REGULATING SPORTS GAMING DATA

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I. INTRODUCTION

“Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own,” concluded the U.S. Supreme Court in Gov. Murphy v. NCAA.¹ In the two years since the Supreme Court declared the partial federal sports betting ban in the Professional and Amateur Sports Protection Act (“PASPA”)² unconstitutional and, in turn, opened up the legalization of sports betting nationwide, there has been one topic that has garnered considerable attention—sports gaming data.

‘Data”—a generic word that includes news and information about sports gaming—has become one of the most-discussed contemporary topics in sports gaming regulation globally.³ Indeed, since the Supreme Court case, the regulatory treatment of sports betting news, information, and data has taken a prominent role in dozens of legislative bodies, at numerous industry conferences, and in a prominent lawsuit recently filed in the United Kingdom. Industry

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¹ Murphy v. Nat’l Collegiate Athletic Ass’n, 138 S. Ct. 1461, 1484–85 (2018). As of June 20, 2020, there remains a spin-off legal proceeding in the court system that is unrelated to the foci here. See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 939 F.3d 597 (3d Cir. 2019); see also Tony Batt, U.S. Supreme Court Bats Down Hail Mary Pass by Sports Leagues, GAMBLING COMPLIANCE (May 19, 2020). In addition, a considerable number of court documents from the precursors to the Supreme Court case remain sealed or partially redacted. See Ryan M. Rodenberg, Sealed Files, First Amendment Right of Access, and the Supreme Court Sports Betting Case, 124 PENN ST. L. REV. PENN STATIM 336 (2019).
³ For purposes of this paper, the words “data,” “information,” and “news” are treated as synonyms and used interchangeably. Likewise, the words “gaming,” “gambling,” “wagering,” and “betting” are used interchangeably herein.
attorney Andrew Nixon wrote: “Anyone close to the commercial side of sports content is likely to know that certain leagues, competitions or event organisers see the data generated during the course of their events as an important part of their commercial portfolios, and understandably so: data, and in particular live data, collected from a sports event has become a valuable commodity from a media perspective, and from a betting perspective.”

There are at least three reasons why data play a critical role in the sports gaming industry: “First, data are used to determine the outcome of wagers, including real-time bets that are made and graded almost instantaneously. Second, data are analyzed for statistical fingerprints indicative of possible integrity issues about the underlying sporting event and the tethered gambling markets. Third, the extent to which sports betting data are available raises a host of complex legal matters.”

In the United States, federal and state efforts to legislate in the area of sports gaming data create various statutory and constitutional issues. Likewise, competition law and property rights (if any) in Europe, Australia, and beyond could be implicated if lawmakers or industry players move to commercially consolidate data access and sales in the sports gaming space. This paper will analyze whether regulatory scrutiny could attach to efforts bent on monetizing or restricting the news and information used in sports gaming.

This paper also explores potential regulatory action in the context of sports gaming data and proceeds in four parts. Part II provides a primer on the sports gaming data market. Part III highlights regulatory issues specific to the United States. Part IV pinpoints regulatory issues globally. Part V concludes with a brief summary discussion and outlook.

II. THE SPORTS GAMING DATA MARKET

A. Overview

The post-PASPA market for sports betting data took shape during the pendency of the litigation that eventually landed at the Supreme Court. In early 2016, it was reported that “U.S. sports leagues are rapidly cutting deals with companies involved in sports betting. To varying degrees, the leagues are

partnering—openly and in secret—with oddsmakers, betting prognosticator, and data providers that make sports wagering possible in the digital age.” Indeed, the entire litigation between five prominent U.S.-based sports leagues and New Jersey can be seen as a vehicle for shaping how news and information are commercialized for sports gaming:

[The] lawsuit…is not about gambling. It is about control: control of events, control of data, control of marketing opportunities, and control of current and future revenue streams. This is a clash between sports leagues looking to reserve opportunities to monetize sporting events as commodities and cash-strapped states intent to raise tax revenue via regulation of an industry with a massive volume of underground activity.  

The root of the friction between the sports leagues and New Jersey over revenue generation rests on the yet-to-be-definitively decided issue of whether a sporting event itself can be owned and, if so, by whom. Indeed, in unrelated litigation, Fox Broadcasting Company, a broadcast partner of the MLB and NFL, posited that the dissemination of information related to sporting events is one in the public interest and analogous to a ‘parade, a natural disaster, a March on Washington, or a government shutdown.’

Such position runs counter to one where sporting events are treated as a commercially exploitable commodity. Intriguingly, this position has

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8 The NCAA, NFL, NBA, NHL and MLB were all co-plaintiffs in the Supreme Court case.
10 Id. at 36.
11 Id. at 36, n.58 (citing Brief of Amici Curiae Fox Broadcasting Company and Big Ten Network, LLC in Support of Defendant NCAA’s Motion for Summary Judgment at 18, In re NCAA Student-Athlete Name & Likeness Licensing Litig., No. 09-CV-01967 CW (N.D. Cal. Sept. 17, 2012).
been espoused by the major media partners of all five Christie II plaintiff sports leagues; ABC, CBS, Fox, and NBC have acknowledged that ‘sports broadcasts concern matters of public interest.’

Nevertheless, in the wake of the 2018 Supreme Court decision, various sports leagues have embarked on a five-pronged federal-state lobbying effort to monetize sports betting. Pushing for a so-called ‘official data requirement’ has consistently been one of the proffered arguments. The five-pronged lobbying points are set forth in Figure 1 below.

### Figure 1

![Diagram of five prongs: Power to control types of bets, Betting right or license, Turnover of customer information, Integrity fees/royalty fund, Official data requirement.]

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12 Id. (citing Brief of A&E Television Networks, LLC, in Support of Appellant NCAA and Reversal at 6, Edward C. O’Bannon, Jr. v. NCAA, Nos. 14-16601, -17068 (9th Cir. 2014).

13 Among the five pecuniary-related lobbying requests made by various sports leagues, the request for a so-called ‘integrity/royalty fee’ has garnered considerable media attention. As of June 20, 2020, no state has passed a law requiring that a sports league be paid any ‘integrity/royalty fee.’ Nevertheless, several sports leagues such as the NBA, MLB, and PGA Tour continue to publicly request that new legislation include such a mandatory fee. Two leagues—the NBA and MLB—also commissioned a ‘study’ related to the request. See Spectrum Gaming Sports Group, *Sports-Betting Royalty Fee Study* (March 8, 2019) (on file with author).
In general, sports leagues attempt to monetize sports gaming data in two ways. First, sports leagues may seek to sell such data themselves. Second, sports leagues may partner with a third-party data broker on an exclusive or non-exclusive basis, with the partner paying the league for the ‘right’ to disseminate data. The latter route has been the most popular to date, with sports league employees and designees describing data they sell as ‘official.’ One MLB employee predicted that sports gaming operators who opt against using ‘official’ data “won’t be around for long.” Widespread reporting has detailed the data-related sales practices of sports leagues and their partners.

Issues pertaining to sports betting news, information, and data have been frequently discussed in state and federal legislative activity since the Supreme Court’s ruling. For example, on March 3, 2020, NFL team executive Rich McKay of the Atlanta Falcons reportedly told a Georgia Senate Committee that

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certain data providers are “under surveillance” during games. According to media reports, McKay said: “We’re in a position now in our stadium where we have people walking around the stadium [on] game day, looking for people that are pushing out results, and pushing out data because people are betting on that, and that’s something that is very uncomfortable for us, and not something we were ever doing two years ago that we’re doing now.” Gaming has even made its way into the collective bargaining agreements between sports leagues and unionized players. A draft version of the NFL-NFLPA collective bargaining agreement dated March 5, 2020 accounted for revenue derived from “operation of gambling of any kind in an NFL stadium” and “revenues related to ensuring the gambling-related integrity of NFL games.”

One motivation for the emphasis on regulating sports gaming data is to ensure the accuracy of betting outcomes for both consumers and operators, thereby preserving the integrity of the underlying betting market. When news, information, and data are manipulated, betting fraud can result. The elimination of betting fraud is a shared priority of regulators, customers, operators, and sports leagues, with leagues cognizant that fan engagement can be explained, at least in part, via wagering. The focus on betting fraud has been widespread. In May

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19 Id.
20 NFL-NFLPA Collective Bargaining Agreement, 70-72 (March 5, 2020), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf. The same document calculated gambling revenue from wagers as “the aggregate net difference between gaming wins and losses (not the total amount wagered) net of all excise taxes or other gambling or gaming-related taxes or surcharges actually paid or owed.”
21 In a revealing—and ironic—twist, having a single data provider (or a small number of data providers) has the potential to create greater integrity risks given the susceptibility to manipulation/failure that cannot be rebutted by a robust market with multiple providers to correct any errors. Ryan Rodenberg & Jack Kerr, Fake News, Manipulated Data, and the Future of Betting Fraud, ESPN (June 27, 2017), https://www.espn.com/chalk/story/_/id/19752031/future-sports-betting-fake-news-manipulated-data-future-betting-fraud.
2017, U.S. Congressman Frank Pallone (D-NJ) introduced federal sports betting legislation that required “[a]ppropriate safeguards to ensure, to a reasonable degree of certainty, that a bet or wager is fair and honest, and to prevent, to a reasonable degree of certainty, cheating (including collusion and the use of a cheating device).” More narrowly, a spotlight has been put on the transmitter of news, information, and data from a sporting event:

Betting fraudsters have discovered a far simpler target: the data scout. Data scouts are those who log play-by-play information on location, in real time. They watch the entire game, manually updating the action as it progresses. They are the filter through which all details must pass, and without them, the global betting industry—especially in-play betting—would grind to a halt. In the lower tiers of sport, data scouts might be a game’s only link to the outside world, and that makes them potentially more valuable than a crooked referee or bent goalkeeper. After all, why go to the trouble of fixing a match when you can simply pay the data scout to delay logging the result long enough to make a strategic bet? All it takes is 30 seconds…The problem of data delays is particularly embarrassing for tennis. The chair umpires might themselves be the data scouts, feeding numbers into a touchscreen tablet and, from there, to the gambling world. Recently, tennis umpires from three different countries were banned after involvement in such a scam…But delayed data are only the start. Fake data from nonexistent sporting events occur, too. Once fraudsters realized they could control the flow of information between the field and the database, it was only a matter of time before fictional matches started to appear. Those are called ‘ghost games.’ How do they work? A data scout in some far-flung corner of the world enters a fake game into the system, perhaps with the help of an industry insider, and then logs the phantom match, play-by-play, in any direction the fraudsters require. If no vetting

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Betting Lines and College Football Television Ratings, 132 ECON. LETTERS 112 (2015). Contrary to prior statements—including some made under oath in court proceedings—about injury and irreparable harm from sports gaming, multiple sports leagues have now attested that “[s]ports betting gives fans another exciting way to engage with the sports they love [and] a legal and regulated sports betting market…would be beneficial to sports and their fans…” Joint Statement from the Commissioners of the National Basketball Association, National Hockey League, Major League Baseball, Major League Soccer, and Canadian Football League (June 8, 2020), available at http://canadiangaming.ca/wp-content/uploads/Leagues-Joint-Statement.pdf.

23 Rodenberg, supra note 21.
occurs, the ghost game can be picked up by gambling operators who fail to double-check the game’s authenticity.\textsuperscript{24}

A useful comparison can be made between sports gaming data and stock market data. Scholar Jerry Markham recently chronicled the latter’s history, revealing some parallels to the nascent market for sports betting data, news, and information, especially that of the real-time variety.\textsuperscript{25} According to Markham, during the early days of the New York Stock Exchange (“NYSE”) there was a ‘curb market’ that existed on the street due to “the NYSE’s exclusive access to members only.”\textsuperscript{26} Markham continued:

During the Civil War, NYSE did relent somewhat on nonmember access to its market data. Nonmembers were allowed to listen to trading on NYSE ‘through a keyhole for [a fee of] $100.’ After the war, spectators were also allowed to watch trading from the gallery of the new NYSE floor…for a fee of only $50. This set a precedent for selectively providing access to exchange market data for a fee.\textsuperscript{27}

Decades later, Markham detailed how “the NYSE created the New York

\textsuperscript{24} Id. See also Ryan Rodenberg, How Gambling ‘Courtsiders’ are Affecting Tennis, ESPN (Aug. 21, 2015), https://www.espn.com/chalk/story/_/id/13481104/how-courtsiders-affecting-gambling-integrity-tennis-chalk (courtsiders are people who attend tennis tournaments “for the purpose of transmitting data in real time to employers who are often continents away”). An executive at a sports gaming data dissemination firm recently described the vast number of data scouts his company employs: “Our focus is on procuring the most reliable, high quality data, and we do [so] by employing over 7,000 data scouts worldwide, covering over 20,000 live events each month.” See Sport Industry Group, David Lampitt Q&A—Sportradar: Data Data Data (July 3, 2019), https://www.sportindustry.biz/features/david-lampitt-qa-%E2%80%93-sportradar-data-data-data. See also Press Release, Tennis Integrity Unit, Venezuelan Match Official Armando Alfonso Belardi Gonzalez Suspended and Fined for Corruption Offenses, TENNIS INTEGRITY UNIT (June 19, 2020), https://www.tennisintegrityunit.com/media-releases/venezuelan-match-official-armando-alfonso-belardi-gonzalez-suspended-and-fined-corruption-offences (“…Mr Gonzalez had…failed to report two approaches he received in 2018 soliciting him to become involved in a corrupt scheme to manipulate match scores…”).

\textsuperscript{25} See generally Jerry W. Markham, Regulating the Sale of Stock Exchange Market Data to High-Frequency Traders, 71 FLA. L. REV. 1209 (2019).

\textsuperscript{26} Id. at 1216–17 (“In 1837, the NYSE discovered that some nonmember traders had drilled a hole through a brick wall at the NYSE building that allowed them to overhear surreptitiously NYSE trading activity.”).

\textsuperscript{27} Id. at 1217 (internal citations omitted).
Quotation Company to handle the distribution of its trading data.”

Likewise, the stock ticker “further facilitated the development of the market for exchange data.”

Issues pertaining to ownership of trading prices spread to the commodities market too. According to Markham:

[T]he Board of Trade of the City of Chicago (“CBOT”) and other commodity exchanges generated valuable market data for traders. This data became a highly marketable commodity, and the CBOT contracted with the Western Union telegraph company to provide data from its trading floor to subscribers throughout the country. The CBOT used its control over this trading data to fend off competitive threats from ‘bucket shop’ operators.

Litigation ensued after a variety of companies in the industry “claimed that exchange market data was a matter of public interest and not exchange property.” In 1905, the Supreme Court addressed the issue in Chicago Board of Trade v. Christie Grain & Stock Co., finding that “the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself.” Markham concluded that the Supreme Court’s ruling “set a strong precedent for the proprietary treatment of such information as a commodity that could be selectively sold to preferred market participants.”

Markham also detailed the latency advantages derived from being in close proximity to the trading floor:

Exchange trading data was also available on an even more privileged basis to traders operating on the floors of the stock exchanges. Those exchange members were given a time and place advantage over other traders. This is because stock quotations and last-sale reports were disclosed on the floor in advance of their transmission to other traders by telegraph or publication in newspapers. That time and place advantage meant that floor traders trading for their own accounts could respond to current, real-time market data before off-exchange traders

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28 Id.
29 Id.
30 Id. at 1218 (internal citations omitted).
33 Id. at 250.
34 Jerry W. Markham, Regulating the Sale of Stock Exchange Market Data to High-Frequency Traders, 71 FLA. L. REV. 1209, 1218 (2019).
received that information. This provided a tremendous trading advantage to the floor traders. The cost of that access was the requirement that the floor traders purchase an often very expensive membership on the exchange and pay membership fees.\textsuperscript{35}

The applicability of the data-specific analogy between stock exchanges and sports is illustrated when looking at prior statements made by various leagues. During the lead-up to the Supreme Court case, the NCAA, NHL, NBA, MLB, and NFL claimed to have a proprietary interest in “the degree to which others derive economic benefits from their own games.”\textsuperscript{36} The same five leagues also posited that they “have an essential interest in how their games are perceived and the degree to which their sporting events become betting events.”\textsuperscript{37} In a different court filing, the same leagues referenced “legally protected interests of the organizations that produce the underlying games.”\textsuperscript{38}

Years earlier, the NFL, NHL, and MLB argued that they “share a common interest with the NBA in protecting and preserving for professional sports leagues and their member clubs, the rights to, and commercial value of, exclusive presentation of real-time running accounts of the live professional sporting event that result from their efforts and investments.”\textsuperscript{39} The position was also furthered via Congressional testimony when PASPA was being considered by the Senate. According to then-NBA executive David Stern: “Conducting a sports lottery or permitting sports gambling involves the use of professional sports leagues’ games, scores, statistics and team logos, in order to take advantage of a particular league’s popularity; such use violates, misappropriates and infringes upon numerous league property rights.”\textsuperscript{40}

More recently, an MLB employee testified during a government proceeding in Washington State that the “statutory and regulatory structure must recognize that sports betting is derivative of the games—i.e. without sports there is no

\textsuperscript{35} Id. at 1219 (internal citations omitted).
\textsuperscript{37} Id. at 13-14.
\textsuperscript{38} Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss the Complaint at 1, Nat’l Collegiate Athletic Ass’n v. Christie, 926 F. Supp. 2d 551 (D.N.J. 2013).
\textsuperscript{39} Brief for The National Football League, The Office of the Commissioner of Baseball and the National Hockey League as Amici Curiae Supporting the National Basketball Association and NBA Properties, Inc. at 9, Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841 (2d. Cir. 1996) (No. 96-7975).
Similarly, the same MLB employee warned a Colorado government entity about ‘pirated’ data collected in alleged violation of ticketing terms or scraped from a website. A ‘coalition’ of sports leagues, including MLB, NBA, and PGA Tour, also told the Washington State Gambling Commission about why they should be entitled to a ‘royalty’. In Ohio, the NFL, Cleveland Browns, and Cincinnati Bengals sent a letter to lawmakers asking them to consider, among other things, “[p]rotection of our content and intellectual property, including from those who attempt to steal or misuse it.” The Cincinnati Reds, in an unsigned submission to Ohio lawmakers, also alluded to disfavored data collection methods.

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42 Matt Rybaltowski, Colorado Stakeholders Offer Diverging Views on Data Licensing at Integrity Working Group, SPORTS HANDLE (Dec. 11, 2019), https://sportshandle.com/colorado-stakeholders-integrity-working-group/ (at the same hearing, other testimony alluded to a “some concern that the leagues and its partners will ‘circuitously’ create a monopolistic situation”).
44 Letter from Bob Bedinghaus, et al. to Representative Scott Oelslager and Representative Jack Cera at 1 (Oct. 8, 2019).
45 Cincinnati Reds Written Submission (Oct. 9, 2019).
A PGA Tour representative submitted testimony in Ohio and pinpointed “web scrapers and on-site operatives.”

We believe that legislation should require bookmakers to use official league data for live betting, meaning bets placed during a game where activity on the field changes the lines and odds of a bet in real-time. In sports betting, data decides the bets – it’s the equivalent of the ball in roulette, or cards in blackjack. We believe that, for live betting – where integrity, timeliness, accuracy and consistency are paramount – the data should come from the official source, the leagues, and not from pirated sources like web scrapers and on-site operatives.

In Illinois, a lobbyist for the NBA, PGA Tour, and MLB submitted proposed rulemaking that addressed both courtsiding and web scraping under the umbrella of an ‘official league data’ requirement:

Master sports wagering licensees may not use a data source in connection with sports wagering that is obtained either directly or indirectly (1) from live, authorized sporting event attendees who collect the data in violation of the terms of admittance to the event or (2) through automated computer programs that compile data from the internet in violation of the terms of service of the relevant website or other internet platform.

47 Letter from Jeremy Kudon to Chairman Charles Schmadeke, Illinois Gaming Bd. (Sept. 27, 2019).
Given these positions, it was forecasted—in 2016 Congressional testimony—that “it is plausible to infer that certain sports leagues may: (i) seek to memorialize certain gaming-related intellectual property rights through litigation or legislation; (ii) move to license so-called “official data rights” to third party gaming operators; and/or (iii) create gaming platforms themselves to offer (exclusive) wagering options directly to consumers and, in turn, cut out competitors.”

The forecast stemmed from the conclusion that “[p]roprietary and non-proprietary real-time data are the fuel for burgeoning live wagering and in-game fantasy sports.” Such forecast is not novel. Almost forty years earlier, the NFL had made similar claims against Delaware when the state looked to offer a football-themed lottery game. In ruling against the NFL, the federal judge wrote extensively about the NFL’s claim that the state was seeking to reap what it had not sown:

It is undoubtedly true that defendants seek to profit from the popularity of NFL football. The question, however, is whether this constitutes wrongful misappropriation. I think not. We live in an age of economic and social interdependence. The NFL undoubtedly would not be in the position it is today if college football and the fan interest that it generated had not preceded the NFL’s organization. To that degree it has benefited from the labor of others. The same, of course, can be said for the mass media networks which the labor of others have developed. What the Delaware Lottery has done is to offer a service to that portion of plaintiffs’ following who wish to bet on NFL games. It is true that Delaware is thus making profits it would not make but for the existence of the NFL, but I find this difficult to distinguish from the multitude of charter bus companies who generate profit from servicing those of plaintiffs’ fans who wish to go to the stadium or, indeed, the sidewalk popcorn salesman who services the crowd as it surges towards the gate. While courts have recognized that one has a right to

48 Daily Fantasy Sports: Issues and Perspectives: Hearing Before the Subcomm. on Commerce, Manufacturing, and Trade of the H. Comm. on Energy and Commerce, 114th Cong. 42 (2016) (statement of Ryan M. Rodenberg). In accord, see Ryan Rodenberg, Wagering on the Future, ESPN THE MAGAZINE (Feb. 03, 2015), https://www.espn.com/chalk/story/_/id/12251828/gambling-issue-charles-barkley-five-voices-debating-sports-gambling-legalization (“Leagues will posit that types of data are proprietary (think sabermetrics meets sports gambling) and will seek licensing fees from sportsbooks and fantasy operators. The leagues will also look to offer wagering options to consumers. Finally, like fantasy’s emphasis on player outcomes, sports betting will continue to shift sporting events from competition between teams and players to a commercialized spectacle. Gambling and fantasy drive consumer interest.”).

one's own harvest, this proposition has not been construed to preclude others from profiting from demands for collateral services generated by the success of one’s business venture. General Motors’ cars, for example, enjoy significant popularity and seat cover manufacturers profit from that popularity by making covers to fit General Motors' seats. The same relationship exists between hot dog producers and the bakers of hot dog rolls. But in neither instance, I believe, could it be successfully contended that an actionable misappropriation occurs.¹⁰⁰

Researcher Christian Frodl divided up sports gaming data into three categories: (i) fixtures; (ii) event data and performance data; and (iii) raw data and refined data.¹⁰¹ Fixtures is a catch-all category that includes items such as the competition schedule, player line-ups, and game rules.¹⁰² The second category—event data and performance data—captures the individual events taking place within the competition as well as tethered information such as fan attendance and weather.¹⁰³ Included here is high-tech data invisible to the naked eye and only derived from digital cameras, body sensors, or microchips placed in game equipment.¹⁰⁴ The final category includes box-score type of news as well as aggregate information compiled after (or during) the event, such as “overall passes in a soccer match or…unforced errors in a tennis match.”¹⁰⁵

The structure of the sports gaming data market can be described as follows:

The market for sports betting information is best explained through a linguistic flowchart with several forks in the road. The first fork in the road bifurcates sports betting data according to time, with two prongs: (i) historical and (ii) real-time/in-game. The market for historical sports betting information is largely decentralized and easy to access, with market participants finding requisite information about already-completed game scores or archived player-level performance statistics from a variety of widely available sources, including television, radio, internet, or via phone from on-site spectators. In contrast, the market for real-time/in-game sports betting news is contentious and involves certain market participants taking measures to centralize distribution

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¹⁰² Id.
¹⁰³ Id. at 58.
¹⁰⁴ Id. at 59.
¹⁰⁵ Id.
channels via on-site access restrictions, demand letters, litigation, and legislative lobbying.

The second fork in the road branches out from the real-time/in-game path, with one prong for proprietary data and the other prong for non-proprietary data.\(^56\) Proprietary data in the sports betting realm includes information generated from high-tech sources such as digital tracking cameras, microchips in balls, and biometric devices worn by athletes. Such proprietary information is effectively invisible to the naked eye and remains in the private domain until released—immediately or otherwise—by the licensor or owner. Tech-generated proprietary data currently plays very little role in the sports betting data market. The other fork at this stage involves non-proprietary live data such as up-to-the-second game scores or as-it-happens player performances with only minimal latency. Sports leagues such as the [NBA] and [MLB] have been lobbying in favor of statutory ‘data mandates’ that attach to such real-time/in-game information used for betting.

The third road fork extends from the non-proprietary real-time/in-game data prong. The first attaches to so-called ‘unofficial data’ that are collected on-site by individuals or by other means (e.g. computer scripts or drones) operating without the explicit approval of the sports league involved in the underlying contest or game. Collectors of such ‘unofficial data’ count sports betting operators as customers in their distribution chain. The second attaches to so-called ‘official data’ that are collected on-site or by other means by a sports league itself or by one or more individuals who operate with a sports league’s approval. Collectors of such ‘official data’ also count sports betting operators as customers in their distribution chain.

The fourth and final fork in the road spawns from the ‘official data’ path. The first prong extends to an individual sports league with in-house capabilities to vacuum up sports betting-relevant information and sell it directly to sports book operators. The second prong is occupied by data dissemination firms operating with the respective league’s stamp of approval. Such data dissemination firms—operating as an intermediary, broker, or agent—then turn around and sell the information collected to sports betting operators and others. States like Tennessee[, Michigan,] and Illinois with statutory ‘data mandates’

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\(^56\) For an overview of whether sports betting information, news, and data can be owned, see Ryan M. Rodenberg et al., *Real-Time Sports Data and the First Amendment*, 11 WASH. J. L. TECH. & ARTS 63, 101 (2015). Although beyond the scope of this paper, an analysis of a market where the underlying product (news, information, and data) may be neither owned nor controlled would lend itself to a peculiar, and perhaps paradoxical, antitrust review. Likewise, if a sports league suddenly started claiming ownership of such data after decades of silence and non-enforcement, the possibility of the laches defense presents itself too.
attach along this fourth prong, purportedly requiring sports betting operators to purchase information from either a sports league or a league designee.57

The structure of the market can also be visually represented in Figure 2 on the next page:

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Temporal Nature of the Data

Privileged Data

Legal determination; easy to access.

Step 1

Proprietary Nature of the Data

Exempt Data

Non-Proprietary Data

Next gen data; currently plays little role in sports gaming market.

Step 2

"Official" Nature of the Data

Trusted Data

"Official" Data

Collected at sporting event or via other means by anyone without approval of sport league.

Step 3

Who is Collecting the Data

Collected by the League

Collected by Team, with Written Authorization

Collected by Team, With Data Verification Form

Purportedly required under TN/IL/MI law

Purportedly required under TN/IL/MI law unless pre-approved by sport league

Step 4
The sport of tennis provides a useful case study on the structure of the sports gaming market too. According to a recent commissioned study:

[T]he ATP, WTA, and ITF have entered into contracts to sell live scoring for almost all their events. The ATP and WTA agreed to sell their live scoring data to Enetpulse in 2011, and the ITF agreed to sell its live scoring data to Sportradar in 2012. While generating millions of dollars in revenue annually, those contracts have permitted betting operators to offer a far broader range of bets on a far greater number of tennis matches, especially at the [l]owest [l]evel of ITF events. Before this (sic) data became available, betting operators could not offer in-play markets unless: [(i)] they purchased unofficial data from a data supply company that had entered into a data sales agreement with an individual tournament or otherwise; [(ii)] they sent their own scouts to an event; [(iii)] a match was available on a live broadcast; or [(iv)] scores were capable of being instantly ‘scraped’ from the internet. 58

The interplay between and among different classifications of data is an issue that crosses continents. In Europe, for example, there is a ‘database right’ that may attach to certain compilations of data. However, a commentator has opined that “[t]he database right applies whether the data is collected under the auspices of an official league data deal or via open source means. It has led to a situation whereby all three major suppliers in the space—Sportradar, StatsPerform, and Genius Group—now provide both types of data to their clients.” 59 A BetGenius executive described the broad scope of its company offerings as follows: “The BetGenius solution delivers live sports data feeds, price management support for pre-game and in-play odds across all major U.S. and international sports, as well as a bespoke, end-to-end price and risk management advisory service.” 60 The peculiar way in which data are labeled—and the impact on integrity-related concerns—were addressed by a Sportradar executive in 2019:

We’re transparent about the fact that there is a place for both official and open-source data in the market. This has long been the case and

every major data supply company provides a mix of official and open-source data. Having said that, the majority of Sportradar’s data is official and we invest in official relationships with sports where there is genuine value that can be unlocked and protected. For sports bodies, having an official supply of data can enhance integrity as, importantly, it enables a contractual link between the sport, the data supplier and the betting operator which can help with setting requirements around information-sharing for integrity purposes, for example. However, there is also an integrity benefit to having multiple sources of data. This is simply because having a single source of truth leads to at least two problems: firstly it means there is a single point of failure which can potentially create significant financial risk in the betting market; secondly it can lead to “information monopolies” which stifle competition and innovation in the data business, ultimately leading to consumer harm (through increased cost or lack of choice). This means that generally speaking we advocate for non-exclusive data partnerships, particularly outside the very top tier of sports competition, as well as for the fact that open-source data collection has a valid part to play in a healthy market.61

B. Collecting and Disseminating Sports Gaming Data

Latency-related advances in technology have allowed for the commodification of real-time data, opening up new possibilities in sports gaming. Indeed, such advances “have allowed spectators, professional sports gamblers, journalists, and business-minded innovators to attend sporting events and disseminate real-time information through several mediums.”62 Sports leagues—sometimes working in concert with exclusive or near-exclusive data brokers—have similarly moved to monetize the distribution of real-time sports data “while simultaneously trying to limit others’ ability to do so.”63

The practice of quickly transmitting news and information about sporting

63 Id. Although outside the scope of this paper, an ancillary issue pertaining to data collection methods takes place in the anti-match-fixing integrity monitoring industry—namely, companies in this space use crawler software to scrape odds from hundreds of bookmakers worldwide and it is uncertain whether such companies pay each bookmaker for such data and/or receive pre-approval to do so. See Tom Ward, Inside the Endless Fight to Kill the $1 Trillion Match-Fixing Industry, WIRED UK (July 9, 2019), https://www.wired.co.uk/article/football-betting-match-fixing-odds-sportradar.
events for betting purposes is often called ‘courtsiding,’ a word likely derived from the activity in tennis, a sport that has been at the forefront of speedy gaming data for years. For example, tennis governing bodies, such as the ATP Tour and WTA Tour, are among several leagues that embargo public domain data for multiple seconds as a way to protect lucrative gambling-specific distribution deals. Courtsiding is valuable to gamblers because communication from inside the stadium is faster (and sometimes more accurate) than a delayed television, radio, or internet broadcast. Sports leagues have described courtsiding by non-approved third parties as a threat to integrity or an illegal activity. Such leagues have tried to curb the practice in a variety of ways, including surveillance, notices to spectators, ticket purchase agreements, and credentials for members of the media. Sports league employees testifying before state governmental bodies have also followed scripted speaking points about ‘pirated’ data.

Existing federal law could also curb sports gaming transmissions by sports leagues, third party gamblers, or otherwise. The Wire Act potentially attaches to anyone “engaged in the business of betting or wagering.” While most precedent

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66 John Holden, Ahoy! Leagues Say There Be Pirates Stealing Sports Betting Data!, LEGAL SPORTS REP. (Nov. 29, 2019), https://www.legalsportsreport.com/36087/mlb-pga-tour-sports-betting-data. For a recent example from California, see Letter from NBA, et al., to Hon. Bill Dodd (June 1, 2020), https://www.legalsportsreport.com/wp-content/uploads/2020/06/CA-League-letter.pdf (“The only dependable way to offer in-game bets is to use official data that is produced by sports leagues in real time. The alternative—using pirated and other unofficial data sources for these bets—creates a high risk of inconsistent betting results and resulting damage to consumer confidence.”).

67 18 U.S.C. § 1084(a). The relevant portion of the Wire Act reads as follows:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or
suggests that the Wire Act’s reach extends only to bookmakers,\textsuperscript{68} the scope of
the statute has been litigated and studied for decades.\textsuperscript{69} A recent in-depth study
found the Wire Act to have boundaries:

[The phrase] “the business of betting or wagering” is not a broad,
limitless phrase applicable to all businesses whose commercial
activities relate to gambling in some way or manner. Rather, the phrase
is very precise language directed at businesses that themselves bet or
wager with others and thereby risk or stake money in a game or contest
that the business may win or lose depending upon an eventuality.\textsuperscript{70}

Such a conclusion is consistent with the Wire Act’s safe harbor for
“transmission[s] in interstate or foreign commerce of information for use in news
reporting of sporting events,”\textsuperscript{71} but could be scrutinized if the sporting event
itself was formed to create gaming content and funded/organized by an entity
also in the business of disseminating data, setting betting lines, and monitoring
gaming integrity-related issues.\textsuperscript{72}

With transmission speed of news and information relevant to sports gaming
at a premium,\textsuperscript{73} one approach that that was recently permitted by a federal

\textsuperscript{68} See United States v. Baborian, 528 F. Supp 324 (D. R.I. 1981); see also United States v. Southard, 700 F.2d 1 (1st Cir. 1983).


\textsuperscript{70} Ben J. Hayes & Matthew J. Conigliaro, The Business of Betting or Wagering:’ A Unifying View of Federal Gaming Law, 57 DRAKE L. REV. 445, 446 (2009). For

\textsuperscript{71} 18 U.S.C. § 1084(b).

\textsuperscript{72} See generally SportBusiness Staff, Genius’ New ‘Grand Slam’ Tennis Series Creates Content for Betting Markets, SPORTBUSINESS

\textsuperscript{73} See Marcus Townend, Racing Out to Ban
regulator involved artificial ‘speed bumps’ to inhibit the advantages of those with ultra-fast data access.\textsuperscript{74} The context for the speed bump approach was a U.S.-based futures market involving an exchange that desired to add a multi-millisecond barrier to “reduce the latency advantages between traders engaged in arbitrage strategies against related markets.”\textsuperscript{75} The applicant explained further:\textsuperscript{76}

\begin{quote}
POP Functionality works by creating a very short (couple of millisecond) delay or “speed bump” for incoming orders that would otherwise transact immediately opposite resting or “passive” orders. This short delay helps level the playing field by giving all traders who have placed a resting order additional time to react to price changes in related markets.
\end{quote}

The Commodities Futures Trading Commission (“CFTC”) permitted the speed bump implementation.\textsuperscript{77}

Beyond in-person data collection via courtsiding, sports betting news and information can also be obtained via scraping a website with near-real-time feeds. A U.S. federal law called the Computer Fraud and Abuse Act (“CFAA”) bans unauthorized access to a computer.\textsuperscript{78} Resulting case law has focused on when access is ‘authorized’ or not, with diverging results.\textsuperscript{79} Scholar Orin Kerr has posited that “authorization to access a computer is contingent on trespass norms.”\textsuperscript{80} The Ninth Circuit recently decided a CFAA case that is—as of June

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\textsuperscript{76} \textit{Id.}


\textsuperscript{78} 18 U.S.C. § 1030.

\textsuperscript{79} On April 20, 2020, the Supreme Court granted cert in Van Buren \textit{v.} United States, 206 L. Ed. 2d 822 (Apr. 20, 2020) and could address the circuit split that has developed about the scope of the CFAA.

20, 2020—at the certiorari stage at the Supreme Court.\textsuperscript{81} For purposes of a preliminary injunction motion, the Ninth Circuit held that the CFAA does not necessarily criminalize web scrapers who access publicly-available data for commercial reasons, even if the website owner has stated that it does not approve of such access.\textsuperscript{82} The Ninth Circuit observed that “[t]he data hiQ seeks to access is not owned by LinkedIn.”\textsuperscript{83} While casting doubt on the prospects of CFAA liability, the Ninth Circuit did point out that other claims could be available, such as trespass to chattels, copyright infringement, misappropriation, unjust enrichment, conversion, break of contract, or breach of privacy.\textsuperscript{84}

The Ninth Circuit’s recent ruling is likely welcome news to sports gaming data brokers and operators unwilling (or unable) to pay for access to news and information already in the public domain. The ruling came down at about the same time that sports league lobbyists and employees were testifying before state governments on related topics. In Michigan, lobbying activity resulted in the insertion of language that would prohibit a sports gaming operator from obtaining data originating from “live event attendees in violation of terms of admittance” or “automated computer programs that compile data from the internet in violation of terms of service.”\textsuperscript{85} An MLB employee and Seattle Mariners employee specifically mentioned “online scraping” (and “courtsiding”) in a joint presentation to the Washington State Gambling Commission excerpted below:\textsuperscript{86}

\begin{footnotes}
\item[81] hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985 (9th Cir. 2019). In seeking a declaratory judgment, hiQ did not further a laches argument, a potentially relevant issue in the sports gaming data context.
\item[82] \textit{Id.} at 993. Notably, the Ninth Circuit viewed the CFAA as an anti-hacking statute, not a misappropriation law.
\item[83] \textit{Id.} at 1003.
\item[84] \textit{Id.} at 1004 (citing Associated Press v. Meltwater U.S. Holdings, Inc., 931 F. Supp. 2d 537, 561 (S.D.N.Y. 2013)).
\end{footnotes}
Attention focused on how sports gaming data are collected and disseminated will continue regardless of whether additional states enact so-called ‘official data’ statutes. In states where such mandates are enacted, it remains to be seen if: (i) regulatory scrutiny attaches to licensed operators who opt to obtain sports gaming data outside the proscribed channels or (ii) licensed operators will adopt an offensive litigation strategy to counteract any mandate. In the absence of such mandates, issues surrounding collecting and disseminating sports gaming data will persist. For example, litigation will likely ensue if efforts are undertaken by sporting event organizers to restrict the flow of news and information relevant to sports gaming.

III. POTENTIAL REGULATORY SCRUTINY OF THE SPORTS GAMING DATA MARKET IN THE UNITED STATES

A. Federal

Congress has a long history of passing legislation specific to sports gaming. Examples include the Wire Act of 1961,\textsuperscript{87} the Sports Bribery Act of 1964,\textsuperscript{88} PASPA in 1992,\textsuperscript{89} and the Unlawful Internet Gambling Enforcement Act of 2006.\textsuperscript{90} Eight years after PASPA, Congress also considered revising the statute to prohibit betting on high school and college sports nationwide, with no

\textsuperscript{87} 18 U.S.C. § 1084.
\textsuperscript{89} 28 U.S.C. §§ 3701-3704.
\textsuperscript{90} 31 U.S.C. §§ 5361-5367.
From the 106th Congress (1999-2000) to the 112th Congress (2011-2012), federal lawmakers also considered a host of other legislative bills that would have impacted the sports gaming space. Although nothing on-point has been enacted as of June 20, 2020, Congress has preliminarily addressed regulatory issues pertaining to sports betting news, information, and data in response to the recent Supreme Court ruling. On December 19, 2018, ex-Senator Orrin Hatch (R-UT) and Senator Chuck Schumer (D-NY) co-introduced the Sports Wagering Market Integrity Act of 2018, with sports betting data described as “one of the difficult issues to be considered as part of the sports wagering discussion.” The draft bill defined ‘Authorized Data’ as follows:

(5) AUTHORIZED DATA.—(A) RESULT OF A SPORTS WAGER.—(A) MARKET TRANSITION PERIOD.—With respect to any sports wager accepted on or before December 31, 2024, provide that a sports wagering operator shall determine the result of a sports wager only with data that is licensed and provided by—(I) the applicable sports

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91 The Senate version of the bill sponsored by Sen. John McCain (R-AZ) was S. 2021: High School and College Gambling Prohibition Act. The House version of the same bill was H.R. 3575: Student Athlete Protection Act. Neither bill became law.
93 115 CONG. REC. S7930 (Statement of Sen. Orrin Hatch (for himself and for Sen. Charles Schumner)) (2018) (mentioning “the basis for requiring the use of so-called official league data”). If Congress were to legislate in the sports gaming space, one key issue would be whether any such legislation would treat all states equally or—as illustrated by PASPA’s unequal treatment of states—include differing standards among the states. Any differing treatment raises equal sovereignty concerns. See Ryan M. Rodenberg & John T. Holden, Sports Betting has an Equal Sovereignty Problem, 67 DUKE L. J. ONLINE 1, 4 (2017). The 2018 draft bill received widespread public support from U.S.-based sports leagues. For example, the United States Tennis Association (“USTA”) wrote a two-page letter to then-Senator Hatch and Senator Schumer to “enthusiastically add our voice to the coalition of sport organizations that seek a national framework for sport wagering.” Letter from Gordon A. Smith, Chief Executive Officer and Executive Director, USTA to The Honorable Orrin Hatch and The Honorable Chuck Schumer (December 19, 2018) (on file with author). While the 2018 draft legislation delegated regulatory oversight to the DOJ, other federal agencies—such as the CFTC—could also be possibilities. For a recent such proposal, see David Aron & Alexander Kane, Federal Regulation Could Sweeten the Sports Betting Pot, BLOOMBERG (June 9, 2020), https://news.bloomberglaw.com/us-law-week/insight-federal-regulation-could-sweeten-the-sports-betting-pot.
organization; or (II) an entity expressly authorized by the applicable sports organization to provide such information.\textsuperscript{94}

If Congress were to recycle the foregoing data-specific language in a subsequent sports gaming bill, the data-specific clause could face legal scrutiny on multiple fronts. Such was the case for PASPA years before the Supreme Court declared PASPA unconstitutional. For example, in the course of discussing PASPA’s carve-outs for certain states, the Court found such exemptions derived from “obscured Congressional purposes.”\textsuperscript{95} The Department of Justice (“DOJ”) raised other concerns: “It is particularly troubling that [PASPA] would permit enforcement of its provisions by sports leagues.”\textsuperscript{96} Further, according to the DOJ: “[I]t is left to the states to decide whether to permit gambling activities based upon sporting events.”\textsuperscript{97}

Such sentiments reinforce how potentially problematic it would be if federal legislation was passed bent on usurping or overriding existing state statues.\textsuperscript{98} This is particularly relevant in the current environment where no fewer than 19 states—as of June 20, 2020—have enacted legislation following the Supreme Court’s 2018 ruling.\textsuperscript{99} Likewise, there are a multitude of state laws still on the books across the country with differing definitions of what constitutes gambling.\textsuperscript{100} These factors make a one-size-fits-all federal approach difficult.

\textsuperscript{94} Sports Wagering Market Integrity Act of 2018, S. 3793, 115th Cong. (2018). The reference to the 2024 date in the draft bill represented a sunset provision, which may have been included in an attempt to satisfy the “limited Times” requirement in the Constitution’s Intellectual Property Clause.

\textsuperscript{95} Greater New Orleans Broad. Ass’n v. United States, 527 U.S. 173, 179 (1999).

\textsuperscript{96} Letter from W. Lee Rawls, Asst. Att’y Gen., Dep’t of Justice, to the Hon. Joseph R. Biden, Jr., Chairman, Comm. on the Judiciary, U.S. Senate (Sept. 24, 1991) (on file with author).

\textsuperscript{97} Id.

\textsuperscript{98} Beyond preemption, issues also arise if any forthcoming federal legislation included one or more grandfather clauses for certain (or all) states. For a discussion of sports gaming regulation vis-à-vis grandfather clauses in the context of PASPA, see John T. Holden, et al., Sports Gambling Regulation and Your Grandfather (Clause), 26 STAN. L. & POL’Y REV. ONLINE 1 (2014).


\textsuperscript{100} Ryan Rodenberg, Why Do States Define Gambling Differently? ESPN (Feb. 18, 2016), https://www.espn.com/chalk/story/_/id/14799507/daily-fantasy-why-do-states-define-gambling-differently. With many states having statutes that turn on relative levels of skill and chance involved, there have been a variety of legal arguments about where sports betting falls on the skill-chance spectrum. For example, see Ryan Rodenberg, Documents Show
B. Statutory

a. Antitrust

Antitrust laws serve as a “safeguard for the Nation’s free market structures.” Such laws, including the Sherman Act, prohibit “cartels, price fixing, and other combinations or practices that undermine the free market.” In 2010, the Supreme Court—in American Needle v. NFL—provided a primer on the reach of the Sherman Act:

The meaning of the term “contract, combination . . ., or conspiracy” is informed by the basic distinction in the Sherman Act between concerted and independent action that distinguishes § 1 of the Sherman Act from § 2. Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action “monopolize[s],” 15 U.S.C. § 2, or “threatens actual monopolization,” a category that is narrower than restraint of trade. Monopoly power may be equally harmful whether it is the product of joint action or individual action. Thus, in § 1 Congress “treated concerted behavior more strictly than unilateral behavior.” This is so because unlike independent action, “[c]oncerted activity inherently is fraught with anticompetitive risk” insofar as it “deprives the marketplace of independent centers of decisionmaking that competition assumes and demands.” For these reasons, § 1 prohibits any concerted action “in restraint of trade or commerce,” even if the action does not “threaten monopoly,” ibid. And therefore, an arrangement must embody concerted action in order to be a “contract, combination . . ., or conspiracy” under § 1. We have long held that concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate. As a result, we have repeatedly found instances in which members of a legally single entity

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103 N.C. State Bd. Of Dental Exam’rs, 135 S. Ct. at 1109.

violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity.  

Antitrust concerns in the burgeoning sports gaming data market are commonplace. According to an executive from William Hill:

A final related policy concern involves the inclusion of a requirement to purchase what sports leagues have deemed ‘official league data.’ Mandating the use of ‘official league data’ just results in monopoly pricing power for the professional sports leagues. Federal courts have rejected the assertion that professional sports leagues have any intellectual property rights to data, further ruling that it is public information. This is simply an attempt by professional sports leagues to legislate what courts have rejected for decades.

According the media reports, the issue arose in the context of a 2018 Connecticut legislative hearing too:

\[105\] Id. (internal quotes and citations omitted). In a footnote, the Supreme Court also made an observation germane to the pooling of purported sports gaming ‘data rights:’ “In any event, it simply is not apparent that the alleged conduct was necessary at all. Although two teams are needed to play a football game, not all aspects of elaborate interleague cooperation are necessary to produce a game. Moreover, even if league wide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.” Id. at 214, n. 7.


Rep. Craig Fishbein noted that this [sports betting data] requirement gives the leagues exclusivity in the space. “Wouldn’t that be allowing the private monopoly of data?” [Fishbein] asked. [Major League Baseball executive Bryan] Seeley confirmed, though he tried to frame the request. “This is driven from consumer concerns, not money concerns,” [Seeley] said. “But I understand.” [Seeley] argued that illegal bookmakers have monopolies on their data, too. Fishbein suggested letting the market dictate which stat[istics] providers are best.  

Restraints of trade alleged to be in violation of the antitrust laws—such as horizontal/vertical price fixing arrangements, output restrictions, and market divisions outside the sports context—are sometimes considered per se unreasonable, but the ‘rule of reason’ test is most commonly applied in the sports industry given the unique aspects of sports whereby they “can only be carried out jointly.”  

Under the rule of reason test, the Supreme Court examines “the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.” Among other things, plaintiffs must identify an injury that is “attributable to an anti-competitive aspect of the practice under scrutiny.” For example, in the case of a horizontal agreement between competitors—such as teams in a sports league—the injury requirement can be shown in at least three ways: (i) a reduction in competitors’ decision-making about “whether and how often to offer to provide services;” (ii) a demonstrated fixing of prices; or (iii) a limitations on competitors “freedom to compete.” Vertical arrangements can give rise to antitrust issues too, provided the plaintiffs have standing under the Supreme Court’s ‘indirect purchaser’ rule.

Among states that have laws requiring licensed operators to use so-called ‘official data’ for certain types of bets, the statutory language is largely uniform: such data must be purchased from a sports league or the league’s designee(s). The latter arrangement—where mandatory data dissemination is

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116 As of June 20, 2020, such states included Tennessee, Michigan, and Illinois. As of July 1, 2020, Virginia will move into the same category too.
facilitated by one or more designees—could plausibly be described as joint venture. Indeed, in many cases, sports leagues and individual team owners are equity investors in the data dissemination firms. To the extent that contractual arrangements in the sports gaming data dissemination space amount to joint ventures, the Supreme Court has set forth guidelines for antitrust scrutiny. In *Texaco Inc. v. Dagher*, for example, the Court applied the rule of reason to joint ventures and required plaintiffs to “demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.” Specifically, “if the joint venture restricts price or output, the rule of reason test generally applies.”

In addition to joint ventures, antitrust scrutiny also extends to tying arrangements that could fix prices or limit market entry. A tying arrangement usually occurs when “a seller of two separate products refuses to sell one unless the buyer also takes the other, either simultaneously or else as aftermarket purchases.” Put another way, a tie results if a consumer is only allowed to purchase one item from a company (which the consumer wants) if the consumer also agrees to purchase another item (which the consumer does not want) from the same company. The antitrust harm from tying takes two forms: “Foreclosure occurs when a tie ousts or unreasonably limits the opportunities of rivals, typically in the tied product…[t]he second type of antitrust harm is extraction, which involves overcharges that purchasers of tied packages are forced to pay.”

Antitrust concerns are central in cases when active market participants play a role in the regulatory process. The Supreme Court has found that “prohibitions

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119 *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 99 S. Ct. 1551, 1564 (1979) (“Not all arrangements among actual potential competitors that have an impact on price are per se violations of the Sherman Act…[j]oint ventures and other cooperative arrangements are also not statutorily unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.”).


against anti-competitive self-regulation by active market participants are an axiom of federal antitrust policy.”\textsuperscript{123} Similarly, Justice Stevens, dissenting in a different case, posited that “[t]he risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of...our antitrust jurisprudence.”\textsuperscript{124}

The restrictive and intertwined nature of the sports gaming data market lends itself to antitrust scrutiny. A variety of different plaintiffs—government or private—could bring a host of different claims and a number of different theories. Beyond antitrust prosecution by the DOJ or one or more state attorneys general, other potential plaintiffs could initiate a lawsuit, including consumers, sports gaming operators, or aggrieved data dissemination firms locked out of the market due to exclusive arrangements or restrictive access policies. Likewise, if sports leagues or players unions moved to unilaterally adopt certain data policies, individual team owners or players could challenge such moves on antitrust grounds or otherwise.\textsuperscript{125}

b. Statutory Data Monopolies and the State-Action Antitrust Exemption

The doctrine of state-action antitrust immunity found its genesis in the Supreme Court’s \textit{Parker v. Brown} decision.\textsuperscript{126} There, the Court held that the federal antitrust laws may not bar states from imposing market restraints because

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  \item \textsuperscript{123} N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 494 (2015).
  \item \textsuperscript{125} For an example of a team owner seeking to opt-out of a league-wide commercial arrangement, see NFL Properties, Inc. v. Dallas Cowboys Football Club, Ltd. 922 F.Supp. 849, 851 (S.D.N.Y. 1996).
  \item \textsuperscript{126} Parker v. Brown, 317 U.S. 307, 314 (1943). A related concept—particularly if there is ever a federal regulatory effort in the context of sports gaming data—is the extent to which the doctrine of implied antitrust immunity potentially attaches. The Supreme Court concluded that “[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions,” United States v. Philadelphia Nat’l Bank, 83 S. Ct. 1715, 1734 (1963). In recent years, the doctrine has “considerably evolved.” Barak Orbach, \textit{The Implied Antitrust Immunity}, (Ariz Legal Stud. Pub. Discussion Paper No. 14-16, 2014), http://ssrn.com/abstract=2477137. \textit{See} Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP 540 U.S. 398 (2004); Credit Suisse Securities (USA) LLC v. Billing, 127 S. Ct. 2383, 2389, (2007) (“Where regulatory statutes are silent in respect to antitrust, ...courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws. Those determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws.”).
\end{itemize}
“‘nothing in the language of the Sherman Act or in its history’ suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies.” 127 While the Sherman Act “serves to promote robust competition” 128 nationwide, states sometimes “impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives.” 129 However, if all state activity in these realms resulted in antitrust liability, “federal antitrust law would impose an impermissible burden on the states’ power to regulate.” 130

Enter state-action antitrust immunity. The ‘burden’ recognized by the Supreme Court gave way to an interpretation of the antitrust laws that “confer[ed] immunity on anticompetitive conduct by the states when acting in their sovereign capacity.” 131 Such immunity “embod[ies] in the Sherman Act the federalism principle that the states possess a significant measure of sovereignty under our Constitution.” 132 However, a finding of state-action antitrust immunity is generally “disfavored.” 133

The difficult application of this principle occurs when “a state delegates control over a market to a nonsovereign actor,” like a regulatory board. 134 In such cases, the Supreme Court has enunciated a two-part test, recognizing that “‘[c]loser analysis is required when the activity at issue is not directly that of the state itself, but rather ‘is carried out by others pursuant to state authorization.’” 135 Namely, “a non-sovereign actor controlled by active market participants—such as [a B]oard—enjoys Parker immunity only if it satisfies two requirements: first that the ‘challenged restraint…be one clearly articulated and affirmatively expressed as state policy,’ and second that the ‘the policy…be actively supervised by the state.’” 136 This dual test derives from a recognition that:

129 Id.
130 Id. at 1109 (citing Exxon Corp. v. Gov. of Maryland, 437 U.S. 117, 133 (1978)).
131 Id. at 1110 (quoting Parker v. Brown, 317 U.S. 341, 350-51 (1943)).
Limits on state-action immunity are most essential when the state seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.\(^{137}\)

Passing the two-part test represents a high hurdle for states looking for immunity to attach. To satisfy the ‘clear articulation’ prong, “the displacement of competition [must be] the ‘inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the state must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.’”\(^{138}\) The ‘active supervision’ requirement mandates “that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”\(^{139}\)

Among the states that have already enacted an ‘official data’ statutory mandate, there is scant evidence that lawmakers in Tennessee, Michigan, or Illinois have enunciated why—or how—such a data law is consistent with state policy. Beyond effective lobbying by industry stakeholders with a pecuniary incentive to pursue such a statutory mandate, the policy-enhancing motivation is dubious. As such, supporters of the laws may have difficulty arguing that the restraints are clearly articulated and affirmatively expressed as state policy. Shifting regulatory standards for what constitutes ‘commercially reasonable’ pricing and deference to industry stakeholders may doom such laws under the second Parker prong. Active state supervision is required, which is a high standard to meet when the underlying regulations look to industry-tethered metrics and off-loaded boards comprised of private sector industry employees, as is the case in Tennessee.

2. Constitutional

Several constitutional provisions impact the regulatory treatment of sports

\(^{137}\) Id. at 1111 (citing California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 106 (1980) (“The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement”).

\(^{138}\) Id. at 1112 (citing Fed. Trade Comm’n v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003, 1013 (2013)).

\(^{139}\) Id. (citing Patrick v. Burget, 486 U.S. 94, 101 (1988)).
gaming data, especially if any *sui generis* property right were to attach.\textsuperscript{140} Article I’s Intellectual Property Clause grants Congress the authority: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”\textsuperscript{141} The Supreme Court has set forth general parameters on the power of Congress to grant monopolies such as an ‘official data’ requirement for sports gaming. According to the Court: “The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit…[it] is intended to motivate the creative activity of authors and inventors.”\textsuperscript{142}

Prominent scholars agree: “[a] corollary principle [of the Intellectual Property Clause] demands that Congress initially direct exclusive grants to those who provide the public with the new creation. Monopolies are not rewards Congress may grant to favored special-interest groups.”\textsuperscript{143} Another scholar concurred: “The overwhelming view among commentators is that the Intellectual Property Clause’s limits apply to all of Congress’s powers and therefore that Congress may not look to other Article I, Section 8 powers in order to avoid those limits.\textsuperscript{144} Indeed, the Intellectual Property Clause has anti-monopoly origins\textsuperscript{145} and its ‘promotion of progress’ requirement limits the power of Congress in the intellectual property realm.\textsuperscript{146}

A federal mandate that sports betting operators—as a condition of receiving and retaining a license—must use data purchased from a sports league or its

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\textsuperscript{140} Whether there is a constitutional right to advertise about sports gaming options is beyond the scope of this paper. See generally United States v. Edge Broad. Co., 509 U.S. 418 (1993). Likewise, whether there is a constitutional right to bet on sports is outside the scope of this paper. See generally Dustin Gouker, *An NFL Team Wants You to Vote to ‘Protect Your Right to Legally Bet on Sports’,* LEGAL SPORTS REPORT (Nov. 6, 2018), https://www.legalsportsreports.com/25655/miami-dolphins-plug-legal-sports-betting/.

\textsuperscript{141} U.S. CONST. art. I, § 8, cl. 8.


designee can plausibly be described as the functional equivalent of a patent. The Supreme Court has made clear that Congress has limited patent powers given the Constitution’s Intellectual Property Clause:

Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must ‘promote the Progress of…useful Arts.’ This is the standard expressed in the Constitution and it may not be ignored.147

Protecting sports gaming data via copyright—a topic that has indirectly already been litigated and is discussed elsewhere herein—is unlikely. In contrast to “live musicals, theatrical plays, and professional wrestling, honestly competitive sports are unscripted, making them incompatible with copyright law’s constitutional and statutory requirements.”148 The DOJ Solicitor General has cited live sports to illustrate the concept too: “In some circumstances, moreover, the initial ‘performance’ may be the act of transmission itself. For example, when a television network broadcasts a live sporting event, no underlying performance precedes the initial transmission—the telecast itself is the only copyrighted work.”149 Disparate court rulings about narrow, discrete issues in this space has seemingly resulted in an inter-circuit split between the Second Circuit150 and the Eleventh Circuit151 and a plausible intra-circuit split within the Eighth Circuit.152

Beyond the Intellectual Property Clause, other constitutional concerns that could arise in the sports gaming data context include the Due Process Clause, Tenth Amendment, Takings Clause, and First Amendment. For example, a state
challenging any new federal regulatory statute—upon establishing standing\textsuperscript{153}—could, among other claims, challenge the law on the same anti-commandeering grounds that New Jersey successfully argued in the context of PASPA. Likewise, if Nevada’s long-standing regulatory process were to be usurped by federal efforts, a Takings Clause claim could be triggered.

\textbf{a. Void-For-Vagueness}

The roots of the void-for-vagueness doctrine are firmly in the Due Process Clause.\textsuperscript{154} If a law is "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits,"\textsuperscript{155} then the statute does not provide fair notice as required by the Due Process Clause. Put another way, such a vague law lacks fair notice because “[i]t leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.”\textsuperscript{156} The void-for-vagueness doctrine could also attach if the law in question does not “establish minimal guidelines to govern law enforcement” and “encourage[s] arbitrary and discriminatory enforcement.”\textsuperscript{157} Courts have evaluated this test with an eye towards whether police would, or could, enforce the law.\textsuperscript{158} If determined to be unconstitutionally vague, a court would then construe the law narrowly to avoid the vagueness or invalidate the entire statute.\textsuperscript{159}

Although the void-for-vagueness standard is most commonly at play in criminal law, it also applies to civil statutes.\textsuperscript{160} However, the Supreme Court has found that “[t]he degree of vagueness that the Constitution [allows]...depends in part on the nature of the enactment...express[ing] greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.”\textsuperscript{161} Lesser scrutiny has been found appropriate for economic regulatory laws “because its subject matter is often more narrow, and because businesses, which face economic demands to plan

\textsuperscript{158} Id. at 358.
behavior carefully, can be expected to consult relevant legislation in advance of action.”

Statutory ‘official data’ mandates with or without ‘commercially reasonable’ standards in sports gaming legislation are close cousins to excessive-price lawmaking in other contexts, such as prescription drugs. Two regulatory moves in the realm of sports gaming data are susceptible to the void-for-vagueness doctrine. First, any statutory mandate—at the state or federal level—requiring operators to purchase so-called ‘official data’ from a designated seller or sellers is clouded by precedent concluding that such information is (already) in the public domain and unowned. Second, some states have attached a ‘commercially reasonable’ standard to the prices of such mandates. In so doing, the states are, paradoxically and nonsensically, trying to attach a price to something that has no definitive owner.

First Amendment overbreadth is a cousin of the void-for-vagueness doctrine. The Supreme Court has found that “[t]he Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.” In First Amendment cases, statutes can be invalidated as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” Given the possibility of a chilling effect, a person whose activity is unprotected may have standing to challenge a law as overbroad under the First Amendment. Any state law purporting to restrict the ability of individuals to transmit news and information from a sports venue—such as the score of the underlying game—is vulnerable to invalidation under a First Amendment overbreadth claim due to the vast net cast by such a law.

b. First Amendment and Prior Restraints

Any government-mandated restrictions on the dissemination of news and

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162 Id. at 498 (footnotes omitted).
163 Id. at 499; see also FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253–54 (2012) (“When speech is involved, rigorous adherence to those [vagueness] requirements is necessary to ensure that ambiguity does not chill protected speech.”).
164 See Michelle M. Mello & Rebecca E. Wolitz, Legal Strategies for Reining in “Unconscionable” Prices for Prescription Drugs, 114 Nw. L. Rev. 859 passim (2020) (discussing unconscionable drug prices in the context of the Due Process Clause).
information—such as via statutory ‘official data’ requirements in the sports gaming realm—invites scrutiny under the First Amendment. The Supreme Court has found “speech on public issues…is entitled to special protection.”\textsuperscript{168} Snyder v. Phelps detailed when such protection attaches: “Speech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”\textsuperscript{169} In a recent court filing, two sports industry stakeholders explained how sports satisfy Snyder’s defendant-friendly two-part test: “Courts broadly construe ‘matters of public concern’ to encompass news reports about all manner of subjects of interest to substantial portions of the public, including news about sports and entertainment.”\textsuperscript{170}

Relatedly, sports league executives have described sports in a similar way. In a 2012 deposition, MLB executive Bud Selig described pro baseball as a “quasi-public institution.”\textsuperscript{171} In a 2018 submission for a Congressional hearing, NFL executive Jocelyn Moore referenced “our nation’s professional and amateur sporting contests.”\textsuperscript{172} A leading scholar has found that courts are adverse to limiting the dissemination of information if involving a public concern, even if having commercial value.\textsuperscript{173} Indeed, “[a]n individual’s right to speak is implicated when information he or she possesses is subjected to ‘restraints on the way in which information might be used’ or disseminated.”\textsuperscript{174} Application of the First Amendment is also shaped by the state action

\textsuperscript{169} Id. at 453 (quoting Connick, 461 U.S. at 146; City of San Diego, Cal. V. Roe, 543 U.S. 77, 83–84 (2011)).
\textsuperscript{170} Brief for Fox Broad. Co. & Big Ten Network, LLC as Amici Curiae Supporting Defendant NCAA’s Motion for Summary Judgment at 4, In re NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F.Supp.3d 1126 (N.D. Cal. 2014) (No. C09-1967 CW) (citing Hilton v. Hallmark Cards, 599 F.3d 894, 908 (9th Cir. 2010)).
\textsuperscript{171} Deposition of Allan H. Selig at 10, NCAA v. Christie 926 F.Supp.2d 551 (D. NJ 2013) (No. 12–4947) (“…baseball is a social institution. I believe that. I also believe it’s a quasi-public institution. But it’s a social institution with really important social responsibility.”) (on file with author).
doctrine, requiring a government actor to be involved. Specifically, “the First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes.”175 Put another way, the First Amendment’s free speech clause “prohibits only governmental abridgment of speech…[and]…does not prohibit private abridgment of speech.”176 In deducing the divide between public and private action, the Supreme Court has concluded: “we say that state action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”177 While some sports venues in the United States are privately owned, most are on public land or take place in publicly-financed stadiums. Enforcement of any ‘official data’ mandates on-site would likely be left to private security forces or duly-authorized law enforcement officials.

Dissemination of news and information—whether related to sports gaming or not—occurring on public land and involving a state actor almost certainly triggers the First Amendment. First Amendment coverage on private land with no state action is less certain, given that private property does not “lose its private character mere ly because the public is generally invited to use it for designated purposes.”178 In PruneYard Shopping Center v. Robins, the Supreme Court left open the possibility that private landowners’ right to suppress free speech had limits.179 In either case, a sports gaming data disseminator could adopt an offensive litigation strategy and preemptively seek to have any state or federal ‘official data’ mandate declared to be an unconstitutional prior restraint or, more generally, file for a declaratory judgment about ownership of real-time data involving sporting events.180

The content of the involved speech and its classification also plays a role in any First Amendment analysis. Certain speech—such as incitement of lawlessness, defamation, and obscenity—fall into a category of unprotected speech.181 Speech in support of a commercial venture has been extended First

180 See generally NBA v. Motorola, Inc., 105 F.3d 841, 846 (2d Cir. 1997) (stating the Second Circuit’s conclusion that a live sporting event, on its own, does not constitute an “original work of authorship” under copyright law).
Amendment protection if it meets the Supreme Court’s *Central Hudson* four-part test:

[I]f the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State’s goal.\(^{182}\)

Speech involving cultural, social, or political discourse is fully protected under the First Amendment\(^ {183}\) with multiple courts extending such protection to entertainment-related news.\(^ {184}\) The Supreme Court has found that this extends to newsworthy items in literary works: “[t]he news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.”\(^ {185}\) Free speech rights vis-à-vis real-time news has also been addressed at the appellate court level, with the Second Circuit concluding that the right to “make news…does not give rise to a right for [an entity] to control who breaks that news and how.”\(^ {186}\)

In any pre-enforcement ‘as applied’ First Amendment challenge involving statutory mandates regarding sports gaming data, the plaintiff would first need to establish Article III standing.\(^ {187}\) Upon a finding of standing, any case brought by a disfavored data disseminator or sports gaming operator would turn to the merits; namely, whether a federal or state mandate restricting the distribution of news and information relevant to sports gaming complies with the First Amendment. Similarly, if any such mandate represents a prior restraint, there is a “heavy presumption against its constitutional validity.”\(^ {188}\) Prior restraints, the Supreme Court has found, represent “the most serious and the least tolerable

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\(^{186}\) Barclays Capital Inc. v. TheFlyontheWall.com, Inc., 650 F.3d 876, 907 (2d Cir. 2011).


infringement on First Amendment rights."

The First Amendment generally stands for the proposition that “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” The right to publish truthful information of a public concern is one of the “core purposes” of the First Amendment flagged by the Supreme Court. Regulations based on content are “presumptively invalid,” with the “Government bear[ing] the burden to rebut that presumption.” When government regulations restrict certain content—such as live scores being disseminated on-site at a sporting event—a court evaluating the permissibility of such restrictions must determine whether to apply strict scrutiny or intermediate scrutiny. If a strict scrutiny standard were to attach, any statutory sports gaming data mandate would only be upheld if “it is justified by a compelling government interest and is narrowly drawn to serve that interest.” The Supreme Court’s intermediate scrutiny standard makes content restrictions permissible only when narrowly drawn and in furtherance of a substantial government interest. Whether there is a compelling or substantial government interest in restricting sports gaming news and information is dubious.

Although the Second Circuit ultimately did not reach the issue in NBA v. Motorola, First Amendment issues were briefed extensively by the parties and amici. For example, amici New York Times emphasized the importance of the case:

The Supreme Court has consistently emphasized that the constitutional guarantee of free speech and a free press are neither limited nor enhanced by economic considerations. See, e.g., New York Times v. Sullivan, 376 U.S. 254, 266 (1964). It is similarly beyond question that real-time sports scores, particularly in widely popular professional NBA basketball games, constitute news entitled to First Amendment protection and status. See Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 578 (1977) (“There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that

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193 The Ninth Circuit recently applied strict scrutiny to a content-based restriction on speech. See IMDb.com Inc. v. Becerra, 962 F. 3d 1111 (9th Cir. 2020).
196 NBA v. Motorola, Inc., 105 F.3d 841, 854 n.10 (1997) (“In view of our disposition of this matter [on alternative grounds], we need not address [defendants’] First Amendment and laches defenses.”).
entertainment can itself be important news.”); Kregos v. Associated Press, 937 F.2d 700, 704-05 (2d Cir. 1991)...

That the NBA undeniably stages and sponsors the sports events which are the subject of legitimate news coverage does not give it a proprietary interest in information about the event itself. The NBA’s position that it could restrain the [New York] Times from reporting about its games more frequently than it wishes because that privilege is supposedly the NBA’s ‘private property’ cannot be the case any more than that the NBA can require the [New York] Times to report on its games in the way it chooses. Contrary to the lower court’s analysis, the First Amendment does not condition the right to collect and disseminate facts to the public upon a publisher’s willingness or ability to pay for news...

Here there can be no question but that the relating of scores of NBA basketball games are news reports. The NBA certainly considers its games as news, and the media have traditionally considered them as such. Key to news is the proposition that the outcome is unknown...Unlike a play or concert to which the NBA tries to analogize its games, there is no script; the story line does not stay the same...[T]he outcome of NBA games is never known in advance, and hence the results and even the running score, are archetypically news...

In a sense, the NBA’s misconception stems from an unfounded view of its ‘property.’ True, the NBA pays for the staging of its contents. True, business realities appear to have influenced courts to allow sports organizers to exploit, on an exclusive basis, the actual television (and radio) transcriptions of the game. However, the NBA does not own, for itself to license, the information stemming from its contests. Those facts are news, and are not part of the proprietary ownership which the NBA can maintain for commercial exploitation -- either during game time or after the final buzzer has sounded...

The data, statistics, and score of an NBA game are imbued with no more proprietary interest than any other news of the day. It is well settled that statistics of sports events cannot be copyrighted.197

197 Brief for N. Y. Times Co. as Amicus Curiae Supporting Appellants at 8–9, 14 n.6, 19, 20, NBA v. Motorola, Inc., Nos. 96-7975, 96-7983, 96-9123, (2d Cir. Sept. 23, 1996) (some internal citations omitted) (quoting American Broadcasting Cos., Inc. v. Cuomo, 570 F.2d 1080, 1083 (2d Cir. 1977)) (“once there is a public function, and participation by some of the media, the First Amendment requires equal access
Some state statutes have entertained the possibility of a ‘bubble zone’ in and near sports stadiums to restrict betting and the dissemination of sports gaming news and information. While the Supreme Court has upheld such a bubble zone near a health care facility under the First Amendment,198 subsequent rulings have called into question the permissibility of such zones moving forward.199 Lobbying has ensued regardless. In 2019, a law firm representing the “Chicago Bears, Chicago Cubs, Chicago White Sox, and the United Center Joint Venture (which is the home venue for the Chicago Bulls and Chicago Blackhawks)” sent a nine-page letter to the Illinois Gaming Board and told the board that:200

\[\text{A. Protect Intended Five-Block Exclusivity.}\]

The Act’s grant to each sports facility and its designee of the exclusive right to conduct sports wagering within a five-block radius of each sports facility creates the incentive to invest in the license and generate sports wagering revenue at and around major sports facilities. The teams have the most at stake in protection of the community surrounding their facility as well as the successful conduct of sports wagering within that community. The teams have the most experience in operating professional, high-quality operations consistent with the sports experience and are uniquely situated to implement sports wagering in their community in a manner which safeguards the fan experience and promotes continued revenue generating activity in the neighborhood. Protecting the teams’ exclusive right to authorize sports wagering activity within the five-block radius both promotes the economic interests of the State and community, and protects the teams’ investment in their fans and the quality and integrity of the games. The following items flow from the five-block protection granted by the General Assembly and should be expressly and clearly set forth in the Rules:

Whether a zone of exclusivity is enforceable vis-à-vis the First Amendment could be resolved if regulations in Indiana, Washington, DC, and elsewhere focused on the “method of data collection” are litigated.201 There are other examples too. Regulations in Iowa require licensed operators to disclose data sources.202 In Michigan, a law includes a provision that “would bar operators from using data that was obtained from live event attendees who are collecting the data in violation of the event’s terms of admittance, also known as ‘scouting’

to all of the media or the rights of the First Amendment would no longer be tenable.”).

202 Id.
The following was included in a draft New York bill:

Persons who present sporting contests shall have authority to remove spectators and others from any facility for violation of any applicable codes of conduct, and to deny persons access to all facilities they control, to revoke season tickets or comparable licenses, and to share information about such persons with others who present sporting contests and with the appropriate jurisdictions’ law enforcement authorities.

**c. Piracy, Public Domain Facts, and Data(base) Rights**

After the Supreme Court sports betting case was decided on May 14, 2018, various sports leagues started using the word ‘piracy’ in lobbying efforts and speaking points when talking to the press. The shift was reminiscent of how amici National Broadcasting Company (“NBC”) described the underlying conduct in the *NBA v. Motorola* litigation twenty-plus years earlier:

Appellants’ real-time, running accounts of a basketball game constitute the on-line equivalent of a play-by-play radio broadcast that is clearly protected under the law. A stream of detailed, real-time reports that include the score, the time remaining and players’ fouls is a running depiction of the game, the essence of the commercial product created by the NBA. This is not the simple reporting of statistics or the bare facts of a game, as appellants now strain to suggest. Appellants provide unauthorized means of following a game in progress, continuously and contemporaneously. This constitutes misappropriation akin to an authorized radio play-by-play description.

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203 Id. (“It would further prohibit the use of scraped data obtained from ‘automated computer programs that compile data from the internet in violation of the terms of service of the relevant website or other internet platform.”).


of the game delivered by a fan with a microphone at his seat, or an unauthorized broadcast by a fan with a video camera. Appellants have misappropriated property to which they have no rights.\textsuperscript{206}

Whether information can be owned has long been analyzed.\textsuperscript{207} Whether news can be owned has been debated and litigated for even longer. Issues related to piracy have persisted for centuries too.\textsuperscript{208} Author Will Slaeter described a "culture of copying" in 18th century Britain and "cutting and pasting" in the United States during the 1700s.\textsuperscript{209} Slaeter provided an early example:

In 1733, a London paper called the \textit{Grub-Street Journal} was accused of 'piracy.' The offense? Each week’s issue contained a digest of news compiled from eight to ten other London papers. The editor would read these papers looking for different accounts of the same event and then reproduce short excerpts one after the other, always indicating the source.\textsuperscript{210}

Two court rulings in the United States—one in 1918 and the other in 1921—shaped the issue for decades later. In 1918, the Supreme Court recognized a "quasi property" right in time-sensitive news that was untethered to copyright.\textsuperscript{211} Three years later, the Seventh Circuit concluded that formatted news articles were eligible for copyright protection and could be infringed.\textsuperscript{212} Evolving technology—first radio and then television—gave rise to a host of misappropriation court cases. Researcher Victoria Smith Ekstrand tracked such

\textsuperscript{206} Brief for NBC as Amicus Curiae Supporting Plaintiff at 8, NBA v. Motorola, Inc. (2d Cir. Oct. 3, 1996).
\textsuperscript{207} ANNE WELLS BRANSCOMB, \textit{WHO OWNS INFORMATION? FROM PRIVACY TO PUBLIC ACCESS} 174 (1994).
\textsuperscript{208} ADRIAN JOHNS, \textit{PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES} 328 (2009).
\textsuperscript{209} WILL SLAETER, \textit{WHO OWNS THE NEWS?: A HISTORY OF COPYRIGHT} 51, 87 (2019).
\textsuperscript{210} \textit{Id.} at 1.
\textsuperscript{211} Int’l News Serv. v. AP, 248 U.S. 215 (1918). Eleven years later, a Second Circuit ruling cast doubt on whether a court, as opposed to Congress, could create such a common law property right. Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1929). For a detailed account of the Supreme Court’s \textit{INS} \textit{v. AP} ruling, see VICTORIA SMITH EKSTRAND, \textit{HOT NEWS IN THE AGE OF BIG DATA: A LEGAL HISTORY OF THE HOT NEWS DOCTRINE & IMPLICATIONS FOR THE DIGITAL AGE} (2015). For example, Ekstrand expertly reveals the origins of phrases such as “reaping where one has not sown” and “parasite” in a 1902 Seventh Circuit case. \textit{Id.} at 56 (citing Nat’l Tel. News Co. v. W. Union Tel. Co., 119 F. 294, 298 (7th Cir. 1902)).
\textsuperscript{212} Chi. Record-Herald Co. v. Tribune Ass’n, 275 F. 797, 798–99 (7th Cir. 1921).
cases and detailed special concerns when sporting events were (re-)broadcast:

In twenty-five misappropriation decisions from 1930 through 1959, sixteen involved the piracy of radio signals or the piracy of sound recordings or live radio performances. Plaintiffs in thirteen of those sixteen decisions were successful making a claim of misappropriation. These misappropriation cases typically involved the reading of printed news from a newspaper on the air, the rebroadcast or recording of live radio performances, and the reuse of live radio descriptions of sporting events, such as baseball games.

The unique character of sports events—live unscripted action made available to the public by private organizations—combined with the new medium of radio to bring sports to many more fans. But the nature of such events on radio also created many more opportunities for others to use or pirate parts of the broadcast left unprotected by copyright. Such actions infuriated private sports organization and their owners who financed and ran such events. Most courts were sympathetic to such misappropriation actions and in their decisions, found it easy to apply elements of misappropriation. 213

According to Ekstrand, one boxing case involved a defendant who used “newsgathering representatives…located at vantage points outside the stadium but within view of the bout.” 214 Another lawsuit included allegations that a defendant “obtained live reports of the games by stationing reporters at vantage points above the walls…where the [Pittsburgh] Pirates played.” 215 A third case involved a disfavored independent sports reporter who sent out play-by-play accounts of New York Giants baseball games. 216 All three cases found that misappropriation had occurred and ruled in favor of the plaintiffs. Ekstrand determined that Loeb v. Turner 217 was “[t]he only sports broadcast decision to reject a finding of misappropriation during this time.” 218 The Loeb v. Turner court allowed a reporter, “who was stationed outside the racetrack,” 219 to broadcast his own depiction of the race gleaned by listening to another radio signal. The Loeb v. Turner court explained:

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213 Ekstrand, supra note 211, at 112–13, 120.
214 Id. at 120.
215 Id. at 121.
216 Id. at 122.
218 Ekstrand, supra note 211, at 123.
219 Id.
The actual happenings of each day, including sporting events, become part of the facts of history immediately upon their happening. News of them cannot be copyrighted; nor, so far as the public is concerned, can the news itself become the subject of a property right belonging exclusively to any person. To hold otherwise would be to contravene our constitutional guaranty of freedom of speech and freedom of the press.\footnote{220}

Whether sports leagues and teams playing games in publicly-owned stadiums are state actors in the context of enforcing restrictions on the dissemination of sports gaming news and information is unsettled. No federal or state case has directly addressed the issue. However, the Supreme Court has found that public funding does not automatically attach state actor classification to a private entity,\footnote{221} even if the entity is granted legal monopoly status.\footnote{222}

In the years immediately following the Supreme Court’s decision in \textit{Feist Publications v. Rural Telephone Service},\footnote{223} Congress considered—but never passed—multiple bills that would provide protection for the commercial value of information databases.\footnote{224} One such bill, the Collections of Information Antipiracy Act, H.R. 2652, 105th Congress, passed the House of Representatives on May 19, 1998 before dying in the Senate.\footnote{225} The object of the bill was, “in effect, to provide a quasi-property right in certain collections of information that required great effort to compile.”\footnote{226} The DOJ found that the bill “would provide what is known as ‘sweat of the brow’ protection for certain compilations of factual material.”\footnote{227}

The DOJ noted multiple “constitutional concerns” stemming from the bill, including concerns related to the Intellectual Property Clause, Commerce Clause, and First Amendment.\footnote{228} For example, the DOJ wrote that “some language in \textit{Feist} might also fairly be read to suggest...that the Intellectual

\footnote{220}{Loeb, 257 S.W. at 802-03.}
\footnote{221}{Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982).}
\footnote{225}{Memorandum from William Treanor, Dep. Asst. Att’y Gen., to William Marshall, Assoc. White House Counsel, on Constitutional Concerns Raised by the Collections of Info. Antipiracy Act 166 (July 28, 1998).}
\footnote{226}{\textit{Id.}}
\footnote{227}{\textit{Id.}}
\footnote{228}{\textit{Id. at} 166–67.}
Property Clause prohibits Congress from relying on any other constitutional power to afford copyright-like protection to facts and to the nonoriginal parts of factual compilations.” The DOJ also wrote: “Even if the Intellectual Property Clause does not itself impose constraints on Congress’s Commerce Clause Power, the First Amendment might nevertheless limit the type of protection that Congress can provide against the ‘use’ and ‘extraction’ of factual compilations.”

The DOJ’s First Amendment-related concern derived from multiple Supreme Court cases that have addressed related issues. The DOJ cited New York Times v. Sullivan for the proposition that “[o]ne of the principal aims of the First Amendment is to ‘secure the widest possible dissemination of information from diverse and antagonistic sources.’” Further, the DOJ cited several Supreme Court cases to emphasize that “the government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a ‘state interest of the highest order.’” Finally, the DOJ looked to Harper & Row Publishers, Inc. v. Nation Enterprises to highlight the so-called idea/expression dichotomy, which “strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression. No author may copyright his ideas or the facts he narrates.” The DOJ concluded: “[N]o intellectual property rights can extend to facts that have been released in the public domain.”

d. Misappropriation and Intellectual Property Preemption

With some exceptions, intellectual property protection generally includes four categories—patents, trademarks, copyrights, and trade secrets. The divide between ‘ideas’ and ‘expression’ permeates across intellectual property categories. The Supreme Court found that “‘[d]ue to this [idea/expression] distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication’; the author’s expression alone gains copyright protection.” Facts—such as phone numbers or perhaps the score of a basketball game as the game is being played—are almost certainly not eligible for intellectual property protection.

Indeed, the most prominent Supreme Court case to date—Feist Publications
v. Rural Telephone Services—considered whether phone numbers qualified for copyright protection. In a 9-0 ruling, the Supreme Court concluded that “[t]he primary objective of copyright is not to reward the labor of authors, but ‘to promote the Progress of Science and the useful Arts.’” The Court also made clear that “[o]riginality is a constitutional requirement” and copyright protection only attaches if there is some “minimal level of creativity.” Further, the Court rejected the so-called ‘sweat of the brow’ theory involving compilations of fact-based news. In an explanation particularly relevant to sports gaming news and information, the Court also explained how facts should be positioned:

[F]acts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence…The same is true of all facts—scientific, historical, biographical, and news of the day. ‘[T]hey may not be copyrighted and are part of the public domain available to every person.’

Disputes over distribution rights outside the context of sports gaming data have persisted for over 130 years, with a range of precedent that has resulted in somewhat of a split between the Second Circuit and the Eleventh Circuit. The Eighth Circuit also has a plausible intra-circuit split of authority. Rights attached to news and information relevant in the sports gaming realm also arose

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237 Id. at 349 (quoting Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 154 n.2 (1975)). Whether modern highly commercialized sports qualify as ‘useful Arts’ under the Constitution is an issue outside the scope of this paper, but worthy of further inquiry.
238 Id. at 346.
239 Id. at 358.
240 Id. at 352–54, 359–60 (“originality, not ‘sweat of the brow,’ is the touchstone of copyright protection in fact-based works”). The ‘sweat of the brow’ theory is also sometimes referred to as ‘industrious collection.’ For details, see Craig Joyce & Tyler T. Ochoa, Reach Out and Touch Someone: Reflections on the 25th Anniversary of Feist Publications, Inc. v. Rural Telephone Service Co., 54(2) HOUSTON L. REV. 257 (2016).
241 Feist Publ’ns, 499 U.S. at 347–48 (citing Miller v. Universal Studios, 650 F.2d 1365, 1369 (5th Cir. 1981)).
242 Morris Commc’n Corp. v. PGA Tour, Inc., 364 F.3d 1288 (11th Cir. 2004); NBA v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997).
243 C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007); NFL v. McBee & Bruno's, Inc., 792 F.2d 726 (8th Cir. 1986).
in a district court decision within the jurisdiction of the Third Circuit. 244 A litany of other cases date back to the late 1800s. 245 However, since the Supreme Court rejected the concept of federal common law in its 1938 *Erie Railroad Co. v. Tompkins* ruling, 246 it generally falls to state common law to recognize a cause of action like misappropriation. 247

To date, courts have been unwilling to deem information—sports gaming-related or otherwise—as intellectual property worthy of commercial protection. 248 Indeed, “[a] fundamental principle of intellectual property is that no one should be given a monopoly on facts, ideas, or other building blocks of knowledge, thought, or communication.” 249 Nevertheless, sports leagues and others have persisted in positing that a property right of sorts can attach to news emanating from the underlying games or contests. For example, in the early stages of the recent Supreme Court sports betting litigation, the DOJ took the position that PASPA granted sports leagues a quasi-property right. According to the DOJ:

PASPA does give the leagues a protected legal interest that has been invaded by New Jersey’s authorization of sports gambling…the legal protection that PASPA accords to sports leagues is similar to the protections traditionally afforded in fields such as copyright and

245 Kregos v. Associated Press, 3 F.3d 656 (2d Cir. 1993); United States Golf Ass’n v. St. Andrews Sys., Data-Max, Inc., 749 F.2d 1028 (3d Cir. 1984); Baltimore Orioles v. Major League Baseball Players Ass’n, 805 F.2d 663 (7th Cir. 1986); Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490, 492 (W.D. Penn. 1938) (“[T]he plaintiffs and the defendant are using baseball news as material for profit…by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, [the Pittsburgh Athletic Company] has a property right in such news, and the right to control the use thereof for a reasonable time following the games”); Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc., 300 N.Y.S. 159, 165 Misc. 71 (1937); Detroit Base-Ball v. Deppert, 27 N.W. 856 (Mich. 1886).
246 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 70 (1938).
trademark law, where authors and companies are given the right not to have their creative works exploited by other parties.²⁵⁰

Legal claims alleging misappropriation (or free-riding) typically arise when the plaintiff recognizes—explicitly or implicitly—that no intellectual property right exists.²⁵¹ Also, misappropriation claims usually arise when two parties are in competition with each other and one is claiming theft of an intangible.²⁵² Although not narrowly focused on sports gaming data, there are three relatively recent federal appellate-level rulings that speak to legal claims centered on the commodification of real-time news and information.²⁵³ Taken together, the trilogy of cases²⁵⁴ provides a framework for evaluating misappropriation claims involving real-time sports gaming data.²⁵⁵

²⁵⁰ Brief for Appellee at 17–22, NCAA v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013).
²⁵² For a detailed discussion about whether the “misappropriation doctrine, if it is to be retained at all, should be federalized,” see Richard A. Posner, Misappropriation: A Dirge, 40(3) HOUSTON L. REV. 621, 640 (2003); see also Edmund J. Sease, Misappropriation is Seventy-Five Years Old: Should We Bury It or Revive It?, 70 NOTRE DAME L. REV. 781, 781 (1994).
²⁵⁴ Morris Commc’n Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1293 (11th Cir. 2004); NBA v. Motorola, 105 F.3d 841, 849 (2d Cir. 1997); C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818 (8th Cir. 2007). Two dated cases—Nat’l Football League v. Governor of Del., 435 F.Supp 1372 (D. Del. 1977) United States Golf Ass’n v. St. Andrews Sys., Data-Max, Inc., 749 F.2d 1028 (3d Cir. 1984)—also provide insight on the viability of misappropriation claims in the sports industry. In NFL v. Delaware, the court rejected the NFL’s misappropriation claim (among others) and found that gambling on NFL games “has not injured [plaintiffs].” 435 F.Supp. at 1378. In the golf case, the Third Circuit key in on the lack of direct competition between the parties: “Indirect competition of this sort—use of information in competition with the creator outside of its primary market—falls outside the scope of the misappropriation doctrine, since the public interest in providing an additional incentive to the creator or gatherer of information.” 749 F.2d at 1038.
First, in *NBA v. Motorola*, the Second Circuit ruled against the NBA in a ‘hot news’ misappropriation case involving a mobile pager system created by Motorola and STATS that tracked in-game statistics such as the score and time remaining. The appellate court held “that a narrow ‘hot news’ exception does survive preemption. However, we also hold that appellants’ transmission of ‘real-time’ NBA game scores and information tabulated from television and radio broadcasts of games in progress does not constitute misappropriation of ‘hot news’ that is the property of the NBA.” To survive preemption by federal copyright law, the Second Circuit offered a test with five requirements that the court concluded the NBA did not meet:

(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.

In the course of the litigation, the NBA argued that it “has adopted certain limitations with respect to reporting on NBA games in progress in order to ‘preserve the value of its proprietary interests’ in real-time NBA game information.” The NBA also wrote that “restrictions on the use of real-time NBA game information also apply to ticket holders, who are prohibited from

(“The question here is whether there is a[n]…overriding justification with respect to rights of sports event promoters to control the information about their events. It appears that except in the case of a promoter that can prove that a ‘hot news’ situation exists, there is not such an overriding public interest…Once the promoter can profit sufficiently from expending the effort and resources to produce, market, and sell its sports entertainment product, there appears to be no public benefit from allowing the promoter to use the legal system offensively to reap competitive profits by restricting the flow of information the public wants…Only statistical data specifically compiled by the promoter about a sports event that is broadcast live will remain within the promoter’s exclusive commercial control. That is no doubt far less than most sports leagues and governing bodies would like.”)

256 NBA v. Motorola, Inc., 105 F.3d 841, 843–44 (2d Cir. 1997).
257 Id. at 843.
258 Id. at 845. In a footnote, the Second Circuit explained that it did not reach any conclusion on the First Amendment and laches defenses raised by Motorola and STATS. Id. at 854 n. 10.
259 Brief of Appellees-Cross-Appellants the National Basketball Association and NBA Properties, Inc. at 7, NBA v. Motorola, Inc., 105 F.3d 841 (2d Cir. 1997)(No.96-7975)( on file with author).
transmitting any information, descriptions, or accounts of games in progress. The NBA explained that: “[T]he issue here is not whether the public will receive access to real-time NBA game information, but only whether defendants are entitled to profit from what they have neither created nor paid for.” Via an amicus brief, the NBA received support from the NFL, MLB, and NHL, with the trio explaining that they “share a common interest with the NBA in protecting and preserving for professional sports leagues and their member clubs, the rights to, and commercial value of, exclusive presentation of real-time running accounts of the live professional sporting events that result from their efforts and investments.”

The NBA v. Motorola case saw considerable amici activity focused on misappropriation and the preemption issue. The Chicago Mercantile Exchange (“CME”) filed an amicus brief in support of the NBA. According to the CME:

Section 301 of the Copyright Act of 1976 indisputably preempts some types of state law misappropriation claims. It does not preempt, however, all state law claims of misappropriation of information. Section 301 imposes two distinct requirements, both of which must be satisfied for preemption: that the state rights are ‘equivalent’ to the rights within the general scope of copyright, and that the claim involves ‘works of authorship.’ In many misappropriation cases, including those involving taking of real-time quotations from financial exchanges, there is no preemption because the misappropriated information does not constitute a work of authorship…As the Seventh Circuit has explained, where the writings at issue are ‘a mere notation of figures at which stocks or cereals have sold, or of the result of a horse-race, or baseball game, they cannot be said to bear the impress of originality, and fail, therefor to rise to the plane of authorship.’ “State law claims alleging misappropriation of such quotations, sports scores, and like notations are therefore not preempted by the Copyright Act.”

260 Id. at 7 n.4.
261 Id. at 38.
262 Brief for the National Football League, et al. as Amici Curiae Supporting the National Basketball Association and NBA Properties, Inc. at 9, NBA v. Motorola, Inc., 105 F.3d 841(2d Cir.1997) (No.96-7975) (on file with author).
264 Nat’l. Tel. News Co. v. W. Union Tel. Co., 119 F. 294, 298 (7th Cir. 1902) (“Without the use of [Western Union’s] tape, [National Telegraph] would have nothing to distribute. The parasite that killed, would itself be killed, and the public would be left without any service at any price.”).
265 Brief of Amicus Curiae, supra note 263, at 3–4 (some internal citations omitted).
Fourteen years after NBA v. Motorola, the Second Circuit considered another ‘hot news’ case and suggested that NBA v. Motorola’s five-part test could be considered dicta. Nevertheless, allegations of ‘hot news’ misappropriation continue to be furthered in court. As of June 20, 2020, the most prominent ongoing case involved one news outlet (The Capitol Forum) suing another (Bloomberg) in connection with subscription-based financial information and whether the hot news misappropriation doctrine is recognized in the District of Columbia. According to researcher Victoria Smith Ekstrand, “the hot news doctrine is part of state common law” in Alaska, California, Colorado, Delaware, Illinois, Maryland, Missouri, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Texas, and Wisconsin. Another researcher concurred about the legal status of these fourteen states.

Issues pertaining to preemption are particularly germane if a federal court sitting in diversity involves a hot news claim that is recognized under state common law. CME’s amicus brief in the NBA v. Motorola litigation addressed this topic too: “Congress did not wish to displace state laws which afford a remedy for misappropriation of hot news, whether in the traditional mode of International News Service v. Associated Press, 248 U.S. 215 (1918), or in the news form of data updates from scientific, business or financial data bases.”

The NBA pointed to the legislative history too: “[S]tate law should have the flexibility to afford a remedy...against a consistent pattern of unauthorized appropriation by a competitor of the facts...constituting ‘hot’ news.”

The NBA told the Second Circuit that Congress was reminded of this in testimony:

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266 Barclays Capital, Inc. v. TheFlyOnTheWall.com, Inc. 650 F.3d 876, 907 (2d Cir. 2011). The Second Circuit issued another ‘hot news’ ruling the following year. See Forest Park Pictures v. Universal Television Network, Inc., 683 F.3d 424, 430-31 (2d Cir. 2012) (preemption turns on whether the plaintiff shows “time-sensitive factual information, free-riding by the defendant, and a threat to the very existence of the plaintiff’s product”).


269 Edmund J. Sease, Misappropriation is Seventy-Five Years Old: Should We Bury it or Revive it?, 70 N.D.L. REV. 781, 801-02 (1994).


Indeed, Congress was specifically apprised of the existence of this state law protection in testimony by representatives of professional sports leagues. See testimony of Philip R. Hochberg on behalf of National Hockey League, Hearings Before House Judiciary Committee on H.R. 2223 Copyright Law Revision, June 12, 1975 at 815 (noting that extending copyright protection to live broadcasts of sporting Events would leave unaffected existing state law protection for ‘unfair competition where there was a radio pickup of a live broadcast of a game in the Pittsburgh Athletic Club case’); id. at 803 (testimony of Bowie Kuhn, Commissioner of Baseball, referring to existing protection under INS).272

The on-going ‘hot news’ case involving The Capitol Forum and Bloomberg provides a case study about how Motorola and other precedent are currently positioned.273 In a January 2020 court filing, Bloomberg repeatedly cited Feist and emphasized that “raw facts may be copied at will”274 and “[t]hat there can be no valid copyright in facts is universally understood.”275 Bloomberg also keyed in on how timely newsgathering is protected by the First Amendment: “the press may not be punished for ‘lawfully obtain[ing] truthful information about a matter of public significance’”276 given that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection.”277 Finally, Bloomberg flagged potential “chilling effects” that could result if any rule were adopted that would strip away “‘protection for seeking out the news.’”278

In a sub-section devoted to arguing that the ‘hot news’ misappropriation tort runs counter to the Constitution’s Intellectual Property Clause, Bloomberg also posited that “the freedom to use facts—even to ‘free-ride’ on facts gathered through the effort of others—is constitutionally protected.”279 According to Bloomberg, post-Feist precedent has “repeatedly confirmed that facts must

272 Id. at 11–12, n.8.
275 Id. at 9 (citing Feist Publ’ns v. Rural Tel. Serv., 499 U.S. 340, 344 (1991)).
276 Id. at 10 (citing Smith v. Daily Mail Pub. Co., Inc., 443 U.S. 97, 103–04 (1979)).
277 Id. (citing Snyder v. Phelps, 562 U.S. 443, 452 (2011)).
278 Id. (citing Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).
279 Id. at 17.
remain in the public domain, free from any restraint or encumbrance." In support, Bloomberg cited to N.Y. Mercantile Exch., Inc. v. Intercontinental Exchange, Inc., finding that “all facts—scientific, historical, biographical, and news of the day…may not be copyrighted and are part of the public domain available to every person.” Likewise, Bloomberg cited Sparaco v. Lawler, Matusky, Skelly, Eng’rs LLP for the finding that “historical, scientific, or factual information belongs in the public domain.” Such precedent—according to Bloomberg—means “[t]he Copyright Clause leaves facts in the public domain for all to use freely, precluding any claim of a property right in those facts.

Bloomberg also looked to public policy concerns when urging the district court to reject the plaintiff’s ‘hot news’ misappropriation claim. First, Bloomberg claimed that “[t]he tort of ‘hot news’ misappropriation…would grant the original news outlet a temporary monopoly over…facts—an outcome that is inconsistent with the strong public interest in receiving important, timely news.” In support, Bloomberg cited Houchins v. KQED, Inc. and the Supreme Court’s recognition that the “right of the public to receive such information and ideas as [they] are published.” Second, Bloomberg noted “timidity and self-censorship” concerns flagged in Bartnicki v. Vopper when arguing that “recognition of the [‘hot news’] tort would chill the lawful dissemination of important news by fostering uncertainty among news outlets as to how long they must ‘sit’ on a story.”

Second, the Eleventh Circuit decided an antitrust case in favor of the PGA Tour involving a media outlet claiming the golf tour monopolized the market for real-time news about on-going tournaments. The PGA Tour—as the defendant—argued that the plaintiff was “free riding” on its own live scoring system, which the court concluded “constitutes a legitimate pro-competitive

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281 Id. (citing N.Y. Mercantile Exch., Inc. v. Intercontinental Exchange, Inc., 497 F.3d 109, 114 (2d Cir. 2007)).
282 Id. (citing Sparaco v. Lawler, Matusky, Skelly, Eng’rs LLP, 303 F.3d 460, 466-67 (2d Cir. 2002)).
283 Id. at 17-18.
284 Id. at 18.
286 Id. (citing Houchins v. KQED, Inc., 438 U.S. 1, 29 n. 17 (1978)).
287 Id. (citing Bartnicki v. Vopper, 532 U.S. 514, 534 n. 22 (2001)).
288 Id.
289 Morris Commc’n Corp. v. PGA Tour, Inc., 364 F.3d 1288 (11th Cir. 2004).
reason for imposing a restriction [on plaintiff Morris].”

With the plaintiff only litigating the case on antitrust grounds, the Eleventh Circuit made clear the narrow focus of the case: “Before discussing the antitrust issues in this case, it is important to note what this case is not about. Contrary to the arguments of Morris and its amici curiae, this case is not about copyright law, the Constitution, the First Amendment, or freedom of the press in news reporting.”

In its briefing at the district court level, the PGA Tour focused on property-related issues:

Morris and the amici completely misunderstand the district court’s decision. The district court’s decision that PGA Tour has a protectable property interest in the product of its proprietary scoring system is predicated entirely on its determination that PGA Tour controls the right of access to its private events. And having complete control over access to its private events, PGA Tour also has the right to control access to the information occurring within its private events, at least until that information is publicly disseminated beyond the confines of those events.

Third, the Eighth Circuit considered a claim by a fantasy sports operator against MLB’s media arm trying “to establish its right to use, without license, the names of and information about [MLB] players in connection with its fantasy baseball products.”

In balancing right of publicity claims with the First Amendment, the court found that the latter controlled. Indeed, the Eighth Circuit wrote: “[R]ecitation and discussion of factual data concerning the athletic performance of [players on MLB’s website] command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection.”

The court also elaborated on how entertainment-related speech qualifies for protection under the First Amendment:

[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. It is true that CBC’s use of the information is to provide entertainment, but “speech that entertains, like speech that informs, is protected by the First Amendment because ‘[t]he line

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290 Id. at 1296.
291 Id. at 1292-93.
294 Id. at 823.
295 Id. at 823-24.
between the informing and the entertaining is too elusive for the protection of that basic right.”

Supreme Court precedent has identified three types of preemption: conflict preemption, express preemption, and field preemption. All three types “work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal takes precedence and the state law is preempted.” The year 1964 marked the start of contemporary Supreme Court rulings involving preemption and intellectual property. In two companion patent cases—Sears, Roebuck & Co. v. Stiffel Co. and Compco Corp. v. Day-Brite Lighting, Inc.—the Supreme Court found preemption to apply: “To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented...would be too great an encroachment on the federal patent system to be tolerated.”

Preemption issues vis-à-vis copyright reached the Supreme Court nine years later in Goldstein v. California. There, the Court found that “[a]lthough the Copyright Clause...recognizes the potential benefits of a national system, it does not indicate that all writings are of national interest or that state legislation is, in all cases, unnecessary or precluded.” The Supreme Court tackled preemption and state-level trade secret laws in 1974, finding that federal patent laws did not preempt Ohio’s trade secrecy statute. In 1979, the Supreme Court similarly concluded that federal patent laws did not preempt state contract law.

296 Id. at 823 (citing Cardtoons v. Major League Baseball Players Ass’n, 95 F.3d 959, 969 (10th Cir. 1996) (quoting Winters v. New York, 333 U.S. 507, 510 (1948))).
298 Id.
299 Potential preemption of state-level statutes in the areas of intellectual property, misappropriation/piracy, or unfair competition could be found via the Constitution’s Intellectual Property Clause or federal statutes. See generally Thomas B. Nachbar, Intellectual Property and Constitutional Norms, 104(2) COLUM. L. REV. 272, 358-61 (2004) (discussing the so-called “dormant Intellectual Property Clause”).
303 Goldstein v. California, 412 U.S. 546, 548 (1973) (case involved a California law “making it a criminal offense to ‘pirate’ recordings produced by others”).
304 Id. at 556-57.
306 Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979) (“The states are free to regulate the use of such intellectual property in any manner not inconsistent with federal law”).
in 1989, the Supreme Court cited the Intellectual Property Clause and determined that a Florida law restricting duplication of boat designs was preempted by federal patent laws.307 According to the Supreme Court:

Thus our past decisions have made clear that state regulation of intellectual property must yield to the extent that it clashes with the balance struck by Congress in our patent laws...Our decisions since Sears and Compco have made it clear that the [Intellectual Property Clause] do[es] not, by [its] own force or by negative implication, deprive the States of the power to adopt rules for the promotion of intellectual creation within their own jurisdictions. Thus, where ‘Congress determines that neither federal protection nor freedom from restraint is required by the national interest,’ the States remain free to promote originality and creativity in their own domains.308

In 1996, the Seventh Circuit added a twist to copyright preemption issues by intertwining a contract rights analysis in ProCD v. Zeidenberg.309 The case involved a digital compilation of numbers in a telephone directory, largely the same type of information deemed uncopyrightable by the Supreme Court in Feist. The Seventh Circuit upheld the no-copying protections in a so-called ‘shrinkwrap license,’ rationalizing that “[a] copyright is a right against the world. Contracts, by contrast, generally affect only their parties, strangers may do as they please, so contracts do not create ‘exclusive rights.’”310 Professor Jane Ginsburg summarized: “[U]nder prevailing copyright preemption caselaw, a contract forbidding copying is not equivalent to a right under copyright, nor does it per se violate copyright public policy.”311 Sports leagues looking to monetize sports gaming data will likely turn to ProCD for support when arguing to expand non-copyright rights via licensing and otherwise.

States—like Tennessee, Illinois, and Michigan—that try to grant de facto property rights in the context of sports gaming data are vulnerable to federal preemption. With no on-point precedent finding such a property right, any litigant challenging the ‘official data’ laws on constitutional grounds will almost

307 Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 152-165 (1989) (“The law of unfair competition has its roots in the common-law tort of deceit: its general concern is with protecting consumers from confusion as to source. While that concern may result in the creation of ‘quasi-property rights’ in communicative symbols, the focus is on the protection of consumers, not the protection of producers as an incentive to product innovation.”).
308 Id. at 152, 165. (internal citations omitted).
309 See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).
310 Id. at 1454.
certainly look to the interplay between the Intellectual Property Clause and state laws that arguably run counter to the Constitution’s limitations. Such an argument would be the strongest if any state positioned its law on misappropriation grounds.

B. State

Dozens of states have accepted the Supreme Court’s invitation to regulate sports gaming in the absence of direct federal oversight.312 As state legislatures deliberated, numerous sports leagues—including a majority of the leagues who initiated and then lost the Supreme Court case—took to lobbying.313 One of the most common league lobbying objectives was to secure a statutory mandate requiring licensed operators to purchase news, information, and data from the sports leagues or the leagues’ designee(s).314

Prior to the litigation that eventually made its way to the Supreme Court, some of the same sports leagues now lobbying previously sued different states on issues pertaining to sports gaming.315 In 1976, the NFL and all of its member teams sued the Governor of Delaware over the state’s plans to offer a football-related lottery.316 In 1989, the NBA sued Oregon when the state’s lottery launched a betting contest connected to basketball scores.317 Twenty years later, all five of the sports leagues who lost the Supreme Court case against New Jersey prevailed in PASPA-driven litigation against Delaware after the state moved to permit single-game wagering.318

1. ‘Commercially Reasonable’ Standard

314 Id.
315 If the sports league quintet were to sue certain states again—such as Delaware or New Jersey—there is a possibility that a res judicata issue could arise. Res judicata is a “a term that now comprises two distinct doctrines regarding the preclusive effect of prior litigation” and encompasses two doctrines—issue preclusion (“which precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment”) and claim preclusion (which “prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated”). Lucky Brand Dungarees, Inc., et al. v. Marcel Fashions Group, 140 S. Ct. 1589, 1594-95 (2020).
318 Office of the Comm’r of Baseball v. Markell, 579 F.3d 293, 293 (3d Cir. 2009).
As of June 20, 2020, three states (Tennessee, Illinois, and Michigan) have enacted laws mandating the use of so-called ‘official data’ for certain types of wagers. Over a dozen other states have introduced bills that contained similar provisions. Such moves have resulted after considerable lobbying from sports leagues. Lobbyists have also sometimes proposed a ‘commercially reasonable” standard to which the ‘official data’ mandates should be measured. According to one report, the commercially reasonable standard in Illinois would be based on:

The availability of an official league data feed from two or more vendors designated by the sports governing body, the use of such a data feed by another master sports wagering licensee in Illinois, or the use of such data feed by two or more sports wagering operators in other legal markets, shall be sufficient by not necessary to establish that the official league data is available on commercially reasonable terms.

In the first iteration of rulemaking, Michigan considered four factors in its determination whether pricing is ‘commercially reasonable’: (i) the availability of official data to sports betting operators from more than one source; (ii) market information regarding the purchase by operators of data from any authorized source including sports governing bodies or their designees for the purpose of settling sports wagers, for use in this state or other jurisdictions; (iii) the quantity, quality and complexity of the process that is used for collecting the data; and (iv) the extent to which sports governing bodies or their designees have made data used to settle tier 2 sports bets available to operators.

The second version of rulemaking in Michigan included six factors to determine ‘commercially reasonable’ pricing: (i) whether the data is available from more than one authorized source under materially different terms; (ii) market information regarding the purchase of data used to settle Tier 2 sports bets in Michigan or any other jurisdiction; (iii) characteristics of official league data and alternate data sources regarding the nature, quantity, quality, integrity, completeness, accuracy, reliability, availability, and timeliness of the data; (iv)

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319 Rodenberg, supra note 312. The effective date of the new sports gaming law in Virginia—another jurisdiction with a statutory mandate pertaining to ‘official data’—is July 1, 2020. Whether all or some of the new state laws attaching to sports gaming data run counter to the dormant Commerce Clause remains an open question.


the extent to which sports governing bodies or their designees have made data used to settle Tier 2 bets available; (v) the availability and cost of comparable data from other sources; (vi) whether any terms of the contract or offer sheet are uncompetitive in nature, economically unfeasible, or place an undue burden on the operator.322

Tennessee’s new sports betting law—which included an ‘official data’ mandate substantially similar to that found in Illinois, and Michigan—states “[a] licensee shall exclusively use official league data for purposes of live betting…”323 The phrase “official league data” was defined as:

- statistics, results, outcomes, and other data related to a sporting event obtained pursuant to an agreement with the relevant governing body of a sport or sports league, organization, or association whose corporate headquarters are based in the United States, or an entity expressly authorized by such governing body to provide such information to licensees for purposes of live betting…324

Tennessee also created a nine-person Sports Wagering Advisory Council. Of the nine members, three are selected by the House speaker, three by the lieutenant governor, and three by the governor.325 As of March 1, 2020, eight of the nine positions had been filled. One of the governor’s appointees is Billy Orgel, who reportedly has a small ownership stake in the NBA’s Memphis Grizzlies team.326 One of the lieutenant governor’s appointees is Kandace Stewart, a lawyer and team executive with the Memphis Grizzlies.327

Even after the law was enacted, Tennessee continued to tinker with the statute. In March 2020, the state held hearings to consider whether to amend the law in order to grant more power to the state’s Sports Wagering Advisory Council.328 For example, the amended law would have delegated to the Sports

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326 Id.
327 Id.
Wagering Advisory Council the ability “to enforce this part and supervise compliance with laws relating to the regulation and control of wagering on sporting events in this state.” 329 In addition, Tennessee’s lieutenant governor and house speaker jointly wrote a letter that stated, in relevant part: “There have been concerns brought to our attention that some of the rules, as drafted, may be outside the authority given to the Board or Council pursuant to the ‘Tennessee Sports Gaming Act.’” 330 Such letter implicitly raised concerns over the permissibility of delegation. More broadly, the off-loading of regulatory oversight to industry-tethered metrics and boards comprised of industry members, raises the spectre of invalidation via the nondelegation doctrine.

2. Nondelegation Doctrine

To the extent that some states fully or partially delegate regulatory oversight of sports betting data to private entities—through establishment of ‘commercially reasonably’ prices or playing a role in the determination thereof—there are constraints that may apply. At the federal level, such constraints derive from the private nondelegation doctrine (via the Vesting Clauses) and the Fifth Amendment’s Due Process Clause. 331 Among a majority of states, there is also a nondelegation doctrine that exists as an independent check. 332 According to one commentator, “[i]t is generally acknowledged among the states that delegations to private parties violate state constitutions. Sometimes this is an absolute bar, but it may be conditional or expressed in dicta...Only Massachusetts and

331 Ryan M. Rodenberg, Due Process, Private Nondelegation Doctrine, and the Regulation of Sports Betting, 9(1) UNLV GAMING L. J. 99 (2019); At the federal level, the private nondelegation doctrine traces its roots back to Carter v. Carter Coal, 298 U.S. 238 (1936). Both Justice Thomas and Justice Alito—in separate concurrences—recently cited Carter Coal when describing the contours of the private nondelegation doctrine. According to Justice Thomas: “the ‘private nondelegation doctrine’ is merely one application of the provisions of the Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private.” Dep’t of Transportation v. Ass’n of American Railroads, 135 S. Ct. 1225, 1252 (2015). Similarly, Justice Alito explained: “there is not even a fig leaf of constitutional justification” when the government delegates regulatory power to private entities. Id. at 1237.
Kentucky have dictum to the effect that delegations to private entities may be valid.”

Private nondelegation doctrine concerns have overlapped with sports betting policymaking before. During a Congressional PASPA-related hearing in 1991, Massachusetts Lottery executive Thomas O’Heir warned the House: “[PASPA] would delegate to private parties the power to enforce…restrictions against the states.”

James Davey from the Oregon State Lottery raised similar concerns with the House subcommittee: “This legislation…would delegate to private parties, the professional sports leagues, the power to enforce these restrictions against the sovereign states.”

The testimony from O’Heir and Davey was consistent with others. Senator Chuck Grassley recognized PASPA’s private nondelegation doctrine problems too: “[PASPA] would prohibit purely intrastate activities. The federal government has never authorized private parties to enforce such restrictions against the States. This legislation would do so.”

Two academic co-authors agreed: “PASPA is vulnerable to constitutional challenges based on its procedural mechanisms…PASPA is facially unprecedented law, giving sports organizations the ability to trump state legislators.”

Even the five sports leagues who initiated PASPA lawsuits against New Jersey in 2012 and 2014 warned Congress about the private nondelegation doctrine. In 2007, the NFL, NBA, NHL, NCAA, and MLB opposed draft legislation that would partially nullify—via an opt-out mechanism—the online gambling restrictions in the Unlawful Internet Gambling Enforcement Act of 2006.

The five leagues wrote: “The opt-outs are subject to challenge in U.S. courts on the grounds that Congress has unconstitutionally delegated its lawmaking power (to ban Internet gambling) to private parties (commissioners of various sports leagues and conferences).”

The prior PASPA-related concerns are equally applicable now in the context

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335 *Id.*
338 OFC Commissioner Baseball, et al. v. Governor Markell, 579 F.3d 293 (3d Cir. 2009) (The same quintet of sports leagues also looked to PASPA when jointly suing Delaware in 2009).
of sports gaming data regulations and the potential off-loading of regulatory power. Such concerns persist most pointedly at the state level. Accordingly, it is useful to undertake a 50-state survey to gauge the interaction between nondelgation doctrines and state legislative moves to regulate sports gaming data via deference to private entities.

Scholars have probed the contours of the private nondelegation doctrine at the state level. Daniel Schwarcz teased out the “general principles that influence state court scrutiny of legislative delegations to private actors” and applied his findings to insurance regulation. Schwarcz found states have adopted a three-pronged test that involves “(i) the public or private status of the delegate, (ii) oversight of the delegate by public bodies such as the judiciary or a public agency, and (iii) the delegate’s independence from the lawmaking function.”

Schwarcz found the state-level non-delegation doctrine to be “quite robust,” with “most state constitutions directly limiting legislatures’ powers to delegate their law-making authority.” His review of the case law led him to conclude that “courts universally recognize that legislative delegations of power to private actors raise more significant constitutional concerns than delegations of power to government entities.” On this point, Schwarcz cited an illustrative Texas case for the proposition that “courts have universally treated a delegation as private where ‘interested groups have been given authoritative powers of determination.’” He also found that “courts are often particularly skeptical of delegations to private entities that hold the prospect of substantially benefitting those parties’ finances.”

Schwarcz also pinpointed an important distinction: One of the most common ways in which state legislatures delegate authority to private actors is by incorporating privately-produced rules or standards into statutes…Statutes that incorporate pre-existing sources are perfectly innocuous…However, when a statute cross-references not just existing materials, but also prospectively adopts—sight unseen—future changes made by private actors to incorporated

341 As of June 20, 2020, Congress has not enacted any federal legislation pertaining to the regulation of sports gaming data.
343 Id. at 217.
344 Id. at 218.
345 Id. at 224.
346 Id. at 225 (citing Texas Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 474–75 (Tex. 1997)).
347 Id. at 231-232 (citing Carter v. Carter Coal, 298 U.S. 238, 311 (1936); Texas Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 472 (Tex. 1997)).
materials, the statute transfers to those actors the capacity to change the law. 348

Prior to Schwarcz’s recent analysis, there were two 50-state surveys about the scope of the nondelegation doctrine. 349 Most recently, Jim Rossi found that “among state courts, there is a diversity of approaches towards interpreting separation of power provisions for nondelegation purposes.” 350 Rossi determined that states could be divided into one of three mutually exclusive categories—weak, moderate, and strong. 351 In “weak” nondelegation states—such Arkansas, California, Iowa, Maryland, Oregon, Washington, and Wisconsin—legislative delegations are upheld “as long as the agency has adequate procedural safeguards in place.” 352

States in Rossi’s “moderate” category—where “procedural safeguards alone are rarely enough for a delegation to be valid”—include Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, New Jersey, North Carolina, North Dakota, Rhode Island, Tennessee, Vermont, and Wyoming. 353 Rossi also flagged twenty “strong” nondelegation states where “statutes are periodically struck down on nondelegation grounds.” 354 Such states include: Arizona, Florida, Illinois, Kentucky, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Dakota, South Carolina, Texas, Utah, Virginia, and West Virginia. 355

Prior to Rossi’s research, Gary Creco completed a similar survey of the 50 states and found that “state courts have upheld broad delegations of power more

348 Id. at 222 (citing F. Scott Boyd, Looking Glass Law: Legislation by Reference in the States, 68 LOUISIANA L. REV. 1201, 1211-12, 1254-55 (2008)).
350 Jim Rossi, Institutional Design and the Lingering Legacy of the Antifederalist Separation of Powers Ideals in the States, 52(5) VANDERBILT L. REV. 1167, 1191 (1999). While both Rossi and Creco were seemingly focused on the public nondelegation doctrine, their findings help inform the contours of the private nondelegation doctrine too.
351 Id. at 1191-1201.
352 Id. at 1191.
353 Id. at 1198.
354 Id. at 1196-1197.
355 Id. (For example, the non-delegation doctrine was applied in the context of New York horse racing); See Fink v. Cole, et al., 302 N.Y. 216, 216 (1951).
reluctantly” vis-à-vis federal courts.\textsuperscript{356} Like Rossi, Creco divided the states into one of three mutually exclusive categories: (i) states with strict standards and safeguards; (ii) states with loose standards and safeguards; and (iii) procedural safeguard states.\textsuperscript{357} States in Creco’s “strict” category require the “legislature to provide definite standards and/or procedures that the agency must adhere to when making a decision.”\textsuperscript{358} Such states include Arizona, Florida, Kentucky, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, and West Virginia.\textsuperscript{359}

According to Creco, states with “loose” nondelegation standards and safeguards—which “allow delegations of lawmaking power to administrative agencies as long as the statute contains a general rule to guide the agency in exercising the delegated power”—include Alabama, Alaska, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Michigan, Mississippi, Missouri, Minnesota, New Jersey, North Carolina, North Dakota, Rhode Island, Tennessee, Vermont, Wyoming.\textsuperscript{360} Creco’s third category—states where delegations are upheld “as long as the administrative agency has adopted adequate procedural safeguards” included California, Iowa, Maryland, Oregon, Washington, and Wisconsin.\textsuperscript{361}

Tennessee, Illinois, and Michigan—the three states with sports betting data mandates as of June 20, 2020—each have case law that speaks to the ability of legislatures to delegate authority to private parties or public agencies. Such precedent increases the chances that a plaintiff may consider a nondelegation doctrine challenge to the laws in one or more of such states. In Tennessee, West v. Tennessee Housing Development Agency found that leeway to a public entity would allow a delegation if it involved a detailed determination of some issue.\textsuperscript{362} The Tennessee case did not speak to the permissiveness of a delegation of such a determination to a private entity or a public entity with membership that included an employee of a self-interested private business, such as a professional sports team.

Like its federal counterpart, Illinois case law suggests that the state follows some form of the ‘intelligible principle’ test employed in public nondelegation

\textsuperscript{357} Id. at 578-601. Creco excluded Arkansas and Utah “because neither state fits within any of the three categories.” Id. at 579.
\textsuperscript{358} Id. at 580.
\textsuperscript{359} Id. at 586-587.
\textsuperscript{360} Id. at 588-597.
\textsuperscript{361} Id. at 598-600.
\textsuperscript{362} West v. Tennessee Hous. Dev. Agency, 512 S.W.2d 275, 281 (Tenn. 1974).
cases. In *Hill*, the Illinois Supreme Court stated: “Absolute criteria whereby every detail necessary in enforcement of a law...need not be established by the General Assembly. The constitution merely requires intelligible standards to be set to guide the agency charged with enforcement.” The resulting *Hill* test was followed in later cases, although the focus was on delegations to public agencies, not private actors. In Michigan, the statutory standard handed down by the legislature must be “as reasonably precise as the subject matter requires or permits,” with attendant consideration of how complex the regulatory topic is.

The Michigan Supreme Court also explained that the adequate standards and safeguards must be in place if administrative agencies exert legislative power.

IV. POTENTIAL REGULATORY SCRUTINY OF THE SPORTS GAMING DATA MARKET INTERNATIONALLY

There is a decided lack of uniformity in terms of how sports gaming data are regulated globally. The International Betting Integrity Association—a sports gaming industry group—“called on all parties engaged in the supply chain of sports event data that facilitates betting markets, to come together to adhere to a global best practice[s] model.” Researcher Christian Frodl found that “the law regarding the ownership of sports data is unsettled,” with copyright only attaching in “certain situations” across a comparative analysis including Europe, Australia, and the United States. Given the limited scope of copyright, Frodl concluded that sporting event organizers “must rely on other proprietary rights and supplementary contractual measures to establish their rights over event-related facts and information.” Such uncertainty is at the heart of an on-going lawsuit—as of June 20, 2020—in Great Britain’s Competition Appeal Tribunal.

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363 Hill v. Relyea, 216 N.E.2d 795, 797 (Ill. 1966). Following Hill v. Relyea, Illinois courts have also sometimes applied a stricter test that considers, among other things, the harm to be prevented; See Stofer v. Motor Vehicle Casualty Co, 369 N.E.2d 875, 879 (Ill. 1977); See also Thygesen v. Callahan, 385 N.E.2d 699, 701 (Ill. 1979).
364 Hill, 216 N.E.2d at 797.
365 See Warrior v. Thompson, 449 N.E.2d 53, 57 (Ill. 1983); see also People v. Carter, 454 N.E.2d 189, 190-91 (Ill. 1982).
367 Id. at 626.
370 Id.
which provided the following summary of the initial claim:\footnote{Notice of a Claim under Section 47A of the Competition Act 1998, Competition Appeal Tribunal, Case No. 1342/5/7/20 (March 12, 2020) (on file with author). The UK court subsequently attached a “confidentiality ring” around the proceedings; see Consent Order, Competition Appeal Tribunal, Case No. 1342/5/7/20 (June 1, 2020) (on file with author). For an example of another on-going dispute, see Ukraine FA Blasts Sportradar Over Unauthorised Data, iGAMINGBUSINESS (June 19, 2020); see also Brad Allen, Sportradar Accused of ‘Unauthorized’ Data Distribution by Ukrainian Soccer League, LEGAL SPORTS REP. (June 23, 2020), https://www.legalsportsreport.com/42132/sportradar-ukraine-soccer-data/.

\footnote{According to Sportradar’s official statement announcing the lawsuit:

This legal action is embarked upon with reluctance and Sportradar has not taken the decision lightly. Sportradar had hoped to find a fair solution that enables it to build its own database and to compete effectively in the market, but that has not proved possible. Sportradar remains open to the possibility of finding a resolution. However, ultimately, Sportradar supports a competitive marketplace in which there is genuine choice between suppliers. This competition is vital for innovation, genuine product choice and fair pricing and we believe these elements are worth protecting. The step Sportradar has taken is focused on that outcome. Sportradar is, and has always been, willing to pay for access, and to be part of an integrated, accredited, and fair system of collection and distribution which enables competition. Sportradar believes that the system put in place by BetGenius and FDC does not allow for this outcome; and that the current arrangements...}

Pursuant to rule 33(8) of the Competition Appeal Tribunal Rules 2015 (S.I. 2015 No. 1648) ("the Tribunal Rules"), the Registrar gives notice of the receipt of a claim for damages ("the Claim") on 28 February 2020, under section 47A of the Competition Act 1998 (the "Act"), by Sportradar AG and Sportradar UK Limited ("the Claimants") against (1) Football DataCo Limited ("the First Defendant"), (2) BetGenius Limited ("the Second Defendant"); and (3) Genius Sports Group Limited ("the Third Defendant") (together, "the Defendants"). The Claimants are represented by Sheridans, 76 Wardour Street, London, W1F 0UR (reference: Mr Andrew Nixon).

The Claimants provide sports data and sports betting services ("Sports Data and Sports Betting Services" or "SDSB Services") to bookmakers in the UK and elsewhere which comprise or incorporate live (or "in-play") data about football matches. Such data can be used by bookmakers to offer in-play betting (sometimes referred to as "live betting"), which occurs while an event is actually taking place, for example, by placing a bet during a football match on which team or which player will score next.

According to the Claimants, the First Defendant claims to be the sole provider of “official” live data in relation to all football matches played in The Premier League, The English Football League and The Scottish Professional Football League (together, "the Three Leagues"), which together account for 134 UK clubs. The live data pertaining to matches played in the Three Leagues is referred to below as “Live League Match Data”, and is abbreviated to “LLMD”.

The Second and Third Defendants compete with the Claimants in the supply of Sports Data and Sports Betting Services to bookmakers in the UK and elsewhere.

The current litigation involves one data dissemination firm (Sportradar) making claims against a competitor (Genius Sports/BetGenius) and its sports league partner (Football DataCo).\footnote{According to Sportradar’s official statement announcing the lawsuit:}

The lawsuit was formally filed after months...
of media coverage foreshadowing the dispute. One media outlet reported that Sportradar sent a letter accusing Genius Sports/BetGenius “of holding ‘an unlawful information monopoly over publicly available sports data.’” The lawsuit, which is still in its early stages, could have relevance beyond the British market:

The tussle centres around the legitimacy of Genius’s arrangement with [Football DataCo]. Genius accuses Sportradar of mining data from Premier League stadiums in violation of ticketing conditions, which state that data collected in a stadium cannot be used for commercial purposes. Sportradar argues that Genius’s deal with [Football DataCo] has created a monopoly that is contrary to EU competition law and therefore those ticketing conditions are void. The issue has become increasingly heated after Sportradar signed an exclusive deal with the NFL in the US [in 2019]. Sportradar said this was not a monopoly because all NFL games were televised and therefore anyone could put together a data feed from the live stream. Not all UK football matches are. But the stakes are high. The US is projected to become one of the

are in breach of UK and EU Competition Law. This status is not only harmful to data supply companies like Sportradar, but also to the downstream market (bookmakers and their customers) where product choice is being restricted or removed in favour of an information monopoly. This is why Sportradar has now sought adjudication by an independent specialist tribunal in the hope that matters can be resolved fairly and equitably. Sportradar’s Statement on Legal Proceedings Against Betgenius and FDC, SPORTRADAR (March 4, 2020), https://www.sportradar.com/news-archive/sportradars-statement-on-legal-proceedings-against-betgenius-and-fdc/.

most cash-generative betting markets in the world with William Hill, the UK bookmaker, projecting that it could add up to $19bn by 2023. US sports lend themselves particularly well to in-play betting — or prop bets as they are known there.\footnote{Alice Hancock, *Sports Data Groups Battle Over Lucrative Rights*, FINANCIAL TIMES (Sept. 30, 2019), https://www.ft.com/content/395d3de4-e08a-11e9-9743-db5a370481bc; For further discussion of the impact the litigation could have globally, see Brad Allen, *Sportradar Launches Legal Action Against Betgenius in UK Soccer Row*, LEGAL SPORTS REP. (March 4, 2020), https://www.legalsportsreport.com/38690/sportradar-sues-betgenius-soccer-data; Matt Rybaltowski, *Implications of Landmark Sportradar Lawsuit Unclear on US Sports Betting Market*, SPORTS HANDLE (March 4, 2020), https://sportshandle.com/sportradar-2020-landmark-suit/.}

The initiation of the lawsuit was foreshadowed a year earlier when Sportradar raised competition concerns generally in the context of a commissioned report about gambling in tennis that included considerable attention to how news and information about tennis competition was utilized:

Restraint of trade is a common law doctrine relating to the enforceability of contractual restrictions on freedom to conduct business. The risk of foreclosing a market, and the potential for competition law infringement, including the risks for the relevant International [Tennis] Governing Bodies, does not appear to have been considered in relation to Recommendation 1. For example, on the face of it, prohibition rules could amount to a restrictive agreement under Article 101/Chapter I. Indeed, para 212 of the Interim Report could be viewed as facilitating indirect collusion between relevant International [Tennis] Governing Bodies to ensure that specific obligations are universally applied to the downstream markets. In addition, a relevant International [Tennis] Governing Body will no doubt be concerned that if they are deemed to be dominant in the market for the provision of particular live scoring data, then the withdrawal of such supply to the various, already well established, downstream markets would leave it open to accusations of abusing a dominant position. Indeed, the specific recommendation that “International [Tennis] Governing Bodies to include in their contracts for the sale of official data to each data supply company... a requirement that the data supply company impose specified obligations that betting operators must fulfil and continue to fulfil, in each case as a precondition of the continued supply of official data” will be of concern because of the potential tying obligations imposed in at least two related markets.\footnote{Sportradar Response to the Independent Review of Integrity in Tennis, SPORTRADAR at 103 (Aug. 2018) (on file with author).}
Other portions of Sportradar’s response to the tennis gambling report also flagged issues relevant to the regulation of sports gaming data globally. According to Sportradar:

(i) Unofficial data is referred to in the [tennis gambling report] as if it is a ‘black market’ product. This is wrong, it is a legitimate product. There are no ‘rights’ attached to the tennis match data, which is publicly available information. Even the enforcement of a property right to try to restrict the collection of this data, that is such a significant and essential input for the betting market, is legally questionable, as well as being a resource intensive undertaking across such a large international tournament network.\(^{376}\)

(ii) Sportradar collects the data from audio-visual feeds and conducts its own manual data collection to create a database in order to offer a competitive product to the market. It is understood that some rights holders are not comfortable with such arrangements but (as stated above) it should also be made clear a) that there is no legal basis for asserting a so-called “data right”; and b) that Sportradar is no different from its competitors in this regard. There is no major sports data company in the world that does not offer a mix of official and unofficial data to its customers. And whereas Sportradar has official data licences with organisations such as the NBA, NHL, PDC, ITF and Tennis Australia for each of these sports, Sportradar’s competitors are providing alternative sources of supply – just as Sportradar does for certain other competitions including in other parts of tennis. That is the market reality.\(^{377}\)

(iii) The nature of the obligations that the [tennis gambling report panel] has recommended in respect of the proposed conditions of official supply (both for data supply companies and for betting operators) is unfeasible and unrealistic. These requirements (whereby these parties must agree not to offer any unofficial tennis product or service as a pre-condition of receiving certain official content) disregards the reality of the


\(^{377}\) Id. at 45, 47.
data market and the legal position on intellectual property rights. Under the proposed mechanism, to take a theoretical example, the official data partner for Roland Garros, could not offer data on the other Grand Slam events, let alone the other Tours, even to the extent that they are televised and available, unless they were also the official data partner for those events. Similarly, a betting operator who took the same Roland Garros feed would have to commit that it would not offer any other markets (not even pre-match) on other events, even if they were fully streamed or televised, unless it had acquired the official rights (even though those rights are not legally necessary). This fundamentally misunderstands the data market, the legitimacy of unofficial data and the dynamics of data supply.\(^{378}\)

(iv) Provided that the “unofficial data” is independently collected and compiled (and is not extracted and/or reutilized from, say, the ITF’s or the ATP’s database without consent), it will not infringe any right. Therefore, while the Panel recommends and “hopes” that data supply companies or betting operators do not seek to establish markets based on “unofficial data” this overlooks the fact that \textit{prima facie} there is no legal barrier to prevent “unofficial data” being collected directly from streams or even venues (please see below for our comments on the enforceability of ticketing terms and conditions and our other comments in respect of potential competition law issues).\(^{379}\)

(v) While it is well established that data generated during the course of competitions is an important part of a rights holder’s commercial portfolio, it cannot be said that the rights holder ‘owns’ the data deriving from those competitions. There is currently no established intellectual property in sports data and there is no such thing as a “data right” per se. The data is simply publicly available information. From an EU perspective, this principle was explained by Floyd J, back in 2012, in Football DataCo v Sportradar and others [2012] EWHC 185: “...if one allows a database right to attach to data which is created by the maker of the database the creator obtains a true monopoly in that data. Such a result would be inconsistent with the objectives of the [EU Database] Directive. The Directive should not be construed in a way

\(^{378}\) \textit{Id. at} 95-96.  
\(^{379}\) \textit{Id. at} 101.
which gives a party a monopoly in facts….where a database consists of data obtained from sources available to the public, such as existing published data, the balance of policy considerations is different. There is (or should be) nothing to prevent the public from investing in obtaining those data from themselves…"

A. Europe

Copyright provides little protection for news and information relevant to sports betting in Europe. Indeed, a commentator concluded that “[b]ased on national legislation in Europe, pure statistical facts of sporting events do not subsist any copyright work and are therefore not copyrightable.” With copyright claims largely foreclosed, the bulk of litigation in Europe has centered around potential findings of intellectual property rights attached to sports-related data and the controlling weight of the European Union’s (“EU”) ‘Database Directive’ codified in Articles 4(1), 7 of the Database Directive 96/9/EC of the EU. The EU’s Database Directive “provides so-called sui generis database rights to the person who has made substantial investments in the collection of data in the database.” The “sui generis protection for the ‘substantial investment’ that information compilers expend” is unique to the EU, as it is not found elsewhere.

Such sui generis property rights—granted via the equivalent of a statute—

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380 Id. at 101-102 (italics removed).
381 See Joined Cases C-403/08 & 429/08, Football Ass’n Premier League Ltd v. QC Leisure, 2011 E.C.R. I-09083, ¶ 98 (“sporting events cannot be regarded as intellectual creations classifiable as works within the meaning of the Copyright Directive…[this] applies in particular to football matches, which are subject to rules of the game, leaving no room for creative freedom for the purposes of copyright”).
384 Hessert, supra note 382, at 5.
are unique to the EU and carry important implications in the regulation of sports gaming data.386 A number of legal proceedings, including lawsuits involving sports leagues and third party brokers of news and information relevant to sports betting, have arisen, helping to define whether database protection can be extended to sports gaming data commercial arrangements that purport to be ‘exclusive’ in nature.387

The Court of Justice of the European Union (“CJEU”) has decided a series of cases in the past twenty years setting the parameters of how sports gaming data can be utilized, including whether any type of sui generis database right attaches. Multiple lawsuits resulted from a dispute about Premier League fixture lists and overseas betting operators use thereof.388 In each case,389 CJEU did not find any unauthorized use of such fixture lists, rationalizing that “the Premier League had not allocated separate resources or made specific investments for drawing up the fixtures.”390

More recent on-point litigation includes Football DataCo v. Yahoo! UK Ltd and Football DataCo v. Sportradar GmbH.391 Both cases involved Football DataCo, a company tethered to the Premier League. In the Yahoo! case, the CJEU determined that “databases may qualify for copyright protection if they, by the selection or arrangement of their content, constitute an original expression of the

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388 Case C-338/02, Fixtures Marketing Ltd v. Svenska Spel AB, 2004 ECR 1.10497; Case C-46/02, Fixtures Marketing Ltd v. Oy Veikkaus Ab, 2004 ECR 1-10365; Case C-444/02, Fixtures Marketing Ltd v. Organismos prognostikon agonon podosfairou AE, 2004 ECR 1-10549.

389 Id.

390 Frodl, supra note 369, at, 78. The CJEU reached a similar conclusion in the context of horse racing. See Case C-203/02, British Horseracing Board Ltd v. William Hill Organization Ltd, 2004 ER 1-10415.

391 Case C-604/10, 2012 ECR 115, ¶ 27.

392 Case C-173/11, 2012 ECR 642.
creative freedom of its author.”  

In the *Sportradar* case, the CJEU found that data broker Sportradar “violated Football DataCo’s *sui generis* database right by publishing online the results and information of these soccer leagues.”  

Attorney Andrew Nixon set out a potential future model:

> There can be no monopoly in facts, and to seek to create such a monopoly engages Competition Law. It would likely be acceptable for the event organiser to charge a fair and reasonable fee for access rights to data collectors: they are, after all, the “landowner.” What the event organiser cannot legitimately do is licence access rights to one undertaking, to the absolute exclusion of all others. The irony is that a non-exclusive model, as well as having better prospects of being compatible with EU competition law, is likely to be more lucrative, in the longer term, to an event organiser, or rights owner, than seeking to squeeze maximum rent from one exclusive partner. It is also likely to have a positive impact on an event organiser’s ability to protect its event from an integrity perspective:

> Firstly, irrespective of any exclusive arrangement, data companies are likely to continue to send data collectors to venues to collect the data, whether it is labelled “unofficial” or not because that data is an essential input to their businesses, and without it they cannot service their customers. As such, the event organiser is better off monetising this demand in the downstream market more widely rather than trying to enforce exclusivity around access rights when such enforcement would be patently anti-competitive and open to challenge.

> Secondly, the reality is that a competitive market place benefits everyone, including the event organiser and there are inherent dangers in the market being reliant on a single data feed. For example, from a betting perspective, numerous bookmakers may wish to use more than one data feed, whether as a backup or a cross check. A number of the data collection companies which would ordinarily be excluded invest in rigorous reporting standards, quality control systems as well as checks on fraud and match manipulation. By restricting access to a single, exclusive undertaking the additional value created by a competitive market would be lost along with the innovation that accompanies such healthy competition.

> Furthermore, having more than one source can also guard against the practice of courtsiding. It is logical that multiple providers, attending

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394 *Id.* at 80 (citing 2012 ECR 642).
sports venues, and competing with one another on speed will mean that these risks are at worst more easily identified, managed and reduced, but at best they will be marginalised and eradicated. The same point applies to so called “ghost matches:” this is less of an issue in sophisticated sporting markets such as the UK, but it is nevertheless a genuine risk attached to single source data feeds, particularly in respect of non-televised matches, and less prominent sports or events, where the bookmakers’ ability to verify particular results is restricted. It is also fair to state that a competitive data collection market would help limit the extent to which database rights infringement occurs.

“Scraped” data is, by its very nature, less reliable than data acquired directly from sources at the venue (such as data collected by in venue collectors). These “grey markets” are more likely to emerge when there is a single source because monopoly pricing could create incentives for bookmakers to sacrifice reliability in return for cost savings. A competitive, multi-operator market would mean that a grey market is less likely to emerge; and lead to overall consumer welfare gains, as well as a tangible and long-term benefit to the rights holder.  

Beyond country-specific laws pertaining to copyright and intellectual property rights, an additional consideration in the EU is the General Data Protection Regulation (“GDPR”), which is focused on a more personal level. The GDPR defines ‘real-time sports performance information’ as “any information relating to an identified or identifiable natural person in connection with her or his sporting activity, including numbers, tracking, and video recording.” According to a commentator, the GDPR may provide a buffer of sorts—via a consent requirement—against centralized sports gaming data commercialization, with athletes in the EU perhaps “hav[ing] a right of compensation under…GDPR if the usage of personal real-time sports performance information constitutes a violation of [the GDPR].”

1. Great Britain

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396 Regulation 2016/679 of the European Parliament and of the Council of April 26, 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC 2016 O.J. (L 119/1).  
397 Id. at Art. 4.  
398 Hessert, *supra* note 382, at 8. (“The collection of personal real-time sports performance information falls within the substantive scope…of the GDPR.”).
Two cases that resulted in CJEU rulings—Football DataCo v. Yahoo! UK Ltd and Football DataCo v. Sportradar GmbH—also resulted in legal decisions being issued by British courts. In the Yahoo! case, “the High Court of Justice ‘issu[ed] a sealed Order declaring that fixture lists are not protected by database copyright or database rights in the [United Kingdom’”].\(^{399}\) In contrast, the Sportradar case “first recognized the protection of sports databases under article 7 of the Database Directive [and] found that the live collection of the results and further data relating to the professional leagues in the United Kingdom and the processing in Football DataCo’s databases constituted a substantial investment by Football DataCo, which met the standards under European law for sui generis protection.”\(^{400}\) Researcher Frodl described the importance of the ruling in Great Britain and beyond:

The court precisely differentiated between sports data that is tied to the organization of the sporting competition, such as fixture lists, and sports data that is generated separately by observing the game. Following this decision, sports bodies and sport event owners may successfully establish an infringement of their sui generis database right under United Kingdom copyright law, provided they can prove that the sports data contained in their databases is extracted and reutilized without their consent. Because the decision is based on an application of article 7 of the Database Directive, its rationale can be extrapolated to other European Union member states. If this approach is litigated, however, sports database owners must prove that the particular data is de facto gathered from their databases—not collected independently by a third-party (e.g., by observing the broadcast of an event). In this context, the above-mentioned supplementary protection measures, such as restrictions on data collection inside a venue, may become pertinent. If implemented, the restrictions may enable event owners to successfully establish that the utilized data may only originate from their database or the data was gathered in breach of a contractual obligation.

2. France

Two aspects of French law are distinguishable from others in the EU in terms of how sports gaming data are regulated. First, the law provides “sports event owners and sports federations exclusive database exploitation rights.”\(^{401}\) Second, the law mandates that “any sports data usage by betting companies requires the

\(^{399}\) Frodl, supra note 369, at 81.

\(^{400}\) Id. at 82.

\(^{401}\) Hessert, supra note 382, at 6 (citing Article L. 333-1 of the French Code du sport).
In other words, sports leagues effectively have veto rights over sports gaming offerings and usage of news/information therein.

3. Other

An sampling of the legal and regulatory status of sports gaming data in other countries revealed wide variation. In Germany, researcher Frodl wrote that “owners of sports databases under German law may claim a sui generis right under Article 7 of the Database Directive, provided that the database owners can overcome [the] procedural hurdle of proving an illegal extraction and reutilization of the database content.”\(^{403}\) Hungary and Poland—like France—enacted a statute bestowing “a right in favour of event owners to consent to betting on sports events.”\(^{404}\) New Zealand law similarly mandates that sports bets not be offered “without the written agreement of the appropriate New Zealand national sporting organisation.”\(^{405}\)

B. Australia

Researcher Christian Frodl described the “legal protection of sports data in Australia [a]s heterogeneous.”\(^{406}\) When news and information are used for betting purposes, “the commercial interests of event organizers are protected by state laws, which allow event owners to negotiate a contractual agreement with betting and wagering operators as a condition to using…event-related information for betting purposes.”\(^{407}\) In other words, the Australian “regulatory regimes require betting and wagering operators to receive approval of, or enter into an agreement with, sports governing bodies for the use of…information relating to their sports events.”\(^{408}\) Such mandates are most prominent in Victoria, Australia, where “a sports event must be approved by the Victorian Commission for Gambling and Liquor Regulations as a condition to offer bets on such events.”\(^{409}\) Statutory law in Australia was enacted under the shadow of a historical court ruling dismissive of the notion that news and information about a sporting event could be owned and/or controlled. In *Victoria Park Racing & Recreation*
Grounds Co. v. Taylor, a dispute about the broadcasting of a sporting event, the court found that it “has not been referred to any authority in English law which supports the general contention that if a person chooses to organize an entertainment or do anything else which other persons are able to see he has a right to obtain from a court an order that they shall not describe to anybody what they see.” Further, the court found that “a person who creates an event or spectacle does not thereby entitle himself to the exclusive right of first publishing the ‘news’ or photograph of the event or spectacle.” Likewise, a “spectacle” cannot be ‘owned’ in any ordinary sense of that word. Nevertheless, the court did suggest that ticketing for admittance to the event could be employed to inhibit access.

In July 2012, a consulting firm completed a study entitled ‘Optimal Product Fee Models for Australian Sporting Bodies’ and addressed sports gaming regulatory issues. The report found that “sports wagering is a clear ‘two sided’ market, where it is in the interests of both the Australian licensed wagering operators and the sporting codes to maintain a competitive, innovative wagering product that will maximize returns to both sides.” Among other things, the report focused on the symbiotic relationship between sports viewing and sports gaming: “Sporting codes will increasingly benefit from wagering as it increases viewing of sports and potentially the rates they can charge sponsors of their events...[w]agering operators in turn benefit from increased sports viewing because of its impact on demand for wagering related to the event.” The report also focused on integrity concerns, finding that weakness in either sports betting or the sporting codes can have significant negative implications for both sides of the market.

V. CONCLUSION

Regulating sports gaming data is as complex as it is timely. While the

410 Victoria Park Racing & Recreation Grounds Co. v. Taylor, 58 CLR 479 (1937).
411 Id. at 496.
412 Id. at 518.
413 Id. at 496.
414 Id. at 494.
416 Id. at 6.
417 Id. at 18.
418 Id. at 19.
419 Given the dynamic nature of the global pandemic as of August 7, 2020, this paper does not endeavor to provide any soothsayer-type of insight into how the regulation of sports gaming data will be impacted vis-à-vis the worldwide public health issues
regulation of sports gaming data has primarily been in focus of late within the context of the nascent U.S. market, the issue is global and impacts the entire commercialized sports ecosystem. Indeed, the sheer number of industry-relevant players makes it difficult to capture all the varied—and sometimes competing—interests at play. For example, private sector stakeholders with a tethered interest in the regulation of sports gaming data include sports gaming consumers, sports gaming operators, sports leagues, athletes and their labor unions, advertisers, that have affected the sports gaming industry in ways unimaginable at the start of 2020. With that said, five noteworthy developments have emerged. First, somewhat obscure sporting events have become popular with bettors. See Paula Lavigne, et al., Gambling on Table Tennis is Blowing Up—But Are the Matches Legit?, ESPN (May 25, 2020), https://www.espn.com/chalk/story/_/id/29206521/gambling-table-tennis-blowing-the-matches-legit. See also Borja Garcia-Garcia, et al., The Impact of Covid-19 on Sports: A Mid-Way Assessment, INT’L SPORTS L. J. (forthcoming 2020). Second, companies in the business of selling news and information relevant for sports gaming have prominently moved to fund and/or organize sporting events with an eye towards creating sports gaming content that can be wagered upon. See David Purdum, Betting Companies Help Get Tennis Players Back on the Court, ESPN (June 17, 2020), https://www.espn.com/chalk/story/_/id/29315110/betting-companies-help-get-tennis-players-back-court. See also Luke Massey, Net Gains: How Sportradar is Helping to Bring Back Tennis, SBCNEWS (May 21, 2020), https://sbcnews.co.uk/features/2020/05/21/net-gains-sportradar-helping-bring-tennis-back/. Third, with multiple U.S.-based sports leagues planning to resume games without spectators on-site, there will be a quasi-natural experiment to: (i) evaluate data dissemination strategies in the absence of courtsiders and (ii) test the scope of the safe harbor under the Wire Act. See 18 U.S.C. § 1084(b) (2018). See also United States v. Scavo, 593 F.2d 837, 841 (8th Cir. 1979) (“we reject appellant’s blanket assertion that suppliers of line information are outside the scope of § 1084(b)’'); United States v. Ross, 1999 WL 782749, *5 (S.D.N.Y. Sept. 16, 1999) (“transmissions reporting the results of sporting events, the odds placed on particular contests by odds-makers, or the identities of persons seeking to place bets would be examples of ‘information’ [under § 1084(b)]”); Jared Diamond, Baseball Stadiums are Closed to Fans, but this Guy’s Balcony is Open for Business, WALL ST. J. (June 30, 2020, 9:08 AM), https://www.wsj.com/articles/baseball-stadiums-major-league-baseball-padres-nationals-petco-stadium-11593522380. Fourth, certain states—such as Michigan—have moved to promulgate draft regulations aimed at restricting long-running methods of information dissemination such as web scraping and live scouting. See Tony Batt, Battle Over U.S. Sports Betting Data Collection May Be Destined for Court, GAMBLING COMPLIANCE (Aug. 5, 2020), https://gamblingcompliance.com/premium-content/insights_analysis/battle-over-us-sports-betting-data-collection-may-be-destined. Fifth, some entities involved in the market for sports gaming news and information have moved to inquire about the prospects of certain best practices in the industry. See Scott Longley, The Best Practice Challenge for Sports Data, IGAMINGBUSINESS (July 13, 2020), https://www.igamingbusiness.com/analysis/best-practice-challenge-sports-data.
broadcasters, data dissemination firms, sports fans, and journalists. In the public realm, lawmakers, judges, and executive branch government officials are increasingly dealing with sports gaming data issues too. This paper provides a roadmap—or a Whack-A-Mole type of preview—for all the complex potential legal issues that will likely arise in the regulation of sports gaming data moving forward.