey League (NHL) game each day. *Id.* Additionally, the service will feature "high-quality original shows and films, exclusive studio programs, and an unmatched on-demand library." *Id.*
23. Black, *supra* note 2, at 743 n.26 ("A 'card' is the set of fights scheduled to be put on at any one particular event.").
24. *See UFC Events*, *supra* note 22.
25. Michael Kim, *Mixed Martial Arts: The Evolution of a Combat Sport and Its Laws and Regulations*, 17 Sports Law. J. 49, 57 (2010).
26. *Id.* While the fight card is scheduled for 11 bouts, fights are routinely cancelled where fighters are injured during training prior to the fight, or more recently, fighters are routinely being pulled from a fight card for complications during the weight cut. *See* Scott Harris, *Weight Cutting: Solving 'The Biggest' Problem in Combat Sports*, Bleacher Report (Aug. 31, 2015), https://bleacherreport.com/articles/2555772-weight-cutting-solving-the-biggest-problem-in-combat-sports [https://perma.cc/9CNH-6Y3U].
27. *See UFC Fight Pass*, UFC (last visited Apr. 28, 2019), https://www.ufc.tv/page/fightpass [https://perma.cc/6TUP-7S3U]. UFC Fight Pass costs customers $9.99 per month, $8.99 per month with a six-month commitment, or $7.99 per month with a twelve-month commitment after a seven-day free trial. *Id.* Much like ESPN+, Fight Pass provides customers with unrestricted access to the live prelims on numbered UFC fight cards as well as the ability to watch hundreds of past events. *See id.*
28. *E.g., UFC 247: Jones vs. Reyes*, UFC, (last visited Apr. 24, 2020), https://www.ufc.com/event/ufc-247#958 [https://perma.cc/75YZ-TMTD].

these preliminary fights, viewers have the option to purchase the "Main Card" on PPV which consists of five fights.[29]

The numbered UFC main card presents the most popular and successful fighters with the two top fights being characterized as the main and co-main event.[30] Typically, the main and co-main event will feature a championship title bout, where the winner will be awarded a belt and declared the UFC's world champion in that weight class.[31] Since 2011, all main and co-main events are scheduled for five (rather than three), five-minute rounds, with a one-minute rest period between each round.[32] The PPV is structured as a bundle, so regardless of how many fights the customer chooses to watch, the customer is billed a set amount.

B. *UFC Revenue*

1. Live Events

Each of the previously mentioned UFC fight cards occur at different locations around the world in various arenas.[33] The price of admission is determined by a number of factors such as location and date, but the main

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29. *See, e.g.*, *id.* On April 13, 2019, ESPN+ expanded its deal with the UFC to 2025 and became the exclusive distributor of PPV events for the UFC in the U.S. Hilary Russ, *ESPN's Digital Service to be Exclusive UFC Pay-Per-View Provider in U.S.*, Reuters (Mar. 18, 2019, 1:04 PM), https://www.reuters.com/article/us-media-sport-espn/espns-digital-service-to-be-exclusive-ufc-pay-per-view-provider-in-u-s-idUSKCN1QZ2E6 [https://perma.cc/EYW9-ADGS].
30. *See, e.g.*, The MMA Plug, *UFC 248 Recap: Co-Main Dazzles, Main Event Flops*, Mile High Sports (Mar. 9, 2020), https://milehighsports.com/ufc-248-recap-co-main-dazzles-main-event-flops [https://perma.cc/QS7S-W95H].
31. *See, e.g.*, *id.*
32. MMA Junkie Staff, *UFC Implements Five-Round Non-Title Fights for All Future Main Events; Evans vs. Davis Exempt*, MMA Junkie (Jun. 9, 2011, 9:35 PM), https://mmajunkie.com/2011/06/ufc-implements-five-round-non-title-fights-for-all-future-main-events-evans-vs-davis-exempt [https://perma.cc/75Y5-36JJ]. Occasionally, a main card fight will be cancelled, and the fight before the main card will be elevated to the title of "main event." *Id.* Typically, because these fighters have trained to fight a three-round fight and it would be unfair to have them compete for all five rounds, the UFC will often allow the fight to only go for three founds, thereby being the exception when a main event will be three, not five, rounds. *See, e.g.*, Alex Chippin, *Adesanya-Silva Still 3 Rounds Despite Elevation to UFC 234 Main Event*, MSN (Feb. 2, 2019), https://www.thescore.com/mma/news/1714121 [https://perma.cc/BTZ8-A9EY].
33. *See UFC Events*, *supra* note 22. For example, in 2019, of the 41 events that took place,19 occurred in a foreign country (3 in Brazil, 3 in Canada, 2 in Australia, 2 in Russia, 1 in England, 1 in Sweden, , 1 in the Czech Republic, 1 in Denmark, 1 in Mexico, 1 in Singapore, 1 in South Korea, and 1 in the United Arab Emirates) with the rest located in various states with 3 in Las Vegas, Nevada and 1 in New York City, New York. *Id.*

determination is demand: higher profile fighters garner higher admission prices.[34] Live events account for 12 percent of the UFC's overall revenue.[35]

2. UFC PPV Revenue

The largest share of UFC revenue comes from "Content," including all revenue generated by UFC broadcasts through TV rights deals or online streams.[36] Within Content, 51 percent is attributed to PPV.[37] All other revenue comes from media rights and the UFC's own streaming service, *Fight Pass*.[38] Unlike admissions for live events, customers pay the same amount for each PPV main card regardless of the profile of fighters on the card.[39]

3. Other UFC Revenue

The remaining 12 percent of revenue comes from "Sponsorship" and "Consumer Products."[40] The UFC has a number of advertisers that are primarily aimed at the company's target demographic: males aged between 18 and 35.[41] Advertisers' logos are featured prominently at live events, as well

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34. Statistics from the top 35 UFC events in Las Vegas, Nevada since 2006 shows an overall average ticket price of $452.90 with the highest event's average ticket price being $963.77 and the lowest being $335.11. *See Nevada's Top 35 MMA Gates*, Nevada State Athletic Commission (last visited Apr. 28, 2019), http://boxing.nv.gov/results/Top_MMA_Gates [https://perma.cc/2RMN-PXGY].
35. Ben Fowlkes & Steven Marrocco, *What Investor Documents Tell Us About the UFC's Past—And Its Future*, MMA Junkie (Oct. 31, 2016 1:05 PM), https://mmajunkie.com/2016/10/what-investor-documents-tell-us-about-the-ufcs-past-and-its-future [https://perma.cc/DZH7-8QBX].
36. *Id.* (showing 76 percent of total UFC revenue in 2015 coming from "Content" amounting to a value of $462 million).
37. *Id.* (42 percent for residential PPV and 9 percent for commercial PPV).
38. *Id.* (28 percent for U.S. media rights, 18 percent for International media rights, and 3 percent for Fight Pass).
39. Russ, *supra* note 29 ("PPV UFC fights will cost $59.99 per event for current ESPN+ subscribers, slightly less than the $64.99 fans usually paid in the past. New subscribers will pay $79.99 for their first PPV event and get one-year of ESPN+ access.").
40. Fowlkes & Marrocco, *supra* note 35 (9 percent from Sponsorship and 3 percent from Consumer Products for $52 million and $19 million, respectively).
41. Jonathan Shrager, *Bud Light and the Top 11 Sponsors in the UFC Today*, Bleacher Report (Jul. 14, 2011), https://bleacherreport.com/articles/767373-bud-light-and-the-top-11-sponsors-in-the-ufc-today#slide6 [https://perma.cc/FZL4-65P7]. However, a recent report showed that the median age of viewers for most sports with the exception of basketball, baseball, and tennis is aging more rapidly than the overall U.S. population. *See* Ryan Harkness, *New Report Shows Once-Coveted UFC Demographic has Gotten Old . . . Fast*, MMA MANIA (Jun. 7, 2017, 12:00 PM), https://www.mmamania.com/2017/6/7/15753610/average-age-ufc-TV-viewers-demographics-ratings-advertisers-fox-sports-mma [https://perma.cc/6XKG-7KE5]. It should be noted that the study only covers TV viewers and not internet viewers, which points to the UFC's recent decision to move all PPV purchases to the ESPN+ online streaming service as a smart move. *Id.*

as in promotional materials that the UFC uses to advertise upcoming fight cards.[42] While fighters traditionally wore any apparel they desired while fighting—thereby giving the fighters the ability to generate income through their own sponsorships—the UFC signed an exclusive apparel deal in 2015 with Reebok whereby fighters could only wear an approved Reebok "fight kit" in competition.[43] These fight kits, along with other UFC apparel, are also sold to consumers but only account for a modest 3 percent of total revenue.[44]

C. *UFC Fighter Compensation*

The distribution of these revenues to the fighters themselves involves a somewhat complicated scheme. UFC fighters are compensated under a multifaceted model involving appearance fees, sponsorships, performance bonuses, and per-point participation. Understanding this scheme is important to conceptualize the potential effects of unbundling.

1. Base Salary

Instead of paying its fighters a regular wage or salary, the UFC pays athletes only when they compete in fights or appear on its reality show, *The Ultimate Fighter*.[45] Additionally, fighters are paid a set amount for showing up on the day of the fight and can have this amount doubled by winning their fight, often called a win bonus.[46]

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42. Michael Silver, *Inside Sponsorship and Marketing Surrounding UFC's International Fight Week*, Front Office Sports (Jul. 13, 2018), https://frntofficesport.com/sponsorship-marketing-ufc-fight-week [https://perma.cc/ARE6-4RPH]. Currently, the UFC's main sponsor is the beer company Modelo, which features prominently in the center of the octagon's canvas. *Id.*
43. Matt Hlinak, *Ultimate Fighting Contractors? How the UFC Misclassifies its Athletes and Why it Matters*, 28 Midwest L.J. 81, 88 (2018). A fight kit is essentially the fighter's uniform, which consists of shorts for male fighters and shorts and a sports bra for female fighters. *See* MMA Junkie Staff, *What You Need to Know About the UFC-Reebok 'Fight Kit' Uniforms and Gear*, MMA Junkie, (Jun. 30, 2015, 11:00 AM), https://mmajunkie.com/2015/06/what-you-need-to-know-about-new-ufc-reebok-fight-kit-uniforms-and-gear [https://perma.cc/U7LJ-SSVH]. The uniforms are largely the same but have different color variations with the UFC and Reebok logos featuring prominently along with the fighter's name. *Id.*
44. Fowlkes & Marrocco, *supra* note 35.
45. Hlinak, *supra* note 43, at 85.
46. *Id.* The "win bonus" has been the subject of considerable controversy, leading to leading UFC commentator Joe Rogan to call for its end, stating that "I don't think anybody fights harder for [the win bonus] . . . ." Ben Fowlkes, *Do Win Bonuses Incentivize MMA Fighters to Give Their All—Or Play it Safe*, MMA Junkie (Mar. 23, 2018, 3:30 PM), https://mmajunkie.com/2018/03/joe-rogan-ufc-win-bonus-contract-fight-purses-incentive-fighters-play-it-safe [https://perma.cc/W75Z-SN5G]. It should also be noted that some fighters with more negotiating leverage have entered contracts with no win bonuses. *Id.* For example, at UFC 209, Mark Hunt was paid $750,000 with no win bonus for his knockout loss to Alistair Overeem, who also negotiated an $800,000 purse with no win bonus for his narrow majority decision against Fabricio Werdum, which he of

2. Reebok Deal

As previously mentioned, the 2015 Reebok deal created a tiered system where fighters are paid sponsorship money based on the number of fights that the fighter has had in the UFC.[47] Because the Reebok deal is an exclusive apparel deal with the UFC, fighters cannot be sponsored by non-Reebok entities during the fight, weigh-ins, or the week leading up to the fight.[48] This has caused considerable discontent among fighters who claim that prior to the Reebok deal, they were able to negotiate more income through their own sponsorships.[49] However, the UFC has not seen a mass exodus of fighters leaving for other promotions, most likely due to the fact that the UFC has the most highly competitive pool of MMA fighters among promoters.[50]

3. Bonuses

Another controversial compensation mechanism is the payment of bonuses.[51] For each fight card, the UFC awards bonuses of $50,000 to individual fighters for the "Performance of the Night" as well as $50,000 to each fighter in a fight that is crowned "Fight of the Night."[52] The awarding of the

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course would have been paid if he had lost the bout. Ben Fowlkes, *Is it Time to do Away with the Show Money/Win Bonus Pay Structure in MMA?*, MMA Junkie (Jul. 14, 2017, 8:30 PM), https://mmajunkie.com/2017/07/ufc-mma-show-money-win-bonus-pay-structure-gegard-mousasi-alistair-overeem-ryan-bader [https://perma.cc/BSE7-7WVU].

47. Fighters with 1 to 5 UFC fights are paid $2500, 6 to 10 fights are paid $5000 and so on. The sponsorship money caps out at 21 or more fights for a sponsorship payment of $20,000. Additionally, champions are paid $40,000 while challengers are paid $30,000. Andrew Brennan, *Why Is The UFC-Reebok Deal Exploiting UFC Fighters and Condoning Pay Gaps?*, Forbes (May 16, 2016, 1:22pm), https://www.forbes.com/sites/andrewbrennan/2016/05/16/is-it-the-ufc-or-is-it-reebok-that-is-exploiting-ufc-fighters-and-condoning-pay-gaps/#5b4079e94a93 [https://perma.cc/YJV7-8N9T]. So, for example, when Darren Till fought Tyron Woodley for the UFC Welterweight Championship, he only had six fights in the UFC and would have only received $5000 in Reebok money; however, because it was a title fight and he was the challenger, he received $30,000 from Reebok. *See Darren Till*, UFC (last visited Apr. 28, 2019), https://www.ufc.com/athlete/darren-till [https://perma.cc/KDR3-QWUW].

48. Brennan, *supra* note 47.

49. *Id.* UFC veteran Vitor Belfort has stated that the Reebok deal has left the fighters "pretty much living in slavery." *Id.* Also, former UFC Champion Meisha Tate has highlighted that "the tier system is inherently discriminatory against women because women didn't participate in the UFC until 2012. As all women have fewer [UFC] bouts then [sic] male fighters, they all earn in the lower tiers of the Reebok sponsorship deal." *Id.*

50. *Id.*

51. Hlinak, *supra* note 43, at 85.

52. Adam Guillen Jr., *UFC Changed 'Fight Night' Bonus Structure to Ensure Allotted $9.8 million Would Go to its Fighters*, MMA Mania (Feb. 13, 2014, 5:00 PM), https://www.mmamania.com/2014/2/13/5408704/ufc-bonus-structure-changed-ensure-allotted-money-goes-to-fighters-mma [https://perma.cc/E6FD-483L].

bonuses are subjective with the number of awards and recipients decided upon by the UFC leadership.[53]

4. PPV Points

A more complicated and largely unknown compensation system includes what is referred to as PPV points.[54] In addition to their base salary, Reebok stipend, and possible bonuses, some fighters receive a small percentage of every PPV purchase.[55] Because the PPV points are negotiated into a fighter's individual contract, they are not publicly available.[56] However, some fighters have challenged various aspects of their contracts in court, thus shedding light on how much the fighters are being compensated via PPV points.[57] While it is

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53. Brent Brookhouse, *UFC's Main Card Fighters Get 70% of Bonuses White Has Threatened to Eliminate*, Bloody Elbow (Jul. 4, 2013, 6:01 PM), https://www.bloodyelbow.com/2013/7/4/4494058/ufc-dana-white-eliminate-bonuses-fighter-pay [https://perma.cc/J5HJ-ULTW]. In response to complaints about the bonuses by fighters, UFC President Dana White stated "You don't like the structure? All right, we'll pay the lower-level guys more money—no more f--king bonuses." *Id.* One study that looked at UFC end-of-the-night bonuses during an eight year timespan found that 36 percent of main event fighters take home some form of bonus, while fighters in the twelfth spot on a card—typically the first fight of the night—won a bonus just 7 percent of the time, including zero "Fight of the Night" bonuses. Ben Fowlkes, *The Economics of UFC Fight-Night Bonuses*, MMA Junkie (Jul. 21 2013, 12:00 AM), https://mmajunkie.com/2013/07/the-economics-of-ufc-fight-night-bonuses [https://perma.cc/D3AR-H74N].

54. Matt Connolly, *Estimating UFC's Highest-Paid Fighters Of 2016: Conor McGregor, Ronda Rousey Lead Top Moneymakers*, Forbes (Jan. 12, 2017, 02:40 AM), https://www.forbes.com/sites/mattconnolly/2017/01/12/estimating-ufcs-top-earners-of-2016-mcgregor-rousey-lesnar-diaz-lead-million-dollar-moneymakers/#188f2713217a [https://perma.cc/A2J3-CKGB].

55. *Id.*

56. *Id.*

57. *Id.* In a 2007 lawsuit over whether or not former UFC heavyweight champion Randy Couture was able contract with other MMA promotions, his PPV point scale was released which showed a tiered system:

100,000–175,000: $1 per buy
175,000–300,000: $1.50 per buy
300,000–330,000: $2 per buy
Over 330,000: $3 per buy. *Id.*

The contract was for UFC 68 which reportedly had 520,000 PPV buys, amounting to $892,500 in compensation to Couture for his PPV points. Adam Swift, *UFC Pay-per-view Bonus Scale Goes Public*, MMA Payout (Oct. 26, 2007), http://mmapayout.com/2007/10/ufc-pay-per-view-bonus-scale-goes-public [https://perma.cc/J8VK-NWJW].

In 2013, Bellator lightweight champion Eddie Alvarez became a free agent and was reportedly offered a contract that would pay him $1 for each PPV buy between 200,000 and 400,000, $2 per buy between 400,000 and 600,000 buys and $2.50 per buy over 600,000 buys. Steven Marocco, *Eddie Alvarez's UFC Offer States Intent for Quick Title Shot, PPV Cut (Updated)*, MMA Junkie (Jan. 10, 2013, 1:45 AM), https://mmajunkie.com/2013/01/eddie-alvarezs-ufc-offer-includes-immediate-title-shot-pay-per-view-cut [https://perma.cc/DU9R-TPQG].

unknown which fighters receive PPV points, past competitors have caused some controversy by suggesting only the top fighters in the UFC receive them.[58]

II. U.S. Copyright Law Background

A. *U.S. Copyright Law*

The United States Constitution incentivizes the creation of art via the Copyright Clause.[59] The Copyright Act of 1976, codified in Title 17 of the United States Code, provides protection for original works of authorship "fixed in any tangible medium of expression," including audiovisual works.[60] While the UFC's PPV and cable TV broadcasts are not technically "fixed" at the time of broadcast, the Copyright Act allows for a work to be "fixed" if there is fixation simultaneous with transmission.[61] Because the UFC produces a live audiovisual work that is simultaneously fixed upon transmission, the UFC's PPV and cable TV broadcasts are both afforded Copyright protection.[62]

B. *Digital Millennium Copyright Act*

In response to the ease with which digital works could be copied and distributed worldwide virtually instantaneously with the creation of the internet, Congress passed the Digital Millennium Copyright Act (DMCA).[63] Congress's concerns were two-fold: Congress worried (1) copyright holders would be hesitant to make their works readily available on the internet without reasonable assurances against massive piracy, while (2) internet service providers (ISP) would also hesitate to "make the necessary investment in the expansion of the speed and capacity of the Internet" without clarification of their liability.[64] Therefore, the DMCA was passed in 1998 "to strike a critical balance between

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58. UFC 234 was supposed to feature a middleweight title fight between Robert Whittaker and Kelvin Gastelum as the main event, however, due to Whittaker pulling out of the event at the last minute due to a hernia, the co-main event became the main event between Israel Adesanya and Anderson Silva. Dave Doyle, *Israel Adesanya on Asking for UFC 234 PPV Points: 'Fair is fair'*, MMA Fighting (Feb. 24, 2019, 8:00 PM), https://www.mmafighting.com/2019/2/24/18223832/israel-adesanya-on-asking-for-ufc-234-ppv-points-fair-is-fair [https://perma.cc/46W4-PEL8]. After Adesanya's win, he expressed that he should have received a cut of the PPV buys, suggesting that even the co-main event fighters do not receive PPV points. *Id.*
59. U.S. Const. art. I, § 8, cl. 8 (granting Congress power "[t]o 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").
60. 17 U.S.C. §§ 102, 102(a)(6) (2006).
61. *Id.* § 101.
62. Black, *supra* note 2, at 746.
63. Viacom Int'l, Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 519 (S.D.N.Y. 2010) (quoting S. Rep. No. 105-190 (1998)).
64. *Id.*

the rights and interests of copyright holders and the protection of [ISPs]," and to enable Copyright law to keep pace with the expansion of the internet.[65]

Title II of the DMCA, separately titled the Online Copyright Infringement Liability Limitation Act (OCILLA) is designed to strike this balance by creating a series of "safe harbors" for ISPs.[66] In order to qualify for the safe harbor protection, a party must meet a set of threshold criteria.[67] Once the threshold criteria have been established, the OCILLA establishes four safe harbors that allow ISPs to limit their liability for claims of copyright infringement.[68]

The safe harbor most relevant to the UFC broadcasts is information "residing on systems or networks at direction of users."[69] In order to qualify for this safe harbor, an ISP must (1) not have actual knowledge of the infringing activity, (2) must not receive a financial benefit directly attributable to the infringing activity, and (3) must expeditiously remove or disable access to the claimed infringing material upon notification.[70] A copyright holder has the ability to inform the ISP that there is infringing content on their website by issuing a "takedown notice" that, if complied with, will protect the ISP from liability.[71]

C. Viacom v. YouTube *Decision*

The safe harbor provision of the DMCA was tested when media conglomerate Viacom sued YouTube, a website that permits its users to upload and view video clips, free of charge.[72] Viacom claimed that "tens of thousands of videos on YouTube, resulting in hundreds of millions of views, were taken unlawfully from Viacom's copyrighted works without authorization" and that YouTube "had actual knowledge and were aware of facts and circumstances

65. Black, *supra* note 2, at 746 ("For purposes of the DMCA, an Internet service provider (also called an Online Service Provider) is defined as 'a provider of online services . . . including an entity offering the transmission, routing or providing of connections for digital online communications.'").
66. Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004).
67. First, a party must be a "service provider" as defined in the statute. 17 U.S.C. § 512(k)(1)(B) (2010). Second, a qualifying ISP must satisfy certain eligibility conditions and not be a "repeat infringer." *Id.* § 512(i)(1)(A). Finally, a qualifying ISP must accommodate "standard technical measures" that are "used by copyright owners to identify or protect copyrighted works." *Id.* § 512(i)(1)(B), (i)(2).
68. The four safe harbors are (a) transitory digital network communications, (b) system caching, (c) information residing on systems or networks at direction of users, and (d) information location tools. *Id.* § 512(a)–(d).
69. *Id.* § 512(c).
70. *Id.*
71. *Id.* § 512(c)(3). "The DMCA requires that a takedown notice contain the copyright holder's physical or electronic signature, the exact location of the infringing work, the work it allegedly infringes, and a statement that the copyright holder has a reasonable belief that the allegedly infringing work is actually infringing." Black, *supra* note 2, at 747.
72. Viacom Int'l Inc. v. YouTube, Inc., 718 F. Supp. 2d 514, 518 (S.D.N.Y. 2010).

from which infringing activity was apparent, but failed to do anything about it."[73] YouTube moved for summary judgment, stating that they were entitled to the DMCA's "safe harbor" protection against Viacom's direct and secondary infringement claims.[74] The critical question for the District Court was whether Viacom could show that YouTube had "actual knowledge" that the material on its website was infringing by either a general awareness of the infringement, or alternatively that YouTube had to have "actual or constructive knowledge of specific and identifiable infringements of individual items."[75] The District Court granted YouTube's motion for summary judgement.[76]

On appeal, the UFC, through their parent company Zuffa, LLC filed an amicus brief on behalf of Viacom, urging the court to take the view that YouTube did in fact have actual awareness of the infringement.[77] The Second Circuit disagreed with Viacom that the District Court's grant of summary judgement was improper with respect to the question of whether YouTube had actual knowledge of infringement, and remanded the question back to the District Court.[78]

On remand, YouTube moved for summary judgement, which the District Court granted.[79] While Viacom had appealed the decision, a week before the parties were set to appear again before the Second Circuit, a settlement was announced.[80]

Ultimately, the outcome of the Viacom case suggests that websites like YouTube will be able to escape copyright liability through the safe harbor

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73. *Id.* at 518–19.
74. *Id.* at 516.
75. *Id.* at 519.
76. *Id.* at 529. "Mere knowledge of prevalence of such activity in general is not enough . . . . To let knowledge of a generalized practice of infringement in the industry, or of a proclivity of users to post infringing materials, impose responsibility on service providers to discover which of their users' postings infringe a copyright would contravene the structure and operation of the DMCA." *Id.* at 523.
77. Brief for American Society of Composers, Authors and Publishers, et. al. as Amici Curiae Supporting Plaintiffs, Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012) (No. 1:07-CV-03582-LLS).
78. Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 34 (2d Cir. 2012). Viacom presented internal emails from YouTube employees that showed they were aware of infringement, including specific instances. *Id.*
79. Viacom Int'l, Inc. v. YouTube, Inc., 940 F. Supp. 2d 110, 113–23 (S.D.N.Y. 2013).
80. Jonathan Stempel, *Google, Viacom Settle Landmark YouTube Lawsuit*, Reuters (Mar. 18, 2014, 6:05 AM), https://www.reuters.com/article/us-google-viacom-lawsuit/google-viacom-settle-landmark-youtube-lawsuit-idUSBREA2H11220140318 [https://perma.cc/7322-JYZU]. While the terms of the deal were not disclosed, it was reported that no money changed hands. *Id*.

provisions in the DMCA.[81] Therefore, many copyright holders no longer view the DMCA as an effective solution to copyright protection.[82]

Despite the Viacom ruling, the UFC continues to pursue litigation in order to stop illegal streaming, relying on a variety of legal theories. For instance, the UFC brought an action against Justin.tv—a website that allows users to stream live videos across the Internet—for copyright and trademark infringement.[83] The UFC even sought relief from an individual who had illegally streamed live fights, resulting in a default judgment of $11,948.70, almost half of which was attorney's fees.[84] In 2014, the UFC sought $32 million in damages from twenty-seven-year-old Steven Messina, who they claimed uploaded 141 UFC presentations.[85] While the UFC may win judgments in some of these lawsuits, it is likely that they primarily intended to send a message.[86] The UFC has also retained the services of antipiracy firms to combat illegal streaming of their events.[87] Despite these measures, viewers continue to successfully stream these fights illegally.[88]

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81. Benjamin Boroughf, *The Next Great Youtube: Improving Content ID to Foster Creativity, Cooperation, and Fair Compensation*, 25 Alb. L.J. Sci. & Tech. 95, 103 (2015).
82. *Id.*
83. Zuffa, LLC v. Justin.tv, Inc., 838 F. Supp. 2d 1102, 1103 (D. Nev. 2012). Justin.tv won a partial motion to dismiss for the noncopyright claims and statutory immunity. *Id.* Ultimately, Justin.tv reached a settlement agreement with the UFC. Wendy Davis, *Justin.tv, UFC Settle Copyright Lawsuit*, MediaPost (Apr. 20, 2012) https://www.mediapost.com/publications/article/172946/justintv-ufc-settle-copyright-lawsuit.html [https://perma.cc/AK54-G678].
84. Zuffa, L.L.C v. Pryce, No. 8:12-CV-1584 (NAM/RFT), 2013 U.S. Dist. LEXIS 134687 at *3 (N.D.N.Y. Sept. 20, 2013). "The complaint sets forth well-pleaded facts supporting plaintiff's claim that defendant knowingly, willfully and unlawfully received, viewed and illegally accessed UFC broadcasts #130 and #131, the subject copyrighted broadcasts, on May 28, 2011, and June 11, 2011, without paying plaintiff the appropriate pay-per-view fees." *Id.*
85. Selim Algar, *UFC: Web 'Pirate' Wwes $32M for Streaming Live MMA Events*, New York Post (Apr. 30, 2014, 1:55 PM), https://nypost.com/2014/04/30/ufc-web-pirate-owes-32m-for-stealing-live-mma-events [https://perma.cc/5BWF-PD2N]. According to the UFC, Mr. Messina was uploading the fights "to controversial file-sharing sites like Piratebay and provided a PayPal donation link to keep the illegal practice going." *Id.*
86. According to UFC President Dana White, the goal of the subpoenas against Justin.tv was to put people in jail, which never happened, nor was it a likely possibility. *See* Black *supra* note 2, at 756.
87. Sam Carp, *UFC Tapped VFT to Combat Piracy During McGregor-Khabib*, SportsPro (Oct. 8, 2018), http://www.sportspromedia.com/news/conor-mcgregor-khabib-ufc-illegal-streaming-piracy [https://perma.cc/MJP6-X6QM].
88. Terry Collins, *Millions Illegally Streamed Mayweather-McGregor Fight*, CNET (Aug. 29, 2017, 6:37AM), https://www.cnet.com/news/illegal-streaming-of-mayweather-mcgregor-fight-reaches-millions [https://perma.cc/K9Z3-FD2M]. While not a UFC event, an estimated 2.9 million people illegally streamed UFC fighter Conor McGregor take on the undefeated Floyd Mayweather Jr. in a boxing match, making it "'one of the most pirated, if not the most pirated boxing matches we have ever seen.'" *Id.*

D. *Law of Diminishing Marginal Utility*

While the UFC's antipiracy firms may take down an illegal stream during a fight, viewers can find another, as-yet undiscovered link and watch the fight until the firm discovers and takes down the new link. This process can repeat itself as many times as necessary, like a game of "'real-time cat-and-mouse whack-a-mole.'"[89] Companies like the UFC are eager to get the content taken down in real time because of the law of diminishing marginal utility, a principle unique to live sporting events.[90] Viewers watching a live UFC fight have no way of knowing how the fight will play out, and it is likely that this unknown aspect of a fight accounts for the high value of realtime sports content. The viewer obtains the maximum amount of utility from watching the fight in real-time (instant replays notwithstanding) and not knowing how the fight will end.

This can be a problem for both the UFC and the viewer. For the UFC, once the fight has been illegally live streamed, there is no meaningful way to rectify the damage.[91] For the viewer, once the link to an illegal live stream they are watching is taken down, the viewer must search for an active link that has not yet been taken down by the UFC. The viewer does this while the fight is still in progress, thereby meaning that the viewer is missing part of the action. With the fast-paced nature of combat sports, it is highly possible that by the time the viewer finds an active link, the fight may already be over due to some fight-ending action, leaving the fighter to have to view it via an instant replay, which as previously discussed, does not provide the viewer with the maximum amount of utility.

III. Recommendation

A. *Three Approaches*

U.S. copyright law's inability to stop illegal live streaming poses a clear problem for the UFC. One solution is for Congress to amend the DMCA.[92]

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89. Queenie Wong, *Anti-Piracy Battle Unfolds in Real Time on Periscope, Live-Streaming Apps*, The Mercury News (Aug. 12, 2016, 2:05 AM), https://www.mercurynews.com/2015/09/20/anti-piracy-battle-unfolds-in-real-time-on-periscope-live-streaming-apps [https://perma.cc/7LC3-WT8X].
90. Gary Lawson, *Efficiency and Individualism*, 42 Duke L.J. 53, 71 (1992). The law of diminishing marginal utility "states that each additional, or marginal, unit of a good will be less highly valued by an actor than previous units." *Id.*; "'The value of real-time sports content diminishes rapidly after that event has ended . . . .'" Wong, *supra* note 89.
91. Black, *supra* note 2, at 771. UFC President Dana White as stated that "'[a]ll this [pay-per-view privacy] stuff is brand new . . . . When our event gets stolen, it's dead. It's over. You know the results. A live event is different than anything else.'" *Id.*
92. Black, *supra* note 2, at 774. "Considering that the DMCA was passed over a decade ago, and the evolving technology in this day and age, the time has come for Congress to reassess the functionality of the DMCA and assess how copyright owners and website owners should interact with one another to better enforce copyright protection." *Id.*

Some members of Congress have attempted to address this concern with an amendment to the Combating Online Infringement and Counterfeits Act (COICA).[93] This legislation has been met with criticism from Internet engineers concerned that the legislation would hurt technological innovation as well as law professors concerned that the amendment would abridge free speech.[94] Oregon Senator Ron Wyden put a hold on the bill, thereby preventing it from reaching a vote in the Senate.[95]

Another proposed solution is judicial, arguing that based on economic game theory, when faced with developing technology that threatens older companies' established business models, judges should rule for the resource-constrained party, even if it runs counter to public policy.[96]

The essential problem with these approaches, from the UFC's perspective, is that they are both exogenous. The first approach relies on Congress to change the law, which as discussed previously, looks more and more unlikely.[97] The second approach may be effective for the UFC if they were to go after large ISPs, but because of the U.S. judicial system's reliance on precedent, statutory interpretation, and the doctrine of *stare decisis*, as well as possibly the Constitution's Equal Protection Clause, it is unlikely that this approach would bear much fruit for the UFC.

The UFC thus has no option but to be proactive in addressing this problem independently of the government.

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93. *See* Combating Online Infringement and Counterfeits Act, S. 3804, 111th Cong. (2010) [hereinafter COICA]; the amendment "would require the Attorney General to receive information from the public—including content owners—about sites that are dedicated to committing infringement and provide content owners information about informing the Department of Justice of these sites." Black, *supra* note 2, at 775. The Attorney General would then be able to ask for a temporary restraining order or injunction to prevent any further action as well as bring an in rem action against such websites. *Id.*

94. *See* Peter Eckersley, *An Open Letter from Internet Engineers to the Senate Judiciary Committee*, Electronic Frontier Found. (Sept. 28, 2010, 2:34 PM), http://www.eff.org/deeplinks/2010/09/open-letter [https://perma.cc/E7MG-PE2S]; *see also* Law Professors' Letter in Opposition to S. 3804 (Combating Online Infringements and Counterfeits Act), Electronic Frontier Found. (Nov. 16, 2010, 6:22 PM), https://www.eff.org/files/filenode/coica_files/professors_letter_re_coica_and_signatories.pdf [https://perma.cc/5M2Y-22UK].

95. Ezra Klein, *Interview: Sen. Ron Wyden's fight to stop SOPA and save the Internet*, The Wash. Post (Jan. 17, 2012), https://www.washingtonpost.com/blogs/ezra-klein/post/interview-sen-ron-wydens-fight-to-save-the-internet/2011/08/25/gIQAqnHG6P_blog.html?noredirect=on&utm_term=.4d1b7baa202a [https://perma.cc/4NW4-47EC]. The Senate attempted to rewrite COICA with the PROTECT IP Act, but Sen. Wyden again placed a hold on it, thereby effectively defeating its passage in the Senate. *Id.*

96. Shahshahani, *supra* note 5, at 37–39.

97. *See* Klein, *supra* note 95.

B. *Unbundling the PPV*

The third approach to combating illegal online streaming would be for the UFC to offer an unbundled PPV package alongside its bundled PPV events. Here, consumers would have a choice between purchasing the five packaged PPV fights for the current price and purchasing the fights individually.

Under this model, the price of the fight could correspond to the fighters' popularity. For example, since the first fight on a PPV fight card typically has the least popular fighters, a viewing could be set at a low price of $5.00. The next fight could be offered for $7.00 and so on building up to the main event, which could be priced at $30.00. These numbers are speculative and provided only for illustration.

The UFC would also be able to charge premium pricing for their most popular fighters. For example, Conor McGregor is arguably the UFC's most popular fighter, headlining four out of five of the highest grossing UFC PPV events in Nevada.[98] Therefore, the UFC may be able to justify a price higher than $30.00 for any Conor McGregor fight.

While illegal streaming may be free in the monetary sense, there are many costs associated with it.[99] Regardless of the costs an individual faces associated with illegally streaming UFC fights, the fact that so many potential UFC customers continue to illegally stream PPV events shows that these costs must be lower than the UFC's PPV price tag. By unbundling the PPV model, these viewers will have the ability to purchase fights at a lower price, which, in combination with developments in antipiracy enforcement, may be low enough to make the efficiency of watching legitimate sources outweigh the cost.

C. *Benefits of Unbundling to Fighters and the UFC*

This increase in revenue from viewers who otherwise would have watched the fight via an illegal stream is the most obvious benefit of unbundling the PPV fights for the UFC.[100] Additionally, unbundling would also provide the UFC and its fighters a variety of ancillary benefits.

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98. *Nevada's Top 35 MMA Gates*, St. of Nev. Athletic Comm'n (last visited Apr. 28, 2019), http://boxing.nv.gov/results/Top_MMA_Gates [https://perma.cc/A4EQ-GRCA].
99. Christina Sterbenz, *How Sketchy Streaming Sites Really Work—And Why Some Are Legal*, Business Insider (Apr. 24, 2014, 3:40 PM), https://www.businessinsider.com/are-streaming-sites-legal-2014-4 [https://perma.cc/3RAK-9EJL] (These costs may include: lower video and sound quality; multiple popup advertisements; risk that clicking on the wrong link will result in files downloading to a viewer's computer that may contain viruses or malware; and risk that viewing a fight could result in being sued by the UFC. It is possible that some viewers may suffer morally from knowing that they are not contributing to the UFC's profits, but no research to date has demonstrated as much.).
100. *See* Josh Peter, *Digital Pirates Steal Signals, Money from Leagues*, USA TODAY (Oct. 7, 2014, 5:14 PM), https://www.usatoday.com/story/sports/2014/10/07/TV-pirates-pay-per-view-ufc-nfl-nba-nhl-mlb/16871583 [https://perma.cc/MLC7-MFNJ].

1. Possible New Compensation Schemes

Typically, only the fighters in the main event receive PPV points because purchasers' primary desire is to view the main event fight.[101] By unbundling, these fighters would be in a better position to negotiate PPV points as the UFC could no longer claim that they are free riders. Because fighters have criticized the PPV point system, it is likely that UFC fighters lower on the fight card would welcome the opportunity to negotiate new fight purses that incorporate PPV points.[102] This could alleviate pressure from fighters to unionize and improve relations.

2. Incentivizes Fighters to Promote their Individual Fights

Currently, because of the PPV point system, fighters lower on the fight card receive no monetary incentive from the UFC to promote the fighter's own fights. Extension of PPV points to these fighters would create an incentive for them to self-promote so as to increase viewership and therefore their own pay. In the world of MMA, however, incentivizing individual fighters to promote their fights can be problematic due to the danger of "trash talk" and interfighter rivalries getting out of hand.[103]

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101. Connolly, *supra* note 54. This was most evident with Conor McGregor being removed from UFC 200 for refusing to fulfil his obligatory media duties. *See* Mark Critchley, *Conor McGregor is Responsible for his Removal from UFC 200, says Dana White*, INDEPENDENT (Apr. 28, 2016, 11:13 AM), https://www.independent.co.uk/sport/general/mma/conor-mcgregor-ufc-200-dana-white-daniel-cormier-jon-jones-a7004856.html [https://perma.cc/PV23-C6XV].

102. *See* Dave Doyle, *Israel Adesanya on Asking for UFC 234 PPV Points: 'Fair is fair'*, MMA FIGHTING (Feb. 24, 2019, 8:00 PM), https://www.mmafighting.com/2019/2/24/18223832/israel-adesanya-on-asking-for-ufc-234-ppv-points-fair-is-fair [https://perma.cc/PF4R-PCHC].

103. A great case study in the dangers of allowing fighters to individually promote their own fight involves the 2018 feud between UFC fighters Conor McGregor and Khabib Nurmagomedov. On April 5, 2018, McGregor, along with ten others, entered the Barclays Center in Brooklyn, New York, and threw a hand truck at a bus carrying UFC fighters, causing injury to one fighter, causing him to be pulled from the UFC 223 fight card. Daniel Victor, *Conor McGregor Is Charged With Assault Before UFC 223*, N.Y. TIMES (Apr. 5, 2018), https://www.nytimes.com/2018/04/05/sports/conor-mcgregor-ufc-barclays.html [https://perma.cc/FQ5U-SWGM]. The incident was recorded and quickly became international news. *Id.* McGregor turned himself into the police later that night and was charged with three counts of assault and one count of criminal mischief. *Id.*

McGregor's actions were reportedly in retaliation against Nurmagomedov, who had an early altercation with McGregor's friend and teammate, Artem Lobov. The Associated Press, *Conor McGregor Gets Community Service for Barclays Melee* N.Y. TIMES, (Jul. 26, 2018), https://www.nytimes.com/2018/07/26/sports/conor-mcgregor-community-service-barclays.html [https://perma.cc/5MRV-2QF2]. For the incident, McGregor pleaded guilty to disorderly conduct and was sentenced to perform five days of community service and an evaluation for an anger-management program. *Id.*

Six months later, the UFC scheduled a fight—UFC 229—between McGregor and Nurmagomedov and used the footage from the bus attack to promote the fight. Karim Zidan, *Incredibly, Conor McGregor May Profit After Farcical Nurmagomedov Scenes*,

3. Easing of Controversy Regarding the Unionization of Fighters

For many years, fighters have expressed a strong desire to unionize.[104]

The Guardian (Oct. 7, 2018, 5:11 PM), https://www.theguardian.com/sport/2018/oct/07/conor-mcgregor-khabib-nurmagomedov-fight-ufc-229 [https://perma.cc/64BK-5VH6].

At UFC 229, moments after defeating McGregor, Nurmagomedov "scaled the octagon cage and launched himself at McGregor's team." *Id.* A brawl ensued which resulted in three members of Nurmagomedov's team arrested. *Id.*

In the buildup to the fight, McGregor made derogatory remarks about Nurmagomedov's family, his Muslim faith and the Dagestan region of his homeland. *Khabib on UFC McGregor Brawl: 'He Talked About my Religion'*, Al Jazeera (Oct. 7, 2018), https://www.aljazeera.com/news/2018/10/nurmagomedov-mcgregor-mass-brawl-mars-ufc-title-bout-181007171904647.html [https://perma.cc/KHX7-956X]. In a post-fight press conference, while apologizing for his actions, Nurmagomedov stated "[h]e talk about my religion, he talk about my country, he talk about my father, he come to Brooklyn and he broke bus, he almost killed a couple people—what about this?" *Id.*

For their actions, both McGregor and Nurmagomdeov were fined by the Nevada Athletic State Commission (NSAC)—$50,000 for McGregor and $500,000 for Nurmagomedov, which amounted to one-fourth of his purse—and given a suspension from fighting in the UFC, six months for McGregor and nine months for Nurmagomedov. Cindy Boren, *Conor McGregor, Khabib Nurmagomedov Suspended for Their UFC 229 Brawl*, The Wash. Post (Jan. 29, 2019), https://www.washingtonpost.com/sports/2019/01/29/conor-mcgregor-khabib-nurmagomedov-suspended-their-ufc-brawl/?utm_term=.c9ad871b6555 [https://perma.cc/2JTN-V7SF]. During the disciplinary hearing, NSAC Executive Director Bob Bennett expressed concern that "trash talk" used to promote fights had become problematic: "I definitely think, unequivocally, that's something we need to take a more active role in and hold fighters accountable for their language." Justin Park, *Nevada Fighters and the Right to Trash Talk*, Reason (Feb. 2, 2019, 4:25 PM), https://reason.com/2019/02/06/nevada-fighters-and-the-right-to-trash-t [https://perma.cc/WD4A-VTU6].

These sentiments were echoed by NSAC chairman Anthony Marnell, stating "[t]he verbal part of the promotion, in my opinion, has gotten so out of line that it's embarrassing." Maria S., *ARE ATHLETES' SPEECH RIGHTS BEING THREATENED?*, Fordham Intell. Prop., Media, & Ent. L.J. Blog (Mar. 15, 2019), http://www.fordhamiplj.org/2019/03/15/are-athletes-speech-rights-being-threatened [https://perma.cc/7RDR-P5XS]. When questioned about the Constitutionally of NSAC limiting fighters' speech, Marnell said, "I haven't thought that far. I guess you can say whatever you want at any time, but that doesn't mean you should earn a privileged license." MMA Weekly Staff, *NSAC Chairman Compares Potential Fighter Trash-Talk Regulations to NFL, NBA, and MLB*, Yahoo Finance (Feb. 27, 2019), https://finance.yahoo.com/news/nsac-chairman-compares-potential-fighter-182941092.html [https://perma.cc/7XP8-L7TT]. This led UFC President Dana White to comment that such oversight by a government entity might be overstepping its bounds. *Id.*

104. Cheryl Robinson, *UFC Fighter Fighting For a Bigger Cause*, Forbes (Apr. 28, 2018, 10:00 AM), https://www.forbes.com/sites/cherylrobinson/2018/04/28/ufc-fighter-fighting-for-a-bigger-cause/#222aac85c049 [https://perma.cc/B7MV-7XWY]. After joining failed attempts to create a fighter's union, UFC fighter Leslie Smith determined that "the only way any type of association was going to work was if it was fighter-driven." *Id.* Therefore, she helped form Project Spearhead, which is striving to get 30 percent of UFC fighters to sign authorization cards, which will then be submitted to the National Labor Relations Board (NLRB). *Id.* The NLRB will then look at a list of 11 factors to

Unionization would provide a variety of benefits, most notably including greater leverage in negotiating the fighters' compensation.[105] The greatest hurdle to unionization, however, is that the UFC categorizes their fighters as independent contractors as opposed to employees, leaving them ineligible for protection under the National Labor Relations Act (NLRA).[106] The National Labor Relations Board (NLRB) uses a highly flexible test that could be used to show that UFC fighters are being misclassified as independent contractors when they actually are employees and thereby entitled to the right to unionize under the NLRA.[107] In order to have the NLRB make this determination, at least thirty percent of UFC fighters would need file a petition with the NLRB.[108]

To date, three organizations have been formed with the goal of collective bargaining for the UFC.[109] With three organizations of fighters vying for membership, none of the three has obtained the requisite thirty percent of support for certification by the NLRB. Additionally, former Bellator CEO Bjorn Rebney's association with one of the organizations, the Mixed Martial Arts Athletes Association, has sparked intense controversy and made it even less likely that the fighters would agree to unionize.[110]

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decide whether or not UFC fighters are independent contractors or employees. *Id. See also* Project Spearhead, http://www.projectspearhead.com (last visited Apr. 28, 2019) [https://perma.cc/L2HB-JW23].

105. "The formation of a recognized fighters' union within the UFC would allow fighters to negotiate with the promotion on such issues as minimum fight guarantees, pensions, health care, grievance procedures, disability benefits, physical therapy and training, agent supervising, revenue splits, and other pressing issues." Genevieve F.E. Birren & Tyler J. Schmitt, *Mixed Martial Artists: Challenges to Unionization*, 28 Marq. Sports. L. Rev. 85, 91 (2017).
106. "The NLRA gives *employees* the right 'to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection.'" Birren & Schmitt, *supra* note 105, at 89 (emphasis added) (quoting 29 U.S.C. § 157 (2017)).
107. Birren & Schmitt, *supra* note 105, at 90; *See* FedEx Home Delivery, Inc., 361 N.L.R.B. No. 55 (2014).
108. Birren & Schmitt, *supra* note 105, at 100; *See Conduct Elections*, N.L.R.B. (last visited Apr. 28, 2019), https://www.nlrb.gov/about-nlrb/what-we-do/conduct-elections [https://perma.cc/4RWH-PK9F].
109. Birren & Schmitt, *supra* note 105, at 90 ("In August 2016, sports agent Jeff Borris, labor attorney Lucas Middlebrook, and economist Andrew Zimbalist formed the Professional Fighters Association (PFA). . . . On November 30, 2016, the Mixed Martial Arts Athletes Association (MMAAA) was formally announced . . . ."). Project Spearhead is also seeking to be the exclusive collective bargaining agent for the fighters. Robinson, *supra* note 104.
110. "It was a mistake during the announcement to have [Bjorn] be a public presence . . . ." Ryan Harkness, *Tim Kennedy Distances the MMA Athletes Association from Bjorn Rebney*, SBNation (Jan. 23, 2017, 6:30 PM), https://www.mmamania.com/2017/1/23/14364782/tim-kennedy-distances-mmaaa-from-bjorn-rebney [https://perma.cc/RF2B-RFUY].

UFC President Dana White also used Bjorn's presence to question the motives of the entire organization, saying "'You've got to figure out whose hand you want in

The UFC itself presents perhaps the greatest difficulty in unionization because their contracts promote rapid turnover in their roster.[111] While unbundling the PPV model would not solve all of the problems that the fighters hope to solve through unionization, offering PPV points to all fighters on the main fight card may work to discourage unionizing efforts and keep fighters from jumping ship to other MMA promotions by providing them a direct monetary incentive to remain with the UFC.[112]

4. Providing the UFC With Greater Marketing Data

A major benefit of ESPN being the exclusive distributor of UFC PPV events in the United States is that the UFC will now have marketing data regarding who is purchasing the PPV fights.[113] This data, however, only details the customer demographics for a bundled PPV event, not the customers' relative interest in individual fights.[114] By allowing customers to purchase individual fights as opposed to the PPV fight card as a whole, the UFC will have objective

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your pocket. And I guarantee you, you don't want Bjork's [sic] hand in your pocket. You know what I mean?'" *Id.* Two law firms involved in a UFC class action antitrust lawsuit sent a letter to Bjorn Rebney expressing "concern over certain statements actions taken by Rebney that they worry could harm MMA fighters by undermining the class action suit." John S. Nash, *Letter Raises Questions About Rebney and CAA's Involvement with MMAAA*, SBNation (Dec. 7, 2016, 4:15 PM), https://www.bloodyelbow.com/2016/12/7/13863614/letter-ufc-lawsuit-raises-questions-about-rebney-caas-involvement-with-mmaaa [https://perma.cc/29F8-42YC].

111. According to the standard UFC fighter contract, "If a fighter loses just one of their agreed upon amount of fights for the UFC, they can be cut. The promotion utilizes this clause heavily, often cutting fighters after two to three losses, which along with signing new fighters just as frequently, results in an ever-changing roster." Birren & Schmitt, *supra*, note 105, at 101. With an ever-changing roster, it is unlikely that any organization will obtain the required thirty percent of athletes needed in order to even have a chance to be certified as employees by the NRLB. *Id.* After the UFC cut UFC fighter and Project Spearhead interim president Leslie Smith from their roster, Smith began consulting with New York labor attorney Lucas Middlebrook—also an advisor for Project Spearhead—in filing a lawsuit against the UFC for violating sections 8(a)(1) and (3) of the NLRA which makes it unlawful to discharge an employee because they support a union or because they engage in union activities. EMagraken, *How Leslie Smith's Legal Action Against the UFC May Achieve Project Spearhed's Goals*, Combat Sports Law (Apr. 25, 2018), https://combatsportslaw.com/2018/04/25/why-the-ufc-may-have-just-shot-themselves-in-the-foot-by-axing-leslie-smith [https://perma.cc/BLV6-MEDE].

112. Jesse Holland, *Dana White Just Admitted Other MMA Promotions are Now Paying More Than UFC*, SBNation (Jun. 6, 2018, 11:04 AM), https://www.mmamania.com/2018/6/6/17433538/dana-white-just-admitted-other-promotions-now-paying-more-than-ufc-mma [https://perma.cc/EQ4S-CMTJ].

113. Russ, *supra* note 29 ("The deal will also give the UFC something it has never had before: data about its PPV audience, including information about who is buying event access and viewers' propensity to purchase goods, said UFC Chief Operating Officer Lawrence Epstein.").

114. *See id.*

data regarding the popularity of up-and-coming fighters. This objective data could also be incorporated into the UFC's fighter ranking system and used in determining championship fights, a practice that has come under much scrutiny in recent years.[115] For example, Oklahoma Representative Markwayne Mullin called for the Muhammad Ali Boxing Reform Act to be extended to the UFC.[116] While this data would still be tied to a fighter's marketability, it would no longer be based upon the subjective determination of a UFC executive handling the matchmaking process, which has become an important issue for class certification in a class-action antitrust case against the UFC.[117]

IV. Objections

The drawbacks to unbundling must also be considered. It should be noted from the outset that this Comment does not advocate the abolition of bundling, but rather that consumers be given the choice to purchase and view individual fights. The reasoning is that the U.S. Copyright Codes' licensing scheme is too complex to be translated to establishments that carry a commercial license to broadcast a UFC PPV event.[118]

A. *Fights Lower on the Main Fight Card May Not be Purchased*

Fights lower on the main fight card might not be purchased and viewed frequently by audiences, thereby injuring the careers of these fighters. The

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115. Alex Daugherty, *A Mixed Martial Arts Fighter Quit a Title Fight. Now He Wants Congress to Help*, McClatchy DC Bureau (Dec. 29, 2016, 3:32 PM), https://www.mcclatchydc.com/news/politics-government/congress/article123589634.html. In 2003, UFC fighter Pete Spratt was offered a title fight for $8,000 while his opponent, UFC hall-of-famer Matt Hughes, then champion, would receive a $50,000 to fight and $50,000 to win. *Id.* When Spratt's counteroffer of $25,000 to fight was rejected, he was never offered another UFC title shot. *Id.* "Now Spratt is hoping Congress will get into the fight, expanding a 16-year-old law intended to . . . force the UFC to . . . set up independent rankings that will award title bouts to fighters based on their records and not on UFC's judgment of their marketability." *Id.*

116. Paul Gift, *Representative Markwayne Mullin Called UFC Executive's Testimony 'Misleading'; It Wasn't*, Forbes (Nov. 10, 2017, 8:30 AM), https://www.forbes.com/sites/paulgift/2017/11/10/representative-markwayne-mullin-ufc-marc-ratner-misleading-congress-mma-news/#3d0dc6684881 [https://perma.cc/X5R3-KVQG]; *see also* Les Carpenter, *Longtime Matchmaker Joe Silva Reportedly Retiring After Sale of UFC*, The Guardian (Sep. 1, 2016), https://www.theguardian.com/sport/2016/sep/01/joe-silva-ufc-matchmaker-retiring-after-sale-reports [https://perma.cc/KV4M-3PHF] ("Among the Ali Act's provisions are stipulations that promoters must . . . use independent rankings in putting together championship bouts.").

117. Paul Gift, *UFC Hearing: Judge Calls For Expert Witness And Joe Silva Questioning*, Forbes (Dec. 20, 2018, 10:00 AM), https://www.forbes.com/sites/paulgift/2018/12/20/ufc-hearing-judge-calls-for-expert-witness-joe-silva-questioning-mma-news/#3fc3a9691902 [https://perma.cc/958A-TEMP].

118. *See generally*, Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

bundled PPV would still be available for purchase, thereby increasing the chance that fighters lower on the main fight card would be viewed by anyone purchasing the bundled PPV. Additionally, the UFC could mitigate this risk by not extending the unbundled PPV option to licensed commercial establishments seeking to show UFC fights. Residential PPV purchases constitutes the bulk of revenue for the UFC.[119] The deeper pockets of commercial PPV purchases makes them an easier target for litigation[120] as opposed to residential PPV purchasers as evidenced by the near nonexistent litigation between the UFC and individual residential PPV purchasers.[121] This would ensure that fighters lower on the card would still receive exposure through commercial establishments even if the residential revenue is lower.[122]

B. *Unbundling Will Essentially Dissolve the Fight Card*

In 1982, Jack Valenti, then president of the Motion Picture Association of America, warned that videocassette recorders would kill his industry.[123] But eight years later, box office revenue had increased sixteen percent even when adjusted for inflation.[124] The music industry has also expressed similar concerns with taping and the Internet.[125] These concerns, however, have not stopped new technologies from reshaping these industries business models.[126]

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119. 76 percent of the UFC's overall revenue comes from "Content" of which 42 percent comes from residential PPV. Fowlkes & Marrocco, *supra* note 35.
120. Joe Hand Promotions, Inc. v. Maupin, 2018 U.S. Dist. LEXIS 89185 (E.D.N.Y. 2018) (holding that a commercial establishment that purchased a noncommercial UFC PPV and broadcast the program to its patrons was liable for statutory damages of $6,000 in violation of the Federal communications Act, 47 U.S.C. §§ 553 and 605, and the Copyright Act, 17 U.S.C. §§ 106 and 501).
121. This default judgement seems to be the only evidence that the UFC has successfully sued an individual for illegally streaming its content. Zuffa, L.L.C v. Pryce, No. 8:12-CV-1584 (NAM/RFT), 2013 U.S. Dist. LEXIS 134687 at *12 (N.D.N.Y. Sept. 20, 2013).
122. . As discussed later, those viewing UFC fights at a commercial establishment are more likely to be casual fans, rather than die-hard fans.
123. Jake Rossen, *How Hollywood Can Capitalize on Piracy*, MIT Tech. Rev. (Oct. 17, 2013), https://www.technologyreview.com/s/520336/how-hollywood-can-capitalize-on-piracy [https://perma.cc/5BCT-QK5H] ("He called [videocassette recorders] a 'parasitical instrument' and told Congress in 1982: 'The VCR is to the American film producer and the American public as the Boston Strangler is to the woman home alone.'").
124. *Id.*
125. Ian Morris, *Technology Is Destroying the Music Industry, Which Is Great For The Next Taylor Swift*, Forbes (Nov. 17, 2014, 3:41 PM), https://www.forbes.com/sites/ianmorris/2014/11/17/technology-is-destroying-the-music-industry-which-is-great-for-the-next-taylor-swift/#458213bb236b [https://perma.cc/9U4P-NYAE].
126. John Schwarz, *How To Survive the Rising Tide of Tech Change*, Forbes (Mar. 5, 2018, 9:00 AM), https://www.forbes.com/sites/forbestechcouncil/2018/03/05/how-to-survive-the-rising-tide-of-tech-change/#56adfbdb1486 [https://perma.cc/5GD7-TE5Y] ("Throughout history, new technologies have reshaped the economy—from the Industrial Revolution to modern conveniences like the telephone, automobile, airplane, television and computer.").

While iTunes essentially destroyed "the album", consumers today still purchase music.[127] Therefore, while concerns that unbundling the UFC PPV model could lead to the dissolution of the entire fight card are valid, that does not mean that consumers will no longer purchase UFC fights. Instead, the ways in which those fights are viewed will simply change.

C. *Time Delay*

Another, more practical concern, is that the nature of how an MMA fight ends could jeopardize unbundling the PPV. All fights are scheduled for three, five-minute rounds, with a one-minute rest period between each round with the exception of main and co-main events which are scheduled for five, five minute rounds.[128] While the fights may be scheduled for a set time, they can end in numerous ways.[129] Therefore, unless a fight ends via decision, there is no way of knowing, with certainty, when a fight will end.[130] This could be problematic for a customer who purchases a single fight, say the second fight on the main PPV card. If the first fight on the card ends early, the customer would not know when to tune into the second fight. If they assumed that the first fight ended after seventeen minutes of action, tuning in at that point may mean that they would be begin watching somewhere in the middle of the fight, and might have missed the beginning. This problem, however, can easily be solved.

First, because UFC PPV has become purely digital,[131] it would not be difficult for ESPN+ to provide a notification on the customer's device letting

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127. Carl Bjurling, *The Inevitable Cycle of Business is that Strengths Become Weaknesses*, Medium: Data Driven Investor (Oct. 23, 2018), https://medium.com/datadriveninvestor/the-inevitable-cycle-of-business-is-that-strengths-become-weaknesses-efe9112b9c4b [https://perma.cc/E58A-ZAAN].

128. Kim, *supra* note 25, at 57.

129. Jordan T. Smith,*: Fighting For Regulation: Mixed Martial Arts Legislation in the United States*, 58 Drake L. Rev. 617, 636 (2010).

> "A bout can end by: 1) submission, which is when a competitor signals either physically or verbally that he does not wish to continue; 2) a technical knockout, where the referee stops the contest; 3) a knockout, when a competitor fails to rise from the canvas; and 4) a decision, where the contest has gone the full number of rounds and the winner is determined by totals on the panel of judges' scorecards. Additionally, a referee may stop a contest in the interest of safety for a number of reasons, including: 1) if he determines that one of the competitors has sustained an injury; 2) if the contest is too one-sided and a competitor is at risk of injury; or 3) if one of the competitors is deemed not to be honestly competing." *Id.*

130. For example, UFC fighter Duane Ludwig holds the record for fastest knockout record in the UFC for his win over Jonathan Goulet at UFC Fight Night 3. *See* George Mills, *Crash, Bang Wallop: The Five Fastest Ever Knockouts in UFC History*, Daily Star Sunday (Oct. 20, 2017, 1:49 PM), https://www.dailystar.co.uk/sport/ufc/653888/UFC-news-fastest-ever-knockouts-Gdansk-stream-video-Darren-Till-Cowboy-Cerrone [https://perma.cc/9JKX-LMWD].

131. Russ, *supra* note 29.

them know when their fight was starting. Second, many customers actually seem to prefer the practice of timeshifting, which would render the live nature of the fight obsolete.[132]

D. *Casual vs. Die-Hard Fans*

Finally, the question must be asked: will unbundling have any meaningful impact on die-hard fans? Most viewers of sports are considered casual fans.[133] A casual fan might be defined as viewing a sporting event strictly as a form of entertainment.[134] By contrast, a die-hard fan puts a tremendous amount of investment into his or her fandom.[135] From an economic standpoint, these two types of fans have different price elasticities of demand.[136] Casual fans most likely have elastic demand curves for viewing the UFC, as they will be more responsive to changes in price. In contrast, die-hard fans, who most likely have inelastic demand curves for viewing the UFC, will be less responsive to changes in price.[137] This is due to the fact that the most important determinant of a consumer's price elasticity of demand is the availability of substitutes.[138] For a die-hard UFC fan, there are not as many substitutes to watching the UFC as there would be for a casual fan who has many other sports that they may enjoy watching.

Therefore, it is likely that unbundling the PPV model would have the biggest effect on casual fans. Still, as evidenced by former UFC fighter Brendan

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132. One court defined "time-shifting" as watching a televised copyrighted audiovisual work, in its entirety, at a later time. Ned Snow, *The TIVO Question: Does Skipping Commercials Violate Copyright Law*, 56 Syracuse L. Rev. 27, 81 (2005) (referencing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 449 (1984)).
133. Jason Mays, *Fan Loyalty and Motivation*, UNLV Theses, Dissertations, Professional Papers, and Capstones, 1348, 1349 (2012).
134. *Id.*
135. *Id.* Die-hard fans may subscribe to magazines, websites, or blogs. *Id.* They may also purchase merchandise and travel long distances to see live events. *Id.*
136. Price elasticity of demand is defined as the "proportional effect on the quantity demanded of a proportional change in price." Richard A. Posner, Economic Analysis of Law § 9.1 (9th ed. 2014).
137. *Id.* A perfect illustration of this concept was former UFC heavyweight and MMA podcaster Brendan Schaub's experience purchasing the UFC's first PPV event via ESPN+. *See* Milan Ordoñez, *Schaub: UFC 'Lost so many Casual Fans' with 'Two Paywalls' and Problematic ESPN+ PPV Stream*, Bloody Elbow (Apr. 19, 2019, 1:00 PM), https://www.bloodyelbow.com/2019/4/19/18507211/brendan-schaub-ufc-lost-so-many-casual-fans-with-problematic-espn-plus-stream-ufc-236-mma-news [https://perma.cc/SYM5-6ZA4]. After approximately $80 to purchase UFC 236, Schaub detailed the technical problems he experienced by purchasing it through ESPN+. *Id.* After attempting to troubleshoot the problem, Schaub clicked on an illegal link that his followers sent him on social media. *Id.* Schaub, a self-described die-hard fan, perfectly illustrated that casual fans have much more elastic demand curves for view the UFC by stating "[the UFC] just lost so many casual fans. Cause you know what my dad did when I couldn't figure it out? He went, 'Who cares? Oh it's too much. I'm out.'" *Id.*
138. Enrique Guerra-Pujol & Orlando I. Martínez-García, *Does The Prisoner's Dilemma Refute the Coase Theorem*, 47 J. Marshall L. Rev. 1289, 1311 (2014).

Schaub's UFC 236 experience,[139] while a die-hard fan may be more likely to stick with a legal stream than a casual fan, it is possible for a die-hard fan to reach a tipping point where they may decide to "go over to the dark side" and watch an illegal live stream. Thus, while the unbundling model could primarily target casual fans, die-hard fans may also benefit. Additionally, because casual fans make up the bulk of the UFC fan base, a business model that primarily targets casual fans will be advantageous for the UFC's bottom line.

V. Application to Other Businesses

A. *Other MMA Promotions*

While the UFC is arguably the world's largest MMA organization,[140] there are a number of other promotions that also show MMA fights on a wide variety of platforms. One such platform, Bellator, is widely regarded as the UFC's main competitor.[141] Owned by entertainment giant Viacom, Bellator broadcasts its fights on TV via the Paramount Network, as well as the streaming service DAZN.[142] For a monthly fee, subscribers can view a variety of sporting events including the monthly Bellator events.[143] Bellator follows a similar model to the UFC with monthly fight cards that feature a preliminary fight card that is viewable through the Bellator website, and then a main card that is viewable on cable TV or online.[144] Because Bellator bundles its fights via a streaming service, it would be entirely possible to offer an unbundled streaming service as advocated by this Comment.

In addition to Bellator, the UFC competes with the Professional Fighters League (PFL).[145] Unlike the UFC and Bellator, the PFL follows a format

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139. Ordoñez, *supra* note 137.
140. Black, *supra* note 2, at 742.
141. Alan Dawson, Scott Coker Explains why Bellator is Ready to Top UFC as the Biggest Company in Cage Fighting, Business Insider (Jul. 23, 2017, 3:39 AM), https://www.businessinsider.com/scott-coker-bellator-ufc-mma-2017-5 [https://perma.cc/5WBW-2LHG].
142. *See* Bellator (last visited Apr. 28, 2019), http://www.bellator.com/about [https://perma.cc/7G3L-UPVG]; DAZN (last visited Apr. 28, 2019), https://my.dazn.com/help/about-dazn-de [https://perma.cc/T3FZ-66D9].
143. Lance Pugmire, *DAZN to Raise Monthly Price and Offer New Annual Pass*, L.A. Times (Mar. 21, 2019, 10:30 AM), https://www.latimes.com/sports/boxing/la-sp-dazn-raises-price-20190321-story.html [https://perma.cc/LLS9-YUQ6]. "While current subscribers paying the original $9.99 monthly fee that was set at DAZN's U.S. debut last year can continue in that model for one year, the service will alter its monthly fee to $19.99 for new subscribers next week while instituting a new $99.99 annual plan." *Id.*
144. *See Events*, Bellator (last visited Apr. 28, 2019)., http://www.bellator.com/events [https://perma.cc/HT2K-3RCD].
145. Kurt Badenhausen, *The New Fight Game: How An MMA Startup Wants to Capture The Sport's 450 Million Global Fans*, Forbes (Dec. 28, 2018, 6:00 AM), https://www.forbes.com/sites/kurtbadenhausen/2018/12/28/the-new-fight-game-how-an-mma-start-up-wants-to-capture-the-sports-450-million-global-fans/#a5e1ceb139e8 [https://perma.cc/BRW6-C75G].

used in professional sports leagues like the NBA and NFL, where there are established playoff and championship seasons.[146] Fans can view PFL fights via Facebook Watch, the social media firm's video on-demand service, as well as cable TV on the NBC Sports Network.[147] Because the PFL does not charge a fee to view their fights online, the PFL functionally offers an unbundled business model where viewers can choose which fights they wish to see.[148] It will be interesting to evaluate the Facebook Watch data, and analyze viewers' consumption habits to determine if viewers commonly watch entire fight cards, or only opt to see particular fights.

Outside of the United States, ONE Championship is Asia's largest MMA organization.[149] Like the PFL, ONE Championship streams its fights for free via their online app, obtaining most of their revenue from live events and advertising.[150] As with the PFL, offering their fights for free online functions as an unbundled business model, and an analysis of the viewing habits of their customers will be very interesting in years to come.

B. *Boxing*

After airing boxing for forty-five years, HBO recently announced that it will no longer air professional boxing events.[151] HBO Sports executive Peter Nelson made the decision in response to audience research that suggested that the availability of boxing programming was "no longer a determinant factor for subscribing to HBO."[152] Despite this, other television networks have reached deals with boxing promotions to air fight cards.[153] As boxing promotions are currently in a shake-up, with various promoters looking to ink deals

146. *See id.*
147. *Id.*
148. *See id.*
149. Brian Mazique, *ONE Championship And the UFC Represent Global Duopoly in Martial Arts*, Forbes (Aug. 20, 2018, 11:53 AM), https://www.forbes.com/sites/brianmazique/2018/08/20/one-championship-and-ufc-represent-global-duopoly-in-martial-arts/#60dda9ab43d4 [https://perma.cc/F4F4-LSF5].
150. Jesse Holland, *ONE Championship App Lets You Watch Live MMA Events—For Free—Anywhere in the Word*, MMA Mania (May 4, 2018, 11:49 AM), https://www.mmamania.com/2018/5/4/17319584/one-championship-app-lets-you-watch-live-mma-events-free-anywhere-in-world [https://perma.cc/N35R-T4B7].
151. Wallace Matthews, *HBO Says It Is Leaving the Boxing Business*, N.Y. Times (Sep. 27, 2018), https://www.nytimes.com/2018/09/27/sports/hbo-boxing.html [https://perma.cc/N34T-S4E9].
152. *Id.*
153. *Id.* Fox Sports signed a four-year deal with Premier Boxing Champions. *Id.* "Matchroom Boxing recently signed a $1 billion deal with DAZN (pronounced "Da-Zone"), a new digital platform, to televise fights over the next eight years." *Id.* In August 2018, ESPN completed a seven-year deal with fighter promotion Top Rank to present 54 boxing shows on its various networks, including ESPN+. *Id.* Additionally, "Showtime, whose fights were once used as a feeder system by HBO, presented 22 live boxing events in 2018 . . . [and] has committed to a 'more robust schedule for 2019.'" *Id.*

with various television and online networks, it seems to be a prime opportunity to thwart the traditional bundled PPV model with one advocated by this Comment.

C. *Cable Television Series*

Premium cable television networks have also experienced online piracy concerns. By offering streaming services, these companies have essentially unbundled the traditional cable television model, but not entirely.[154] While subscribers pay a far more modest monthly fee to stream programming than they otherwise would with a traditional cable TV service, these subscribers still have access to the entirety of the network's video library, much of which includes programming that subscribers are likely not watching. These premium cable television networks may be served well by offering consumers the option to purchase an entire season of a show rather than only offering a subscription to the network's entire library of programming, thereby unbundling their own subscription service. Indeed, companies like Amazon offer consumers the ability to purchase previous seasons of television shows.[155] This service, however, only applies to previous seasons, and not currently airing seasons.[156] Because some consumers are unwilling to purchase a monthly subscription for the cable television service to view currently airing seasons of a television show, many have turned to illegal streaming.[157] Instead, illegal streaming may be curbed by allowing consumers to purchase individual episodes of the most current season of a show, or by allowing consumers to purchase the entire season and watch along with those who have a cable television online subscription.[158] Additionally, in the advent of social media, the law of diminishing marginal utility also comes into play[159]: just like a UFC fan would rather see a knockout in realtime and not a replay, a Game of Thrones fan, for example, would

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154. *See id.*

155. *See, e.g. Westworld Season 2*, Amazon (last visited Apr. 24, 2020), https://www.amazon.com/Phase-Space/dp/B079LF4JPK/ref=sr_1_2?dchild=1&keywords=purchase+westworld+season+2&qid=1587774205&s=instant-video&sr=1-2 [https://perma.cc/MP5C-YHTJ]. The most recent complete season of *Westworld* can be purchased on Amazon for $3.99 per episode. *Id.*

156. *See, e.g.*, *Westworld Season 3*, Amazon (last visited Apr. 24, 2020), https://www.amazon.com/gp/video/detail/B07RYFVFKG/ref=atv_dp_season_select_s3 [https://perma.cc/X9KE-5V67]. By contrast, individual episodes of the current, third season, cannot be purchased. *Id.* Fans must purchase an HBO subscription for $14.99 per month. *Id.*

157. Sterbenz, *supra* note 99.

158. *Id.*

159. Because so many viewers of *Game of Thrones* posted about the most recent episode on social media, Google enabled the ability for users to black out any social media posts mentioning the show. Robert Moran, *How to Avoid Game of Thrones Spoilers*, Sydney Morning Herald (Apr. 15, 2019, 11:38 AM), https://www.smh.com.au/entertainment/tv-and-radio/how-to-avoid-game-of-thrones-spoilers-20190415-p51e8e.html [https://perma.cc/62VA-ER3H].

prefer to learn that Jon Snow is banished to the Night's Watch to appease the Unsullied rather than reading it on social media . . . or in an academic paper.[160] With a typical TV season lasting a few months, fans who do not wish to purchase a subscription to a cable television online service would have to severely restrict their social media, (as well as their offline social interactions) and wait until a service like Amazon offers the season for purchase. Is it any surprise that these fans are turning to illegal streaming? Therefore, by applying the UFC PPV unbundling model advocated by this Comment, these cable television networks could experience increased revenue that would otherwise be lost to illegal online streaming.

Conclusion

Before each fight, Bruce Buffer, billed by the UFC as the "Veteran Voice of the Octagon" always hypes up the crowd with his signature catchphrase "It's Time!"[161] Indeed, it is time for the UFC to thwart illegal live streaming of their fights by offering customers an unbundled PPV option. While there will be tradeoffs to this approach, this Comment demonstrates that an efficient allocation of economic resources favors unbundling.

Additionally, this same approach may also be applicable to other MMA platforms, premium cable television networks, and professional boxing. Bruce Buffer's brother, legendary fight announcer Michael Buffer, has begun countless boxing matches with his catchphrase, "Let's Get Ready to Rumble!"[162] Perhaps now we should say, "Let's Get Ready to Unbundle!"

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160. According to Vulture, the statute of limitations for spoilers of narrative TV shows allowed within the text of an article is the day after the show runs in its normal time slot. Dan Kois, *Spoilers: The Official Vulture Statute of Limitations*, N.Y. Mag. (Mar. 13, 2008), https://www.vulture.com/2008/03/spoilers_the_official_vulture.html [https://perma.cc/T6XB-EYZX]. Because this Comment refers to the series finale of *Game of Thrones*, which aired on May 19, 2019, the statute of limitations on spoilers has not been violated. *Id*.

161. Kelsey Borresen, *UFC Announcer Bruce Buffer Gives Couple The Ultimate Wedding Entrance*, HuffPost (May 22, 2014, 3:41 PM), https://www.huffpost.com/entry/bruce-buffer-wedding_n_5374400 [https://perma.cc/5QW4-UWAB].

162. Charles Curtis, *Michael Buffer on his Signature Phrase and Losing his Voice Before Mayweather-Pacquiao*, USA TODAY (Dec. 11, 2018, 2:09 PM), https://ftw.usatoday.com/2018/12/michael-buffer-lets-get-ready-to-rumble-origin-canelo-rocky-muhammad-ali-interview [https://perma.cc/7PZA-L94G].