

MONOPOLIZING SPORTS DATA

MARC EDELMAN* & JOHN T. HOLDEN**

ABSTRACT

With legal sports betting viewed as a panacea for state budget woes across the United States, the underlying data that fuels the sports betting industry has emerged as an especially valuable asset. In the hopes of capitalizing on state laws that have now legalized sports betting, United States professional sports leagues have attempted to gain exclusive ownership rights over valuable sports betting data by asking legislators to mandate that bookmakers exclusively use data sold through the league. In addition, some sports leagues have imposed policies mandating that teams bundle together their collected data for purposes of selling it exclusively through the league to third parties, and, on the league level, compiling sports data rights with other desirable league rights—all with the hopes of allowing the league to gain control over all data pertaining to their sport, and thus, indirectly, sports betting.

These efforts by the United States professional sports leagues to potentially monopolize sports data markets raise novel questions both in terms of who, if anyone, owns the property rights to sports data and what efforts, if any, are needed to prevent sports leagues from improperly gaining control over sports data markets. This Article proposes that the United States professional sports leagues' recent attempts to collectivize the sale of sports game data and prevent non-league-affiliated entities from competing in the markets to collect, aggregate, and resell game data gives rise to both legal and policy concerns under federal antitrust laws. In particular, this

* Professor of Law, Baruch College, Zicklin School of Business, City University of New York; Adjunct Professor, Fordham Law School, Email: Marc@MarcEdelman.com.

** Assistant Professor of Law, Spears School of Business, Oklahoma State University.

Article analyzes whether the league-wide sale of sports game data should be viewed as a form of collusion among individual sports teams that may potentially violate section 1 of the Sherman Act, and whether league-wide efforts to secure exclusive rights to sell sports game data should constitute a potential form of exclusionary conduct under section 2 of the Sherman Act.

TABLE OF CONTENTS

INTRODUCTION	73
I. A BRIEF HISTORY OF SPORTS INFORMATION	77
<i>A. Basic Scorekeeping.</i>	78
<i>B. Early Distribution Era</i>	81
<i>C. Advanced Analytics</i>	83
<i>D. Future of Sports Data</i>	86
II. USES FOR SPORTS DATA	87
<i>A. Player Performance</i>	88
<i>B. Scouting</i>	90
<i>C. Fantasy Sports and Gambling</i>	92
1. <i>The Fantasy Sports Industry</i>	93
2. <i>The Gambling Industry</i>	95
III. THE LACK OF INTELLECTUAL PROPERTY RIGHTS IN SPORTS DATA	101
<i>A. Pure Game Data.</i>	101
1. <i>Patents</i>	102
2. <i>Trademarks</i>	102
3. <i>Copyright</i>	104
4. <i>Trade Secrets</i>	105
5. <i>Common Law Property Rights.</i>	106
<i>a. The Right of Publicity</i>	106
<i>b. Misappropriation</i>	107
<i>c. New Property Rights Derived from State Gambling Statutes</i>	108
<i>B. Already Collected and Aggregated Data.</i>	109
IV. ANTICOMPETITIVE RISKS OF LEAGUE-WIDE SPORTS DATA LICENSING AGREEMENTS	112
<i>A. Concerted Action</i>	115
<i>B. Competitive Effects Analysis</i>	117
1. <i>General Standards of Review</i>	118
2. <i>Legal Precedent.</i>	119
3. <i>Likely Competitive Effects of Centralized League Data Policies.</i>	122
4. <i>Antitrust Exemptions and Other Mitigating Factors</i> . .	127
V. THE MONOPOLIZATION OF SPORTS DATA	128

<i>A. Do Sports Leagues Have Monopoly Power Over Any Relevant Market?</i>	130
<i>B. Do Sports Leagues' Data Policies Entail Exclusionary Conduct?</i>	132
CONCLUSION	134

INTRODUCTION

Data is the fuel that powers the sports betting industry.¹ In recent years, sports betting has become increasingly reliant on technology.² The demand for faster, more accurate, and more robust data by bookmakers and bettors began in the 1980s and has continued to increase through today.³ While both the legal and illegal betting markets rely on data with the same features, the recent expansion of legal sports betting in the United States in the wake of the Supreme Court's decision in *Murphy v. National Collegiate Athletic Ass'n*,⁴ has spurred the industry as a whole and made data an investible resource.⁵ The recent expansion of legalized gambling into more than twenty states transpired so rapidly that a few well-positioned companies, with the help of professional sports leagues, have acquired dominant market positions while others are playing catch-up.⁶ The ability for states to legalize sports betting marked a turning point for sports leagues that had long opposed legalized betting, and it even fueled the lawsuits that eventually resulted in the repeal of the Professional and Amateur Sports

1. See James Glanz & Agustin Armendariz, *When Sports Betting Is Legal, the Value of Game Data Soars*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/sports/sports-betting.html> [<https://perma.cc/HCJ2-ZVED>] (describing the role that data plays in “feeding betting sites”).

2. *Id.*

3. *Id.*

4. 138 S. Ct. 1461, 1484-85 (2018).

5. One sports data company was valued at \$2.4 billion in 2018 and attracted investments from Washington Wizards owner Ted Leonsis, Dallas Mavericks owner Mark Cuban, and NBA star Michael Jordan. Dustin Gouker, *Sports Data Company Sportradar Now Valued at \$2.4 Billion with New Investors*, LEGAL SPORTS REP. (July 9, 2018), <https://www.legalsportsreport.com/21837/sportradar-deal-2-4-billion-valuation/> [<https://perma.cc/25GJ-9VBL>].

6. For instance, in less than a year following the Supreme Court's *Murphy* decision, two sportsbook operators, FanDuel and DraftKings, had acquired 83 percent of the market share in New Jersey. Alex Sherman, *Legal Gambling from Your Phone Could Be a \$150 Billion Market, but Making It Happen Will Be Tough*, CNBC (Apr. 29, 2019, 4:07 PM), <https://www.cnbc.com/2019/04/27/fanduel-draftkings-race-to-win-150-billion-sports-betting-market.html> [<https://perma.cc/X65D-D48H>]. Relatedly, as a few sportsbooks were gaining a dominant market position, so too were data suppliers, with one supplier purportedly acquiring 90 percent of the sports betting data market in New Jersey by March 2019. Matt Rybaltowski, *As Offshore Books Operate Unchecked, Demand for Sports Betting Data Knows No Boundaries. That's an Issue*, SPORTSHANDLE (Mar. 19, 2019), <https://sportshandle.com/sports-betting-data-distribution-offshore-sportsbooks/> [<https://perma.cc/B5RS-NGGP>].

Protection Act (PASPA), which allowed states to begin legalizing the practice.⁷ Sports leagues have not so quietly begun seeking to gain a piece of the sports betting pie, first demanding that jurisdictions legalizing sports betting pay the leagues a so-called integrity fee,⁸ before pivoting to having legislators mandate that bookmakers use data that is sold by league partners.⁹ These mandates are only the most recent efforts by sports leagues to consolidate control of information resulting from games they facilitate.¹⁰

The major American professional sports leagues have long faced opposition to their efforts to collectivize and sell team rights as a bundle.¹¹ The emergence of legal sports gambling has created a rush to parcel and sell a new item under a single umbrella—game data.¹²

7. See generally John T. Holden, *North American Sports Leagues and Gambling Policy: A Comparative Analysis*, 14 INT'L SPORTS L.J. 242, 242 (2014) (describing historical opposition from the major American sports leagues to sports gambling liberalization policies in the United States and Canada).

8. See John Holden & Mike Schuster, *The Sham of Integrity Fees in Sports Betting*, 16 N.Y.U. J.L. & BUS. 31, 37 (2019) (noting that the first bill to include an integrity fee appeared in January 2018, before the Supreme Court decision in *Murphy*, and would have mandated that all wagers placed in Indiana result in effectively 1 percent of the amount wagered being remitted to the relevant league).

9. See John Holden, *Can Leagues Own Data Rights When It Comes to US Sports Betting?*, LEGAL SPORTS REP. (May 28, 2018), <https://www.legalsportsreport.com/20745/leagues-and-fees-in-sports-betting/> [<https://perma.cc/T2RD-DLF7>] (noting the sports leagues' transition from demanding integrity fees to mandating the use of official league data providers for certain types of wagers).

10. Sports leagues have a long history of attempting to control the use and dissemination of information derived from sporting events. See generally Marc Edelman, *Lack of Integrity? Rebutting the Myth That U.S. Commercial Sports Leagues Have an Intellectual Property Right to Sports Gambling Proceeds*, 15 N.Y.U. J.L. & BUS. 1, 5-7 (2018) (describing efforts to use copyright protections to assert ownership over sports information).

11. Marc Edelman, *Sports Data Policies Could Represent Next Big Antitrust Challenge for Pro Sports Leagues*, FORBES (June 10, 2019, 9:30 AM), <https://www.forbes.com/sites/marc-edelman/2019/06/10/sports-data-policies-could-provide-next-big-antitrust-challenge-for-pro-sports-leagues/> [<https://perma.cc/8J7F-SCNZ>]; see, e.g., *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 187-88 (2010); *In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d 1136, 1145 (9th Cir. 2019), cert. denied, 141 S. Ct. 56 (2020); *Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 596-97 (7th Cir. 1996); *Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465, 471 (S.D.N.Y. 2012). Previous lawsuits have centered on broadcast rights, media rights, and merchandise sales. See *Chi. Pro. Sports*, 95 F.3d at 595 (broadcast rights); *Madison Square Garden v. Nat'l Hockey League*, No. 07 CV 8455, 2008 WL 4547518, at *4 (S.D.N.Y. Oct. 10, 2008) (media rights); *Am. Needle*, 560 U.S. at 187 (merchandise sales).

12. Edelman, *supra* note 11; Eric Ramsey, *'Data Monopoly' Key to Leagues' Desired Control over US Sports Betting*, LEGAL SPORTS REP. (Mar. 22, 2018), <https://www.legalsports>

To increase revenue, some leagues are using data distribution partners to notify users who do not agree to increased fees that they may be cut off.¹³ The efforts by various sports leagues to exert pressure on data purchasers to pay increased fees raise important antitrust questions for the regulators and consumers who will ultimately bear the burdens of increased supply costs.¹⁴

Recent efforts to raise revenue by sports leagues like the National Basketball Association (NBA), Major League Baseball (MLB), and the Professional Golfers' Association Tour (PGA Tour) have centered on using their official data partners to extract rents from sportsbook operators who rely on fast, accurate, and reliable data, while lobbying legislators to mandate that sportsbooks use only official data.¹⁵ The result of this double barreled approach is a stifling of competition in the market for sports data.¹⁶ While the sports leagues appear to be granting nonexclusive licenses to a small handful of data brokers, this is likely nothing more than an illusion of competition in the data market.¹⁷ As long as the sports leagues control the spigot of data that is disseminating the information to select providers, the leagues are able to dictate pricing and other conditions antithetical to a robust and free market.¹⁸ The sports leagues' desire to control sports data, despite the lack of an intellectual property right in much of the data itself, has been referred to as

report.com/19047/data-monopoly-key-to-leagues-controlling-sports-betting/ [https://perma.cc/H9PU-BVXA].

13. Matt Rybaltowski, *Shakedown Fees: NBA, MLB Demanding Nevada Sportsbooks Pay More or Get Cut Off*, SPORTSHANDLE (May 2, 2019), <https://sportshandle.com/nba-mlb-demands-data-fee-nv-sportsbooks/> [https://perma.cc/7V3X-AJHK] (describing sports league efforts, via data distributors, to raise the fees paid by sportsbook operators for league data).

14. See Edelman, *supra* note 11.

15. At present, sports leagues have only been successful in securing limited mandates requiring the use of official data. See Rybaltowski, *supra* note 13. For instance, Illinois, Tennessee, and Michigan have mandated the use of official league data for some bets that occur during the course of a game. Craig Mauger, *Pro Leagues Score with Michigan's New Sports Betting Law*, DETROIT NEWS (Jan. 8, 2020, 8:10 AM), <https://www.detroitnews.com/story/news/local/michigan/2020/01/07/pro-sports-leagues-scored-michigans-sports-betting-law/2805358001/> [https://perma.cc/PJH6-HM68].

16. See Brett Smiley, *Antitrust Tripwires: Legal Expert Explains Sports Betting Data Issues*, SPORTSHANDLE (June 4, 2019), <https://sportshandle.com/sports-betting-data-antitrust/> [https://perma.cc/HU9R-7ETZ].

17. See *id.*

18. See *id.* (noting that sports leagues have strong lobbying power that may allow them to control the flow of data by virtue of legislative barriers).

“naked rent-seeking.”¹⁹ Though the leagues have only had moderate success in lobbying state legislatures to mandate official data use for certain types of wagers, this “rent-seeking” activity may eventually become protected.²⁰ However, the extension of this market position into states without mandates creates antitrust questions worth examining.²¹ Some sports leagues such as the National Football League (NFL)—a part owner of one of the data distributors—have asked that bookmakers remit a percentage of sportsbook profits to the league as part of contracts for data.²² There are collusive barriers to entry being created through official partnerships—buttressed by legislative mandates that linger beyond state borders.²³ These barriers create a significant concern for the long-term viability of an industry that is making a transition from an almost entirely illegal market to a legal and regulated market at warp speed.²⁴

This Article proposes that the United States professional sports leagues’ recent attempts to collectivize the sale of sports game data to third-party buyers and prevent non-league-affiliated entities from competing in the markets to collect, aggregate, and resell sports game data gives rise to both legal and policy concerns under federal antitrust laws. This Article proceeds in five main parts. Part I explores the history of sports game data, the historical collection of this data, and the historic sale of this data. Part II explains the wide range of uses for sports game data in the modern era, where sports gambling, traditional fantasy sports, and daily fantasy sports are all an important part of many fans’ sports experience. Part III describes the intellectual property rights (or lack thereof) that extend to pure sports game data, as well as already collected and aggregated data. Next, Part IV explores the league-wide sale of

19. Holden & Schuster, *supra* note 8, at 37 (referring to naked rent-seeking in the context of integrity fees).

20. *See* Smiley, *supra* note 16.

21. *See id.*

22. Dustin Gouker, *NFL Partner Is Asking US Sportsbooks to Pay for Official Data*, LEGAL SPORTS REP. (Sept. 1, 2019), <https://www.legalsportsreport.com/35312/sportradar-asks-for-official-data-money-for-nfl/> [https://perma.cc/4JWB-98XP].

23. *See* Smiley, *supra* note 16.

24. *See* John T. Holden & Marc Edelman, *Regulating Vice: What the U.S. Marijuana Industry Can Learn from State Governance of Sports Gambling*, 2021 U. ILL. L. REV. 1051, 1081.

sports game data as a form of collusion among individual sports teams that may potentially violate section 1 of the Sherman Act. Finally, Part V analyzes league-wide efforts to secure exclusive rights to sell sports game data. In doing so, Part V looks at the right to sell sports game data as a potential form of exclusive conduct that illegally leverages each league's shared monopoly in the market to host games in a given sport, and transforms it into a second shared monopoly in the market to collect, aggregate, and resell sports game data.

I. A BRIEF HISTORY OF SPORTS INFORMATION

Sports information is now ubiquitous, but even before the advent of modern sports analytics, people were keeping score.²⁵ However, sports information has undergone a number of transitions over the last two centuries, beginning with an era of developing a means of keeping track of final results and individual performance.²⁶ The transition from individualized scorekeeping and record keeping, to publication of sports scores in newspapers, eventually to distribution across national wire services, and then to near-instant transmission over the internet, began in the 1800s and continues to this day.²⁷ The modern era of sports information has been driven by

25. For instance, there is evidence that scorekeeping, or at least ranking of competitors, dates back to at least the Olympics in Ancient Greece, where Coroebus won the 192-meter footrace, the only event at the time. *The Olympic Games*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/sports/olympic-games> [<https://perma.cc/773G-KCVY>]; see also Holden & Schuster, *supra* note 8, at 67 (noting the “ubiquity of sports information”).

26. In the 1700s, cricketers kept score using a notching post, recording runs by marking an additional notch on a wooden post. John Thorn, *Keeping Score*, OUR GAME (Jan. 29, 2018), <https://ourgame.mlblogs.com/keeping-score-9895da4606df> [<https://perma.cc/53JA-BGHF>]. This scoring system would eventually evolve to a system in baseball where scorers use standardized scoring sheets to track the results of a game. *Id.*

27. See Ed Sherman, *The Slow Death of Baseball Box Scores in Newspapers*, POYNTER (Sept. 10, 2015), <https://www.poynter.org/reporting-editing/2015/the-slow-death-of-baseball-box-scores-in-newspapers/> [<https://perma.cc/Z5DC-JC9B>] (describing the prominence of baseball box scores in newspapers as far back as the 1800s). Wire services are used to transmit news, including sports scores, across the country (and in some instances across the globe). See *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 229 (1918). The Supreme Court described the wire service business as follows:

[The service] gathers in all parts of the world, by means of various instrumentalities of its own, by exchange with its members, and by other appropriate means, news and intelligence of current and recent events of interest

a desire to collect and then present large amounts of data in a way that yields novel insights, and in turn, this has led to the emergence of an entire subfield revolving around sports analytics.²⁸

A. Basic Scorekeeping

Before it was possible to conduct advanced analytics and develop derivative statistics yielding new insights and creating a multi-billion dollar industry, sports needed a scoring system.²⁹ The ancient Olympics crowned winners with an olive branch wrapped into a crown, and losers received nothing—a contrast to today’s Olympic system, whereby medals are awarded for first, second, and third place.³⁰ While the ancient Olympics’ winner-take-all system afforded a clear understanding of who was successful, the modern system of sports scorekeeping has evolved to utilize all varieties of interval measurement to rank teams, players, and even certain aspects of players.³¹

Scorekeeping and the publication of American sports results date back to the mid-1800s.³² In 1837, the Olympic Ball Club of Philadelphia, which played an early predecessor to baseball, mandated the use of a scorebook to record runs scored by each team in their constitution.³³ Beginning in 1845, the *New York Morning News*

to newspaper readers and distributes it daily to its members for publication in their newspapers.

Id.

28. While sports analytics is widely thought of as having its origins in the early 1970s, many became familiar with the concept after the 2003 release of Michael Lewis’s book *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME*, which chronicled the use of statistical analysis by Oakland Athletics’ general manager in order to gain a cost-effective competitive advantage. James J. Cochran, *The Emergence of Sports Analytics*, *ANALYTICS* (Feb. 1, 2010), <https://pubsonline.informs.org/doi/10.1287/LYTX.2010.01.06/full/> [https://perma.cc/2YK6-7JGT].

29. For an overview of the information that can be derived from basic sports statistics, see generally TOBIAS J. MOSKOWITZ & L. JON WERTHEIM, *SCORECASTING: THE HIDDEN INFLUENCES BEHIND HOW SPORTS ARE PLAYED AND GAMES ARE WON* (2011).

30. Jeremy Golubcow-Teglasi, *The Olympic Medal: It’s All Greek to Us!*, NAT’L ENDOWMENT HUMANS. (Nov. 13, 2009), <https://edsitement.neh.gov/lesson-plans/olympic-medal-its-all-greek-us> [https://perma.cc/HX5H-WMNA].

31. See generally BENJAMIN C. ALAMAR, *SPORTS ANALYTICS: A GUIDE FOR COACHES, MANAGERS, AND OTHER DECISION MAKERS* (2013) (providing an overview of sports analytics).

32. Thorn, *supra* note 26.

33. Alan Schwarz, *A Numbers Revolution*, *ESPN* (July 8, 2004), <https://www.espn.com/>

began publishing a predecessor to the modern box score by including a column listing each team's batters and the runs they scored, as well as the outs that they recorded.³⁴ By 1858, box scores expanded to include nine columns per player and provided additional information on how outs were recorded.³⁵

Baseball scorekeeping would evolve significantly in 1859, after an English-born cricket reporter, Henry Chadwick, changed his focus from cricket to baseball.³⁶ Chadwick, who had been hired by the *New York Times* to cover cricket, became enthralled with baseball after watching a game in 1856.³⁷ By 1859, Chadwick was covering the sport for the *New York Clipper* and the *Sunday Mercury*.³⁸ Chadwick was instrumental in evolving the box score and in introducing a variety of statistics, including runs, hits, and errors.³⁹ Eventually, Chadwick would develop other statistics as well, including the unearned run and the concept of total bases.⁴⁰ During the 1870s and 1880s, sports writers and the two prominent baseball leagues—the American League and the National League—experimented with keeping a variety of different statistics, some of which would prove to be nearly a century ahead of their time.⁴¹

Statistics and scorekeeping continued to evolve throughout the early twentieth century, and in 1912, the first register of player batting and fielding statistics was made commercially available.⁴² This would be followed by a growing number of publications in the following years.⁴³ In 1918, a pair of brothers started a sports data empire when they began selling baseball scores and statistics to newspapers and billiards halls.⁴⁴ The brothers' company, which

mlb/columns/story?columnist=schwarz_alan&id=1835745 [https://perma.cc/QG6T-WLRB].

34. *Id.*

35. *Id.*

36. *Henry Chadwick*, NAT'L BASEBALL HALL OF FAME, <https://baseballhall.org/hall-of-famers/chadwick-henry> [https://perma.cc/X3Q6-TZGM].

37. *Id.*

38. *Id.*

39. *Id.*

40. Schwarz, *supra* note 33.

41. *See id.* (noting that in 1887, the American and National Leagues counted walks as hits, a measure that is now reflected in the on-base percentage statistic, which has gained popularity in the recent analytics boom).

42. *Id.*

43. *Id.*

44. *Id.*

would become the current Elias Sports Bureau, was the official data distributor of the National League.⁴⁵ By 1941, baseball scorekeeping had become such a hobby that Ethan Allen began marketing All-Star Baseball,⁴⁶ an early predecessor to today's fantasy sports.⁴⁷

While other sports evolved much like baseball, so too did another industry that relies on sports information—the bookmaking industry.⁴⁸ Betting on sports dates back at least to the earliest Olympics.⁴⁹ It was, however, a history major from the University of Chicago who introduced a statistical tweak that allowed for a new type of wager—the point-spread bet.⁵⁰ Charles McNeil, a banker turned gambler, opened his own bookmaking operation in the 1940s.⁵¹ McNeil's system involved rating the two teams playing and then analyzing by how many points the favored team was likely to win.⁵² McNeil originally designed the point-spread for football, but would later adapt it to college basketball.⁵³ While McNeil was forced out of business by his fear of retribution by organized crime for his monopolization of the betting industry, the point-spread has been a staple of American wagering since the 1940s.⁵⁴ The emergence and early evolution of sports statistics created a following that in its most pure form—scorekeeping by hand—remains present today.⁵⁵ In a more nefarious form, sports statistics have fueled a fantasy sports and gambling world worth billions of dollars.⁵⁶ Overall, the

45. *Id.*

46. *Id.*

47. John T. Holden, Christopher M. McLeod & Marc Edelman, *Regulatory Categorization and Arbitrage: How Daily Fantasy Sports Companies Navigated Regulatory Categories Before and After Legalized Gambling*, 57 AM. BUS. L.J. 113, 125-26 (2020).

48. See Robert H. Boyle, *The Brain That Gave Us the Point Spread*, SPORTS ILLUSTRATED (Mar. 10, 1986), <https://vault.si.com/vault/1986/03/10/the-brain-that-gave-us-the-point-spread> [<https://perma.cc/G6HM-CDMS>].

49. John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates Its Most Lucrative Vice*, 2020 WIS. L. REV. 907, 910.

50. Boyle, *supra* note 48.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. See *Baseball Basics: How to Keep Score*, MLB, <https://www.mlb.com/official-information/basics/score> [<https://perma.cc/K6S6-BFGP>].

56. See John T. Holden, *Regulating Sports Wagering*, 105 IOWA L. REV. 575, 578 (2020) (describing the size of the illegal sports gambling market); see also Brian Goff, *The \$70 Billion Fantasy Football Market*, FORBES (Aug. 20, 2013, 10:01 AM), <https://www.forbes.com/sites/>

success of today's world of fantasy sports and sports gambling would not have been possible without a means for distributing the sports-related information.⁵⁷

B. Early Distribution Era

The early distribution of sports data is closely tied to the growth of sports journalism.⁵⁸ Sports journalism in the United States began in the 1820s and 1830s with an early focus on horse racing and boxing.⁵⁹ Early American sports journalism was concentrated in magazines, with newspapers only addressing sports that had a larger societal connection.⁶⁰ As newspaper marketers sought a means of appealing to a wide audience, they looked for industries that would be of wide interest—amongst them was sports reporting.⁶¹ By 1883, the *New York World* had created the first sports news department, and in 1895, the *New York Journal* was the first newspaper to dedicate an entire section to sports.⁶²

Between 1880 and 1920, coverage of sports in American newspapers grew from .04 percent to between 12 and 20 percent of the total volume of newspaper space.⁶³ The 1920s, which was dubbed the “Golden Era” of sports journalism, was when sports coverage took a narrative turn and newspapers began printing play-by-play recaps of sporting events.⁶⁴ The emergence of competing mediums like television and radio changed the way that newspapers delivered their narrative.⁶⁵ New mediums necessitated a means for reporters to file stories from road games where the reporters would travel

briangoff/2013/08/20/the-70-billion-fantasy-football-market/ [https://perma.cc/D7NA-XYAE].

57. See Goff, *supra* note 56.

58. See Brian P. Moritz, *The History of Sports Journalism (Part 1 of 3)*, SPORTS MEDIA GUY (May 9, 2017), <https://www.sportsmediaguy.com/blog/2017/5/9/the-history-of-sports-journalism-part-1-of-3> [https://perma.cc/M6JP-YXRF].

59. *Id.*

60. *Id.* (noting such events included a horse race that featured a horse from the American North and a horse from the American South).

61. *Id.*

62. *Id.*

63. Brian P. Moritz, *The History of Sports Journalism (Part 2 of 3)*, SPORTS MEDIA GUY (May 10, 2017), <https://www.sportsmediaguy.com/blog/2017/5/10/the-history-of-sports-journalism-part-2-of-3> [https://perma.cc/FXF6-4UWV].

64. *Id.*

65. *Id.*

with teams and then use Western Union telegrams to transmit their stories back to their offices to be printed.⁶⁶

Indeed, much like the Western Union telegram and telegraph systems being used for news reporting, in the early to mid-1900s there was also a rise in the use of wire services to disseminate horse racing and sports results to bookmakers.⁶⁷ The wire service allowed for the “rapid dissemination of racing information.”⁶⁸ According to a 1953 student note in the *Stanford Law Review*, the Continental Press Service facilitated the wire service that was used by bookmakers, but the service operated under the guise of being the seller of news as opposed to bookmaking information:⁶⁹

Continental did not sell information directly to the bookmakers. Its customers were news-distribution services located in different parts of the country, each having an area to serve. These distributors made arrangements with “news services” who assumed the position of subdistributors. Continental made agreements with the distributors by which it would deliver to the subdistributors. Thus the subdistributors assumed the role of creditor beneficiaries of a third-party beneficiary contract. Continental appeared to be engaged in the honorable calling of selling news. Although the news was of virtually no value to the subdistributor except for resale to bookmakers, the use to which Continental’s customers put the news could be considered their own business.⁷⁰

The Continental Press Service was, however, not the only wire service operating at the time; Western Union also provided a ticker service that delivered inning-by-inning information from baseball games around the country.⁷¹ After a battle that took more than a decade, Congress secured a bill that criminalized the use of wire services for the interstate transmission of gambling information.⁷²

66. *Id.*

67. See John T. Holden, *Through the Wire Act*, 95 WASH. L. REV. 677, 694-95 (2020).

68. Note, *Racing Wire Service*, 5 STAN. L. REV. 493, 493 (1953).

69. *Id.* at 494.

70. *Id.*

71. Holden, *supra* note 67, at 698.

72. See DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET 80-116 (2005); see also Holden, *supra* note 67, at 692-712 (providing a detailed description of the various efforts to criminalize the use of wire communication facilities to transmit

The Wire Act, passed in 1961, banned the use of interstate wire communication facilities for the transmission of information that assists in placing of bets or wagers.⁷³ The statute, however, did protect the transmission of information for use in legitimate news reporting.⁷⁴ The Wire Act would serve as a marginal impediment for the dissemination of wagering information while sports betting remained largely illegal in the United States.⁷⁵ In present times, the Wire Act appears to serve largely as an obstacle to a robust legal market.⁷⁶ In the era prior to the advent of widespread legal sports wagering, sports information underwent a radical transformation from the early box scores and game narratives.⁷⁷

C. *Advanced Analytics*

While many associated the rise of advanced analytics in sports with the Oakland A's general manager Billy Beane and Michael Lewis's book *Moneyball: The Art of Winning an Unfair Game*, the origins of statisticians providing unique insights into sports extends to at least the 1940s when the Brooklyn Dodgers executive, Branch Rickey, hired a statistician named Allan Roth to analyze player performance.⁷⁸ Roth would become baseball's first full-time statistician

wagering information prior to the passage of the Wire Act in 1961).

73. 18 U.S.C. § 1084(a).

74. *Id.* § 1084(b) ("Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.")

75. It has been estimated that the illegal sports gambling market could have ballooned to several hundred billion dollars while sports gambling remained largely illegal in the United States; as such, it is unlikely many would call the Wire Act a successful piece of legislation. See Holden, *supra* note 67, at 679 n.8 (noting that there is an inherent challenge in estimating the size of the illegal market).

76. See John Holden, *Opinion: Clarity Long Overdue on US Sports Betting Laws*, LEGAL SPORTS REP. (June 19, 2020), <https://www.legalsportsreport.com/37280/us-sports-betting-law-enforcement/> [<https://perma.cc/3VEC-PWCA>] (noting that the Wire Act creates redundancies for companies who operate within the law while allowing those who disregard the law a competitive advantage as a result of nonenforcement).

77. See generally Mike Pesca, *The Man Who Made Baseball's Box Score a Hit*, NPR (July 30, 2009, 12:02 AM), <https://www.npr.org/templates/story/story.php?storyId=106891539> [<https://perma.cc/F2F5-WALH>] (describing the advent of Henry Chadwick's box score and its serving as a predecessor to more advanced metrics).

78. *A Guide to Sabermetric Research*, SOC'Y FOR AM. BASEBALL RSCH., <https://sabr.org/>

and was instrumental in changing how people thought about baseball performance.⁷⁹ In 1977, Bill James decided to share some of his research about baseball that he had developed in part while working at a pork and beans plant in Lawrence, Kansas; his work would be instrumental in bringing about a widespread change in how baseball was thought about and talked about.⁸⁰

Bill James would begin sharing his thoughts about baseball by self-publishing a book annually, called the *Bill James Baseball Abstract*.⁸¹ James named his new form of statistical analysis Sabermetrics, after the Society for American Baseball Research (SABR).⁸² By the mid-1990s, James's publications and his way of thinking about baseball had begun to attract attention.⁸³ In 2003, James was hired as a statistician by the Boston Red Sox and eventually helped bring the Red Sox their first World Series win since they infamously sold Babe Ruth to the New York Yankees in 1918.⁸⁴

James played an instrumental role in changing the conventional wisdom of thinking about not only baseball, but sports in general.⁸⁵ There has been a recent move across sports to increase the role that analytics play within an organization, and while some teams choose to place less emphasis on analytics than more traditional methods like scouting, analytics has a presence in nearly every professional sports front office in the United States.⁸⁶ The attention being paid

sabermetrics [<https://perma.cc/ACQ9-B9TW>].

79. Tom Cronin, *Allan Roth: Baseball's Forgotten Innovative Thinker*, STATLINERS, <https://statliners.com/2015/03/23/allan-roth-baseballs-forgotten-innovative-thinker/> [<https://perma.cc/FZ3R-PPW8>].

80. Ben McGrath, *The Professor of Baseball*, NEW YORKER (July 14, 2003), <https://www.newyorker.com/magazine/2003/07/14/the-professor-of-baseball> [<https://perma.cc/3397-GTLJ>].

81. Luke Hale, *Bill James: Father of Sabermetrics*, MEDIUM (May 10, 2017), <https://medium.com/sabermetrics-changing-americas-pastime/bill-james-father-of-sabermetrics-f9a5c99763a4> [<https://perma.cc/PZM2-SD7B>].

82. *Id.*

83. *Id.*

84. See Jason Kelly, *Red Sox Need to Permanently Separate Themselves from Bill James*, BASEBALL ESSENTIAL (Feb. 8, 2019), <https://www.baseballessential.com/news/2019/02/08/red-sox-need-to-permanently-separate-themselves-from-bill-james/> [<https://perma.cc/ZJE2-2WCR>].

85. See Kevin Clark, *The NFL's Analytics Revolution Has Arrived*, RINGER (Dec. 19, 2018, 12:08 PM), <https://www.theringer.com/nfl/2018/12/19/18148153/nfl-analytics-revolution> [<https://perma.cc/J3QK-EVPM>] (describing the emergence and increasing influence of analytics on the NFL).

86. See, e.g., Albert Breer, *How All 32 NFL Teams Handle Analytics*, SPORTS ILLUSTRATED

to statistics in the advanced analytics era has also been welcomed by professional gamblers and daily fantasy sports participants.⁸⁷

The emergence of widespread legal gambling and the related daily fantasy sports industry has changed societal views regarding how sports gambling is discussed, generally making the subject more acceptable.⁸⁸ The daily fantasy sports industry, however, revealed very quickly after its emergence that the dominant participants, dubbed “sharks,” used algorithms to design optimal lineups and entered them into hundreds of contests, maximizing their returns on investment.⁸⁹ The top daily fantasy participants relied on computerized scripts and bots to enter lineups in order to maximize the number of entries.⁹⁰ But, while daily fantasy sports emerged as a more palatable version of sports gambling, the top sports gamblers were using their own statistical analysis shortly after advanced analytics were acknowledged in professional sports.⁹¹

Indeed, as far back as the 1980s, top gamblers were using sophisticated analytics in an effort to yield more successful results.⁹² In 1985, the FBI conducted a multi-state raid aimed at crippling a gambling syndicate known as the “Computer Group.”⁹³ The Computer Group relied heavily on a former Pentagon contractor named Michael Kent who began building computer programs to predict

(June 28, 2017), <https://www.si.com/nfl/2017/06/28/nfl-analytics-front-office-old-school-approach-draft-game-planning-charting> [<https://perma.cc/X8ET-345U>] (describing the reliance of all thirty-two NFL teams on analytics in team decision-making).

87. See Drew Harwell, *All the Reasons You (Probably) Won't Win Money Playing Daily Fantasy Sports*, WASH. POST (Oct. 12, 2015, 8:00 AM), <https://www.washingtonpost.com/news/the-switch/wp/2015/10/12/all-the-reasons-you-probably-wont-win-money-playing-daily-fantasy-sports/> [<https://perma.cc/S4CX-DQAB>].

88. See Holden et al., *supra* note 47, at 135-54 (describing the similarities between daily fantasy sports and gambling, and how daily fantasy sports companies compared themselves to gambling when it was convenient).

89. Harwell, *supra* note 87.

90. *Id.*

91. *Cf.* John T. Holden & Simon A. Brandon-Lai, *Advertised Incentives for Participation in Daily Fantasy Sports Contests in 2015 and 2016: Legal Classification and Consumer Implications*, ENT. & SPORTS L.J. 6-8 (2017), <https://entsportslawjournal.com/article/id/842> [<https://perma.cc/C25K-JFGX>] (describing the advertising strategies of daily fantasy sports companies that publicized a number of features such as financial incentives in playing daily fantasy sports, which are also closely associated with sports gambling).

92. Tomas Rios, *The Godfathers of Sports Betting*, DAILY BEAST (Apr. 13, 2017, 6:18 PM), <https://www.thedailybeast.com/the-godfathers-of-sports-betting> [<https://perma.cc/86D5-E4Z4>].

93. *Id.*

college football outcomes in the late 1970s.⁹⁴ While the Computer Group would eventually expand around the country and rely on a high volume of bets to be profitable, the group met its downfall after failing to pay taxes.⁹⁵ Some of the analytical insights gained by gamblers have even attracted the attention of professional sports executives. For instance, the Dallas Mavericks named former professional sports bettor Bob Voulgaris as the team's Director of Quantitative Research and Development in 2018.⁹⁶ While both the sports world and the derivative gambling world have been at the forefront of modernizing sports information, it appears that many in the professional sports world already have their eyes set on the next frontier: proprietary information.⁹⁷

D. Future of Sports Data

If advanced analytics, algorithms, and artificial intelligence are the present for sports information, the future is likely to include the use of biometrics and increased speed of transmission (low or zero latency) from stadiums to buyers or viewers around the globe.⁹⁸ While the sale of biometric data as part of data packages is a controversial topic, the subject has already been on the minds of sports executives for several years.⁹⁹ The commercial value of the data is not yet ascertained, but both sports leagues' and players'

94. *Id.*

95. *Id.*

96. Dalton Trigg, *Betting on Bob Voulgaris: The Mavs 'Analytical Advantage' That Isn't Being Talked About Enough*, SPORTS ILLUSTRATED (Dec. 26, 2019), <https://www.si.com/nba/mavericks/news/betting-on-bob-voulgaris-the-mavs-analytical-advantage-that-isnt-being-talked-about-enough> [<https://perma.cc/3WLZ-J7RY>].

97. See Matt Rybaltowski, *Under Pressure: Stakeholders Feeling the Sweat as Sports Betting Data War Escalates*, SPORTSHANDLE (May 10, 2019), <https://sportshandle.com/under-pressure-stakeholders-data-war/> [<https://perma.cc/3CC3-SM4A>] (describing efforts by sports leagues to claim data as proprietary).

98. See, e.g., Jacob Gershman, *The Brave New World of Betting on Athletes' Data*, WALL ST. J. (Mar. 10, 2020, 10:02 AM), <https://www.wsj.com/articles/the-brave-new-world-of-betting-on-athletes-data-11583848891> [<https://perma.cc/CLM5-WRQV>] (noting the potential future market for betting on athletes' biometric data).

99. See John Holden, *The Major Issues Behind Biometric Data and Its Potential in Legal Sports Betting*, LEGAL SPORTS REP. (June 5, 2019), <https://www.legalsportsreport.com/32915/biometric-data-legal-sports-betting/> [<https://perma.cc/9KT2-KX9U>] (discussing the 2019 Sports Lawyers Association Conference, where representatives from sports leagues debated biometric data collection and ownership of the information).

associations' interest in ownership of the data being collected likely extends beyond privacy interests, and into a future where the data could be commodified.¹⁰⁰ The other major improvement that is likely to drive the future of sports information is the decrease in transmission times, and a move towards zero latency, or truly real-time delivery.¹⁰¹ Eliminating lag times in the delivery of information is consequential for sports betting operators who frequently must adjust betting lines before so-called "courtsiders" can relay information to confederates placing bets outside of the stadium.¹⁰² Delays in disseminating information from the stadium to sportsbook operators can be costly.¹⁰³

II. USES FOR SPORTS DATA

Sports data has evolved since the mid-1800s when the Olympic Ball Club of Philadelphia first used a scorebook to record runs scored by each team.¹⁰⁴ Since this time, there has been an increased reliance on the use of data for decision-making in sports.¹⁰⁵ While there is anecdotal evidence of some teams using statisticians and data science to make decisions years ahead of others, the recent rise in data science has become more pronounced, with nearly all teams across major sports having an analytics department or advisors.¹⁰⁶

100. See Brant James, *Biometrics: Currency, Conundrum in Sports Betting Future*, GAMBLING.COM (Nov. 30, 2018), <https://www.gambling.com/news/biometrics-currency-conundrum-in-sports-betting-future-1693000> [<https://perma.cc/E67L-EDMY>] (describing potential interest in biometric information).

101. See generally Steven J. Vaughan-Nichols, *Online Sports Are About to Get Actual Real-Time Streaming*, ZDNET (Sept. 14, 2018, 8:05 PM), <https://www.zdnet.com/article/online-sports-are-about-to-get-actual-real-time-streaming/> [<https://perma.cc/9LG8-GH75>] (describing the concept of actual real-time streaming).

102. See Ryan M. Rodenberg, John T. Holden & Asa D. Brown, *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH. & ARTS 63, 75-79 (2015) (describing the practice of courtsiding).

103. See Matt Rybaltowski, *As States Consider Anti-Courtsiding Measures, Debate on Transmission of Live Data Intensifies*, SPORTSHANDLE (July 10, 2019), <https://sportshandle.com/state-anti-courtsiding-measures/> [<https://perma.cc/N6MP-XHWR>] (describing the practice of courtsiding and legislative efforts to curb the practice).

104. See *supra* notes 32-33 and accompanying text.

105. See, e.g., Stephen Pritchard, *Marginal Gains: The Rise of Data Analytics in Sport*, GUARDIAN (Jan. 22, 2015, 11:09 AM), <https://www.theguardian.com/sport/2015/jan/22/marginal-gains-the-rise-of-data-analytics-in-sport> [<https://perma.cc/LBV4-LCJN>] (describing the incorporation of data analytics programs in sports).

106. See Eric S. Hintz, *Branch Rickey, Baseball Innovator*, SMITHSONIAN (Jan. 17, 2020),

Despite a resistance to change from some decision makers,¹⁰⁷ reliance on data analysis is the future of sports information, and the faster and more reliable the data, the more valuable it is.¹⁰⁸ Overall, this Part will explore data analytics in the context of player performance, scouting, fantasy sports, and gambling.

A. Player Performance

Sports data, and in particular analytics, is most commonly associated with player performance and the ability to evaluate a player in comparison to other players.¹⁰⁹ While American sports, particularly baseball, have long been intertwined with statistics and keeping score, the modern emergence of data analytics in sports has called into question some of baseball's most established benchmarks for success, including batting average and pitcher wins.¹¹⁰ In an era before salary caps and luxury taxes, conventional

<https://invention.si.edu/branch-rickey-baseball-innovator> [<https://perma.cc/8REV-5KGZ>] (describing Branch Rickey's innovations including his employment of Allan Roth to conduct statistical analyses); see also Sam Fortier, *The NFL's Analytics Movement Has Finally Reached the Sport's Mainstream*, WASH. POST (Jan. 16, 2020, 1:50 PM), <https://www.washingtonpost.com/sports/2020/01/16/nfls-analytics-movement-has-finally-reached-sports-main-stream/> [<https://perma.cc/5BL7-RU6X>] (describing the rise of analytics in the NFL). See generally *The Great Analytics Rankings*, ESPN, https://www.espn.com/espn/feature/story/_/id/12331388/the-great-analytics-rankings [<https://perma.cc/3HSR-ZER2>] (providing a ranking of analytics programs across the four major American sports leagues).

107. See KEITH LAW, SMART BASEBALL: THE STORY BEHIND THE OLD STATS THAT ARE RUINING THE GAME, THE NEW ONES THAT ARE RUNNING IT, AND THE RIGHT WAY TO THINK ABOUT BASEBALL 3 (2017) (describing the resistance of some to the use of analytics within the baseball establishment).

108. See Matthew Waters, *LSR Q+A: Phenix CMO Says Latency Costs Sportsbook Operators Billions in Handle*, LEGALSPORTSREP. (May 20, 2020), <https://www.legalsportsreport.com/40387/phenix-latency-costs-sportsbook-operators/> [<https://perma.cc/VSD2-ZTZM>] ("Delays of even a few seconds can make all the difference when betting on a live game, especially when it comes to prop bets. Imagine watching a football game and you want to place a quick bet on the coin toss result or whether or not the next play will result in a touchdown. If you're watching a stream even five seconds behind broadcast, that means you've already lost out on a window to place that bet. And in turn, sportsbooks have lost out on that revenue. A few seconds is the difference between a bet made and money lost.")

109. See generally MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME 68-96 (2003) (describing the "field of ignorance," or how Bill James and sabermetrics were able to elucidate traits in baseball players that may have been missed by the casual observer or someone relying on traditional measures).

110. See LAW, *supra* note 107, at 9-11 (noting that batting average, which can be traced back to Henry Chadwick in the 1800s, is flawed in that it fails in a number of ways to

wisdom dictated that teams willing to employ the best players by the measures of the day would, over time, be successful, essentially relying on the efficient market hypothesis.¹¹¹ But, like the stock market, people have spent years looking for inefficiencies.¹¹² Indeed, this was the crux of Billy Beane's "Moneyball" plan, believing there was a way to win using players that conventional wisdom overlooked.¹¹³

In a period with salary caps and luxury taxes, the need to identify talent within the restrictions of allowable payrolls is heightened, and being able to identify inefficiencies is critical to success.¹¹⁴ Data helps provide a visual representation of players' contributions to a team.¹¹⁵ The use of analytics in sports with regard to player performance has continued to evolve since Billy Beane brought "Moneyball" to the Oakland A's.¹¹⁶ The modern trends include the incorporation of wearable technologies and highly advanced camera equipment that provide proprietary information, which is not observable by everyone in attendance.¹¹⁷

For example, the NBA began installing SportVu cameras in 2012, which utilize missile tracking technology to capture spatial data during NBA games.¹¹⁸ The SportVu system records the locations of

articulate successful batting with adequate specificity).

111. The efficient market hypothesis is the hypothesis that share prices reflect all information; in the context of athletes, the best players would command the highest prices. See Lucas Downey, *Efficient Market Hypothesis*, INVESTOPEDIA (Mar. 25, 2021), <https://www.investopedia.com/terms/e/efficientmarkethypothesis.asp> [<https://perma.cc/NTJ2-8YEB>].

112. See James R. Rogers, *Moneyball Illustrates Efficient Markets, Not Behavioral Economics*, L. & LIBERTY (Apr. 26, 2018), <https://lawliberty.org/moneyball-illustrates-efficient-markets-not-behavioral-economics-thaler-tversky-kahneman-sunstein/> [<https://perma.cc/E4TV-JPP6>].

113. *Id.*

114. See generally Jared Dubin, *Which NBA Player Literally Gives His Team the Most Value?*, FIVETHIRTYEIGHT (Apr. 16, 2019, 12:06 PM), <https://fivethirtyeight.com/features/forget-giannis-pascal-siakam-is-our-mvp/> [<https://perma.cc/88SL-DXP7>] (using player performance measures and salary to rank NBA players).

115. See, e.g., *id.* (providing an illustration of player contributions).

116. See Rogers, *supra* note 112.

117. Abhas Ricky, *How Data Analysis in Sports Is Changing the Game*, FORBES (Jan. 31, 2019, 7:15 AM), <https://www.forbes.com/sites/forbestechcouncil/2019/01/31/how-data-analysis-in-sports-is-changing-the-game/> [<https://perma.cc/C63U-54WJ>].

118. Bryan Bishop, *SportVu's Missile-Tracking Technology Turns Basketball into a Numbers Game*, VERGE (June 23, 2012, 1:30 PM), <https://www.theverge.com/2012/6/23/3112926/sportvu-missile-tracking-technology-basketball> [<https://perma.cc/XV9P-Y53R>].

all players, referees, and the ball, twenty-five times per second.¹¹⁹ The technology provided by products like SportVu enables teams to identify information beyond what is observable to the naked eye, such as how many rebounds a basketball player *should* have had versus the conventional measure, how many rebounds a basketball player *did* have.¹²⁰ While the NBA could have kept this data to itself, the league has allowed fans to access some of the information.¹²¹ In addition to using camera-based technology to generate insights into player performance, there has been a growing reliance on wearable technology to optimize training schedules for athletes.¹²² The proprietary nature of data derived from wearable technology not only provides teams insight into player fatigue, but it also makes this data highly desirable to others who rely on complete information, such as bookmakers.¹²³

B. Scouting

Scouting is an area whereby team employees evaluate the performance of players on other teams, and it has become one of the most significant aspects in sports, both from the perspective of evaluating upcoming opponents, and for evaluating future team members.¹²⁴ All of the major professional sports rely on data, both quantitative and qualitative, to make player personnel decisions, and the ability to find something that others miss can be highly

119. *Id.*

120. See James Plafke, *How the NBA's SportVU Ball and Player Tracking Tech Changes the Face of Sports*, EXTREME TECH (Oct. 29, 2013, 5:00 PM), <https://www.extremetech.com/extreme/169775-how-the-nbas-sportvu-ball-and-player-tracking-tech-changes-the-face-of-sports> [<https://perma.cc/U5TW-5UYD>] (describing the uses of SportVu cameras).

121. Troy Wolverton, *Big Data Meets Big-Time Basketball*, MERCURY NEWS (Aug. 12, 2016, 7:40 AM), <https://www.mercurynews.com/2014/05/17/big-data-meets-big-time-basketball/> [<https://perma.cc/425J-LPPP>].

122. See, e.g., Stephanie Springer, *An Update on Wearable Baseball Technology*, HARDBALL TIMES (Aug. 7, 2018), <https://tbt.fangraphs.com/an-update-on-wearable-technology/> [<https://perma.cc/EBB4-X78T>] (describing the adoption of a collectively bargained policy governing wearables in Major League Baseball).

123. See John T. Holden & Kimberly Houser, *Taboo Transactions: Selling Athlete Biometric Data*, 48 FLA. ST. U. L. REV. (forthcoming 2021) (manuscript at 9), <https://ssrn.com/abstract=3793144> [<https://perma.cc/JCE3-TGYF>].

124. Frank Angst, *What Does a Sports Scout Do?*, BALANCE CAREERS (Aug. 22, 2019), <https://www.thebalancecareers.com/career-profile-sports-scout-3113310> [<https://perma.cc/5S4M-9MT5>].

valuable.¹²⁵ Data from scouts is compiled in scouting reports and then integrated into team decision-making.¹²⁶ While there has been an increased shift away from in-person scouting towards data-driven analyses, most major professional sports still rely on the observations of people to generate at least some aspects of their scouting reports.¹²⁷

Indeed, at least in the case of MLB scouting, the industry has, perhaps, become a victim of its own success.¹²⁸ Technological advancements, like baseball's TrackMan radar, provide more data with greater accuracy than a human scout is capable of providing.¹²⁹ In turn, these data points supply information directly back to team front offices, where projections on players' career paths can be made.¹³⁰ Reliance on data scientists has created a source of competition for traditional scouts, which could eventually create a market where only the very top scouts survive.¹³¹ The modern scouting department is a combination of in-person staff and scientific input from technologies, like TrackMan; both send information back to the front office staff, who then make decisions based on the analytic output.¹³² Despite the technological threat for traditional scouts, the information and insight that scouts collect is of significant value, and there is some evidence that the expert knowledge of a scout may be a valuable trait in other derivative industries such as sports betting.¹³³

125. See MOSKOWITZ & WERTHEIM, *supra* note 29, at 173-91 (discussing how Mike McCoy and Jerry Jones revolutionized the National Football League draft by reconceptualizing the value of each draft pick).

126. ALAMAR, *supra* note 31, at 24-26 (describing the process of integrating scouting reports into a data analytics program).

127. See Ron Morris, *A 'Concerning' Future for Traditional MLB Scouting*, BASEBALL AM. (Feb. 4, 2019), <https://www.baseballamerica.com/stories/a-concerning-future-for-traditional-mlb-scouting/> [<https://perma.cc/ALS4-JB9D>] (noting a decrease in scouting in Major League Baseball as teams shift towards expanded analytics programs).

128. See Ben Lindbergh, *The Evolution of MLB Scouting Is a Threat to the Profession Itself*, RINGER (Mar. 8, 2019, 6:30 AM), <https://www.theringer.com/mlb/2019/3/8/18255453/cincinnati-reds-scouting-reports-series-part-3> [<https://perma.cc/S2L3-N3HF>] (describing how as scouts provide increasing amounts of data to be analyzed, analysts are better able to make predictive judgments, which could render much of the profession obsolete).

129. *Id.*

130. *Id.*

131. *Id.*

132. ALAMAR, *supra* note 31, at 91-116.

133. See Mike Fish, *'Seven or Eight' Scouts Linked to Gambling Investigation*, ESPN (Aug.

C. *Fantasy Sports and Gambling*

As valuable as sports information is to players, teams, and sports leagues, it is likely as valuable—perhaps even more so—to the intertwined fantasy sports and sports gambling industries.¹³⁴ Success in both fantasy sports and sports gambling relies on a combination of skill derived from compiling and analyzing information and luck.¹³⁵ The ability to gain access to, and act on, information that is faster and better than that which fantasy players and gamblers are competing against can create a significant advantage.¹³⁶

11, 2008), <https://www.espn.com/mlb/news/story?id=3529999> [<https://perma.cc/63KX-H4YX>] (describing a gambling ring involving a number of former Major League Baseball scouts).

134. The illegal sports gambling market in the United States has been estimated to see upwards of \$150 billion wagered annually. See Holden, *supra* note 56, at 578. Likewise, the fantasy sports market is estimated to be worth more than \$33 billion by 2025. Press Release, Orbis Research, Fantasy Sports Market Estimated to Grow at 13.2% to Reach \$33200 Mn by 2025—Key Insights on Revenue (Value), Potential Application, Economic Fluctuations, Growth Rate and Future Trends (Aug. 24, 2019, 12:33 AM), <https://www.globenewswire.com/news-release/2019/08/24/1906227/0/en/Fantasy-Sports-Market-Estimated-to-grow-at-13-2-to-reach-33200-Mn-by-2025-Key-Insights-on-Revenue-Value-Potential-Application-Economic-Fluctuations-Growth-Rate-and-Future-Trends-Or.html> [<https://perma.cc/CYP5-53MU>]. In contrast, the NFL, the most valuable professional sports league in the United States, saw revenue of only \$9.5 billion in 2019. Eben Novy-Williams, *NFL Shared Revenue Hits Record \$9.5 Billion as Media Payouts Rise*, SPORTICO (July 21, 2020, 1:00 PM), <https://www.sportico.com/leagues/football/2020/nfl-shared-revenue-2019-billion-packers-1234609285/> [<https://perma.cc/8GG5-WXFX>].

135. For a detailed discussion on skill versus chance in daily fantasy sports, see Dylan Pickering, Alex Blaszczynski, Melanie Hartmann & Brittany Keen, *Fantasy Sports: Skill, Gambling, or Are These Irrelevant Issues?*, 3 CURRENT ADDICTION REP. 307, 308-11 (2016); see also Brief and Special Appendix for the United States at 30, *United States v. DiCristina*, 726 F.3d 92 (2d Cir. 2013) (No. 12-3720), 2012 WL 6800562, at *30 (“[S]ports betting ... involves ‘substantial (not “slight”) skill’.... Sports bettors can employ superior knowledge of the games, teams and players in order to exploit odds that do not reflect the true likelihoods of the possible outcomes.”); Ryan Rodenberg, *Documents Show DOJ, NFL Have Argued That Sports Betting Is Skill-Based*, ESPN (July 16, 2015), https://www.espn.com/chalk/story/_/id/13268458/documents-show-justice-department-nfl-argued-skill-sports-betting [<https://perma.cc/33FT-Y4N4>].

136. See, e.g., Peter Rowe, *Billy Walters, Gambler Extraordinaire*, CHI. TRIB. (June 13, 2014, 6:17 PM), <https://www.chicagotribune.com/sdut-billy-walters-gambler-extraordinaire-2014jun13-story.html> [<https://perma.cc/B4K5-9K5X>] (noting that legendary sports bettor Billy Walters would send “members of his gambling syndicate to the airport, where they gleaned intelligence from travelers’ out-of-town newspapers” and that Walters was also one of the first to use computers in the pre-personal computer era to calculate odds in order to gain an advantage on bookmakers).

1. *The Fantasy Sports Industry*

The fantasy sports industry has its origins dating back nearly 100 years to the 1920s with the sale of a tabletop game called All-Star Baseball made by the Ethan Allen furniture company.¹³⁷ The tabletop game eventually faded in popularity as fantasy sports emerged from an activity in Professor Bill Gamson's "Baseball Seminar."¹³⁸ Gamson's seminar was conceived in the spring of 1960, while he attended graduate school.¹³⁹ Gamson and two friends spent five hours bantering back and forth and eventually came up with an auction system for MLB players using four statistics: batting average, runs batted in, earned run average, and wins.¹⁴⁰ One of the Baseball Seminar attendees was Robert Sklar, who is credited with explaining the concept to a mentee of his, Daniel Okrent, who would go on to conceive of the rules behind Rotisserie baseball—a derivative of the Baseball Seminar.¹⁴¹ Okrent's game would be named after the restaurant where he proposed the game's rules to his friends, La Rotisserie Francaise.¹⁴²

The first season of Rotisserie league baseball featured ten participants who each paid \$260 for participation.¹⁴³ The Rotisserie league participants selected an equal number of real-life baseball players and competed over the course of a Major League Baseball season along eight statistical categories: four for batting and four for pitching.¹⁴⁴ The winner was the individual whose team of real-world players scored the highest in the eight statistical categories and received a cash prize.¹⁴⁵ The popularity of Rotisserie baseball would grow, eventually playing a significant role in launching the fantasy sports industry that exists today.¹⁴⁶ The advent of the internet was a monumental event for fantasy sports, because it

137. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 4 (2012).

138. *Id.* at 5.

139. Morty Ain, "We Had No Idea", ESPN (Feb. 23, 2010), <https://www.espn.com/mlb/insider/news/story?id=4939543> [<https://perma.cc/Q6BU-ECEW>].

140. *Id.*

141. *See id.*

142. Edelman, *supra* note 137, at 6.

143. *Id.* at 7.

144. *Id.*

145. *Id.* at 7-8.

146. *Id.* at 7-9.

eliminated one of the biggest obstacles to playing fantasy sports: the paperwork.¹⁴⁷ By the mid-1990s, major sports broadcasting properties, such as ESPN, launched verticals on their websites devoted to fantasy sports.¹⁴⁸

By around 2010, the fantasy sports industry had grown in value to more than \$5 billion per year.¹⁴⁹ But, the fantasy industry would be changed forever in the years following the launch of daily fantasy sports as a result of incessant advertising campaigns by the dominant companies in the industry.¹⁵⁰ Daily fantasy sports decreased the length of time required for fantasy sports from the length of an actual professional sports season to days, or even hours, leading some to argue daily fantasy sports were fantasy sports on steroids.¹⁵¹

Daily fantasy sports were an accelerant for fantasy sports participation, and by 2015, more than fifty-seven million people in North America were playing fantasy sports.¹⁵² There is an argument to be made that daily fantasy sports were treading a fine line between sports gambling (which was forbidden at the time of their launch) and fantasy sports.¹⁵³ The daily fantasy sports industry argued that because the games were skill-based they were distinct from gambling laws, which prohibited activities like sports betting.¹⁵⁴ Daily fantasy sports contests, however, were so skill-based

147. *Id.* at 9-10.

148. *Id.* at 10.

149. *Id.* at 11.

150. See Holden & Brandon-Lai, *supra* note 91, at 1 (during the lead up to the NFL season in 2015, one of the largest daily fantasy companies was airing a television advertisement every one-and-a-half minutes).

151. See Christian Rigg, *What Are Daily Fantasy Sports?*, TECHRADAR (Mar. 11, 2020), <https://www.techradar.com/news/what-are-daily-fantasy-sports> [<https://perma.cc/E62A-NXUR>]; Andrew Billings, Brody James Ruihley & Yiyi Yang, *Fantasy Gaming on Steroids? Contrasting Fantasy Sport Participation by Daily Fantasy Sport Participation*, 5 COMM'N & SPORT 732, 732 (2017).

152. Holden & Brandon-Lai, *supra* note 91, at 1.

153. Holden et al., *supra* note 47, at 122-23.

154. See John T. Holden, Will F. Green & Ryan M. Rodenberg, *Daily Fantasy, Tipping, and Wire Fraud*, 21 GAMING L. REV. & ECON. 8, 9 (2017) (noting that the CEO of FanDuel argued that daily fantasy games were games of skill). This assertion confuses the issue that despite being a game of skill, in many states, an activity can still be prohibited as a gambling activity. See John T. Holden, *Trifling and Gambling with Virtual Money*, 25 UCLA ENT. L. REV. 41, 79-81 (2018) (describing the various state law tests for ascribing an activity as gambling).

that one study found that the top eleven daily fantasy participants accounted for the majority of the winnings.¹⁵⁵

Overall, daily fantasy sports changed how fantasy players engaged with statistics and sports data.¹⁵⁶ Not only did daily fantasy sports change fantasy sports from a social activity amongst friends to an activity that centered around contests with thousands of strangers, but it also created a market for information beyond box scores.¹⁵⁷ The growth of daily fantasy sports enabled individuals to make a living on the activity, and that stimulated innovation.¹⁵⁸ The innovation in the daily fantasy sports world has pushed the fantasy football world in a direction that differentiates it from traditional fantasy sports.¹⁵⁹ Specifically, the fantasy football world looks for predictive analytics, as opposed to focusing on past performance like that denoted in box scores.¹⁶⁰ This shift in focus, and the huge prize pools in the daily fantasy sports industry, changed fantasy sports from an activity driven by sports fans, who enjoyed the minutiae of a box score, to an activity dominated by a small group of participants who play more frequently and win much more frequently because of their superior entry strategies.¹⁶¹

2. *The Gambling Industry*

While the gambling industry and the fantasy sports industry share some commonalities, especially in the daily fantasy sports realm,¹⁶² the value of the sports gambling world far exceeds that of

155. Holden et al., *supra* note 154, at 9.

156. See Hal Koss, *How Data Science and Analytics Came to Dominate Fantasy Football*, BUILT IN (Aug. 20, 2020), <https://builtin.com/data-science/data-analytics-fantasy-football> [<https://perma.cc/C4HV-JDGX>].

157. *Id.*

158. *Id.*

159. *See id.*

160. *Id.*

161. See Ed Miller & Daniel Singer, *For Daily Fantasy Sports Operators, the Curse of Too Much Skill*, SPORTS BUS. J. (July 27, 2015), <https://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx> [<https://perma.cc/N2KV-7Q9Y>] (noting that the top eleven daily fantasy players accounted for 17 percent of all entry fees, and the bottom 85 percent of daily fantasy players effectively only exist to provide money for the top players to win).

162. See generally John Brennan, *Is Daily Fantasy Sports Gambling? IRS Now Says 'Yes'*, USBETS (Aug. 20, 2020), <https://www.usbets.com/irs-says-daily-fantasy-sports-gambling/> [<https://perma.cc/N2H2-7GP9>] (noting that the IRS clarified in 2020 that daily fantasy sports

the fantasy sports industry.¹⁶³ The sports gambling industry dates back centuries to some of the earliest organized sporting competitions.¹⁶⁴ While sports betting has always relied on game results to determine winners and losers, the rise of in-play betting, or wagering while a game is ongoing, has created a demand for faster data.¹⁶⁵ There has been a rise in in-play betting and increases in demand for high-speed data.¹⁶⁶ The practice of getting in-game updates from bookmakers is not new, and it even served as a motivation for the 1961 Wire Act,¹⁶⁷ which prohibited the interstate transmission of “information assisting in the placing of bets or wagers.”¹⁶⁸

On the surface, bookmaking markets appear to have similarities to financial markets.¹⁶⁹ Unlike in financial markets, which characteristically feature frequent price changes, sports betting markets feature a bookmaker setting a price and then making infrequent adjustments based on market demand.¹⁷⁰ Similarly, unlike in financial markets where the primary task of the market is to match buyers and sellers, in the traditional bookmaking world, the bookmaker is a market participant; though historical wisdom is that the

contests are within the scope of the federal excise tax on sports wagers).

163. The illegal sports betting market is valued at upwards of \$150 billion by some. See Steve Silverman, *Legalized Sports Gambling Passes \$10 Billion, Likely Just Tip of the Iceberg*, FORBES (Aug. 29, 2019, 12:39 PM), <https://www.forbes.com/sites/stevesilverman/2019/08/29/legalized-sports-gambling-passes-10-billion-likely-just-tip-of-the-iceberg/> [https://perma.cc/38M9-945E]. Whereas the fantasy sports industry is projected to reach \$25 billion by the year 2024. Press Release, MarketWatch, *Fantasy Sports Market Is Set to Grow at 13.7% CAGR Exceeding US\$ 25780 Million by 2024* (Mar. 10, 2021, 8:47 AM), <https://www.marketwatch.com/press-release/fantasy-sports-market-is-set-to-grow-at-137-cagr-exceeding-us-25780-million-by-2024-2021-03-10> [https://perma.cc/8ESY-V7HY].

164. See generally Holden & Edelman, *supra* note 49, at 910-11 (describing the history of betting on sports).

165. Brett Smiley, *Opinion: The War Over Sports Betting Data: Lies, Half-Truths and Statistics: Part II*, SPORTSHANDLE (Sept. 18, 2019), <https://sportshandle.com/sports-betting-data-war-analysis-part-two/> [https://perma.cc/2TDY-HJRA].

166. See Glanz & Armendariz, *supra* note 1 (describing the demand for data).

167. Holden, *supra* note 67, at 698 (noting that during the 1950s, “Western Union provided a ticker service that furnished inning by inning scores” of baseball games).

168. 18 U.S.C. § 1084(a).

169. See Steven D. Levitt, *Why Are Gambling Markets Organised So Differently from Financial Markets?*, 114 ECON. J. 223, 223 (2004) (noting that there are many similarities between certain financial markets and sports betting markets, yet they are organized differently).

170. *Id.* at 223-24.

bookmaker would attempt to attract an equal number of wagers on each side of a proposition and then make their profit on the vigorish or commission they charged.¹⁷¹ But researcher Steven Levitt found that bookmakers actually seek to maximize profits, as opposed to merely seeking to create a balanced book with an equal number of wagers on each side of a proposition.¹⁷²

Sportsbooks rely on sports data companies to collect, process, monitor, and deliver data.¹⁷³ The sports data provider is in a precarious long-term position, as a sports league could elect to cut off their access and deliver the product themselves.¹⁷⁴ To date, however, many leagues still rely on official data provider partners to deliver sports data to betting operators.¹⁷⁵ Sports data companies provide a variety of services to bookmakers.¹⁷⁶ In 2012, upwards of 70 percent of bookmakers used third-party data providers to supply data and provide odds suggestions.¹⁷⁷ The services offered by some data providers include: “validating bets, aggregating the betting data of all clients, and updating the odds in real-time based on the total liabilities of those clients.”¹⁷⁸ Sports data companies functionally offer many of the necessities to operate a sportsbook, short of a physical or online storefront.¹⁷⁹

Sports leagues rely on official scorers to generate the “official” results of a game.¹⁸⁰ Some sports data companies employ data scouts who attend games (or watch on a screen) and record the results on a phone app, transmitting data back to a processing center, which

171. *Id.* at 224-25.

172. *Id.* at 225-26.

173. See Ramon Casadesus-Masanell, Karen Elterman & Oliver Gassmann, *Sportradar (A): From Data to Storytelling*, HARV. BUS. REV., Nov. 2018, at 1.

174. *Id.* at 12.

175. See, e.g., *id.* at 1 (“Moreover, sports leagues might soon decide to eliminate third-party data feeds such as Sportradar’s, which they used to supplement their proprietary data feeds, and opt to develop data services as part of their own core businesses.”).

176. See *id.* at 5.

177. *Id.*

178. *Id.*

179. See *id.* (noting the availability of information on game times and teams involved; pregame information; live data; pregame odds; live odds, which are calculated as the game is being played; statistics; managed risk trading services; and data visualization).

180. See, e.g., *Official Scorer*, BASEBALL REFERENCE (May 27, 2019, 2:11 PM), https://www.baseball-reference.com/bullpen/Official_scorer [<https://perma.cc/F8VH-9VRT>] (describing the role of official scorers of Major League Baseball games).

then relays the information to clients in milliseconds.¹⁸¹ Sports data companies rely on speed to deliver data as fast as possible to clients because “[a]fter one second, data had significantly less value for betting markets, and within a few seconds, the value was diluted to zero in betting markets.”¹⁸² Odds updates that are not delivered at rapid speed risk allowing bettors to place bets on events that have already taken place—something that would be incredibly costly for a bookmaker.¹⁸³

A dominant player in the sports betting data world has likened itself to the famed Bloomberg Terminal after announcing that it controls 90 percent market share in the nascent New Jersey sports betting market.¹⁸⁴ The cost for a data package with live in-game odds for three hundred games can cost upwards of \$4,000 to \$6,000 per month, with the cost increasing as customers request live data for additional games.¹⁸⁵ The cost of a data package can be broken down into à la carte pieces, with 50 percent of the cost attributed to an XML data feed, a second 25 percent attached to opening betting line information and updates to pregame betting lines, and the final quarter attributed to in-game live data feeds.¹⁸⁶ Managing this information in-house could cost a sportsbook seven figures a year in salaries.¹⁸⁷

Beginning at the start of the 2019 NBA season, the league announced official partnerships between the league and two data providers that would have the nonexclusive distribution rights to official league data.¹⁸⁸ The partnerships would mean that the distributors would have access to the league’s official scorekeeping

181. Casadesus-Masanell et al., *supra* note 173, at 6.

182. *Id.* This is because if bookmakers do not adjust live odds fast enough after an on-field event has occurred, bettors in the marketplace could capitalize on a pricing inefficiency. See generally Simon Cox, *Why Tennis ‘Courtsiding’ Was My Dream Job*, BBC NEWS (Apr. 20, 2015), <https://www.bbc.com/news/magazine-32402945> [<https://perma.cc/Y2ER-3NQ8>] (describing the practice of courtsiding).

183. Casadesus-Masanell et al., *supra* note 173, at 6.

184. Matt Rybaltowski, *Here’s How Much ‘Official’ League Data Actually Costs*, SPORTSHANDLE (Mar. 12, 2019), <https://sportshandle.com/sports-betting-official-data-cost/> [<https://perma.cc/5ES5-9A7U>].

185. *Id.*

186. *Id.*

187. *See id.*

188. *Id.* (noting that the deal included the rights to the WNBA as well).

data.¹⁸⁹ The NBA deal was followed by an announcement of a similar deal by MLB with one of the major data providers.¹⁹⁰ But the deals were only the beginning. After failed efforts to secure an integrity fee, which would have mandated that states require bookmakers pay the leagues 1 percent of the amount wagered on a particular league's events, the leagues began lobbying for the implementation of mandates requiring states use official league data to determine the outcomes of certain types of bets.¹⁹¹ Indeed, the search for official data mandates could actually serve to undermine the legal betting market, especially if the use of official league data translates into higher costs, which illegal bookmakers do not have to pay.¹⁹²

While leagues could certainly use proprietary technology to generate unique information that providers could sell to a sportsbook operator at a premium, the demand for such information remains speculative.¹⁹³ The debate over official data mandates has centered largely on the marketing of official league data as a superior product to unofficial data, which many of the same data providers sold previously, and in some instances continue to sell.¹⁹⁴ The sports leagues have advocated that official league data is more accurate than other sources, though this argument is not supported by strong evidence.¹⁹⁵ Indeed, while fast data may be desirable, its value may ultimately be trumped by that of accurate data.¹⁹⁶ Although the leagues have publicly argued that official data mandates are necessary to protect the accuracy of the data, they have privately

189. *Id.*

190. *Id.*

191. See Holden & Schuster, *supra* note 8, at 36-39 (describing sports league efforts to secure integrity fees and official data mandates).

192. See Rybaltowski, *supra* note 6.

193. See Matt Rybaltowski, *Future of Sports Betting Data: What's Next in 2020?*, SPORTSHANDLE (Mar. 28, 2019), <https://sportshandle.com/sports-betting-data-future-2020/> [<https://perma.cc/V7K8-AEJB>] (describing future trends in sports betting).

194. See Brett Smiley, *Opinion: The War over Sports Betting Data: Lies, Half-Truths and Statistics: Part I*, SPORTSHANDLE (July 17, 2019), <https://sportshandle.com/sports-betting-data-war-analysis-part-one/> [<https://perma.cc/AY3V-VPCQ>]; see also John Holden, *What Gaming in Holland Can Teach the US Sports Betting Market*, LEGAL SPORTS REP. (July 18, 2019), <https://www.legalsportsreport.com/34412/holland-gaming-us-sports-betting/> [<https://perma.cc/B9DG-HUP3>] (noting that data providers sell both official and unofficial data).

195. Smiley, *supra* note 194.

196. Smiley, *supra* note 165.

negotiated “by bayonet” with state lawmakers over the mandates.¹⁹⁷ In fact, after West Virginia passed a bill that did not satisfy MLB, deputy commissioner Dan Halem was quoted as saying: “Not one of our issues was taken up, not a single one. If you don’t want to address them, then we won’t do business in this state and we’ll leave.”¹⁹⁸ When asked by casino representatives what casinos would receive in exchange for paying a fee to the leagues, Halem reportedly said: “Peace. Keeping our commissioner (from) going on TV saying (the state’s betting market) is corrupt and sorts. You want that or support that? Pay us.”¹⁹⁹ The tactics reportedly employed by MLB in West Virginia were unsuccessful, however.²⁰⁰ A softer approach was used with lawmakers from Michigan, who were allegedly convinced of the benefits of official data while being swooned at the world-renowned TPC Sawgrass golf course in Florida.²⁰¹

The mandates for official data are particularly odious to many in the betting industry because, for years, the industry has existed on services that deliver similar products to the official data providers, but without the endorsement of the leagues.²⁰² The efforts to consolidate legislative mandates and then corner the market threaten to harm the competitiveness of the data market,²⁰³ and the integrity of the market.²⁰⁴ Further, it is even more offensive that leagues would seek legislative mandates and strong-arm tactics after they have spent decades failing to successfully assert a property interest in information resulting from the games they facilitate.²⁰⁵

197. Joe Vardon, *How MLB, the NBA and the PGA Used ‘Negotiation by Bayonet’ to Get a Slice of State Gambling Revenue*, ATHLETIC (Jan. 16, 2020), <https://theathletic.com/1530989/2020/01/16/how-mlb-the-nba-and-the-pga-used-negotiation-by-bayonet-to-get-a-slice-of-state-gambling-revenue/> [https://perma.cc/R4L4-LMT2].

198. *Id.*

199. *Id.* (alterations in original).

200. *Id.*

201. *Id.*

202. *See id.* (describing the Don Best service).

203. John Holden, *What Exactly Is ‘Commercially Reasonable’ Pricing for Official League Data?*, LEGAL SPORTS REP. (Jan. 14, 2020), <https://www.legalsportsreport.com/36742/commercially-reasonable-official-league-data-sports-betting/> [https://perma.cc/5CHD-7SL6].

204. *See* John T. Holden, *Ghosts in the Machine: How Corrupters Manipulate Games That Never Happened*, 22 GAMING L. REV. 630, 632-33 (2018) (describing how games with only a single data feed may be easier to corrupt than games where there is a marketplace, because a marketplace for data should be able to quickly identify events that are mispriced).

205. *See generally* Rodenberg et al., *supra* note 102, at 86-96 (describing various historical efforts by sports leagues to unsuccessfully claim ownership over sports statistics).

III. THE LACK OF INTELLECTUAL PROPERTY RIGHTS IN SPORTS DATA

One of the initial narratives in the nascent legal sports betting environment has been from sports league executives claiming that they have a property right in the information generated from sporting events.²⁰⁶ Indeed, both the commissioner of MLB and the commissioner of the NBA referred to the use of the leagues' "intellectual property" as part of their justification for demanding royalty payments from sportsbook operators.²⁰⁷ While sports leagues own an abundance of intellectual property rights, the information used by bookmakers does not immediately appear to be amongst those for which leagues can demand compensation.²⁰⁸ Data generated from sporting events can be broken down into two categories for purposes of an intellectual property examination: first, pure game data; and second, data that has already been collected and aggregated, also known as "refined data."²⁰⁹ This Part will explore these two categories of data in turn.

A. Pure Game Data

The professional sports league executives who have asserted an intellectual property interest in the information used by bookmakers have often been vague in describing exactly which intellectual

206. John Holden, *Making Sense of Pro Sports Leagues' Search for Sports Betting Data Fees*, LEGALSPORTS REP. (June 19, 2018), <https://www.legalsportsreport.com/21245/search-for-sports-betting-fees/> [https://perma.cc/5NYC-MRYA].

207. *Id.* (quoting MLB commissioner Rob Manfred: "We think that the integrity fee—a negotiable number somewhere below one percent at this point—is an appropriate recognition of the fact that the gambling industry is riding our intellectual property, our content, and is presenting a threat to our competition from an integrity perspective so that we're going to have to spend money to prevent that threat from becoming a reality." NBA commissioner Adam Silver also weighed in, stating, "the 1% [integrity fee] came directly from other jurisdictions outside the United States that used that very fee as the model for how leagues or content creators should be compensated for the use of their intellectual property.").

208. *Id.*

209. See generally Aaron Feld, Note, *Gambling on Sports Data: Protecting Leagues' High-Level Data from Sportsbooks*, 2020 U. ILL. L. REV. 341, 362-68 (describing the differences in treatment between raw, which we term pure, and refined, which we call already collected and aggregated, data).

property right they are seeking to assert.²¹⁰ Federal law recognizes three broad categories of intellectual property,²¹¹ in addition to certain qualifying trade secrets.²¹²

1. Patents

Patents are a property right granted by the federal government to a patent holder for a period of twenty years.²¹³ Patents are available in three varieties: utility patents, plant patents, and design patents.²¹⁴ The constitutional foundation for patents is found in Article I, under the so-called “Intellectual Property Clause” of the Constitution, which establishes congressional power to grant protections to authors and inventors.²¹⁵ A search of the United States Patent and Trademark Office website, however, revealed that none of the professional sports leagues possess any patent rights related to sports gambling.²¹⁶ Indeed, while the sports leagues possess a number of patents relating to things like helmet design and replay technology,²¹⁷ and patents have been granted for certain types of fitness training and golf swings,²¹⁸ patents related to pure game data in the sports gambling realm are unlikely to be the source of intellectual property claims.

2. Trademarks

Trademarks provide protection for entities’ brand identifiers²¹⁹ because they protect things like a name, symbol, word, or device.²²⁰ Many sports trademarks are quite famous, from symbols such as the Jerry West NBA logo,²²¹ to the Dallas Cowboys’ star.²²² Indeed, the

210. Edelman, *supra* note 10, at 3.

211. *Id.*

212. 18 U.S.C. § 1836(b)(1).

213. 35 U.S.C. § 154(a)(2).

214. *Id.* §§ 101, 161, 171.

215. U.S. CONST. art. I, § 8, cl. 8.

216. Edelman, *supra* note 10, at 4-5.

217. *Id.*

218. Holden, *supra* note 206.

219. Edelman, *supra* note 10, at 7.

220. Holden, *supra* note 206.

221. NBA, Registration No. 5,529,487.

222. Color is not claimed as a feature of the mark. The mark consists of a star with a

professional sports leagues sought to gain congressional protection from state lotteries using trademarks and service marks belonging to the leagues and their members as far back as 1990.²²³ Trademark infringement occurs under the Lanham Act, when “a person uses (1) any reproduction ... of a mark; (2) without the registrant’s consent; (3) in commerce; (4) in connection with the sale, offering for sale, distribution or advertising of any goods; (5) where such use is likely to cause confusion, or to cause mistake or to deceive.”²²⁴ There are limits on the commercial use of sports league trademarks by gambling providers.²²⁵ For example, a sportsbook operator would not be able to imply an endorsement by a sports league by using league trademarks, but the use of a sports team name to denote a team that is the subject of a bet is likely a protected use.²²⁶ As far back as 1977, the NFL argued that a lottery that offered a wager and used city names to denote the two teams playing in the game violated trademark law.²²⁷ In fact, as the Delaware District Court explained:

Undoubtedly when defendants print “Philadelphia v. Los Angeles”, the public reads “Philadelphia Eagles v. Los Angeles Rams”, and, in this sense, the words utilized by defendants have a secondary meaning. But I do not understand this fact alone to constitute infringement of plaintiffs’ registered marks or unfair competition. Defendants may truthfully tell the public what service they perform, just as a specialist in the repair of Volkswagen cars may tell the public of his specialty by using the word “Volkswagen”, and just as the manufacturer of a razor blade may advertise the brand names of the razors they will fit. The same rule prevails in the area of comparative advertising which utilizes the tradenames of competing products.²²⁸

border design. Registration No. 3,097,072.

223. *See Legislation Prohibiting State Lotteries from Misappropriating Professional Sports Service Marks: Hearing on S. 1772 Before the Subcomm. on Pats., Copyrights & Trademarks of the Comm. on the Judiciary*, 101st Cong. 1-2 (1990).

224. Edelman, *supra* note 10, at 8 (quoting *Bos. Pro. Hockey Ass’n v. Dallas Cap & Emblem Mfg. Inc.*, 510 F.2d 1004, 1009-10 (5th Cir. 1975)).

225. *See id.* at 9-10.

226. *See id.*

227. *Nat’l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1377 (D. Del. 1977).

228. *Id.* at 1380 (footnotes omitted).

Indeed, the mere use of team names is unlikely to rise to the level necessary to satisfy the burden of trademark infringement, and this use may also fall within the safe harbor of normative fair use.²²⁹

3. Copyright

When sports league executives cite intellectual property rights for which they seek compensation, it is most likely that they are arguing they have a copyrightable interest in the results of the sporting events their leagues facilitate.²³⁰ The challenge for the sports leagues in arguing that information used by bookmakers is protected by copyright is that bookmakers have historically relied on information that exists as facts in the public domain.²³¹ While compilations of material may be protectable by copyright, facts on their own are not.²³² Despite this apparent obstacle, the sports leagues have attempted, on numerous occasions, to circumvent the fact that they do not have copyright protection in information generated from sporting events, such as scores.²³³ In fact, the Solicitor General has argued that there is no protectable copyright interest in a live sporting event, though the broadcast may be copyrighted.²³⁴ The sports leagues themselves have seen various defeats in federal courts across the country as they tried to establish a property right in information arising from games.²³⁵

For example, in 1997, the NBA failed to secure protection under the Copyright Act after alleging that a service run by Motorola,

229. See Edelman, *supra* note 10, at 9-10.

230. See generally Holden, *supra* note 9 (highlighting previous efforts by the sports leagues to claim ownership over information derived from the games they facilitate).

231. Holden, *supra* note 9; Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 846 (2d Cir. 1997) ("In our view, the underlying basketball games do not fall within the subject matter of federal copyright protection because they do not constitute 'original works of authorship' under 17 U.S.C. § 102(a)."); C.B.C. Distrib. Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 823 (8th Cir. 2007) ("[T]he information used in CBC's fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone.").

232. See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

233. See Holden, *supra* note 9.

234. Brief for the United States as Amicus Curiae Supporting Petitioners at 26, Am. Broad. Cos. v. Aereo, Inc., 573 U.S. 431 (2014) (No. 13-461).

235. See Holden, *supra* note 9.

which sent sports scores to subscribers' pagers, infringed on league intellectual property rights.²³⁶ The Second Circuit held that athletic events were not copyrightable and that the reproduction of facts from a broadcast did not infringe on the league's copyright in the broadcast of the game itself.²³⁷ Other cases pressed by sports leagues have similarly sought to assert intellectual property rights to sports data, but they have similarly failed to yield a positive result for the sports leagues.²³⁸ In fact, one of the leagues' own official data partners sent a tweet in 2018, quoting an expert stating: "[t]here is no intellectual property in #sportsdata...."²³⁹

4. Trade Secrets

The final category of federal statutory protection that the sports leagues may use to claim protection of raw game data is trade secrets.²⁴⁰ The World Intellectual Property Organization notes that

to qualify as a trade secret, the information must be: commercially valuable because it is secret, be known only to a limited group of persons, and be subject to reasonable steps taken by the rightful holder of the information to keep it secret, including the use of confidentiality agreements for business partners and employees.²⁴¹

But, while there is a possibility that certain types of compilations of data sold by sports leagues are protectable under trade secrets legislation, easily replicable information that is not secret by virtue of it occurring as part of a public sporting event is unlikely to qualify for protection.²⁴²

236. Nat'l Basketball Ass'n v. Motorola, 105 F.3d 841, 844 (2d Cir. 1997).

237. *Id.* at 846-47.

238. Holden, *supra* note 9.

239. John Holden, *Is Sportradar Taking a Wrecking Ball to League Arguments on Intellectual Property in Sports Data?*, LEGAL SPORTS REP. (Aug. 24, 2018), <https://www.legal-sportsreport.com/22756/sportradar-intellectual-property/> [<https://perma.cc/AU9N-CB4A>].

240. *See* Holden, *supra* note 206.

241. *Trade Secrets*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tradesecrets/en/> [<https://perma.cc/HE4E-BNY8>].

242. *See id.*; Nathaniel Grow, *Free Agency for the Front Office: How Data Analytics and Noncompete Agreements Threaten to Disrupt Competitive Balance in U.S. Professional Sports Leagues*, 58 AM. BUS. L.J. 121, 136 (2021) ("[T]o qualify for trade secret protection, a U.S.

5. Common Law Property Rights

Despite the apparent absence of statutory rights in general sporting event information, there are also additional common law property rights that the sports leagues may employ as a shield against bookmakers looking to use information from sporting events.²⁴³ To date, the sports leagues have been unsuccessful in asserting both of these common law rights in their efforts to control the use of information generated by sporting events.²⁴⁴

a. The Right of Publicity

The right of publicity is a state law claim that is designed to protect a person's image from being used by another for commercial benefit without consent.²⁴⁵ Approximately half the states recognize the right of publicity, with some classifying the right under a right to privacy.²⁴⁶ The right of publicity, however, must be balanced against other interests such as the First Amendment.²⁴⁷ In fact, the First Amendment was fatal to the argument of Major League Baseball Advanced Media, the licensing arm of MLB and the league's players association, in the Eighth Circuit Court of Appeals.²⁴⁸ In *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, it was undisputed that following the expiration of a licensing agreement, C.B.C. continued to use the names of baseball players and their statistics as part of their fantasy sports contests.²⁴⁹ While this act would appear to violate the Missouri right

professional sports team must show that it has employed sufficient measures to maintain the secrecy of its information.”).

243. See Edelman, *supra* note 10, at 10-14 (describing misappropriation and the right of publicity).

244. See, e.g., *Nat'l Basketball Ass'n v. Motorola*, 105 F.3d 841, 853 (2d Cir. 1997) (describing why Motorola's actions did not satisfy the requirements of the doctrine of misappropriation); *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007) (holding that the appellant's First Amendment rights “supersede” the right of publicity).

245. See Edelman, *supra* note 10, at 10.

246. *Publicity*, CORNELL LEGAL INFO. INST., <https://www.law.cornell.edu/wex/publicity> [<https://perma.cc/WPX6-8HWY>].

247. See Edelman, *supra* note 10, at 10-11.

248. *C.B.C. Distrib. & Mktg.*, 505 F.3d at 824.

249. *Id.* at 822.

of publicity, C.B.C. successfully argued that the First Amendment “trumps the right-of-publicity.”²⁵⁰ In finding for C.B.C., the Eighth Circuit noted that “[c]ourts have also recognized the public value of information about the game of baseball and its players, referring to baseball as ‘the national pastime.’”²⁵¹ Courts around the country have rejected efforts by sports leagues to use the right of publicity to restrict fantasy sports and sports trading card related products.²⁵²

b. Misappropriation

A second common law right that sports leagues have sought to claim is a right that has its origins in the 1918 case of *International News Service v. Associated Press*—“hot news misappropriation.”²⁵³ The doctrine of “hot news” misappropriation is a common law doctrine that is designed to protect commercial sellers of information from being victimized by free-riders.²⁵⁴ A “hot news” claim has five elements:

(i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant’s use of the information constitutes free riding on the plaintiff’s efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.²⁵⁵

Historically, the challenge for sports leagues has been two-fold. First, like in *Motorola*, the issue has not been that others are free-riding, but instead that people are independently keeping score and disseminating that information on their own, which defeats the

250. *Id.* at 823.

251. *Id.* (citing *Cardtoons v. Major League Baseball Players Ass’n*, 95 F.3d 959, 972 (10th Cir. 1996)).

252. See Edelman, *supra* note 10, at 11; *Cardtoons L.C.*, 95 F.3d at 969 (holding that parody trading cards that use the likenesses of baseball players are protected by the First Amendment).

253. 248 U.S. 215 (1918).

254. *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 845 (2d Cir. 1997).

255. *Id.*

third element of the test.²⁵⁶ Second, the sports leagues were not competitors with companies like Motorola.²⁵⁷ Indeed they still do not directly appear to provide data, with the exception of the NFL, which has an equity stake in one of the providers to sportsbook operators.²⁵⁸

The two common law rights appear to provide little support for the leagues' claims that they have intellectual property rights in the raw game data. However, in several states, the leagues have lobbied successfully for official data mandates requiring sports betting operators to use official league data for certain types of wagers.²⁵⁹

c. New Property Rights Derived from State Gambling Statutes

While sports leagues have sought to assert a property interest in information surrounding the games that they facilitate, dating back to at least the 1970s, they have largely been unsuccessful.²⁶⁰ The leagues began seeking to obtain a quasi-property right in sports betting data even before the Supreme Court's decision in *Murphy v. National Collegiate Athletic Ass'n*.²⁶¹ The sports leagues initially began lobbying for a flat fee, dubbed an "integrity fee," arguing that the money was needed to address integrity related concerns,²⁶² but after receiving little support, the leagues pivoted to seeking to impose mandates for the use of official data.²⁶³ The first appearance of the sports leagues' request for a mandate for official league data was in early 2018.²⁶⁴ The sports leagues began by lobbying in

256. *See id.*

257. *See id.*

258. Rodenberg et al., *supra* note 102, at 99 n.147.

259. *See* Becky Harris, *Federal Interference with State and Tribal Sports Betting Regulations Will Not Work: Where the Sports Wagering Integrity Act of 2018 Went Wrong and How Federal Legislation Might Be Effective*, 30 J. LEGAL ASPECTS SPORT 106, 126-27 (2020) (describing adopted and proposed official data mandates).

260. *See, e.g.*, *Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1377 (D. Del. 1977).

261. Harris, *supra* note 259, at 126; 138 S. Ct. 1461, 1484-85 (2018).

262. Daniel J. Spitz & Ryan P. Terry, *We Can Handle It: Advocating in Support of State Legislation of Legal Sports Gambling Post-Murphy v. NCAA*, 30 J. LEGAL ASPECTS SPORT 153, 160-61 (2020).

263. Holden & Schuster, *supra* note 8, at 40.

264. Harris, *supra* note 259, at 126.

Connecticut, followed by Kansas, but neither state passed a sports betting bill.²⁶⁵ By June of 2018, the *Murphy* decision had been issued and the sports leagues began lobbying for official data mandates in Pennsylvania, an effort which was also rebuked.²⁶⁶ Perhaps feeling like state-level lobbying would leave the leagues without a mandate for the use of official data, and potentially seeing a possibility of walking away from the nascent sports gambling market with nothing, the sports leagues turned their attention to Congress, where Senators Chuck Schumer and Orrin Hatch included an official data mandate in proposed legislation.²⁶⁷ But, the bill introduced at the end of the 115th Congress would die without a vote.²⁶⁸

The leagues would eventually turn their attention back to state-level lobbying to secure an official data mandate in several states, including Tennessee, Illinois, Michigan, and Virginia.²⁶⁹ The mandates all have some variance, but they all effectively require that providers use league-approved data for determining the outcomes of wagers that occur after a game has begun; in other words, in-play wagering must utilize official league data.²⁷⁰ While official data mandates provide a quasi-property interest to sports leagues, their efficacy—both in practical terms regarding promoting honest sports betting results, and legally, in regards to various questions about whether states can mandate that commercial providers use a certain source of information—remains to be seen.²⁷¹

B. Already Collected and Aggregated Data

The scope of the data that was found lacking protection in the cases that have previously addressed intellectual property rights

265. *Id.* at 126-27.

266. *Id.* at 127.

267. *Id.*; Holden & Schuster, *supra* note 8, at 41.

268. Holden & Schuster, *supra* note 8, at 41-42.

269. Harris, *supra* note 259, at 129-30.

270. *See id.* at 130-32 (describing the subtleties of the various official data mandates).

271. Indeed, one of the concerns that leagues may face in enforcing data mandates is the First Amendment and whether this mandate is effectively a commercial speech restriction without sufficient justification; it appears as though by mandating data from certain sources, the government is privileging a specific version of facts. *See* Holden & Schuster, *supra* note 8, at 55-58.

centered on raw data.²⁷² In contrast to raw data, which has several decades of precedent addressing ownership, sports leagues have also begun investing heavily in technology that generates, collects, refines, and aggregates data.²⁷³ MLB uses a Statcast system tracking technology that provides information such as the launch angle of a batted ball, exit velocity of a ball off a bat, and the spin rate of a pitcher's pitches.²⁷⁴ Similarly, the NBA uses the SportVu camera system, which maps player and ball movements multiple times per second.²⁷⁵ Additionally, sports leagues have become increasingly reliant on proprietary algorithms.²⁷⁶ The data collected by proprietary systems is indeed distinct from the raw data that could be observed by any attendee at a game and thus requires a separate examination.²⁷⁷

Data that is produced from other information is called derived data.²⁷⁸ Derived data differs from raw data and changes the analysis of an application of federal law, particularly with respect to the application of the Copyright Act, which provides protections for compilations of work.²⁷⁹ So, while the factual information observable to the naked eye is not protectable, the compilation generated by the use of the technology may be copyrightable.²⁸⁰ There is a possible challenge to the ability to copyright derived data that is generated by algorithms as it may not satisfy the Copyright Office's standards, which protect only works by humans and specifically exclude technical methods, formulas, and algorithms.²⁸¹

272. Feld, *supra* note 209, at 368.

273. *Id.*; see also Ryan M. Rodenberg, *Antitrust Standing After Apple v. Pepper: Application to the Sports Betting Data Market*, 64 ANTITRUST BULL. 584, 588 (2019) (discussing proprietary and nonproprietary data).

274. Feld, *supra* note 209, at 369.

275. See Zach Lowe, *Seven Ways the NBA's New Camera System Can Change the Future of Basketball*, GRANTLAND (Sept. 4, 2013), <https://grantland.com/the-triangle/seven-ways-the-nbas-new-camera-system-can-change-the-future-of-basketball/> [<https://perma.cc/L7CZ-BS6K>] (describing the implementation of the SportVu camera system in all NBA arenas).

276. Grow, *supra* note 242, at 125-26 (describing the growth and reliance on analytics in professional sports front offices).

277. Feld, *supra* note 209, at 369.

278. Holden & Houser, *supra* note 123 (manuscript at 14-15).

279. 17 U.S.C. § 101; see Holden & Houser, *supra* note 123 (manuscript at 49).

280. Holden & Houser, *supra* note 123 (manuscript at 49).

281. *Id.* (manuscript at 49-50) (citing U.S. COPYRIGHT OFFICE, CIRCULAR 31: IDEAS, METHODS, OR SYSTEMS (2012)).

While copyrighting the compilations may be dependent on how the Copyright Office views the data, whether made by a human or generated by an algorithm,²⁸² there may be an alternative claim to protectability via patent.²⁸³ Even though some have been skeptical of the decision of the Patent Office to grant the patent,²⁸⁴ it appears as though this could be a viable means of protecting information capable of only being generated by patented machines.²⁸⁵ However, while this may protect the collection of the information, it would appear that once that information is made available, either via broadcast or publication, the information generated would become a fact incapable of protection by copyright, potentially defeating some of the value for having a patented process of collecting information in the first place.²⁸⁶ There is also the potential that a league could claim that the methodology for generating a point of derived data is a trade secret.²⁸⁷ This argument becomes strained in practice, however, as a result of varying groups gathering information independently.²⁸⁸ This concern is, however, muted in cases where equipment needs to be installed on private property to collect data.²⁸⁹

While none of the new official data mandates include specific reference to derived data products, some leagues have begun including them with the packages sold by data providers.²⁹⁰ The inclusion of proprietary data, as well as that which is freely

282. *Id.*

283. *See, e.g.*, Baseball Pitch Quality Determination Method & Apparatus, U.S. Patent No. 10,737,167 (issued Aug. 11, 2020) (describing a patent issued for “[a] system for automatically determining a pitch rating for a pitch in baseball, the pitch rating indicative of a quality of the pitch”).

284. Eno Sarris, ‘You Can’t Own an Idea’: Attempt to Patent a Baseball Stat Surprises Community, ATHLETIC (Sept. 22, 2020), <https://theathletic.com/2074516/2020/09/22/you-cant-own-an-idea-attempt-to-patent-a-baseball-stat-surprises-community/> [<https://perma.cc/8MFD-45UJ>].

285. *See, e.g.*, ‘167 Patent.

286. *See* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344 (1991) (“The first is that facts are not copyrightable; the other, that compilations of facts generally are.”).

287. *See* Holden & Houser, *supra* note 123 (manuscript at 52-54).

288. *Id.* (manuscript at 53-54).

289. *See id.*

290. *See* Brett Smiley, *MLB, Sportradar Ink Sports Betting Data Deal as Controversy Brews*, SPORTSHANDLE (Feb. 27, 2019), <https://sportshandle.com/mlb-sportradar-announce-betting-data-deal/> [<https://perma.cc/XB9Q-44EE>] (noting that MLB’s deal with a data provider includes Statcast data).

accessible, is likely a means of hoping to create a market around these proprietary products.²⁹¹ The challenge for the marketplace is that the sports leagues are consolidating the market for data around only a handful of companies, and given that gambling operators operate in multiple jurisdictions, the legislative limitations of state borders have a ripple effect of stifling the marketplace by freezing out new entrants.²⁹²

IV. ANTICOMPETITIVE RISKS OF LEAGUE-WIDE SPORTS DATA LICENSING AGREEMENTS

To the extent that professional sports teams do not have an exclusive right to collect their own sports data, one would reasonably expect there to be a free and robust market for collecting, aggregating, and selling (or licensing) sports data to third parties.²⁹³ However, for the most part, there has not emerged a free market for securing rights to use most forms of sports data.²⁹⁴ To the contrary, the market for acquiring sports data has come to more closely resemble a seller's monopoly, in which each league's central office is the only source where third parties can reasonably turn to acquire data related to that particular sport.²⁹⁵ In certain circumstances, for example, with respect to obtaining players' biometric data, the teams within a sports league, if not infringing on player privacy rights, have gained a monopoly through exclusive access to information.²⁹⁶ In other circumstances, sports leagues may have faster or

291. *Id.*

292. See Rybaltowski, *supra* note 6 (noting that there are effectively four companies that handle supplying sports data to gambling operators).

293. See generally *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 853-54 (2d Cir. 1997) (discussing the competition for the collection and providing of NBA game data between Gamestats, a company owned by the NBA teams, and STATS, a company that serviced America Online and Motorola's SportsTrax paging device).

294. See *Official League Data*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/official-league-data/> [<https://perma.cc/3YS9-2XG5>] (discussing the efforts by U.S. professional sports leagues to pressure or force teams to use what they call "official data," which is collected and provided by just a few companies with a direct relationship to the sports leagues).

295. See *id.*

296. See Ryan Chiavetta, *Biometric Monitors Bring Fresh Privacy Concerns to Pro Sports*, IAPP (Mar. 8, 2017), <https://iapp.org/news/a/biometric-monitors-bring-fresh-privacy-concerns-to-pro-sports/> [<https://perma.cc/H97H-F7TB>] (discussing MLB's 2017 approval of players using wearable technology to collect biometric data during games, but leaving open the question as

otherwise superior methods for aggregating publicly collectable data.²⁹⁷ Meanwhile, in yet still other circumstances, sports leagues may have successfully incentivized the largest sportsbooks to use exclusively their data (thus driving potential competitors from the marketplace) or have successfully lobbied state governments to mandate gambling companies exclusively use their data.²⁹⁸ Under each of these circumstances, similar, albeit perhaps not identical, questions emerge as to whether the league's control over such data yields significant anticompetitive effects such to give rise to scrutiny under federal antitrust laws.²⁹⁹

Among the many arguably anticompetitive components of sports leagues' emerging data policies are efforts by at least some sports leagues to require individual teams to sell data exclusively on the league level, rather than on the team level.³⁰⁰ This practice of collectivizing the ownership and sale rights of sports data gives rise to important legal questions under section 1 of the Sherman Act, which courts sometimes describe as "the Magna Carta of free enterprise."³⁰¹

In pertinent part, section 1 of the Sherman Act states that "[e]very contract, combination ... or conspiracy[] in restraint of trade or

to who owns that data between the player and his team); see also Jacob Feldman, *Data Monetization Trend to Bring Revenue in 2021*, Deloitte Says, SPORTICO (Dec. 7, 2020, 9:01 PM), <https://www.sportico.com/business/tech/2020/sports-data-value-covid-deloitte-1234617870/> [<https://perma.cc/DJV8-B8SK>] (discussing new potential ways for sports leagues to monetize players' biometric data, especially in the context of emerging sports gambling markets).

297. Matt Rybaltowski, *Document Shows MLB Pitch for Sportsbooks to Become 'Official League Data Licensee'*, SPORTSHANDLE (June 13, 2019), <https://sportshandle.com/mlb-authorized-gaming-operator-program/> [<https://perma.cc/L98W-3RYC>] (discussing a pamphlet created by MLB, trying to encourage sportsbooks to purchase their data for use in prop bets, based on the League's claim that their data is superior because it is collected more rapidly, thus reducing lag time).

298. See Beatrice Lucas, Comment, *All Bets Are Off: Preempting Major League Baseball's Monopoly on Sports Betting Data*, 95 WASH. L. REV. 1537, 1538 (2020) (explaining, in particular, that two states, Illinois and Tennessee, have passed requirements mandating that gambling operators exclusively use official league data).

299. See Edelman, *supra* note 11; see also Ryan M. Rodenberg, *Regulating Sports Gaming Data*, 11 UNLV GAMING L.J. 9, 35-41 (2020) (noting antitrust issues in the data marketplace).

300. See, e.g., Gregory J. Pelnar, *The Antitrust Perils of Sports Data for U.S. Sports Leagues*, ANTITRUST CHRON., Apr. 2020, at 28, 31 ("Sports leagues that have collectivized the ownership and sale of sports data at the league level ... may be accused of a conspiracy in the restraint of trade ... in violation of Section 1 of the Sherman Act.").

301. See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

commerce ... is declared to be illegal.”³⁰² Read literally, this section of antitrust law would seem to disallow all business contracts, as all contracts technically entail at least some degree of “restraint.”³⁰³ In practice, however, most courts have adopted an interpretation of section 1 of the Sherman Act that only invalidates those contracts that “unreasonably” restrain trade.³⁰⁴ The process by which a court would review an antitrust challenge under section 1 of the Sherman Act is rather straightforward, and typically entails applying a three-step process.³⁰⁵ First, a reviewing court would determine whether there exists “concerted action between at least two legally distinct economic entities,” as is necessary to bring an action under the scope of section 1.³⁰⁶ Then, the court would assess if the underlying conduct “does more to harm than to help competition in the specific market or markets of inquiry.”³⁰⁷ Finally, the court would need to consider if there is a broader statute or matter of public policy that would override the traditional application of antitrust law.³⁰⁸

302. 15 U.S.C. § 1.

303. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98 (1984).

304. *See id.* (“[T]he Sherman Act was intended to prohibit only unreasonable restraints of trade.”).

305. Marc Edelman, *The NCAA, Fair Pay to Play, Antitrust Scrutiny, and the Need for Institutional Reform*, 20 WAKE FOREST J. BUS. & INTEL. PROP. 177, 186 (2020).

306. *Primetime 24 Joint Venture v. Nat'l Broad. Co.*, 219 F.3d 92, 103 (2d Cir. 2000); *see also Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 186 (2010) (“The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade.”).

307. Edelman, *supra* note 305, at 186-87.

308. *Id.* at 187. Implicit within this analysis is also the threshold requirement that the underlying restraint affects interstate commerce, as is required to create the judicial hook for Congress to appropriately regulate commerce; however, in the context of a purported restraint implemented in a United States professional sports league, it is hard to argue that either the “interstate” or the “commerce” component of the requirement would prove to be a source of meaningful debate. *See Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001) (“In order to establish a claim under Section 1 [of the Sherman Act], a plaintiff must demonstrate: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.” (emphasis added) (quoting *Hairston v. Pac. 10 Conf.*, 101 F.3d 1315, 1318 (9th Cir. 1996))); *see also Flood v. Kuhn*, 407 U.S. 258, 282-83 (1972) (acknowledging that professional sports leagues engaged in activities that affect interstate commerce and, outside of perhaps MLB, are subject to federal antitrust laws); Marc Edelman, *Are Commissioner Suspensions Really Any Different from Illegal Group Boycotts*, 58 CATH. U. L. REV. 631, 642 (2009) (“There is no real dispute about whether the NFL Personal Conduct Policy has an effect on trade or commerce among more than one state.”).

Section A of this Part explores why league-wide policies related to collectivizing the ownership and sale of sports data would likely constitute “concerted action” under section 1 of the Sherman Act. Section B then analyzes the potential competitive effects of a sports league’s collective selling or licensing the rights to use league data. Finally, Section C explores any mitigating factors that, as a matter of public policy, may override general antitrust concerns related to the centralized sale of sports data.

A. Concerted Action

Unlike other sections of antitrust law, section 1 of the Sherman Act “applies only to concerted action” between multiple entities.³⁰⁹ In this vein, the law recognizes that certain acts that may be harmless when performed by a single entity acting alone “may become a public wrong when done by many acting in concert” if the result is harmful “to the public or to the individual against whom the concerted action is directed.”³¹⁰ To determine whether an alleged restraint of trade involves “concerted action between two legally distinct economic entities,” a court will typically consider “whether there is evidence of an agreement, either written or implied, between entities that lack a common objective.”³¹¹ This determination compels a plaintiff to show the presence of an agreement that “deprives the marketplace of independent centers of decisionmaking’ ... and thus of actual or potential competition.”³¹²

The Supreme Court’s unanimous 2010 decision in *American Needle* provides the important guideposts for ascertaining whether a centralized decision by a professional sports league constitutes “concerted action” under federal antitrust law. The Court found that the collectivized licensing of NFL team marks for use on paraphernalia constituted “concerted action.”³¹³ The Court explained that “[d]ecisions by NFL teams to license their separately owned

309. *Am. Needle*, 560 U.S. at 190.

310. *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600, 614 (1914).

311. Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RESV. L. REV. 61, 72 (2013) (quoting *Primetime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92, 103 (2d Cir. 2000)).

312. *Am. Needle*, 560 U.S. at 195 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984)).

313. *Id.* at 186.

trademarks collectively and to only one vendor [would] ‘depriv[e] the marketplace of independent centers of decisionmaking,’ ... and therefore of actual or potential competition.”³¹⁴ The Court further explained that “[a]lthough NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily [fully] aligned.”³¹⁵

The Supreme Court’s holding in *American Needle* does not necessarily apply to every theoretical model for operating a professional sports league.³¹⁶ For example, one could make a reasonable argument that there would not be “concerted action” if a sports league such as the XFL, a startup American football league that was fully owned by the publicly traded World Wrestling Entertainment Inc., were to sell its data through a central league office.³¹⁷ The reason being, this action would not constitute the joining of otherwise separate centers of decision-making.³¹⁸ Nevertheless, the holding in *American Needle* still strongly supports the conclusion that when traditionally structured sports leagues (e.g., MLB, the NBA, the NFL, the NHL, and probably even Major League Soccer) centralize data rights, the threshold requirement of “concerted action” is almost certainly met.³¹⁹

314. *Id.* at 197 (alteration in original) (quoting *Copperweld*, 467 U.S. at 769).

315. *Id.* at 198.

316. *See id.* at 191 (explaining that in determining whether there is concerted action for purposes of an antitrust analysis, courts have “eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate[d]”).

317. *See* Marc Edelman, *Why the ‘Single Entity’ Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 891, 902-03 (2008) (describing the original XFL, which folded after the 2000-01 season as a “pure common-property system” that would fall under the scope of a “single entity” in the antitrust sense because the entirety of the league was owned in majority stake by a single, publicly traded company: WWE); Michael McCann, *Advantages and Drawbacks to XFL Operating as a Single-Entity Sports League*, SPORTS ILLUSTRATED (Jan. 26, 2018), <https://www.si.com/nfl/2018/01/26/xfl-single-entity-sports-leagues-advantages-drawbacks> [<https://perma.cc/SRK9-Z48H>] (explaining how the second iteration of the XFL was structured in much the same way, arguably for the purposes of avoiding potential antitrust liability).

318. *See Am. Needle*, 560 U.S. at 194-95 (discussing the separate centers of decision-making test).

319. *See id.* at 186 (finding that the NFL’s league-wide licensing activities constitute concerted behavior); *see also* *Fraser v. Major League Soccer*, 284 F.3d 47, 58 (1st Cir. 2002) (finding that despite Major League Soccer’s single corporate structure, which distinguished it from MLB, the NBA, the NFL, and the NHL, the economic realities of the operations of

If there is any room whatsoever for debate about whether a sports league's attempts to centralize the rights to data constitute "concerted action," that debate would likely stem from questions about whether in-game data from a particular sporting event is non-property, individual team property, shared property between the two teams who play in a game, or even perhaps the players' property.³²⁰ This question is complicated both by the fact that sports statistics from a given contest would not exist unless there were two separate teams playing against one another,³²¹ and that there is no public database in which individuals or entities can file claims of ownership over game data, such as what exists for trademark rights.³²² Nevertheless, this complex and theoretical question is largely tangential to the "concerted action" analysis because if no team were to own underlying sports data, it would not be able to license it to others.³²³ And, even if one were to deem in-game data to be property of both teams playing in a game, still the joining of individual game data from multiple games, each involving different teams, would be "concerted" in nature.³²⁴

B. Competitive Effects Analysis

Recognizing that the league-wide sale of sports data, at least under traditionally structured sports leagues, almost certainly constitutes "concerted action,"³²⁵ the antitrust inquiry of collectivizing the ownership of sports data next shifts to assessing the competitive

Major League Soccer made single-entity treatment of the league "doubtful").

320. See Danielle Boyd, *The Great Debate: Athlete Data—Who Owns It?*, SPORTSTECH.GRP. (Oct. 15, 2018), <https://www.sportstechgroup.co/sports-tech-education/athlete-data> [<https://perma.cc/FX5Z-R8SN>] (focusing primarily on the question of who owns data derived from wearable technologies—players or teams?).

321. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 278 (1978) (pointing out an arguable paradox existing in itself in terms of analyzing professional sports leagues under traditional legal frameworks because two teams are needed for a game to be played).

322. See *Iancu v. Brunetti*, 139 S. Ct. 2294, 2297-98 (2019) (noting that "Under the Lanham Act, the [Patent and Trademark Office] administers a federal registration system for trademarks," which provides *prima facie* evidence of who has ownership rights in a given mark).

323. See *C.B.C. Distrib. & Mktg. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 825 (8th Cir. 2007) (discussing the importance of a contractual right of ownership in data because one cannot license rights that one does not first legally possess).

324. See *Am. Needle*, 560 U.S. at 191-92 (explaining what constitutes "concerted action").

325. See *id.* at 198.

effects emanating from the agreement among individual teams in a sports league to collectively license the use of their aggregated data.³²⁶ This Article assesses the competitive effects of league data policies in three steps: first, by explaining the general standard of reviewing such restraints; second, by exploring existing case law that relates to somewhat analogous restraints; and third, by exploring the likely economic effects of sports leagues collectivizing the ownership and sale of sports data.

1. *General Standards of Review*

There are a number of different standards by which a court can assess collective action under antitrust law, including, for example, the *per se* test, the full Rule of Reason test, and the quick-look Rule of Reason test.³²⁷ Because professional sports leagues are typically recognized as legitimate joint ventures that serve at least certain, benevolent purposes (such as setting league rules and scheduling games),³²⁸ it is almost a certainty that a court would review the practice of sports leagues collectivizing the ownership and sale of sports data under a full Rule of Reason inquiry.³²⁹ Applying a full Rule of Reason analysis rather than any judicial shortcut, the legality of a sports league's collectivizing of the ownership and sale of sports data would likely turn on careful analysis of factors, including: the collective market power of teams within a given

326. Edelman, *supra* note 305, at 186-87 (referencing competitive effects analysis as the second stage in an antitrust inquiry under § 1 of the Sherman Act).

327. See Marc Edelman, *Upon Further Review: Will the NFL's Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. Nat'l Football League*, 16 STAN. J.L., BUS. & FIN. 183, 197-200 (2011) (explaining that “[i]n accordance with long established precedent, a court may review any purportedly anticompetitive [conduct] under one of three ‘general standards’—a *per se* test reserved for conduct that, on the surface, is most directly problematic; a quick look Rule of Reason test for conduct that may be somewhat less problematic; and the full Rule of Reason test for conduct where potential procompetitive benefits need to be reviewed most carefully).

328. See *id.* at 199-200; see also *Am. Needle*, 560 U.S. at 202 (“The fact that [professional sports] teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions.”).

329. See *Am. Needle*, 560 U.S. at 203; see also *Texaco Inc. v. Dagher*, 547 U.S. 1, 8 (2006) (holding that “the pricing decisions of a legitimate joint venture do not fall within the narrow” scope of *per se* analysis under section 1 of the Sherman Act).

professional sports league;³³⁰ an economic assessment of the competitive effects of centralized data licensing practices on data consumers within all relevant markets; and the degree of consumer harm that is caused by leagues collectivizing ownership rights in sports data.³³¹

2. Legal Precedent

The practice of sports leagues collectivizing the ownership and sale of sports data is a matter of first impression for the courts. Nevertheless, one can turn to reasonable analogs, both inside and outside of the sports industry, to help assess the underlying economic effects of this practice.³³² Perhaps the closest analog to the league-wide collectivization of sports data ownership is the NFL's longstanding practice of offering only centralized, exclusive licenses for the use of individual team trademarks for use on paraphernalia.³³³ In *American Needle*, the district court, upon remand from the Supreme Court, held that this practice presented bona fide issues of material fact as to whether the NFL teams had collectively restrained trade in "the wholesale market for NFL trademarked hats," of which the NFL teams collectively had 100 percent, when it imposed the requirement that hat manufacturers exclusively negotiate for a license to use one or more NFL team marks at the central, league level.³³⁴ While the district court in *American Needle*

330. See Edelman, *supra* note 327, at 200-01 (explaining that market power, which is "the power to control prices or exclude competition," may be established either by looking at actual marketplace data or by basing it on secondary economist reports).

331. See *id.* at 201 (explaining that an assessment of whether there exists net anticompetitive effects requires a balancing of anticompetitive effects and procompetitive benefits). In balancing competitive effects, a potential plaintiff would have "the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in [a] relevant market." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). If the plaintiff meets this burden, the burden then shifts to the defendant to demonstrate "a procompetitive rationale for the restraint." *Id.* Meanwhile, if the defendant can show a procompetitive rationale, the burden then shifts back to the plaintiff to demonstrate the procompetitive efficiencies may be achieved through a less anticompetitive alternative. *Id.*

332. See *infra* notes 337-41 and accompanying text.

333. See *Am. Needle, Inc. v. New Orleans La. Saints*, No. 04-cv-7806, 2014 WL 1364022, at *1 (N.D. Ill. Apr. 7, 2014), *remanded from Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010) (discussing this very restraint).

334. *Id.* at *2. There, the court rejected the NFL's motion for summary judgment to dismiss on grounds that *American Needle* failed to show a relevant market, finding that *American*

ordered a trial on this issue, the parties ultimately settled prior to final adjudication—leaving a final decision on the factual merits undetermined.³³⁵ Nevertheless, the league-wide licensing arrangement was very much called into doubt by the district court’s rejection of the NFL’s motion for summary judgment—a result that led the NFL to ultimately enter into a settlement somewhat reforming its centralized trademark licensing practices.³³⁶

A second Supreme Court case that similarly draws upon the issue of sports leagues collectivizing the ownership and sale of team-based property rights is the seminal 1984 ruling in *National Collegiate Athletic Ass’n v. Board of Regents of the University of Oklahoma*—a case where the Supreme Court held the National Collegiate Athletic Association’s (NCAA) efforts to collectivize football television broadcast rights, for purposes of exclusive resale on a national level, outright violated federal antitrust laws.³³⁷ Decided twenty-six years before *American Needle*, the Supreme Court in *Board of Regents* rejected NCAA member schools’ assignment of their television broadcast rights to a centralized NCAA committee because doing so both created a limitation on output and precluded any individual negotiation for broadcast rights with NCAA member schools.³³⁸

By contrast, the Supreme Court in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* rejected an antitrust challenge to the collective licensing of individual composers, authors, and publishers—holding that the pooling of individual musical composers, authors, and publishers’ copyrights for purposes of offering a blanket music license was, under a full Rule of Reason analysis, procompetitive.³³⁹ The underlying economic analysis in *Broadcast*

Needle produced more than sufficient evidence to proceed to trial on the argument that the market to sell NFL team hats was distinct from the market to sell hats bearing other professional sports team logos. *See id.* at *3.

335. *See* Marc Edelman, *American Needle Settles Antitrust Lawsuit with the NFL, Preventing an Important Sports Law Trial*, FORBES (Mar. 3, 2015, 10:30 AM), <https://www.forbes.com/sites/marcedelman/2015/03/03/american-needle-settles-antitrust-lawsuit-with-the-nfl-preventing-an-important-sports-law-trial/> [<https://perma.cc/6BVM-94H2>]; *see also* Ken Belson, *N.F.L. and American Needle Agree to Settle Lawsuit*, N.Y. TIMES (Feb. 18, 2015), <https://www.nytimes.com/2015/02/19/sports/football/nfl-and-american-needle-agree-to-settle-lawsuit.html> [<https://perma.cc/7LYY-DARP>].

336. *See* Edelman, *supra* note 335.

337. 468 U.S. 85, 120 (1984).

338. *Id.* at 99.

339. 441 U.S. 1, 24 (1979).

Music, however, is distinguishable from both *American Needle* and *Board of Regents* in at least three important ways. First, in *Broadcast Music*, the individual musical composers, authors, and publishers that participated in the group license granted their membership association “nonexclusive rights to license [their] ... performances.”³⁴⁰ Thus, they retained the right to license the copyrights to their own works independently from the collective association outside of the context of the group license.³⁴¹

Second, in the context of the group license, the potential purchasers of the right to play certain copyrighted music in *Broadcast Music* still had the choice of working with two different associations—ASCAP and BMI—both of which continued to compete against one another to sell group licenses to these artists.³⁴² Thus, even in terms of negotiating group licenses, potential television and radio stations were not limited to a single seller for purposes of negotiation, much as seems to be the case in at least some sports leagues’ data licensing policies.

Finally, from a practical matter, one can argue that there is a distinction between the level of efficiencies generated from aggregating the copyrights to thousands of different musical composers, authors, and publishers, and aggregating the rights of just thirty or thirty-two independent professional sports teams.³⁴³ Indeed, it would likely be comparatively easier for a licensed sports gambling operator to secure the rights from thirty or thirty-two different teams to use their real-time player data than it would be for a television or radio station to secure the rights from thousands of individual performers to play their music on the air.

340. *Broad. Music*, 441 U.S. at 5.

341. See Edelman, *supra* note 327, at 215 (discussing the nonexclusive nature of either the ASCAP or BMI license in *Broadcast Music*).

342. *Broad. Music*, 441 U.S. at 5 (explaining that most radio and television licensees purchase licenses from both ASCAP and BMI).

343. See Edelman, *supra* note 327, at 214-15 (discussing the likely differences in efficiency that emerge from pooling together the rights of thousands of different musical workers and those of just a limited number of professional sports teams within a given league).

3. *Likely Competitive Effects of Centralized League Data Policies*

Turning back to the Rule of Reason assessment of sports leagues collectivizing the ownership and sale of sports data, one could point to specific potential anticompetitive effects of this practice similar in nature to those found by courts in *American Needle* and *Board of Regents*. Most notably, when a sports league adopts an exclusive league-wide policy for licensing aggregated data, it precludes a potential purchaser from licensing the rights to aggregated statistical data from just a single team.³⁴⁴ Thus, much as how *American Needle* was forbidden by NFL policy from purchasing a license to use the trademarks of only a single team—such as the New Orleans Saints—on paraphernalia, in terms of league-wide data sale and licensing policies, “a gaming company that wants to offer betting exclusively on Los Angeles Dodgers games [or New York Knicks games] might be forced to buy statistical feeds from the league overall, and not directly from the Dodgers [or Knicks].”³⁴⁵ As a result, this could potentially increase sports gaming operators’ costs by denying them the opportunity to purchase the data of one team against another team based in the same league.³⁴⁶ If the gaming operator is a smaller company, the need to purchase the statistical feeds from all of the teams in the league may drive the operator out of business, or may make it too expensive for them to launch their business in the first instance.

The efforts by sports leagues to collectivize the ownership and sale of sports data, however, also might produce at least four types of procompetitive benefits. First, to the extent that most gaming operators wish to acquire the aggregated data from an entire sports league and not just a few teams, a centralized, league-wide licensing system would substantially reduce “transaction costs”³⁴⁷ for many would-be licensees.³⁴⁸ Indeed, not only would it expedite the process

344. See Edelman, *supra* note 11.

345. *Id.*

346. *Id.*

347. JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, PROPERTY 48 (8th ed. 2014) (defining “transaction costs” as “costs of *arranging* an offer”).

348. See *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 303 (2d Cir. 2008).

of securing all of the desired rights, but it would mitigate the risk of an individual team owner holding out or demanding an unusually high fee from a gaming operator, knowing full well that acquiring the rights to use statistical data for all of the teams in a league is likely to have far greater value than if the data for just a few teams is missing.³⁴⁹

Second, while the centralized sale of sports data erodes intra-league competition, it may arguably enhance interleague competition by pitting the individual sports leagues against one another when gaming operators decide whose data to purchase.³⁵⁰ For example, if a sports betting operator or online daily fantasy sports contest is debating between using aggregated data derived from the NBA or the NHL but not both, even when centralizing their sale of data, these leagues may find themselves competing for that customer.³⁵¹ While this is a novel issue in the context of the licensing of aggregated sports data, the Second Circuit Court of Appeals opined in *Major League Baseball Properties, Inc. v. Salvino, Inc.* that in the market of licensing team trademarks for the making of promotional items, MLB teams compete in licensing their trademarks not only against each other but also against “other sports entities such as the NBA, the NFL, the NHL, [and] NASCAR.”³⁵²

A third potential, albeit far more dubious, benefit of league-wide licensing of statistical data may theoretically lie in enhancing on-field competitive balance within the league overall by facilitating the even split of all data-generated revenues between all of the

349. For an example of a professional sports team engaging in the act of holdout with respect to a licensing arrangement absent league-wide mandate, see *Major League Baseball Props., Inc. v. Salvino, Inc.*, 420 F. Supp. 2d 212, 217 (S.D.N.Y. 2005), *aff'd* 542 F.3d 290 (2d Cir. 2008) (discussing the Houston Astros’s decision to refuse to participate in the league-wide licensing of their intellectual property rights for purposes of making a set of baseball cards encompassing all players, across all MLB teams).

350. See *Major League Baseball Props.*, 542 F.3d at 299 (noting the potential interleague competition for the licensing of rights to use team logos on promotional products).

351. For a discussion of potential interleague competition in various sports product markets as a potential affirmative defense to a league-wide restraint, see *id.* at 328-31 (recognizing the possibility that the proper relevant market for licensing intellectual property rights for Bammers (plush bears) was far broader than just MLB teams); *Chi. Pro. Sports Ltd. v. Nat’l Basketball Ass’n*, 95 F.3d 593, 603-04 (7th Cir. 1996) (recognizing that the NBA’s collective licensing of game broadcasts may yield procompetitive benefits within a broader market for selling the rights to television programming).

352. 542 F.3d at 299.

league's teams.³⁵³ While courts have long rejected the notion of improved competitive balance as justification for a sports league's restraints in labor markets,³⁵⁴ there is a possibility that some courts may adopt a more open-minded view to the competitive balance argument when used to defend restraints involving product markets.³⁵⁵ For example, the Supreme Court stated in *American Needle* that "making [an] entire league successful and profitable ... provides a perfectly sensible justification for making a host of collective decisions."³⁵⁶ Nevertheless, despite the Court's language in *American Needle* which seems to raise the possibility that fostering competitive balance may constitute a procompetitive benefit under antitrust laws, longstanding antitrust precedent makes clear that there must be a direct nexus to a financial benefit to consumers emanating from any alleged defense of a restraint based on procompetitive effects.³⁵⁷ Absent evidence that the teams benefiting from equal sharing of sports data revenues are poor-performing on-field teams that would invest more money into player labor with better access to revenues, the argument does not have much legal traction.³⁵⁸ Furthermore, even without centralizing

353. See James T. McKeown, *The Economics of Competitive Balance: Sports Antitrust Claims After American Needle*, 21 MARQ. SPORTS L. REV. 517, 550 (2011) (arguing from the perspective of an antitrust lawyer at a large national law firm that represents the interests of large companies and joint ventures, including professional sports leagues, that "[c]ompetitive balance ... may provide procompetitive justifications for ... league rules or polices, particularly when the restrictions relate to the integrity of the game or apply to markets for the downstream product offerings of the professional sports league").

354. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1072 (9th Cir. 2015) (rejecting a college sports league's alleged competitive benefit of enhanced competitive balance absent evidence the underlying restraint of trade actually had enhanced competitive balance).

355. See, e.g., McKeown, *supra* note 353, at 549-50 (broadly differentiating competitive balance as an antitrust defense when used to justify a league's collective selling or licensing of "downstream product[s]," rather than labor-side restraints implemented outside of the scope of collective bargaining).

356. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 202 (2010); see also *Chi. Pro. Sports Ltd.*, 95 F.3d at 604 (Cudahy, J., concurring) ("Such a balance is needed to ensure that the league provides high quality entertainment throughout the season so as to optimize competition with other forms of entertainment.").

357. See Edelman, *supra* note 327, at 216-17. See generally *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 688, 693-94 (1978) (explaining that general policy considerations such as safety cannot be considered as a procompetitive benefit under a proper antitrust analysis).

358. See *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1187 (D.C. Cir. 1978) (rejecting a competitive balance argument to justify the NFL's draft under the Rule of Reason analysis); *Mackey v. Nat'l Football League*, 543 F.2d 606, 621-22 (8th Cir. 1976) (finding that the NFL's

league data rights, there are far less restrictive means that a sports league could use to promote competitive balance in a sports league, such as revenue sharing among the teams, without collectivizing independent property rights.³⁵⁹

Finally, one could even perhaps attempt to argue that the league-wide licensing arrangement is net procompetitive because, as a practical matter, there really is little to no consumer demand for aggregated data of just a single professional sports team within a league—thereby making such a purported market, in itself, relevantly obsolete. Indeed, while there is strong evidence of a viable market for companies to sell shirts, hats, and other apparel with just single-team logos,³⁶⁰ further economic analysis is needed to assess the true viability of a business model where consumers bet on sporting events based on the data derived from some, but not all, of the games in a given league. While the gravamen of the above analysis presumes there is a viable market to purchase sports data in which individual teams within a league are competitors to sell their data but teams across sports leagues are not, it is possible that the acquisition of the game data for a single team might, based on economic evidence, prove to be a standalone market (for example, acquiring the rights to Los Angeles Dodgers data is not part of the same market as acquiring the rights to San Francisco Giants data). Likewise, based on economic evidence, the acquisition of the game data for a single team might prove to be a market broader in scope than just a given sports league (for example, the rights to Los Angeles Dodgers data may be part of the same market as rights to

rule restricting free movement of players not under contract between teams cannot be saved based on the purported argument that the rule improved competitive balance). *See generally O'Bannon*, 802 F.3d at 1072 (accepting the district court's finding that while compensation rules could theoretically constitute a procompetitive balance, the NCAA failed to show that its rules limiting college athlete pay actually promote competitive balance in terms of their economic effects).

359. *See generally* Stephen F. Ross & Benjamin Woodworth, *More Like the United Nations than McDonald's: Economic and Policy Aspects of the NFL Labor Dispute*, PA STATE INST. FOR SPORTS L., POL'Y & RSCH. 1, 9, https://pennstatelaw.psu.edu/_file/Sports%20Law%20Policy%20and%20Research%20Institute/More_Like_the_United_Nations.pdf [<https://perma.cc/B7TS-C96H>] (“Designing revenue sharing schemes is always a delicate balance to achieve desired competitive balance among teams, while preserving the incentive for individual club initiative.”).

360. *See* Edelman, *supra* note 327, at 192.

Los Angeles Lakers, Los Angeles Chargers, Los Angeles Kings, or even Los Angeles Galaxy data).

Under a proper section 1 Sherman Act analysis, when there are both significant anticompetitive and procompetitive effects to a given restraint, a court may then consider whether the objectives of the restraint may be achieved by a less restrictive alternative or, conversely, balance the anticompetitive effects of the restraint against its procompetitive benefits.³⁶¹ While substantial fact finding and economic analysis would go into this stage of the inquiry, a strong argument could be made that even if there are *bona fide* procompetitive benefits to sports leagues' collective ownership and sale of sports data, these benefits could largely be achieved in a less restrictive manner.³⁶² Specifically, these benefits could stem from allowing the occasional would-be purchaser of data who prefers to buy data from just a single team (or a few teams) in a sports league, to acquire these rights from the teams themselves, rather than from the league overall.³⁶³ By allowing theoretical purchasers of sports data to choose between purchasing rights on a team-by-team basis or purchasing a blanket license from the league overall, such a league-wide data policy comes far closer to resembling the music licensing arrangement that was upheld by the Supreme Court in *Broadcast Music, Inc.*³⁶⁴ Additionally, this purchasing option differentiates sports data from both the broadcast rights licensing system overruled by the Supreme Court in *Board of Regents* and the NFL team trademark licensing system that was called into doubt in *American Needle*.³⁶⁵

361. See Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 827 (2009).

362. See *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1251 (9th Cir. 2020), *aff'd sub. nom.* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (explaining that in the third stage of a Rule of Reason antitrust analysis, a court will consider if there are ways that are "less restrictive but virtually as effective" in attaining the procompetitive benefits advocated for by the antitrust defendants).

363. See *id.*

364. See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 5 (1979).

365. See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 92 (1984); *Am. Needle, Inc. v. New Orleans La. Saints*, No. 04-cv-7806, 2014 WL 1364022, at *1 (N.D. Ill. Apr. 7, 2014), *remanded from Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010).

4. Antitrust Exemptions and Other Mitigating Factors

Beyond the *bona fide* (albeit perhaps weak) antitrust arguments that sports leagues may attempt to make in support of collectivizing their data rights, there are a series of other legal arguments that may exempt, or perhaps otherwise justify, collective league behavior in centralizing data licensing, even where these practices may otherwise be anticompetitive. First, as unseemly as it may be, the collective lobbying of state governments for favorable laws in terms of data rights, and the collectivizing of the sale of sports data for specific purposes of complying with state laws, are both likely beyond the scope of the Sherman Act.³⁶⁶ Moreover, if it becomes law in any given state that licensed sports gambling operators must purchase their contest data from the underlying sports leagues, a licensed gambling operator that does business in a state maintaining such a data mandate would probably not have an antitrust claim for paying an amount above the free market price to secure data in compliance with state law.³⁶⁷

Second, MLB has historically enjoyed some degree of an exemption from federal antitrust laws based on a well-known trilogy of Supreme Court decisions, culminating with the Court's 1972 decision in *Flood v. Kuhn*.³⁶⁸ However, based on somewhat ambiguous language in the *Flood* decision, lower courts continue to disagree about whether MLB's historic antitrust exemption, as adopted by the Supreme Court, relates only to the league's player reserve system (the source of the dispute in *Flood*) or to broader aspects of the business of MLB.³⁶⁹ Even after Congress's passing of the Curt Flood

366. See *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 555-56 (2014) (explaining that under what has become known as the *Noerr-Pennington* doctrine, "defendants are immune from antitrust liability for engaging in conduct ... aimed at influencing decisionmaking by the government"); see also Smiley, *supra* note 16 (quoting one of this Article's authors, Marc Edelman, as explaining that "[a]s unseemly as it may seem, there is a complete antitrust exemption for companies that jointly petition Congress or a state government for more favorable terms, and, once a state mandates particular conduct, the harm is no longer clearly antitrust in nature"); Rodenberg, *supra* note 299, at 39-41 (discussing the exemption under federal antitrust laws for state-authorized monopolies).

367. See Smiley, *supra* note 16 (quoting one of this Article's authors, Marc Edelman).

368. 407 U.S. 258, 282 (1972); see also Smiley, *supra* note 16.

369. See, e.g., Charles Matthew Burns, Note, *The Scope of Major League Baseball's Antitrust Exemption*, 24 STETSON L. REV. 495, 515-17 (1995) (discussing disagreement about the scope of MLB's antitrust exemption in the aftermath of *Flood v. Kuhn*); Nathaniel Grow,

Act in 1998 with the effort of clarifying the scope of MLB's historic antitrust exemption, such uncertainty remains.³⁷⁰ Thus, it is possible—but probably not likely—that a court would find the practice of MLB teams selling their rights to their league data exclusively on a central league level also to be beyond the scope of the Sherman Act.³⁷¹

Third, certain uniquely structured sports leagues such as the XFL, which are true single entities, may not even be subject to section 1 of the Sherman Act.³⁷² This issue is discussed in far more detail in Part IV.A of this Article with respect to the presence, or absence, of “concerted action.”³⁷³

While these potential exemptions and mitigating factors may seem like a copout from holding certain sports leagues' otherwise anticompetitive practices subject to proper antitrust scrutiny, it is important to remember that even where a sports league may benefit from an exemption from liability under section 1 of the Sherman Act, the league still may be found to have illegally monopolized a market under section 2 of the Sherman Act.³⁷⁴ The final Part of this Article thus turns to the question of whether any sports leagues are leveraging their monopolies over hosting sporting events into new monopolies over sports data markets. Indeed, if proven, such conduct could lead to antitrust liability under a monopolization theory for even a professional sports league that is able to escape liability under a collusion theory.

V. THE MONOPOLIZATION OF SPORTS DATA

In addition to antitrust issues that may arise from league-wide sale of game data under section 1 of the Sherman Act, league

The Curiously Confounding Curt Flood Act, 90 TUL. L. REV. 859, 869-72 (2016) (describing splits in the lower courts with respect to the scope of MLB's antitrust exemption).

370. See Grow, *supra* note 369, at 900 (“[W]hen properly read, the [Curt Flood Act] neither codifies, nor reflects congressional acquiescence in, any particular view of baseball's exemption. As a result ... the judiciary largely retains the power to shape the scope of baseball's antitrust immunity as it sees fit.”).

371. See *id.* (explaining that the Curt Flood Act does not seem to likely provide any true answers about the scope of MLB's historic exemption).

372. See *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 200-01 (2010).

373. See *supra* Part IV.A.

374. See *United States v. Griffith*, 334 U.S. 100, 106-07 (1948) (explaining the distinctions in legal claims lying under section 1 and section 2 of the Sherman Act).

policies that impede private companies from independently collecting and selling or licensing game data may further present legal concerns under section 2 of the Sherman Act. The primary distinction between sections 1 and 2 of the Sherman Act is that while “[s]ection 1 applies only to concerted action that restrains trade,” section 2 “covers both concerted and independent action, but only if that action ‘monopolize[s] ... or ‘threatens actual monopolization.’”³⁷⁵ Thus, while the scope of section 2 is in some ways broader than section 1 (for example, there is no need for a plaintiff to establish concerted action), it is in other ways narrower (for example, monopoly power requires a far greater market power threshold).³⁷⁶

To state a claim for monopolization under section 2 of the Sherman Act, one must show both possession of monopoly power and engagement in some form of exclusionary conduct.³⁷⁷ In this vein, having monopoly power, in itself, does not violate section 2 of the Sherman Act.³⁷⁸ Rather, an alleged wrongdoer must further have acquired or expanded that monopoly through illegitimate means.³⁷⁹ Section A of this Part explores whether the teams within a professional sports league are likely to collectively have “monopoly power.” Section B then analyzes, presuming the presence of monopoly power in any relevant market, whether professional sports leagues might

375. *Am. Needle*, 560 U.S. at 190 (first alteration in original) (citations and internal quotation marks omitted); see also *Griffith*, 334 U.S. at 106-07 (“Section 2 [of the Sherman Act] is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce.”).

376. See *Am. Needle*, 560 U.S. at 190 (comparing section 1 and section 2 of the Sherman Act).

377. See PHILLIP AREEDA, LOUIS KAPLOW & AARON S. EDLIN, *ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES* 396 (7th ed. 2013) (explaining that “monopolization entails something more than monopoly”); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) (“[S]ize does not determine guilt; ... there must be such ‘exclusion’ of competitors.”); cf. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (explaining that the offense of monopolization requires: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident”).

378. See *Aluminum Co. of Am.*, 148 F.2d at 430 (“Mere size ... is not an offense against the Sherman Act.” (quoting *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932))).

379. See AREEDA ET AL., *supra* note 377, at 396; *Aluminum Co. of Am.*, 148 F.2d at 429 (noting that it is not a violation of section 2 of the Sherman Act where a monopoly has simply been “thrust upon” a company).

engage in any “exclusionary conduct” with the effect of expanding their legally generated monopolies.³⁸⁰

A. Do Sports Leagues Have Monopoly Power Over Any Relevant Market?

The term “monopoly power” as used under section 2 of the Sherman Act is fundamentally different from “market power,” as referenced earlier, in the context of a section 1 Sherman Act analysis.³⁸¹ “Monopoly power,” as a general matter, has been interpreted to mean “the power to control prices and exclude competition.”³⁸² Alternatively, some courts have defined “monopoly power” as the ability to “raise prices substantially above the competitive level.”³⁸³ Although high market shares are not direct evidence of monopoly power,³⁸⁴ Judge Learned Hand famously wrote in *United States v. Aluminum Co. of America* that a market share of ninety percent “is enough to constitute a monopoly;” whereas, “it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not.”³⁸⁵

To determine the presence of “monopoly power,” under section 2 of the Sherman Act, one must first define the relevant market, which must, like under a section 1 inquiry, include “all products reasonably interchangeable by consumers for the same purposes.”³⁸⁶ When looking at the market structure of the United States’ professional sports industry, one can make a very strong argument that each United States premier professional sports league collectively exercises a monopoly over hosting the highest level of sporting contests in its respective sport.³⁸⁷ For example, the NFL collectively

380. See *Aluminum Co. of Am.*, 148 F.2d at 429.

381. See *supra* note 377 and accompanying text.

382. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

383. *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (per curiam).

384. See generally Louis Kaplow, *Market Share Thresholds: On the Conflation of Empirical Assessments and Legal Policy Judgments*, 7 J. COMPETITION L. & ECON. 243, 244 (2011) (“Market shares do not constitute answers to questions about market power. To assume otherwise involves a categor[ical] mistake.”).

385. 148 F.2d at 424.

386. See generally *Microsoft*, 253 F.3d at 52 (citation and internal quotation marks omitted).

387. See Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 647 (1989) (“[M]onopoly sports leagues or their member teams exercise monopoly power.”).

has nearly 100 percent of the market in the hosting of premier, professional football games in the United States.³⁸⁸ This is shown by the fact that, even despite various recent attempts by entrepreneurs to launch rival, high level professional sports leagues, the NFL's storied history, access to premier stadium venues, and rules prohibiting member teams from staging games against teams outside of the league, have prevented lower ticket-priced leagues from taking away a significant in-game or television market share from the NFL.³⁸⁹ Similarly, the NBA collectively enjoys nearly 100 percent of the market for hosting premier, professional basketball games in the United States, as presumably does MLB for hosting American baseball games and the NHL for hosting American hockey games.³⁹⁰

From time to time academics have floated the argument that the government should respond to this monopoly power of the professional sports leagues in their given sport by breaking these leagues into smaller, competitive ventures.³⁹¹ However, the mere access of

388. *See id.* at 645 (“The [NFL] achieved its monopoly status in 1966 when Congress enacted a specific statute permitting the league to merge with its one major rival, the American Football League.”).

389. Rodger Sherman, *The AAF Failed Because All Minor League Football Does*, RINGER (Apr. 4, 2019, 6:10 AM), <https://www.theringer.com/nfl/2019/4/4/18294528/american-alliance-football-aaf-collapse-suspend-xfl> [https://perma.cc/6HBH-KFB5] (explaining why the American Alliance of Football was unable to survive in the same general market as the NFL); Jim Reineking, *Alliance of American Football Is Just the Latest in a Long Line of Failed Start-Up Leagues*, USA TODAY (Apr. 3, 2019, 7:36 PM), <https://www.usatoday.com/story/sports/nfl/2019/04/03/aaf-joins-xfl-usfl-wfl-start-up-pro-football-leagues-failed/3349422002/> [https://perma.cc/HBD4-EGZG] (providing a long list of failed U.S. professional football leagues and attempting to explain some rationale for their failure).

390. *See* Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 891 (1999) (“The NFL, NBA, NHL and Major League Baseball ... have sustained a monopoly position that allows them to obtain undue profits from sports fans and taxpayers.”); Ross, *supra* note 387, at 646 n.14 (expressing the perspective that MLB is a monopoly, and leaving open the possibility that the NBA and NHL are too). *But see* Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIA. L. REV. 729, 816 (1987) (rejecting the idea that each professional sport constitutes its own antitrust market for the purpose of hosting exhibitions and concluding instead that “[t]he modern era of professional sports is characterized as one in which sports entertainment competes among a vast array of equally attractive leisure activities”—a view that looks at each league that hosts a given sports competition as holding just a small part of the entertainment exhibition marketplace).

391. For two very good articles regarding the argument to breakup professional sports leagues into competing economic joint ventures for each sport, see Ross, *supra* note 387, at 646, and Piraino, *supra* note 390, at 891.

these leagues to monopolies in the market for hosting premier events in a given sport would not, in itself, be grounds for breaking up these leagues—at least to the extent their monopolies over the market to host premier sporting events in their given sport arise from the superior nature of their product or business acumen of team ownership.³⁹² The legal problem only lies when these leagues begin to engage in exclusionary conduct that attempts to forestall new competition.³⁹³ This, among other things, could include efforts to expand their legally garnered monopoly over hosting sporting events into monopolies in other markets such as, for example, the market for selling or licensing sports data.

B. Do Sports Leagues' Data Policies Entail Exclusionary Conduct?

Recognizing that if a United States professional sports league were to have a monopoly over hosting sporting events in a given sport, that league could not then engage in exclusionary conduct to forestall new competition, the question next turns to whether any of the United States professional sports leagues' policies with respect to data may constitute the type of "exclusionary conduct" that is impermissible given monopoly power in an event hosting market.

There are multiple types of exclusionary conduct that would violate section 2 of the Sherman Act in which the actor has monopoly power.³⁹⁴ One form of exclusionary conduct is "leveraging," which takes place when a monopolist "leverage[s] its power to extend its monopoly into other markets and thereby increase[s] the social harm caused by the initial monopoly."³⁹⁵ One of the most famous cases in which a court has found a company with monopoly power in one market to have impermissibly leveraged that monopoly into

392. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

393. See *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 447-48 (2009) ("Simply possessing monopoly power and charging monopoly prices does not violate § 2 [of the Sherman Act]; rather, the statute targets the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." (citations and internal quotations omitted)).

394. For a series of examples of conduct that courts have traditionally deemed "exclusionary" under federal antitrust law, see Frank X. Schoen, Note, *Exclusionary Conduct after Trinko*, 80 N.Y.U. L. REV. 1625, 1646-49 (2005).

395. See AREEDA ET AL., *supra* note 377, at 410.

a potential monopoly in a second market was *United States v. Microsoft Corp.*³⁹⁶ There, the D.C. Circuit Court of Appeals explained that Microsoft violated section 2 of the Sherman Act by making it impracticable for users of Microsoft's operating system to use the Netscape Navigator internet browser with the Microsoft operating system rather than Microsoft Explorer, with the goal of leveraging Microsoft's legitimate monopoly over operating systems into a second monopoly over browsers.³⁹⁷

In the context of today's professional sports leagues, certain league policies in the sale of rights to game data may similarly be viewed as an effort to leverage a monopoly in one market (the market for hosting games in a single sport) into a monopoly in a second market (data collection and sale/licensing). For example, according to multiple public sources, the MLB teams, in addition to collectivizing their sports data rights, have agreed to make sportsbooks that use exclusively their data into "Authorized Gaming Operators" by granting them exclusive access to "media and content extension opportunities and product integration through MLB. TV."³⁹⁸ This promotion sounds like a healthy thing when expressed by MLB as an "opportunity."³⁹⁹ However, when looked at in a more neutral light, MLB is, in essence, precluding those sportsbooks that seek to acquire their sports data from other sources from purchasing media extensions and product integrations without also buying MLB's data—a form of tying or exclusionary conduct that is reasonably comparable with the type of conduct found by the courts to be potentially impermissible in *Microsoft*.⁴⁰⁰ To the extent that sports leagues with monopolies over hosting events in a given sport engage in this type of conduct, it would perhaps justify the Department of Justice bringing a claim under section 2 of the Sherman Act against those particular leagues, at least so long as the underlying leagues are not the beneficiary of any special antitrust exemption that would negate such a claim.

396. 253 F.3d 34, 46 (D.C. Cir. 2001) (per curiam).

397. *Id.* at 65-66.

398. Lucas, *supra* note 298, at 1542 (citation and internal quotation marks omitted).

399. *See Microsoft*, 253 F.3d at 65-67; *see also* Lucas, *supra* note 298, at 1561 (explaining a statement by a MLB executive responsible for gaming and data policy that sportsbooks that did not use "official game data would not 'be around for long'").

400. 253 F.3d at 85.

CONCLUSION

Data has long played an important role in professional sports—allowing commentators, fans, and managers to better analyze player and team performance.⁴⁰¹ In recent years, however, the emergence of legalized sports betting has greatly increased the value of sports data.⁴⁰² As a result, United States professional sports leagues have increasingly sought to gain control over sports data markets.⁴⁰³

Although United States professional sports leagues generally lack intellectual property rights to prevent competitors from collecting, aggregating, and selling sports data,⁴⁰⁴ some sports leagues have attempted to gain control over the markets for sports data by freezing out competition through league-wide data licensing policies and selling media rights exclusively in conjunction with league data.⁴⁰⁵ While innovative, these business practices may potentially be seen as having anticompetitive effects under federal antitrust laws.⁴⁰⁶

While the United States professional sports leagues could legally gain control over sports data markets by developing superior data products or selling their data for a better price, leagues are not allowed to gain control over sports data markets by engaging in anticompetitive or exclusionary business practices.⁴⁰⁷ Thus, it is imperative for antitrust regulators to pay careful attention to the business practices of United States professional sports leagues to ensure that they do not harm free markets for selling sports data.

If antitrust regulators are lax in enforcing competition law in sports data markets, there is a reasonable chance that United States professional sports leagues will monopolize sports data markets by engaging in anticompetitive and exclusionary practices. In turn, this would lead to an increase in the price to acquire sports data and a decrease in quality of available data. These outcomes

401. *See supra* Part II.C.

402. *See* Rybaltowski, *supra* note 184 (discussing the cost of official league data packages).

403. Smiley, *supra* note 16.

404. *See supra* Part III.A.

405. *See supra* Part V.

406. *See supra* Part V.

407. *See supra* Parts IV-V.

would not only harm consumer welfare, but also would detract from the long-term viability and competitiveness of the United States legal sports betting market. Thus, if United States antitrust regulators allow professional sports leagues to monopolize sports data, it would not serve the best interests of either the economy or society overall.