

# PROFESSIONAL SPORTS

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and the **LAW**

## Nimble Pro Sports Organizations Have Opportunity to Exploit Alternative Revenue-Generating Content Initiatives

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Professional sporting events are one of the few remaining entertainment sources providing live and gripping entertainment. The live nature of sports, and the volume of spectators who view live sports in real time, provides immense opportunity for lucrative, innovative and expansive media rights agreements. For example, Super Bowl LIV had roughly 113.4 million live viewers, generating sponsorship revenue totaling hundreds of millions of dollars. However, with the growing pandemic of COVID-19 (coronavirus), all domestic sporting events have been canceled, postponed or delayed, which has abruptly upended the typical revenue model of most sports organizations.

Not surprisingly, domestic leagues, teams and relevant stakeholders are searching for creative and innovative ways to exhibit live sporting events. Fans across the various leagues are eager to attend live events as soon as possible, and to view live events in real time across different platforms. As a result, organizations will undoubtedly develop solutions to appropriately accommodate this eagerness, as they have proven to be hallmarks of creativity that adapt and thrive in all climates. The current and temporary lack of live sports presents an opportunity for players, teams and leagues to engage fans through other outlets.

The popularity of the sports industry cuts across all demographics, and, in the past, the industry has proven its ability to persevere in uncertain times. Still, the industry needs to be thoughtful and creative when sourcing alternative revenue opportunities to convert at least a portion of such opportunities beyond the stop-gap to the current lack of revenue into permanent fixtures of the sports programming landscape even after live sporting events resume. Ensuring continuity of novel content will provide a long-term opportunity for sports organizations to ensure a stream of revenue into the future.

### Legal Considerations and Revenue Opportunities

With no ticket sales or other game-day revenues (e.g., concession sales, memorabilia sales, parking, etc.) and reduced media opportunities, teams and leagues need to be creative and provide alternative content options through a variety of mediums. We have highlighted options for industry decision-makers to stop-gap cash flow shortages and benefit from high demand for content.

**Archived Content:** Archived content has significant value due to fans yearning for sports and lack of other sports entertainment options. According to Statista, 37% of the U.S. public listed “classic games” as preferred alternative content to live sports – likely attributable to the nostalgia of fans. The desire for this content was exemplified in the record-breaking debut of the first two episodes of the ESPN documentary series “The Last Dance”, covering Michael Jordan and the 1997-1998 season of the Chicago Bulls dynasty. According to ESPN, the premiere of the first two episodes of the documentary series averaged 6.1 million viewers, which is the most-viewed documentary in ESPN’s history.

Moreover, additional creative opportunities may exist for archived content, such as having current or former players or coaches providing live commentary while viewing classic games. This will bring a new and enhanced user experience (e.g., David Cone providing commentary on his 1999 perfect game or Johan Santana providing similar commentary for his no-hitter in 2012). The content can also be repackaged into a new form, such as a compilation video of the greatest highlights and iconic moments from various sports.

Leagues provide archived and additional content to fans through paid streaming services (e.g., ESPN+ and MLB.TV), and now is the perfect time to offer free trials for these products to fans as an opportunity to permanently acquire customers. If the content proves to be of high quality, there is little risk of churn after the season resumes. For example, NFL Game

Pass is free to customers until May 31, 2020, which includes access to every game from the 2009-2019 seasons as well as additional content. Leagues may capitalize on the seemingly endless opportunities of highlighting, editing and enhancing archived content, thereby opening new streams of revenue from an existing source.

**Player Interactions:** Social media has eliminated the barriers that once stood between athletes and fans. As the country practices social distancing, an opportunity has arisen for athletes to communicate directly with their peers in a public forum. Players are now using this newfound time to interact with other players and/or fans on Instagram Live and other social media platforms in greater numbers and with greater frequency. In the last month, Steph Curry and Chris Paul have shared previously untold stories of their on-court experiences and have reacted to famous moments in NBA history. Teams have also begun to leverage their social communities and remain in the public eye. The Miami Heat have hosted players on the team Instagram Live, during which Heat players discussed various questions and topics submitted by their fans. Such opportunities promote personal interactions and enable fans to feel connected to the individuals and organizations they support so passionately. In a time when people are craving some semblance of human interaction, sports fans seek to maintain a connection with the athletes, teams and leagues that used to fill their news feeds, conversations and television screens.

**Coordinated Production Opportunities:** Interest and excitement have been growing around coordinated production opportunities where leagues and teams can display new content in a safe and innovative manner. The NBA has created the NBA HORSE competition including NBA and WNBA players, both current and retired. This media embodies the inherent competitive nature in sports, while also cultivating nostalgia of childhood games with friends. This creative marriage between sports and commonly experienced and relatable memories provides welcomed entertainment to sports fans. Other leagues could similarly create skills competitions and trick shot challenges but must be mindful of putting forth an idea with exceptional levels of creativity and buzz necessary to generate viewership. If successful, this opportunity not only creates content for leagues but also allows players to build their own brand, especially retired athletes who are looking for revenue-generating opportunities themselves as they move away from their respective game.

**Player Personnel Decisions:** A growing facet of sports content is player personnel decisions. The NBA free agency period, which encompasses trades, signings and releases, is an annual whirlwind that has grown each year with mounting

excitement. Teams should use this opportunity to highlight player personnel decisions and discuss the ins-and-outs of the decision-making process, the calculus in making such decisions and information they may share after such decisions are made. The largest free agency buzz in recent weeks was Tom Brady signing with the Tampa Bay Buccaneers. The Buccaneers General Manager discussed the signing on ESPN's Get Up and shared certain insights on Tom Brady's thought process during the signing period. Roster decisions are constantly at the forefront of a team's focus; as such, a weekly series revealing non-confidential decisions and underlying revelations would be warmly welcomed by fan bases.

**Involvement with Esports:** Business Insider Intelligence estimated that total esports viewership was expected to grow from 454 million in 2019 to 646 million in 2023. Esports has



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grown into the mainstream as a standalone form of sports competition with viewership on online streaming media platforms (e.g., YouTube, Twitch and Mixer). In recent years, even more traditional sports organizations have entered the growing esports space to generate other revenue streams, including the New York Yankees' equity investment in Vision Esports, a holding company that invests in esports businesses.

More recently, teams and leagues have sought opportunities to merge with esports and provide novel media content. Examples of these opportunities include, among others, the eNASCAR iRacing Pro Invitational Series, an NBA 2K20 tournament and MLB The Show league. According to Sports Illustrated, the Dixie Vodka 150 at virtual Homestead-Miami Speedway was the single most-watched esports event in U.S. history, drawing 903,000 viewers on FS1. Unlike competitions on Madden or NBA 2K20, iRacing allows the athletes to use gaming controls in the esports competition that are similar – or at least comparable – to their customary equipment used in their day-to-day professional lives (e.g., steering wheel, gas pedal, etc.). The quality of the esports competition that results by virtue of such familiarity with the gaming controls could be recreated; other sports leagues could leverage technology to provide a similar experience for its athletes, such as PGA TOUR athletes playing a full round together on golf simulators. Although development could take longer than the length of the pandemic, engagement with esports represents potential revenue drivers – both during the regular season and offseason – that outlast the temporary absence of live sports programming and would ensure continuity of content for the long term.

### Legal Ramifications

While focusing on ways to increase cash flow and revenue, teams and leagues must also be aware of potential legal ramifications due to COVID-19.

**Force Majeure:** Force majeure clauses are commonly found in commercial agreements and provide that, under specified conditions, a party's contractual performance is excused due to circumstances beyond such party's control. Determination of whether COVID-19 is captured in a force majeure clause requires an analysis of the specific provision and the governing law under which the contract is subject. Lawsuits brought under this doctrine are likely to rise, and it remains to be seen whether courts will implement a strict or liberal interpretation of what constitutes a force majeure under a specific contract. Typically, the State of New York generally construes force majeure provisions narrowly to cover only those events expressly listed in such clauses.

**Employment and Liquidity Considerations:** As a result of cash flow shortages related to the short-term disruption in live sports programming, organizations find themselves in delicate positions with respect to whether they should pay players, managers and employees while games are canceled and postponed. The decisions for many players will be determined by the relevant collective bargaining agreement and the interpretation of the force majeure clause, if applicable. The revenue shortage can be weathered by drawing on the team's credit facility, a debt instrument available to most teams, capital calls from team equity owners and/or potential payments from insurance policies.

**Positive and Long-Lasting Agreements:** Media rights agreements are often entered into between parties that enjoy an ongoing and valuable relationship. Although current payments under these contracts may be halted due to lack of revenue on the part of the teams or leagues, the potential revenue drivers, detailed above, can help mitigate cash flow shortages and supplement required payments. Stakeholders on both sides of these agreements must mutually focus their resources to formulate work-arounds in order to be prepared to continue the symbiotic relationship when sports eventually resume.

Certain contracts may include make-whole benefit provisions, which will permit the parties to mutually agree on a substitute or replacement benefit close to equivalent value. Negotiations and necessary amendments to agreements may take place to ensure that both parties are financially strong and responsible in the coming months. Given the publicity and goodwill of being associated with a team or a league, commercial solutions are superior and more desirable than resorting to litigation or other third-party dispute resolution processes.

### Creativity and Perseverance are Key

While organizations develop creative and accommodating solutions in an effort to restore fan confidence to attend live sporting events, the importance of providing popular alternative content is growing. It will not be the largest brands or teams and leagues with the most dedicated fan bases that will thrive once this pandemic subsides; it will be those organizations that are ready and able to adapt to this change and take advantage of alternative opportunities.

In this trying time, a sense of community is more important than ever. Sports is the epitome of community, of being a part of something bigger than oneself. Sports will weather the storm, rebound, and even flourish by considering intelligently and creatively all revenue opportunities as well as the legal risks and challenges ahead. ●