MONEYBALL 2.0: CHARTING A COURSE FOR SPORTS LEAGUE DATA MONETIZATION DURING THE LEGALIZED U.S. SPORTS BETTING BOOM

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I. INTRODUCTION

Not long ago, if you wanted to bet on sports, you had to scour the sports pages of newspapers to find information on athletes, injuries, and other conditions, like the weather, that could affect the outcome of a game. Then, you either gambled with others in the bleachers at the event or placed a bet by going to a Western Union office and wiring money to a sportsbook. Now you can watch a sporting event from anywhere while accessing a constant stream of real-time data that can inform any bet you place using a mobile betting app. This is high-tech gambling.[1] This is the reality envisioned by the late David Stern, former Commissioner of the National Basketball Association ("NBA").[2] This is the new normal for sports fans and bettors.

This new normal is possible because the United States Supreme Court recently invalidated the federal ban on sports gambling in *Murphy v. NCAA*.[3] In 1992, Congress exercised its authority under the Commerce Clause to enact the Professional and Amateur Sports Protection Act ("PAPSA"), which largely prohibited states from operating or authorizing "betting, gambling, or wagering" on sports.[4] At the time, sports leagues supported the legislation, and Stern testified on behalf of the NBA that "[t]he interstate ramifications of sports betting are a compelling reason for federal legislation."[5]

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[1] Steve Carp, *ShotTracker Is a Tool for Teams, Bettors*, GAMING TODAY (Dec. 4, 2019), https://www.gamingtoday.com/industry/article/87350-ShotTracker_is_a_tool_for_teams_bettors.

[2] *David Stern Talks Sports Betting, NBA Tech and His ShotTracker Investment*, SPORTTECHIE (Nov. 7, 2018), https://www.sporttechie.com/david-stern-davyeon-ross-shottracker-technology-basketball-nba-sports-betting-investment-podcast.

[3] Murphy v. NCAA, 138 S. Ct. 1461, 1484–85 (2018).

[4] 28 U.S.C. § 3702.

[5] S. REP. No. 102-248, at 5–6 (1991).

In *Murphy*, the National Collegiate Athletic Association ("NCAA") sued New Jersey to enjoin a law that the state had passed to permit sports gambling.[6] In 2018, the Supreme Court repealed PAPSA, reasoning that because Congress created the law to issue direct orders to state legislatures, it unequivocally violated state sovereignty and the Constitution's anti-commandeering rule.[7] Accordingly, the Court held that Congress can implement a national framework to regulate sports betting, but if Congress does not, then each state is free to regulate sports betting within its borders.[8] The Federal Wire Act looms large, limiting online sports gambling across state lines.[9]

With the individual states empowered to legalize sports gambling, sports leagues have called on state legislatures for protection. The NBA, along with Major League Baseball ("MLB"), led the charge with a cross-country lobbying effort for statutory protections to help preserve the integrity of their respective games.[10] Specifically, the leagues asked legislators to set policies and procedures to which gambling operators must adhere, as well as "a compensation mechanism for the sportsbooks' use of the leagues' sports data."[11] The leagues urged both state and federal legislatures to consider two different statutory schemes: an "integrity fee" mandate, which would require sportsbooks to pay each league one percent of all wagers on its events, or an official data mandate requiring sportsbooks to use only data and statistics directly from professional sports leagues.[12]

The NBA explained that an integrity-fee mandate would be fair given that the league creates the content that sportsbooks profit from and bears "all of the risk that accompanies sports betting and will incur additional expenses to

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[6] *Murphy*, 138 S. Ct. at 1471.

[7] *Id*. at 1478.

[8] *Id*. at 1484–85.

[9] 18 U.S.C. § 1084. *See What Is the Federal Wire Act?*, LEGAL SPORTS BETTING, (Jan. 27, 2021), https://www.legalsportsbetting.com/what-is-the-wire-act/ (explaining the federal government's current interpretation of the Wire Act prohibits online gambling, though the situation is fluid); *see also* Letter from Gurbir S. Grewal, N.J. Att'y Gen. (June 21, 2021), https://www.njoag.gov/ag-grewal-urges-u-s-justice-department-to-rescind-trump-era-reinterpretation-that-found-online-gaming-can-be-prosecuted/.

[10] Aaron Feld, *Gambling on Sports Data: Protecting Leagues' High-Level Data from Sportsbooks*, 20 U. ILL. L. REV. 341, 356 (2020). *See also* Daniel Libit, *NBA Lobbying Spend Leaves D.C. for States as Gambling Grows*, SPORTICO (May 6, 2021, 5:55 AM), https://www.sportico.com/leagues/basketball/2021/nba-avoids-congressional-lobbying-1234629039/ ("Both the NBA and Major League Baseball have been trying to secure guaranteed cuts from states' sports betting revenues.").

[11] *Id*.

[12] Benjamin Kovach, *Know When to Hold 'Em, Know When to Fold 'Em: How Professional Sports Leagues Should Monetize Data in the Era of Legalized Sports Gambling*, 25 ILL. BUS. L.J. 119, 124.

expand [its] existing compliance and enforcement programs."[13] The NBA said an integrity fee serves to protect its fans and the integrity of the game, but opponents argued that the price is too steep and that leagues should monitor integrity regardless of whether sportsbooks pay a fee to them.[14] Although one percent seems insignificant on its face, such fee would amount to an estimated twenty percent of the average Nevada sportsbook's profit, and even more in other states.[15] In recognition of this fact, the NBA later reduced its asking price to 0.25% of handle.[16] Thus far, league efforts to command an integrity fee have proved fruitless and the official data approach has resulted in very limited success.[17]

In the three years since PASPA's demise, thirty-three states and Washington, D.C., have joined Nevada by legalizing sports gambling, while one

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[13] *NBA Defends Quest for 'Integrity Fee' Payment in Sports Bets*, NBA (May 24, 2018, 8:45 AM), https://www.nba.com/news/nba-defends-quest-integrity-fee-payment-sports-bets.

[14] *See, e.g.*, Interview by Anthony Cabot with Robert Walker, Director of Operations, USBookmaking, in Las Vegas, Nev. (Jan. 11, 2021).

[15] Matt Bonesteel, *Sports Gambling 'Integrity Fee' Supporters Are Not Doing Themselves Any Favors*, WASH. POST (May 22, 2018), https://www.washingtonpost.com/news/early-lead/wp/2018/05/22/sports-gambling-integrity-fee-supporters-are-not-doing-themselves-any-favors/. Additionally, there is a 0.25% federal excise tax on sports wagers and legislation has been introduced to eliminate it. Howard Stutz, *Washington D.C.: Legislation Introduced to End an Antiquated Excise Tax on Sports Wagers*, CDC GAMING REP. (Apr. 2, 2021, 8:06 AM), https://www.cdcgamingreports.com/washington-d-c-legislation-introduced-to-end-an-antiquated-excise-tax-on-sports-wagers/.

[16] *NBA Official Explains Why the League Is Pushing for 'Integrity Fee,'* METRONEWS (Mar. 15, 2018, 1:09 PM), https://wvmetronews.com/2018/03/15/nba-official-explains-need-for-integrity-fee/.

[17] *See* Jake Patel, *Integrity Fees*, COMPARE.BET, https://www.compare.bet/en-us/integrity-fees (last visited Nov. 10, 2021) (explaining that no state has successfully included integrity fees in its sports betting legislation); Craig Mauger, *Pro Leagues Score with Michigan's New Sports Betting Law*, DETROIT NEWS (Jan. 8, 2020, 8:10 AM), https://www.detroitnews.com/story/news/local/michigan/2020/01/07/pro-sports-leagues-scored-michigans-sports-betting-law/2805358001/ (stating Michigan, Illinois, and Tennessee are the only states that passed sports-wagering legislation with an official league data requirement. This means that the NBA's lobbying has yet to pay off in the other twenty states with teams); Buck Wargo, *SBC Digital North America: Sports Teams and Leagues Discuss Betting Partnerships with Sportsbooks*, CDC GAMING REP. (June 9, 2021, 3:04 PM), https://www.cdcgamingreports.com/sbc-digital-north-america-sports-teams-and-leagues-discuss-betting-partnerships-with-sportsbooks/ (the NBA admitted, "[w]e have lobbied in state legislatures and haven't been successful in codifying that, but we have achieved that objective through our commercial agreements [with sports betting companies]").

other state has introduced active or pre-filed sports betting legislation.[18] Over that span, Americans legally wagered more than $51 billion on sports and generated more than $500 million in state tax revenue.[19] The potential market for internet sports betting alone is estimated to be worth up to $23 billion per year,[20] starting with an estimated seventy percent growth in 2021.[21] The ability to legally wager on sporting events increases the value of the teams, leagues, and sports betting operations.[22]

The coronavirus ("COVID-19") pandemic sped up the momentum for sports gambling, with certain states legalizing faster than they otherwise might have to address financial problems.[23] Sportsbooks were hit hard during the pandemic as a direct consequence of leagues delaying, shortening, and canceling events or entire seasons.[24] For example, the cancellation of the 2020 NCAA men's basketball tournament cost the sports betting industry nearly $4 billion.[25] Meanwhile, bettors desperate for something to gamble on turned to nontraditional sporting events like iRacing, Russian table tennis, aerial drone

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[18] *Interactive Map: Sports Betting in the U.S.*, AM. GAMING ASS'N, https://www.americangaming.org/research/state-gaming-map/ (last updated Dec. 23, 2021).

[19] Bill Miller, *Legal Sports Betting Is Thriving — We Have to Work to Keep It That Way*, THE HILL (May 13, 2021, 3:30 PM), https://thehill.com/blogs/congress-blog/politics/553420-legal-sports-betting-is-thriving-we-have-to-work-to-keep-it-that.

[20] Katrina Hamlin, *U.S. Is Promised Land for Online Gambling*, REUTERS: BREAKINGVIEWS (Dec. 29, 2020), https://www.reuters.com/article/us-fanduel-group-m-a-breakingviews/breakingviews-u-s-is-promised-land-for-online-gambling-idUSKBN2931B3.

[21] Chris Katje, *Sports Betting Could Grow 70% in 2021, Casino Recovery Coming: BofA Analyst*, YAHOO FIN. (Jan. 10, 2021, 9:43 AM), https://finance.yahoo.com/news/sports-betting-could-grow-70174309410.html?guccounter=1.

[22] *See, e.g.*, Mike Chiari, *NFL Owners Reportedly Believe Teams Will Eventually Be Worth $8B-$10B Due to Gambling*, BLEACHER REP. (June 30, 2021), https://bleacherreport.com/articles/10006798-nfl-owners-reportedly-believe-teams-will-eventually-be-worth-8b-10b-due-to-gambling.

[23] Jonathan D. Cohen, *Sports Gambling Could Be the Pandemic's Biggest Winner*, WASH. POST (Feb. 5, 2021, 3:00 AM), https://www.washingtonpost.com/outlook/2021/02/05/sports-gambling-could-be-pandemics-biggest-winner/.

[24] *See, e.g.*, *The BIG3 Is Cancelling the 2020 Season but Will Be Back in the Summer of 2021*, BIG3 (May 18, 2020), https://big3.com/news/the-big3-is-cancelling-the-2020-season-but-will-be-back-in-the-summer-of-2021/.

[25] Patrick Everson, *March Madness Falls to Coronavirus, Dealing $4 Billion Blow to Sports Betting Industry*, COVERS (Mar. 12, 2020, 7:56 AM), https://www.covers.com/industry/march-madness-coronavirus-sports-betting.

races, and a videogame tournament featuring NBA players.[26] The return of many sports led to a massive surge in sports betting across the country and many states setting new records in handle and win.[27] The 2021 NCAA men's basketball tournament became the first U.S. sporting event to draw more than $1 billion in legal wagering.[28]

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[26] Jon Lewis, *Ratings: iRacing, NBA 2K, Basketball HOF, Encores*, SMW: SPORTS MEDIA WATCH (Apr. 2020), https://www.sportsmediawatch.com/2020/04/iracing-ratings-nascar-indycar-nba-2k-players-basketball-hof/; Lucia Maffei, *With No Pro Sports, DraftKings Bets on Fantasy, Esports and Ping Pong*, BOS. BUS. J. (May 26, 2020, 5:57 AM), https://www.bizjournals.com/boston/news/2020/05/26/draftkings-continues-alternative-sports.html. *See also* John Brennan, *Back in Action: Atlantic City Casinos Go All Out to Give Guests Safe Entertainment Options*, JERSEY'S BEST (Dec. 29, 2020), https://www.jerseysbest.com/community/back-in-action-atlantic-city-casinos-go-all-out-to-give-guests-safe-entertainment-options/ (reporting when professional sports leagues like the NBA and NHL suspended play in March, sports-hungry bettors in New Jersey wagered on Ukrainian and Russian table tennis, as well as soccer and ice hockey in Belarus); Wayne Parry, *Plenty of Overhead in This Market: Betting on Drone Races*, AP NEWS (Jan. 8, 2021), https://apnews.com/article/drone-races-gambling-9d6519f7724028a851841fc8c86c1ca8 (reporting that DraftKings took bets for the Drone Racing League championship).

[27] *See, e.g.*, Richard N. Velotta, *Record $3B Wagered on Sports in Legal US Sportsbooks in October*, LAS VEGAS REV. J. (Dec. 8, 2020, 7:21 PM), https://www.reviewjournal.com/business/casinos-gaming/record-3b-wagered-on-sports-in-legal-us-sportsbooks-in-october-2209648/ (reporting Americans bet more in U.S. legal sports books in October than any other month in history); Wayne Parry, A*nother Month, Another Sports Bet Record in NJ: $931M in Nov*, AP NEWS (Dec. 14, 2020), https://apnews.com/article/atlantic-city-new-jersey-coronavirus-pandemic-gambling-industry-sports-betting-6a555bae7ec2a917e5623df2fd222ff3/ (reporting New Jersey set a national record for the most money wagered on sports in a month for the fourth month in a row); Larry Gibbs, *Oregon Sets New October Sports Wagering Record but Concerns Remain*, WSN (Dec. 3, 2020), https://www.wsn.com/betting/oregon-october-sports-wagering-record/ (reporting that Oregon set a record with $29.45 million in October handle. The state has saw a steady climb in handle and revenue since legalizing sports wagering in August 2019); Dan Carden, *Indiana Breaks Record with $251M in November Sports Wagers*, NWI.COM (Feb. 13, 2021), https://www.nwitimes.com/business/gambling/indiana-breaks-record-with-251m-in-november-sports-wagers/article_08af724e-30e2-59a3-9202-c835dd5fec76.html (reporting Indiana broke a monthly sports wagering record in November with $251.4 million in handle, with football bets accounting for nearly half).

[28] Howard Stutz, *Three Years Since PASPA Was Struck Down, Sports Betting Legalization Continues to Dominate the Gaming Industry*, CDC GAMING REP. (May 10, 2021, 8:07 AM), https://www.cdcgamingreports.com/three-years-since-paspa-repeal-sports-betting-legalization-continues-to-dominate-the-gaming-industry/ ("PlayUSA said $1.6 billion was bet legally on the games.").

This note focuses on an alternative approach to regulating sports gambling: sports leagues should be entitled to own their refined data and sportsbooks should be required to pay to use it. Section II of this paper focuses on the NBA's complicated relationship with sports betting, as the league was once diametrically opposed to it, and now embraces it with open arms. Section III offers a look in sports data and how it has evolved over the years because of league investment into advanced technology. The third section also presents league arguments in support of an official data mandate, as well as counterarguments. Section IV explores the Copyright Act and case law on the copyrightability of sports data. Section V looks at other legal doctrines that support league ownership of refined data. Finally, Section VI lays out options for the NBA.

II. CASE STUDY: WHY THE NBA SHOULD BE ENTITLED TO COPYRIGHT PROTECTION FOR ITS REFINED DATA

A. The NBA's History of Sports Betting

The NBA has a complicated history with gambling. In 2007, former referee Tim Donaghy pleaded guilty to two felonies for betting on games that he officiated and providing inside information on games to others.[29] The NBA distanced itself from gambling following the scandal by requiring employees to complete anti-gambling training and barring them from betting on any of their games.[30] In the years leading up to the *Murphy* decision, however, the NBA shifted its stance on sports betting.

In 2014, NBA Commissioner Adam Silver wrote an op-ed in the New York Times in which he called on Congress to adopt legislation to legalize professional sports gambling.[31] In 2017, the league signed a new collective bargaining agreement with a provision to include gambling proceeds as part of

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[29] Allan Chernoff & David Miller, *Ex-NBA Ref Pleads Guilty in Betting Scandal*, CNN (Aug. 15, 2007), https://www.cnn.com/2007/US/law/08/15/nba.ref/.

[30] Tania Ganguli, *NBA Has Been Preparing to Embrace Legalized Sports Betting for Years*, L.A. TIMES (May 14, 2018, 6:00 PM), https://www.latimes.com/sports/nba/la-sp-sports-betting-basketball-20180514-story.html; Chris Sheridan, *Sheridan: How the NBA Plans to Box Out Illegal Betting and Protect Consumers*, THE LINES (Jan. 3, 2020), https://www.thelines.com/nba-illegal-sports-betting-interview/ (reporting that the NBA prohibits players and employees from gambling on all NBA games, as well as WNBA and G League games).

[31] Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html.

basketball-related income.[32] A few months before the *Murphy* ruling, Silver said the NBA spends roughly $7.5 billion to create content (including games), and as the "intellectual property creators," the league should receive a one-percent integrity fee.[33] The day that PASPA was repealed, Silver declared, "[w]e remain in favor of a federal framework that would provide a uniform approach to sports gambling in states that choose to permit it, but we will remain active in ongoing discussions with state legislatures. Regardless of the particulars of any future sports betting law, the integrity of our game remains our highest priority."[34]

At the core of the NBA's fight for ownership of its data is an argument summed up best by Silver's predecessor. In 1991, then NBA commissioner Stern explained in front of the Senate Subcommittee on Patents, Copyrights, and Trademarks that "[c]onducting 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."[35] Even though PASPA is now defunct, leagues continue to seek the same legislative protection that the Act afforded them.[36]

B. The NBA's Efforts Post-Murphy

Since the repeal of PASPA, the NBA has sought legal protection for its game data through the courts and legislatures—seeking an integrity fee or official data mandate—only to be met with resistance in some cases and flat-out rejection in others.[37] As a result, the league shifted its primary focus to data licensing and strengthening the value offer of that licensing. Dubbed "an innovator at the

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[32] NBA COLLECTIVE BARGAINING AGREEMENT, Art. VII, § 1, (a)(1)(xiii) (Jan. 19, 2017), https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf.

[33] Matt Rybaltowski, *Adam Silver Touts Virtues of NBA's Intellectual Property in Support of 1% Gambling Integrity Fee*, FORBES (Feb. 18, 2018, 9:47 PM), https://www.forbes.com/sites/mattrybaltowski/2018/02/18/adam-silver-touts-virtues-of-nbas-intellectual-property-in-support-of-1-gambling-integrity-fee/#3710092f2f19.

[34] *Adam Silver's Statement Regarding Supreme Court's Decision to Overturn PASPA*, NBA COMMC'NS (May 14, 2018), https://pr.nba.com/adam-silver-statement-supreme-court-decision-paspa/.

[35] Ryan M. Rodenberg et al., *"Whose" Game Is It? Sports-Wagering and Intellectual Property*, 60 VILL. L. REV. TOLLE LEGE 1, 3–4 (2014).

[36] Brett Smiley, *A History of Sports Betting in the United States: Gambling Laws and Outlaws*, SPORTS HANDLE (Nov. 13, 2017), https://sportshandle.com/gambling-laws-legislation-united-states-history/.

[37] Kovach, *supra* note 12, at 127–28. *See also* Brett Smiley & Jill Dorson, *The Many Ways NBA Has Embraced Legal Sports Betting*, SPORTS HANDLE (Oct. 22, 2019), https://sportshandle.com/nba-sports-betting-evolution/ (the NBA has "[lobbied] aggressively to have states mandate by law that state-licensed operators purchase sports betting data from their third parties").

forefront of sports evolution,"[38] the NBA was the first U.S. professional sports league to partner directly with a sportsbook when it struck a non-exclusive deal with MGM Resorts ("MGM") six weeks after the *Murphy* decision.[39] As part of the deal, which is reportedly worth $25 million over three years, the NBA and WNBA provide real-time data to MGM and allow it to use league trademarks while marketing itself as a league partner.[40] Additionally, the NBA has since formed non-exclusive official data partnerships with BetStars, FanDuel, and William Hill.[41]

The NBA also became the first U.S. professional sports league to secure betting data and distribution deals when the Association agreed to official data-licensing deals with Genius Sports and Sportradar.[42] The data analytics companies use the NBA and WNBA's real-time official data and algorithms to produce in-game betting odds, which they then sell to sportsbooks.[43] The deals allow the NBA to monetize its data, and grant Genius Sports and Sportradar access to the fastest data available, so they can provide betting odds to sportsbooks expeditiously.

In other firsts, the NBA became the first major U.S. sports league to enter the virtual sports betting market when it entered into a partnership with gaming supplier Highlight Games in June 2019 to create a sports gambling product using NBA highlights and footage.[44] The NBA also became the first U.S. league to partner with global sportsbook operator PointsBet, which integrated the first ever Win Probability Metric across digital NBA platforms to give fans real-time insight on projected outcomes.[45] Additionally, the NBA became the first league to experiment with alternate betting-centric broadcasts when it launched

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[38] Sam Carp, *US Major League First as NBA Signs US$25M Betting Deal with MGM*, SPORTSPRO MEDIA (July 31, 2018), https://www.sportspromedia.com/news/nba-signs-betting-deal-mgm-25-million/.

[39] Hilary Russ, *NBA Strikes Sports Betting Deal with MGM as Official Partner*, REUTERS (July 31, 2018, 2:09 PM), https://www.reuters.com/article/us-basketball-nba-betting/nba-strikes-sports-betting-deal-with-mgm-as-official-partner-idUSKBN1KL2XI.

[40] Sam Carp, *NBA Claims US First with Betting Data Distribution Deals*, SPORTSPRO MEDIA (Nov. 28, 2018), https://www.sportspromedia.com/news/nba-betting-odds-sportradar-genius-sports-data/.

[41] *Official League Data*, LEGAL SPORTS REP., https://www.legalsportsreport.com/official-league-data/ (last visited Nov. 10, 2021).

[42] *Id.*

[43] *Id.*

[44] David Purdum, *NBA to Launch Virtual Sports Betting Game*, ESPN (June 19, 2019), https://www.espn.com/chalk/story/_/id/27007778/nba-launch-virtual-sports-betting-game.

[45] Press Release, NBA Commc'ns, PointsBet and NBA Announce Multiyear Sports Betting Partnership Including the NBA's First Win Probability Metric (Feb. 12, 2020), https://pr.nba.com/nba-pointsbet-partnership/.

NBABet Streams in August 2020 to try to keep viewers engaged during the COVID-19 pandemic, when it was not possible for fans to attend games.[46]

The NBA embraced legal sports betting and made adjustments to benefit bettors, sportsbooks, and its own bottom line.[47] For example, the NBA announced a new rule requiring teams to publicly reveal their starting lineups thirty minutes ahead of tipoff (up from ten minutes) in part to help bettors make more informed decisions.[48] The league also began offering quarter-by-quarter pricing,[49] which may be an attractive option for those who prefer to bet on a specific part of a game, rather than an entire game. For instance, a bettor could bet that the Toronto Raptors will outscore the Boston Celtics in a quarter, or that Kyle Lowry will rack up at least five assists in the first half.

Capital One Arena, home of the NBA's Washington Wizards and the Washington Capitals of the National Hockey League ("NHL"), became the first U.S. professional sports arena to offer full-service betting when it opened an in-house William Hill sportsbook in July 2020.[50] The NBA also entered a multiyear marketing partnership with Yahoo Sports that includes the right to create content that helps inform bettors.[51] Even the NBA's players are joining the betting frenzy, with LeBron James taking a $100 mid-shot bet with a teammate who wagered that James would not hit that three-point shot.[52] He did.

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[46] David Purdum, *NBA Launches Betting-Centric Telecast for Select Games of Restart*, ESPN (Aug. 3, 2020), https://www.espn.com/nba/story/_/id/29590780/nba-launches-betting-centric-telecast-select-games-restart/; Taylor Smith, *NBA Becomes First Major American League to Launch Betting TV Broadcast*, SPORTS GEEK (Aug. 4, 2020, 12:41 PM), https://www.thesportsgeek.com/news/nba-becomes-first-major-american-league-to-launch-betting-tv-broadcast/.

[47] Smiley & Dorson, *supra* note 37.

[48] Zack Jones, *New NBA Starting Lineup Rule Is "All About Gambling,"* FORBES (Sept. 21, 2019, 10:10 PM), https://www.forbes.com/sites/zackjones/2019/09/21/new-nba-starting-lineup-rule-is-all-about-gambling/?sh=370008521485.

[49] Press Release, NBA Commc'ns, NBA Digital Launches Quarter-by-Quarter Pricing Option on NBA League Pass (Dec. 10, 2018), https://pr.nba.com/nba-digital-launches-quarter-by-quarter-pricing-option-on-nba-league-pass/.

[50] Jason Owens, *Wizards, Capitals Arena Becomes First in U.S. with in-House Sports Book*, YAHOO SPORTS (July 31, 2020), https://sports.yahoo.com/wizards-capitals-arena-becomes-first-in-us-with-inhouse-sports-book-004519085.html.

[51] Press Release, NBA Commc'ns, Yahoo Sports and NBA Bring Future of Sports Entertainment to Life Through Virtual Reality, Fantasy and Betting Relationship (July 30, 2020), https://pr.nba.com/yahoo-sports-nba-partnership/.

[52] Ryan Young, *LeBron James Wins Bet with Dennis Schroder Mid-Game with Wild 3-Pointer Against Rockets*, YAHOO SPORTS (Jan. 12, 2021, 9:47 PM), https://sports.yahoo.com/los-angeles-lakers-lebron-james-dennis-schroder-bet-3-pointer-houston-rockets-054702463.html.

III. THE EVOLUTION AND OWNERSHIP OF SPORTS DATA

A. Types of Sports Data

Sports data refers to all the facts and information generated from and related to a sporting event.[53] More specifically, sports data can be divided into five categories. First, event data comprises all observable aspects and data collected from the external circumstances of an event, ranging from weather conditions and attendance to single events during the game, such as a touchdown, foul, or error.[54] Second, performance data concerns the physical performance of athletes throughout a game, including movements, acceleration, speed, and heart rate.[55] Third, raw data derives from a single event or concerns a specific athlete (including performance data) and is not altered in any way since acquisition, unlike refined data.[56] Fourth, teams and leagues often finance technology to create refined data, which is "cleaned, aggregated, edited, or modified" to measure an athlete's or team's technical performance.[57] Examples include shooting percentages and batting averages. Finally, official data is a "league-approved tabulation of what happened in a sports competition," while unofficial data comes from unlicensed sources without a license or league permission.[58]

B. Refined Data Around Professional Sports

In this age of advanced analytics, it is common for teams and leagues to invest in state-of-the-art camera and sensor-based technology to track player and team performances and generate refined data.[59] MLB uses the Statcast system, which features tracking technology that can produce statistics such as a baseball's exit velocity, the spin rate of a pitcher's curveball, and the probability that a batted ball to the outfield will be caught.[60] The NHL extracts and collects 2,000 data points per second through chips embedded in pucks and shoulder

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[53] Feld, *supra* note 10, at 346.
[54] *Id.*
[55] *Id.*
[56] *Id.* at 347.
[57] *Id.* (noting that teams and leagues typically use refined data to predict a team's success and optimize its value.)
[58] *Id.* at 351.
[59] *See Data Deluge: MLB Rolls Out Statcast Analytics on Tuesday*, USA TODAY (Apr. 20, 2015, 8:13 PM), https://www.usatoday.com/story/sports/mlb/2015/04/20/data-deluge-mlb-rolls-out-statcast-analytics-on-tuesday/26097841/ (quoting an MLB Advanced Media representative who said that the league paid "tens of millions of dollars" for the Statcast technology).
[60] Feld, *supra* note 10, at 369. *See also Statcast*, MLB (last visited Nov. 10, 2021), https://www.mlb.com/glossary/statcast/ (defining the Statcast technology).

pads.[61] The National Association for Stock Car Auto Racing ("NASCAR") invested heavily in technology dedicated to creating new betting opportunities.[62] For example, by tracking all thirty-six cars simultaneously going 200 miles per hour, bettors can wager on different stages of a race or who is leading in any given lap.[63] The Professional Golfers' Association ("PGA") Tour is creating new betting opportunities through "extremely expensive" ShotLink technology, which gathers data from every single shot; there are more than 30,000 shots in a golf tournament.[64] The PGA Tour introduced a second-screen broadcast catering to golf bettors in January 2021.[65]

C. The NBA's Refined Data

Gone are the days when sports betting was limited to basic aspects of a game, such as counting statistics (including points, rebounds, and turnovers), which team will prevail, and what the final score will be. Now, with significant investment in and commitment to increasingly innovative and sophisticated technology, leagues and teams are tracking and generating more data than ever before. In 2013, the NBA became the first U.S. professional sports league to use player-tracking technology for every game.[66]

At that time, the league invested hundreds of thousands of dollars in SportVU, technology originally developed to track missiles, to provide real-time basketball statistics measuring speed, distance, player separation, and ball possession.[67] The system employed high-resolution cameras and leading-edge

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[61] Wayne Parry, *Leagues Finally Cash in on Sports Betting by Selling Data*, AP NEWS (Jan. 7, 2020), https://apnews.com/article/2fc27b7c558ceddd8669fb03acc15e3d.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] Stephen Hennessey, *PGA Tour to Debut Second-Screen Broadcast Geared Toward Gamblers at Waste Management*, GOLF DIG. (Jan. 25, 2021), https://www.golfdigest.com/story/pga-tour-gambling-second-screen-nbc-pointsbet.

[66] Press Release, NBA Commc'ns, NBA Announces Multiyear Partnership with Sportradar and Second Spectrum (Sept. 22, 2016), https://pr.nba.com/nba-announces-multiyear-partnership-sportradar-second-spectrum/ [hereinafter Second Spectrum Press Release]. *See also* Press Release, NBA Commc'ns, NBA, Sportradar Announce Landmark Long-Term Global Partnership (Nov. 17, 2021), https://www.nba.com/news/nba-sportradar-announce-landmark-long-term-global-partnership (the NBA and Sportradar agreed to a new deal that includes expanded distribution of player-tracking data).

[67] Mark Wilson, *Moneyball 2.0: How Missile Tracking Cameras Are Remaking The NBA*, FAST CO. (June 20, 2012), https://www.fastcompany.com/1670059/moneyball-20-how-missile-tracking-cameras-are-remaking-the-nba; Press Release, NBA Commc'ns, Stats LLC and NBA to Make STATS SportVU Player Tracking Data Available to More Fans

computer vision technology to capture both the X/Y coordinates of all the players and the X/Y/Z (3D) coordinates of the basketball 72,000 times a game, equal to every move twenty-five times per second.[68]

NBA teams now employ Second Spectrum's player-tracking system, which uses cameras to track movements on a microsecond-by-microsecond basis as well as machine learning to provide advanced statistics, including speed, distance, paint touches, drives, and defensive impact.[69] Second Spectrum creates and sells the proprietary metrics to NBA teams.[70] Second Spectrum can identify Stephen Curry's overall shooting percentage, as well as more specific details such as his shooting percentage after dribbling one time compared to two times, his shooting percentage when there is a defender within two feet of him versus a wide-open shot, and his shooting percentage from varying distances from the rim.[71] Additionally, Second Spectrum can tell you how Curry scored (catch and shoot, pull-up jumper, etc.), who (if anyone) passed him the ball, for how many seconds Curry touched the ball, and how much time remained on the shot clock after each shot.[72]

Similarly, wearable technology is no longer limited to measuring steps taken, speed, and pulse. Teams like the Golden State Warriors invested in high-tech smart clothing that relies on motion and breathing sensors to collect information on electrical activity in the players' skeletal muscles.[73] Other teams use Kinexon technology, which can render players' 3D location with an accuracy of one centimeter and provides numerous motion and training load metrics.[74]

Than Ever Before (Jan. 19, 2016), https://pr.nba.com/stats-llc-nba-sportvu-player-tracking-data/ [hereinafter Player Tracking Data Press Release]. *See* Albert Lee, *NBA Partners with STATS, LLC. to Provide SportVU in All Arenas*, SB_NATION: SWISH APPEAL (Sept. 5, 2013, 7:51 PM), https://www.swishappeal.com/2013/9/5/4699538/nba-partners-with-stats-llc-to-provide-sportvu-advanced-analytics/ (noting that SportVU costs $100,000 per year for each team).

[68] Player Tracking Data Press Release, *supra* note 67.

[69] Ben Dowsett, *How Second Spectrum is Redesigning the NBA*, FANSIDED (June 28, 2018), https://fansided.com/2018/06/28/second-spectrum-redesigning-nba/; Second Spectrum Press Release, *supra* note 66.

[70] Bruce Schoenfeld, *L.A. Clippers Owner Steve Ballmer Wants to Save Sports by Reinventing the Way We Watch Them*, FAST CO. (May 4, 2020), https://www.fastcompany.com/90490917/l-a-clippers-owner-steve-ballmer-wants-to-save-sports-by-reinventing-the-way-we-watch-them.

[71] *Stephen Curry Statistics*, NBA, https://www.nba.com/stats/player/201939/shots-dash/ (last visited Nov.10, 2021).

[72] *Id.*

[73] Alex Senemar, *NBA: Training with 'Wearable' Technology (Part 1)*, MEDIUM (Apr. 21, 2016), https://medium.com/sherbit-news/nba-training-with-wearable-technology-part-1-816bf273ed63.

[74] Joe Lemire, *Kinexon Has Become the NBA's Most Used Wearable Technology*, SPORTTECHIE (Sept. 21, 2018), https://www.sporttechie.com/kinexon-wearable-76ers-rockets-pacers-hawks-wizards/.

Kinexon's algorithms transform player position, motion, and physiological data into insights about player performance, injury prevention, and return-to-play tactics.[75] Teams use Intel RealSense 3D depth cameras to provide analytics of every shot, including where each shot is taken, its trajectory to the rim, and exactly where the ball reaches the basket.[76] The Orlando Magic partnered with AutoSTATS, which provides player-tracking data that helps inform the team's decisions regarding which college players to draft.[77]

While these technologies are intended for coach and team use, there is clear potential for new betting opportunities and using this refined data to settle such wagers. But under the NBA's current collective bargaining agreement, players are not allowed to use wearable devices in games and "no player data collected from a Wearable worn at the request of a Team may be made available to the public in any way or used for any commercial purpose" pending an agreement between the parties.[78] There are some alternatives, for example, Second Spectrum's CourtVision video technology superimposes graphics and statistics, such as the probability that a player will hit a shot in real time based on his past data, which may come in handy for sportsbooks to set odds.[79]

D. League Arguments for a Proprietary Right in Their Refined Data

Bettors can benefit from refined data by having more options for what they can bet on, and sportsbooks benefit because the added offerings can directly add to their bottom line.[80] Leagues argue that based on their substantial investment, skill, effort, and creativity spent in creating and exploiting this refined data in real time, they are entitled to a proprietary interest to the extent that others derive economic benefits from their games.[81] Although sportsbooks

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[75] *Basketball PERFORM*, KINEXON, https://kinexon.com/solutions/basketball (last visited Nov. 14, 2021).

[76] *Id*.

[77] Simon Ogus, *Orlando Magic Enter Exclusive Deal with STATS to Begin Using AI Player Tracking Technology*, FORBES (Feb. 27, 2019, 7:30 AM), https://www.forbes.com/sites/simonogus/2019/02/27/orlando-magic-enter-exclusive-deal-with-stats-to-begin-using-ai-player-tracking-technology/?sh=4ff97c576b03.

[78] NBA COLLECTIVE BARGAINING AGREEMENT, *supra* note 32, at Art. XXII, § 13(i).

[79] Marcus Woo, *Artificial Intelligence in NBA Basketball*, INSIDE SCI. (Dec. 21, 2018), https://www.insidescience.org/news/artificial-intelligence-nba-basketball.

[80] *See, e.g.*, *Vegas Sports Fans Celebrate New Offerings with STN Sports*, STN BLOG (Feb. 1, 2021), https://www.stationcasinosblog.com/2021/02/vegas-sports-fans-celebrate-new-offerings-with-stn-sports/ (a sportsbook promoted its 300-plus prop bets for Super Bowl LV, including "cross-sport" props, such as the number of points LeBron James scores in a game versus Patrick Mahomes's total completions).

[81] *See* Response Brief of Plaintiffs-Appellees at 17, *NCAA v. Governor of N.J.*, 730 F.3d 208, No. 137-1713 (3d Cir. 2014).

can collect some event data and performance data by sending a data scout to a sporting event, it is impossible to gather refined data in that manner.

Even if outsiders were given extensive access to the players, teams, and facilities, they could not track most of this information with the naked eye, let alone collect all this data with the speed and accuracy required to settle wagers. There is simply no league alternative to the collection of this data, so sportsbooks necessarily piggyback off league data to generate betting lines and settle wagers without compensating them. The leagues argue that this practice violates the Copyright Act and sportsbooks must compensate them for such usage.[82]

Leagues hope to receive this compensation through an official data mandate that would require sportsbooks to settle all wagers using only official league data.[83] Not only is official data faster, more accurate, and more reliable, but the alternative—unofficial data—threatens the integrity of sports by creating inconsistencies throughout the industry in terms of when bets are graded and what numbers are used to grade them.[84] One proponent of official data likened unofficial data to "pirated DVDs and sidewalk hustlers and illicit streaming sites."[85] This data mandate could materialize as a requirement for sportsbooks and leagues to reach agreements that enhance in-game betting products. While this type of arrangement exists and is becoming more popular across leagues—including the American Cornhole League, which partnered with sports betting operator DraftKings[86]—they are not required by law.[87]

Armed with the understanding that refined data is valuable and can be monetized, the National Football League ("NFL") included data rights in its latest collective bargaining agreement, providing that the league and players will split revenues from gambling, gambling-related sponsorships, and player data.[88] But while leagues and players have acknowledged the value in their official data,

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[82] Feld, *supra* note 10, at 369.

[83] *Official League Data*, *supra* note 41.

[84] Feld, *supra* note 10, at 371.

[85] James Glanz & Agustin Armendariz, *When Sports Betting Is Legal, the Value of Game Data Soars*, N.Y. TIMES, (July 2, 2018), https://www.nytimes.com/2018/07/02/sports/sports-betting.html.

[86] Conor Mulheir, *DraftKings Becomes Official Partner of American Cornhole League*, IGB N. AM. (Mar. 19, 2021), https://www.igbnorthamerica.com/draftkings-becomes-official-partner-of-american-cornhole-league/.

[87] *See, e.g.*, Sam Carp, *MLB Adds FanDuel as Third Sports Betting Partner*, SPORTSPRO MEDIA (Aug. 16, 2019), https://www.sportspromedia.com/news/mlb-fanduel-sports-betting-sponsorship (MLB announced its sports betting partnership with FanDuel, joining MGM Resorts International and DraftKings); Press Release, NHL Pub. Rel., NHL Reaches Sports Betting Partnership with PointsBet (Feb. 9, 2021), https://www.nhl.com/news/pointsbet-becomes-official-sports-betting-partner/c-321234558.

[88] NFL COLLECTIVE BARGAINING AGREEMENT, Art. XII, § 1 (2020), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf.

most sportsbooks are not obligated to use any specific source of data. Only Illinois, Tennessee, and Michigan require operators to use official data to settle in-play wagers.[89] Prior cases suggest that the leagues face an uphill battle in justifying a legal basis to charge sportsbooks to use their data.[90]

E. Counterarguments

There is a slew of arguments against league efforts to profit from sports betting. Many professionals in the gaming industry argued that a 1% integrity fee is unreasonably high, and even when the NBA lowered its asking price to 0.25%, critics still balked because they believe that the purported reason for implementing this fee is disingenuous.[91] They argued that the leagues do not need to charge sportsbooks any fee to maintain integrity of the sport because the leagues already have mechanisms in place to monitor and protect gambling activity.[92] How else could Nevada maintain sports wagering for decades without an integrity fee or official data mandate?

Robert Walker, the Director of Operations for USBookmaking, expressed utter disgust in the "hypocrisy" of leagues, which were vehemently against sports betting (even where it has been lawful) until the *Murphy* decision and have since changed their tune to capitalize on the attendant new revenue streams.[93] The bookmaker suggested that the leagues are greedy and only care about making money, and that he would sooner throw a dart and make up his own odds than pay the leagues even one cent.[94] His resentment is understandable, but people (and entities) change with the times and circumstances.

Opponents also argue that restrictions, such as the proposed official data mandate, will only make it more difficult for legal U.S. sportsbooks to compete with offshore sportsbooks, which are not bound by the same restrictions and can

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[89] John Holden, *What Exactly Is 'Commercially Reasonable' Pricing for Official League Data?*, LEGAL SPORTS REP. (Jan. 14, 2020), https://www.legalsportsreport.com/36742/commercially-reasonable-official-league-data-sports-betting/. *See also* Jill R. Dorson, *Maryland Regulator Approves Draft Sports Betting Rules That Raise Some Questions*, SPORTS HANDLE (July 15, 2021), https://sportshandle.com/maryland-draft-rules-revealed/ (Maryland approved a draft of proposed sports betting rules that mandate the use of official league data to settle bets on the outcome of games, which is broader than the others states' official-data requirement for only in-play wagers).

[90] John Holden, *Can Leagues Own Data Rights When it Comes to US Sports Betting?*, LEGAL SPORTS REP. (May 29, 2018), https://www.legalsportsreport.com/20745/leagues-and-fees-in-sports-betting/.

[91] Bonesteel, *supra* note 15.

[92] *Id.*

[93] Interview by Anthony Cabot with Robert Walker, *supra* note 14.

[94] *Id.*

therefore offer more value to bettors.[95] An official data mandate could prove costly for sportsbooks (especially small ones) and consumers, who may consequently seek offshore options.[96]

Another common point of contention is that allowing leagues to own their data prevents competitors from gathering and selling data, likely raising costs for the competitors and potentially creating a monopoly in violation of antitrust laws.[97] This argument is addressed *infra* Part V.C.

Additionally, opponents argue that restraints on data collection could run afoul of the First Amendment.[98] This is because "factual data concerning the athletic performance . . . command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection."[99] This argument is addressed *infra* Part V.D.

Opponents also argue that they do not need to pay leagues for sports data because the leagues do not own it. Underlying games are not copyrightable because they are not original works of authorship,[100] nor are the accompanying raw statistics because they constitute facts in the public domain.[101] This argument is addressed *infra* Part IV.B.

Finally, opponents argue that leagues do not need additional funding because they already profit from sports betting. Fans who can bet on a sporting event pay closer attention to the action and generally watch about twice as much sports as non-bettors.[102] The NBA Commissioner himself said he is banking on

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[95] Eric Ramsey, *'Data Monopoly' Key to Leagues' Desired Control over US Sports Betting*, LEGAL SPORTS REP. (Mar. 22, 2018), https://www.legalsportsreport.com/19047/data-monopoly-key-to-leagues-controlling-sports-betting/.

[96] *See Official League Data*, *supra* note 41 ("While distributors are not currently changing pricing based on mandates, some privately suggest they could reevaluate that position if legal requirements become more widespread."); Patel, *supra* note 17 ("Integrity fees could also impact the consumer in that, in order to cover increased business costs and reduced tax revenue, bettors may be taxed on any winnings. This could mean they [favor] unregulated offshore gambling sites over legal [] sports betting sites.").

[97] *See* Glanz & Armendariz, *supra* note 85 (William Hill executive Joe Asher said that a legislative mandate for official data "sets up monopoly pricing power"); Jacob Gershman, *The Brave New World of Betting on Athletes' Data*, WALL STREET J. (Mar. 10, 2020, 10:02 AM), https://www.wsj.com/articles/the-brave-new-world-of-betting-on-athletes-data-11583848891.

[98] Gershman, *supra* note 97.

[99] C.B.C. Distribut. & Mktg., Inc. v. MLB Advanced Media, L.P., 505 F.3d 818, 823–24 (8th Cir. 2007) (quoting Gionfriddo v. MLB, 114 Cal. Rptr. 2d 307 (2001)).

[100] NBA v. Motorola, Inc., 105 F.3d 841, 846–47 (2d Cir. 1997).

[101] *C.B.C. Distribution & Mktg.*, 505 F.3d at 823.

[102] Kevin Draper, *How Betting Will Change the Sports Media Business*, N.Y. TIMES (May 15, 2018), https://www.nytimes.com/2018/05/15/sports/sports-betting.html.

sports betting to lead to increased fan engagement.[103] In fact, Silver said that the main upside to partnering with sportsbooks is the additional fan engagement, rather than the revenue from selling data.[104] However, just because the NBA already rakes in heaps of money does not mean that it should be foreclosed from earning more when it is entitled to do so.

IV. SPORTS DATA OWNERSHIP UNDER COPYRIGHT LAW

In support of PASPA's enactment, Stern said in 1991, "[c]onducting 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."[105] Even though PASPA is no longer in effect, leagues seek the same legislative protection that the Act had afforded them.

The NBA currently owns the rights to the broadcasts of their games,[106] but these rights do not protect the underlying games nor the statistics produced as part of the game. The current state of the law regarding sports data ownership is uncertain and does not prevent unlicensed sportsbooks from using sports data.[107] The NBA argues that sports leagues are entitled to a propriety right in the refined data that they invest in, and they should therefore be allowed to sell these assets to sportsbooks.

As discussed below, the case law rules out ownership of data that can be observed and collected from simply attending a game or watching a broadcast, but it does not yet address refined data that requires substantial investment in

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[103] Mason Levinson & Scott Soshnick, *NBA's Silver Says Legal Sports Gambling in U.S. Is Inevitable*, BLOOMBERG (Sept. 4, 2014, 11:06 AM), http://www.bloomberg.com/news/articles/2014-09-04/nba-s-silver-says-legal-sports-gambling-in-u-s-is-inevitable.

[104] Online Meeting, Duke Sports and Entertainment Law Symposium: A Conversation with NBA Comm'r Adam Silver (Apr. 12, 2021, 9:30 AM).

[105] *Prohibiting State-Sanctioned Sports Gambling: Hearing on S. 473 and S. 474 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 102nd Cong. 51 (1991) (statement of David Stern, Comm'r, NBA).

[106] *See* 17 U.S.C. § 101 (Congress expressly affords copyright protection to simultaneously recorded broadcasts of live performances, including sports events). *See also* Baltimore Orioles, Inc. v. MLB Players Ass'n, 805 F.2d 663, 669 (7th Cir. 1986) (concluding baseball telecasts are copyrightable works under the Copyright Act of 1976). *See also* Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490, 493–94 (W.D. Pa. 1938) (holding "the right, title and interest in and to the baseball games played within the parks of members of the National League . . . is vested exclusively in such members" who invested heavily in creating them).

[107] Christian Frodl, *Commercialization of Sports Data: Rights of Event Owners over Information and Statistics Generated About Their Sports Events*, 26 MARQ. SPORTS L. REV. 55, 56 (2015).

new technology—such as player-tracking—by leagues and teams.[108] Consequently, the case law does not currently favor league ownership. In this section, I will provide an overview of the Copyright Act and relevant case law, as well as an explanation of why these cases can be distinguished from the matter at hand.

A. Copyright Act of 1976

Article I, Section 8, Clause 8 of the U.S. Constitution grants Congress the power "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."[109] In drafting the Copyright Act of 1976, Congress considered the significant technological advances—including television, motion pictures, sound recordings, and radio—that occurred since the Act's predecessor was enacted in 1909.[110] Congress anticipated new methods for reproducing and disseminating copyrighted works, as well as evolving dynamics between authors and users.[111] The updated Act seeks to foster the creation and dissemination of intellectual works for the public good and to reward creators for their contributions to society.[112] Both of these purposes can be read to support the ownership of data that sports leagues create and share with the public. But the inquiry is more complicated than that, with courts considering many other factors.

B. Case Law

i. Feist Publications

In the 1991 case *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, the United States Supreme Court examined whether a phonebook arranged alphabetically was sufficiently original to warrant copyright protection.[113] The Court concluded that while an alphabetical phonebook is a specific selection and arrangement of facts, it was not creative enough to be considered an original work and thus was not copyrightable.[114] This is because "copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity" and facts "are not original and therefore may not be copyrighted."[115]

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[108] Feld, *supra* note 10, at 368.
[109] U.S. CONST. art. I, § 8, cl. 8.
[110] H.R. Rep. No. 94-1476, at 47 (1976).
[111] *Id.*
[112] *General Guide to the Copyright Act of 1976*, U.S. COPYRIGHT OFFICE 1:1 (1977), https://www.copyright.gov/reports/guide-to-copyright.pdf.
[113] Feist Publ'ns. Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 342 (1991).
[114] *Id.* at 364.
[115] *Id*. at 350–63.

Although facts alone are not copyrightable, the *Feist* Court explained that a work may qualify as a copyrightable compilation when it comprises of: "(1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an 'original' work of authorship."[116]

While the *Feist* decision appears on its face devastating for sports leagues seeking ownership of statistics, all hope is not lost. The *Feist* Court implied that raw sports statistics and data in general (such as game times, team records, and scores) are not copyrightable as facts. Anything that a person can glean from observing a game is essentially available to the public and fair game for anyone to use. For example, by simply watching the December 5, 2016, matchup between the Golden State Warriors and the Indiana Pacers, a journalist, oddsmaker, or any other person could see that Klay Thompson was having a hot shooting night. If you were keeping score (either by a mental tally or by glancing at the box score) you would know Thompson scored sixty points. Under *Feist*, that data is not copyrightable because it is a fact, therefore media outlets, sportsbooks, and anyone else may freely use it.

However, it is the NBA's position that but not for its heavy investment of effort, time, and money to "construct the best statistical system for the NBA in the world,"[117] such statistics and data would not be available. For example, due to the NBA's investment in Second Spectrum's services,[118] the league was able to generate the following statistics: Thompson scored those sixty points in twenty-nine minutes despite touching the ball only forty-six times and dribbling the ball just eleven times over the whole game.[119] He had the ball in his hands for a total of 88.4 seconds, averaging 1.73 seconds per touch, and only 1 of his 21 field goals was unassisted.[120] Advanced statistics like these may give rise to new opportunities for "microbets," which are wagers placed on outcomes within an event (such as the next foul or the next point) that are determined almost immediately.[121]

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[116] *Feist*, 499 U.S. at 357. *See also* 17 U.S.C. § 101 (defining a "compilation" as a "work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.").

[117] *See* Glanz & Armendariz, *supra* note 85.

[118] Darren Heitner, *The NBA's Six Year, $250 Million Data Deal*, FORBES (Sept. 22, 2016, 2:05 PM), https://www.forbes.com/sites/darrenheitner/2016/09/22/the-nbas-six-year-250-million-data-deal/?sh=1310eaf8481d.

[119] Jeff Eisenband, *5 Crazy Stats from Klay Thompson's 60-Point Game*, THEPOSTGAME (Dec. 6, 2016), www.thepostgame.com/crazy-stats-klay-thompson-60-point-game.

[120] *Id.*

[121] Alex M. T. Russell et al., *Who Bets on Micro Events (Microbets) in Sports?*, 35 J. GAMBLING STUD. 205, 206 (2019).

The *Feist* holding also suggests that the NBA could be entitled to a propriety right in a compilation that is creative enough to be considered an original work. This compilation requires more creativity than merely listing points per game from highest to lowest, or some other statistical category arranged in an intuitive or otherwise obvious order.

ii. Kregos v. Associated Press

In *Kregos v. Associated Press*, the Court of Appeals for the Second Circuit considered the extent to which copyright law protects a person who compiles information, to determine whether the creator of a baseball-pitching form is entitled to a copyright.[122] The plaintiff's pitching form presented a compilation of facts, specifically nine items of information concerning a pitcher's performance, from a universe in which the "known facts available . . . is considerably greater than nine."[123] Citing *Feist*, the court noted that the "originality" standard for compilations of facts is narrowed by the requirement of "some minimal level of creativity."[124] Given that there are "thousands of combinations of data that a selector can choose to include in a pitching form" and the plaintiff chose specific ones that he believed held predictive power, the majority ruled that the plaintiff was entitled to a trial on his copyright claim, but the available relief "may be extremely limited."[125]

Under *Kregos*, a compilation of statistics can receive limited copyright protection if the selection is creative enough, meaning not "entirely typical," "garden-variety," or "obvious."[126] The leagues could argue that a collection of refined statistics is not obvious in the selection, like the plaintiff's pitching forms in *Kregos*. For instance, the NBA could argue that using Second Spectrum's technology, the league generates a vast amount of information and selects only a relatively small portion of it to provide to sportsbooks, which is akin to Kregos picking just nine statistical categories out of the many more in existence.

Judge Robert W. Sweet, who concurred in part and dissented in part in *Kregos*, argued that the plaintiff's creation was not sufficiently creative to be a compilation under *Feist* because "the format and the arrangement of data existed prior to [the plaintiff's] choice of particular items to report."[127] The majority noted that the prior existence of publicly available data is not only non-dispositive, but also irrelevant in finding a copyrightable compilation.[128] This argument would not even arise in the matter at hand, though, because the format and arrangement of certain refined data would not exist until the leagues publish it.

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[122] Kregos v. Associated Press, 937 F.2d 700, 701 (2d Cir. 1991).
[123] *Id.* at 704.
[124] *Id.* at 703 (citing *Feist*, 499 U.S. at 358).
[125] *Id.* at 702–07.
[126] *Id.* at 705 (citing *Feist*, 499 U.S. 340).
[127] *Id.* at 711 (Sweet, J., concurring in part, dissenting in part).
[128] *Id.* at 705.

In a Massachusetts case from 1942, a trial court ruled that there may be a separate copyright for data that "could not be observed and recorded by one person but which require the combined skill, judgment, and effort of several highly trained persons working in unison."[129] Similarly, a trial court in Illinois ruled in 1989 that a particular selection and arrangement of horseracing data constituted a copyrightable compilation, because there is an abundance of data and many ways to select and arrange it.[130]

Thus, the league could likely receive copyright protection in a compilation of certain refined data. However, as the *Kregos* majority notes, that protection would extend only to the selection and creative arrangement of statistics.[131] Such fate would almost certainly apply here because sports data is typically arranged in an intuitive and logical manner. For example, words are arranged alphabetically, dates are arranged by most or least recent, and numbers are arranged from highest to lowest, or vice versa. Hence, even if the NBA succeeds in arguing its compilation of statistics was selected or arranged in a manner sufficiently creative to earn a copyright, that copyright would protect the format only to the extent that it is creative, but the protection would not reach the statistics within the database.

iii. NBA v. Motorola

In *National Basketball Association v. Motorola, Inc*., Motorola and STATS appealed from a permanent injunction enjoining Motorola from selling a handheld pager called SportsTrax, which displayed scores and other information concerning live NBA games without the league's consent.[132] The Court of Appeals for the Second Circuit declared that the NBA does not own the underlying basketball games because they do not constitute "original works of authorship" and are thus foreclosed from copyright protection, whereas simultaneously recorded broadcasts of games are copyrightable.[133] The court determined that Motorola did not infringe the NBA's copyright because Motorola reproduced "only facts from the broadcasts, not the expression or description of the game that constitutes the broadcast."[134]

This holding is distinguishable because *Motorola* dealt with raw factual sports data that can be collected from observing an event, such as scores, rather than refined data that cannot be accurately collected from mere observation.

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[129] Triangle Publications v. New England Newspaper Pub. Co., 46 F. Supp. 198, 201 (D. Mass. 1942).
[130] Wabash Pub. Co. v. Flanagan, No. 89 C 1923, 1989 WL 32939, at *2 (N.D. Ill. Apr. 3, 1989).
[131] *Kregos*, 937 F.2d at 709.
[132] NBA v. Motorola, Inc., 105 F.3d 841, 843 (2d Cir. 1997).
[133] *Id.* at 846–47.
[134] *Id.* at 847.

V. OTHER LEGAL DOCTRINES SUPPORT LEAGUE OWNERSHIP OF REFINED DATA

While copyright law may offer some limited protection to sports leagues for their refined data, there are other legal doctrines both in the United States and abroad that support league ownership of such data.

A. Foreign Case Law: Sui Generis Right

The European Union's Database Directive protects sports data that leagues go out of their way to collect.[135] To qualify for *sui generis* protection, a league must make investments specific to gathering data and separate from organizing events.[136] A league can succeed on an infringement claim by proving that a third party obtained sports data by extracting it from the league's database without permission, rather than by independently collecting it through watching the game or broadcast.[137]

In the 2012 United Kingdom case *Football Dataco Ltd. v. Sportradar*, Football Dataco contracted with Scottish and English soccer leagues to create and distribute live match-day data. Sportradar provided online match results and statistics, which Football Dataco claimed was extracted using its proprietary database and therefore constituted infringement.[138] The European Court of Justice ("ECJ") acknowledged that Football Dataco possessed a *sui generis* right in its databases due to its substantial investment.[139] The owner of a *sui generis* database right, typically the event or competition organizer that substantially invests in the official data feed, can prevent "extraction" and "re-utilisation" of the data.[140]

In the sports betting context, the *Sportradar* ruling suggests that the European Union rewards leagues that substantially invest in producing, verifying, and disseminating data with an intellectual property right in those databases. However, the United States is obviously not a member of the European Union, and is therefore not bound by the ECJ's decision.[141] The United States does not grant copyright protection to uncreative collections of facts.

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135 Frodl, *supra* note 107, at 82.

136 *Id.* at 78.

137 *Id.* at 82.

138 Case C-173/11, Football Dataco Ltd. v. Sportradar GmbH, 2012 E.C.R. 1, ¶¶ 8–11, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0173&from=EN.

139 *Id.* at ¶ 19.

140 *Id*. at ¶ 4.

141 Mark Walsh, *Justice Breyer Says Looking to International Law Can Help the Court Evaluate US Case*, ABA J. (Apr. 15, 2021, 9:13 AM), https://www.abajournal.com/news/article/breyer-says-looking-to-international-law-can-help-the-court-evaluate-us-cases.

Furthermore, the First Amendment to the U.S. Constitution blocks leagues from monetizing data already in the public domain.

Accordingly, U.S. sports leagues have no *sui generis* right to real-time data. At best, they may be able to lobby for *sui generis*-like protection to reward them for their investments specific to gathering data, but that right likely could not withstand the First Amendment and the Copyright Act's fair-use exception for works in the public domain. This right would thus protect data only prior to mass publication.

B. Misappropriation Doctrine in Unfair Competition

i. Int'l News Serv. v. Associated Press

In *International News Service v. Associated Press*, the Supreme Court in 1918 considered whether a news gathering service ("INS") may lawfully be restrained from appropriating news taken from a competitor's ("AP") bulletins or newspapers for the purpose of selling to clients.[142] Considering the issue of unfair competition, the Court noted that when a news service acquires news fairly and at substantial cost, a competitor cannot justify misappropriating the news for profit and to the disadvantage of complainant by dismissing it as "too fugitive or evanescent to be regarded as property."[143] The Court held INS liable for unfair competition because it interfered with AP's quasi-property right in selling its gathered news when both parties sought to profit off the news at the same time and in the same field, irrespective of the fact that it included uncopyrighted news matter that the public can access upon publication.[144] The Court reasoned that news organizations must be rewarded for the "large expenditure of money, skill, and effort" involved in providing reliable and thorough news gathering and distribution.[145]

The Court clarified that the ruling does not give AP an absolute right to monopolize the collection, dissemination, or even reproduction of news but merely "postpones participation" of competitors in news they have not gathered to the extent necessary to prevent them from reaping the fruits of AP's efforts and expenditures.[146] This holding is consistent with the Supreme Court's explanation in *Feist* that while copyright law only protects original material, "[p]rotection for the fruits of [factual] research . . . may in certain circumstances be available under a theory of unfair competition."[147]

Just as in *INS* where a newspaper's competitor was required to compensate the original publisher for articles it republished, American sportsbooks need to compensate leagues to use their real-time official data. If the

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[142] Int'l News Serv. v. Associated Press, 248 U.S. 215, 232 (1918).
[143] *Id.* at 240.
[144] *Id.* at 236.
[145] *Id.* at 238.
[146] *Id.* at 241.
[147] Feist Publ'ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 354 (1991).

sportsbooks (and their customers) are fine with some delay, then they can wait for the "hot news" effect to wear off and for the data to reach the public domain for competitors and non-competitors alike. However, it is unclear from this case *when* exactly the "hot news" effect wears off.

ii. NBA v. Motorola

In *NBA v. Motorola, Inc*., the Second Circuit considered the extent to which a state law "hot news" misappropriation claim based on *INS* survives preemption by the Copyright Act of 1976, and whether the NBA's claim fits within the surviving *INS*-type claims.[148]

The court ruled that a narrow "hot news" exception survives preemption, and such claims are limited to cases where:

> (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 freeriding 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 freeride 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.[149]

The Second Circuit noted that some of the elements of a "hot news" *INS* claim were met, including time-sensitivity and direct competition, because the league rolled out a service like SportsTrax that sent official play-by-play game sheets and box scores to pagers. However, the court concluded there were "critical elements missing" in the NBA's hot-news claim, including a lack of competition between the parties in producing basketball games for live attendance and licensing copyrighted broadcasts.

The court also concluded that SportsTrax did not freeride on the NBA's collection and transmission of game data because Motorola expended its own resources to collect information to transmit to the pagers and did not damage the NBA's product.[150] Accordingly, the court concluded SportsTrax did not meet the test and Motorola's transmission of "real-time" NBA game scores and information tabulated from broadcasts of games in progress did not constitute a misappropriation of "hot news" that the NBA owns.[151]

The main hurdle that *Motorola* presents here is the lack of direct competition resulting from sportsbooks' dissimilar and transformative use of

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[148] NBA v. Motorola, Inc., 105 F.3d 841, 843 (2d Cir. 1997).
[149] *Id.* at 845.
[150] *Id.* at 853–54.
[151] *Id.* at 853.

sports data. Traditionally, the NBA engaged in the business of producing, marketing, and broadcasting live games, while sportsbooks engaged in the business of setting the lines, marketing them, and managing them.[152] The NBA cannot prevail on a tort claim for misappropriation and prevent a sportsbook from collecting and commercially distributing NBA game data unless the league runs its own sportsbook and competing sportsbooks freeride off its data.

Freeriding is likely in the case of most refined data, which sportsbooks typically cannot collect independently from a league without its permission and access. The NBA and its teams could create sportsbooks in their arenas to place them in direct competition with sportsbooks and capitalize on the above holdings.[153] However, if a court grants the *Motorola* exception to the NBA, the league could force all sportsbooks to pay to use its official data, raising antitrust concerns.

C. Antitrust: Morris v. PGA Tour

In *Morris Commc'ns Corp. v. PGA Tour*, a media company ("Morris") brought an antitrust action and alleged that the PGA Tour monopolized "real-time" golf scores in violation of section 2 of the Sherman Act.[154] The PGA Tour developed the Real-Time Scoring System ("RTSS"), which monitored all the players and transmitted real-time scoring data to the PGA Tour's website and electronic leaderboards throughout the golf course using state-of-the-art technology.[155] Given the nature of the tournament, it was impossible for any person to simultaneously gather golf scores for all players, so RTSS was the only source of this information.[156] The PGA Tour made this data initially available only through its media center and required reporters to delay publishing scores until the PGA Tour posted them on its website.[157]

Morris sold the real-time golf scores it acquired through RTSS, and the Court of Appeals for the Eleventh Circuit concluded that Morris did not have a right to make the sale because those golf scores were a derivative product of RTSS, which the PGA Tour exclusively owned.[158] Accordingly, the court ruled on narrow antitrust grounds that the PGA Tour met its business-justification burden because it showed that it sought to prevent Morris from freeriding on the RTSS technology.[159] The court also ruled that the PGA Tour can sell or license

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[152] *Id. See also* Josh Appelbaum, *Sports Betting 101: Sportsbooks, Oddsmakers and Setting the Line*, VSIN (Mar. 19, 2020, 12:44 AM), https://www.vsin.com/sports-betting-101-sportsbooks-oddsmakers-and-setting-the-line/.

[153] *See* discussion *infra* Part VI.B.

[154] Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1290 (11th Cir. 2004).

[155] *Id.*

[156] *Id.* at 1291.

[157] *Id.*

[158] *Id.* at 1296.

[159] *Id.* at 1298.

both its primary product (championship golf) and its derivative product (compiled golf scores) the same way it sells rights to television broadcasting stations.[160]

Morris supports the proposition that leagues should be allowed to restrict access to their events and the resulting data. The court reasoned that because the PGA Tour is a private event held on private property and the PGA Tour compiled data using technology created at its own expense, the PGA Tour possessed a property interest in the RTSS-compiled scores. Therefore, the PGA Tour possessed a right to exclude third parties from accessing the data and to sell the data under a licensing system. The court justified this monopoly because the PGA Tour had a valid business purpose in protecting its product and could thus prohibit competitors from freeriding.

Just as the PGA Tour can license its data to third parties under specific conditions, such as delayed publication, other leagues can withhold access to the data they pay to generate. But once that data is broadcasted, it enters the public domain where it is freely available, and the leagues lose the right to restrict access. Accordingly, a league can license the refined data that it pays to create and earn compensation for that data up until the moment that it enters the public domain.

The main problem that leagues will likely face is that licensees will immediately publish the data they purchase from them, so there is little incentive for most sportsbooks to obtain a license when they can simply freeride off data that a licensed counterpart quickly shares or data that enters the public domain by any other means (for example, through publication or broadcast via a licensed media organization). The leagues will not be able to collect a licensing fee from all sportsbooks, only those that want the data as fast as possible and are willing to pay more for it. The leagues will be hard-pressed to collect compensation from any sportsbook willing to wait.

Although fast data has been described in betting as "the difference between having value and having no value at all,"[161] many sportsbooks simply cannot afford the premium option. Most sportsbooks lack the financial wherewithal to physically monitor dozens of contests at once, so they often use automated data solutions for in-play betting odds.[162] It is likely that the same sportsbooks employing automated data solutions will piggyback off data shared by league licensees or otherwise pooled, as this method is highly cost-effective. Providers of those data solutions are more likely to obtain a license and pass on the benefits to their users for less than it would cost each sportsbook to obtain a license and individually monitor all the outcomes.

This issue raises several questions. Chief among them is: will bettors flock to sportsbooks with league licenses that are more reliable and can settle

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[160] *Id.* at 1296.

[161] *See* Glanz & Armendariz, *supra* note 85.

[162] Matt Rybaltowski, *Here's How Much 'Official' League Data Actually Costs*, SPORTS HANDLE (Mar. 12, 2019), https://sportshandle.com/sports-betting-official-data-cost/.

wagers more quickly? This result is possible, especially for bettors seeking friction-free in-game action, which accounts for an estimated seventy percent of most global sports betting handle/turnover.[163] However, it is also possible some nefarious bettors will take advantage of latency by resorting to past-posting, which refers to placing bets after the outcome is all but decided but before the sportsbook processes and grades the bets.[164] This practice constitutes cheating and is illegal.[165] In the context of sports wagering today, past-posting is more of problem for in-game bets than straight bets on a game result.

Another issue that may arise from data licensing is that sportsbooks may offer less competitive pricing to offset the costs of obtaining a license with a league. The higher costs may deter bettors, especially if the difference in wait times for settling wagers between sportsbooks with and without a league license is negligible. The added cost may also push bettors to offshore sportsbooks, which are known for offering more competitive pricing.[166]

D. First Amendment: C.B.C. v. MLB

In *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, the Court of Appeals for the Eighth Circuit found that MLB players offered sufficient evidence to support a right of publicity violation under Missouri law based on CBC's use of their names and statistics in fantasy games.[167] Nevertheless, the court ruled that CBC's First Amendment right to offer fantasy baseball products superseded the players' rights of publicity.[168] The court explained that CBC's use of baseball statistics for online fantasy gaming constitutes speech that entertains, which the First Amendment protects.[169]

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[163] STATS PERFORM, FIVE WAYS SPORTSBOOKS USE CONTENT TO MAKE BETTING MORE ENTERTAINING 6, https://o7dkx1gd2bwwexip1qwjpplu-wpengine.netdna-ssl.com/wp-content/uploads/2020/02/Five-Ways-Sportsbooks-Use-Content-Guide.pdf (last visited Nov. 17, 2021).

[164] ANTHONY CABOT & KEITH MILLER, SPORTS WAGERING IN AMERICA: POLICIES, ECONOMICS AND REGULATION 198–99 (2018).

[165] *See* United States v. Ruthstein, 414 F.2d 1079, 1084 (7th Cir. 1969) (past-posting is illegal under 18 U.S.C. § 1084). There are also state statutes prohibiting this practice. *See, e.g.*, Nev. Rev. Stat. § 465.070(5) (it is unlawful "to place or increase a bet after acquiring knowledge of the outcome of the game or other event which is the subject of the bet, including past-posting and pressing bets.").

[166] *See, e.g.*, Mike Seely, *Leaving Las Vegas, or Not: Sin City Still King for Some Post-PASPA*, US BETS (July 6, 2021), https://www.usbets.com/leaving-las-vegas-paspa-mobile/ (a professional bettor said that he bets "less than 1%" of his money domestically, adding, "[e]very professional gambler out there relies on the offshore market. There's no such thing as a professional sports bettor that is solely relying on the domestic market.").

[167] C.B.C. Distribut. & Mktg., Inc. v. MLB Advanced Media, L.P., 505 F.3d 818, 823 (8th Cir. 2007).

[168] *Id.* at 824.

[169] *Id*. at 823.

Baseball is a national pastime that commands a "substantial public interest" and fans gain more appreciation for player performances when they are aware of records and statistics.[170] Furthermore, because the information was "readily available in the public domain," denying CBC access would infringe its First Amendment right.[171]

The *CBC* holding is considered a defeat for leagues. Sportsbooks will try to analogize fantasy sports to sports betting and cite to *CBC* as evidence that there is a constitutionally protected right in some of the information necessary to operate their businesses. Sportsbooks will argue that they need to use game and player data to settle wagers, just as fantasy sports operators need that information for their contests. However, such First Amendment rights may be limited by the proprietary rights of sports leagues in certain technology and refined data. Leagues may be able to exclude others from using their data before it enters the public domain.

MLB loses any potential proprietary rights to game and player statistics as soon as they are published or displayed on its mobile app, in television broadcasts, and in ballparks. But the league could retain proprietary rights in refined data that it generates (for example, from sensors in the equipment or from player wearables) based on its financial investment in compiling such data and to the extent that it has not yet entered the public domain. MLB would likely be able to exclude others from using that data and charge a fee to access it before the league or a third-party licensee releases the data to the public.

VI. OPTIONS FOR THE NBA

Based on the foregoing, the NBA can try to monetize its data in the growing legal betting sector by: (1) selling official data through partnerships with sportsbooks, (2) opening its own sportsbooks, (3) restricting and delaying access, and (4) gaining recognition of a proprietary right in its refined data.

A. License Data to Sportsbooks

The NBA could continue to sell official data to sportsbooks through non-exclusive licensing schemes. While the NBA was at the forefront of this movement, these agreements are becoming increasingly common and lucrative for leagues and teams, with parties negotiating various assets in addition to data access.[172]

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[170] *Id.* at 823–24 (quoting Gionfriddo v. MLB, 114 Cal. Rptr. 2d 307 (2001)).

[171] *Id*. at 823.

[172] *See supra* Part II.B.; Eben Novy-Williams & Scott Soshnick, *Genius Sports Buys Ballmer-Backed Second Spectrum for $200 Million*, SPORTICO (May 6, 2021, 4:30 PM), https://www.sportico.com/business/sales/2021/genius-sports-second-spectrum-1234629072/ ("As data becomes increasingly important to power sportsbooks and live broadcasts, providers like Genius Sports are in an arms race to

For example, the NHL signed a ten-year deal to make Sportradar the league's official data host, which includes the right to distribute real-time data from the NHL's new Puck and Player Tracking technology.[173] The NHL also partnered with casino operator Bally's Corporation in a sports betting deal that brought Bally's sports wagering information and products into the television broadcasts of NHL games.[174] Research shows that the betting industry invested almost $400 million in sponsorships in U.S. sports since PASPA was repealed.[175]

The NBA can add value to these agreements in two ways: by capitalizing on the facts that (1) in-game betting requires the fastest data available; and (2) the league is in a unique position to create prop-betting opportunities. The NBA could bring data analytics in-house to develop its own betting-odds algorithms which, when used with its real-time official data, could cut out the intermediaries—analytics companies—so that sportsbooks would need to pay them directly for these odds.[176] Additionally, the league could create new prop-betting opportunities using player-tracking devices to collect data, such as how fast players move, how far they travel, and how high they jump.[177]

Sportsbooks must then decide whether to pay for official data or forgo it, the latter of which may force some patrons to seek sportsbooks with fewer

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acquire faster, more reliable, proprietary feeds."); *Official League Data*, *supra* note 41 (noting that sportsbooks such as DraftKings, FanDuel, and MGM each have official-data partnerships with multiple professional sports leagues); Michael McCarthy, *Sports Betting Operators Could Spend $1B In Football Ads*, FRONT OFFICE SPORTS (Sept. 8, 2021), https://frontofficesports.com/sports-betting-operators-could-spend-1b-in-football-ads/ (sports betting operators "could spend up to $1 billion on football advertising this season"). *See, e.g.*, *NCAA Launches Transformative Statistics Initiative*, NCAA (May 13, 2018), http://www.ncaa.org/about/resources/media-center/news/ncaa-launches-transformative-statistics-initiative (the NCAA named Genius Sports as the exclusive agent in licensing real-time official data from the NCAA championship series to media platforms and other companies); Eben Novy-Williams & Scott Soshnick, *NFL, Genius Sports Strike Data Deal That Includes Equity Stake*, YAHOO SPORTS (Apr. 1, 2021, 1:15 PM), https://sports.yahoo.com/nfl-genius-sports-strike-data-201540433.html (the NFL awarded Genius Sports with exclusive rights to distribute official data to sportsbooks in the United States and around the world).

[173] Press Release, NHL, NHL, Sportradar Agree to 10-Year Deal (June 29, 2021), https://www.nhl.com/news/nhl-sportradar-10-year-partnership/c-325502590.

[174] Howard Stutz, *Sports Betting Deal Between Bally's and the NHL Could Include Content on Televised Games*, CDC GAMING REP. (Feb. 18, 2021, 4:06 PM), https://www.cdcgamingreports.com/sports-betting-deal-between-ballys-and-the-nhl-could-include-content-on-televised-games/.

[175] Daniel O'Boyle, *Betting Sponsorships Worth $396.6M to US Sport, Research Claims*, IGB N. AM. (Feb. 3, 2021), https://www.igbnorthamerica.com/betting-sponsorships-worth-396-6m-to-us-sport-research-claims/.

[176] Kovach, *supra* note 12, at 129.

[177] *Id.* at 130.

limitations. Sportsbooks that refuse to work directly with leagues or with a licensed data analytics company will be less competitive compared to their competitors that can tout themselves as league partners and offer in-game betting, unique prop bets, and the most accurate real-time official league data.

While serving as the William Hill US CEO, Joe Asher explained the company's reasoning for partnering with certain teams. The sportsbook operator struck a deal with the Las Vegas Golden Knights because "everybody in Vegas loves the Knights" so there was value in creating a positive association with the team.[178] In D.C., there are no casinos, so to operate there, William Hill partnered with Monumental Sports & Entertainment, which is eligible for a Class A sports betting license as the owner of Capital One Arena.[179] Asher said he is not a fan of leagues getting paid for no particular reason given that they do not need any help, but he supports a fair exchange of value.[180]

Furthermore, these agreements symbolize a willingness of leagues and sportsbooks to collaborate on "comprehensive responsible gaming measures and [to] work to protect the integrity of the game both on and off the field."[181] The parties can contract for the development and maintenance of mechanisms aimed at upholding integrity. Although these deals tend to have a term of only three-to-five years, these issues will persist beyond contract expiration so they will require perpetual renewal unless and until Congress steps up.[182]

B. Operate Own Sportsbooks

If the NBA owned and operated its own sportsbook, it would find itself in direct competition with other sportsbooks and thus have a chance to satisfy the *Motorola* exception. For the first time ever, people can place bets at an NBA arena thanks to the agreement between William Hill and Monumental Sports & Entertainment to build a sportsbook at Capital One Arena, home of the Washington Wizards and Washington Capitals.[183] Similarly, FanDuel will open a sportsbook retail location inside the Phoenix Suns' arena.[184]

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[178] Online Meeting with Joe Asher, CEO, William Hill US (Mar. 24, 2021).
[179] *Id.*
[180] *Id.*
[181] Feld, *supra* note 10, at 360. *See generally Statcast*, *supra* note 60.
[182] Feld, *supra* note 10, at 360.
[183] Owens, *supra* note 50.
[184] Press Release, Phoenix Suns, Suns and FanDuel Announce Arizona Market Access Partnership Making FanDuel the Suns' Official Sportsbook and Daily Fantasy Sports Partner (Apr. 15, 2021), https://www.nba.com/suns/suns-and-fanduel-announce-arizona-market-access-partnership-making-fanduel-suns-official-sportsbook/. Teams from other leagues are following suit. *See, e.g.*, Matt Horner, *Sneak Peek at Wrigley Field's Brand New Sportsbook*, SPORTS MOCKERY (Jan. 14, 2021), https://www.sportsmockery.com/sports-betting/sneak-peak-at-wrigley-fields-brand-new-sportsbook (providing a sneak peak of the Chicago Cubs' new sportsbook at Wrigley Field with betting windows and self-serve kiosks).

At first glance, these in-area sportsbooks appear to put NBA teams in direct competition with sportsbooks and lay the foundation for a hot-news misappropriation claim. But these are not slam-dunk violations because the NBA does not have actual skin in the game; rather than operating sportsbooks, teams are merely leasing space for sportsbooks to operate in exchange for a rental fee.[185]

The NBA would have a better argument for monetizing its real-time official data if the league or its teams ran its own sportsbooks, which is a possibility. Some jurisdictions—including Illinois, Virginia, and Washington, D.C.—allow professional sports teams to serve as licensed operators or host a sportsbook in their arena, but so far only the NFL's Washington Football Team has an operator license.[186] The league could also invest in its own in-house analytics team that uses its data to create betting odds, which would remove the need for external data analytics companies and allow the league to work directly with sportsbooks.

The NBA could go a step further by becoming an equity owner and operator of a data transmission provider, analytics firm, and journalistic outlet, placing itself in direct competition with all the third parties that commodify its data.[187] Such result could prevent competing companies from using certain league data, at least until the "hot news" effect wears off, though this scenario could raise significant antitrust problems.

C. Restrict Access

The NBA is entitled to restrict access to its events and to the information and statistics that it generates, like the PGA Tour does.[188] If the league refines event-related data and creates a marketable product, that product may be licensed subject to certain conditions, such as a time delay of its publication.[189] The Association of Tennis Professionals and Women's Tennis Association deliberately delay live scores on their websites as part of data deals with bookmakers, according to a Daily Mail report.[190] If the NBA adopts this

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[185] Howard Stutz, *Stadiums Augment Newly Enacted Maryland and Arizona Sports Betting Markets*, CDC GAMING REP. (Apr. 17, 2021, 5:00 AM), https://www.cdcgamingreports.com/commentaries/stadiums-augment-newly-enacted-maryland-and-arizona-sports-betting-markets/.

[186] Chris Altruda, *Texas Bill Would Allow Pro Teams to Be Licensed Sportsbook Operators*, SPORTS HANDLE (Feb. 23, 2021), https://sportshandle.com/texas-sports-betting-bill-ballot-question/.

[187] Ryan M. Rodenberg et al., *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH. & ARTS 63, 102–03 (2015).

[188] *See supra* Part V.C.

[189] Frodl, *supra* note 107, at 76.

[190] Matt Hughes, *Special Report: Advantage Bookies! WTA and ATP Cash in by Deliberately Delaying 'Live' Scores so Tennis Fans Are Pushed Towards Gambling Sites to Follow Matches in Deal That Is Earning Almost £1 Billion in*

approach, it will likely be seen as a shameless money grab and result in public backlash.

D. Pursue a Proprietary Right in Refined Data

The NBA could modify its request for an official data mandate to instead seek recognition of a proprietary right in its refined data. Based on the case law, the best way to secure this right is by investing in technology to generate certain statistics that are otherwise not possible to create or observe with the human eye. Then, the NBA could analyze the data points and arrange the information in a particularized manner that could garner copyright protection and be enforced against freeriders. The NBA could also seek trade secret protection for the proprietary data and unique sports wagering options it develops using advanced analytics.[191]

Should the NBA stay the course on its quest for an integrity fee or official data mandate, and Congress considers requiring sportsbooks to pay the leagues a portion of every bet, the Interstate Horse Racing Act of 1978 would serve as valuable precedent.[192] Congress has shown no concern for the impact of wagering on the integrity of horseracing and instead focuses on compensating the sport's stakeholders when people wager on their events.[193]

VII. CONCLUSION

While it is true that leagues should not be able to monopolize all sports data, they arguably should receive protection for their refined data. There is some optimism, with at least one legal expert predicting that courts will find that real-time sports data belongs to the people who create it: the leagues and players.[194] The NBA remains at the forefront of sports leagues seeking to capitalize on the legalization of sports betting in many states. Moreover, the NBA presented the best case for gaining a league proprietary right in certain refined data that it creates through substantial investment. If any league deserves it, it is the NBA.

In lieu of legal recognition of that right, the NBA focuses on monetizing its official data through licensing agreements with data analysis companies and sportsbooks. More than any other league, the NBA has proven to be innovative and opportunistic, so it would be unfair to allow sportsbooks or anyone else to use its official and refined data for profit without compensating the league.

Data Agreements, DAILY MAIL (Feb. 10, 2021, 5:57 PM), https://www.dailymail.co.uk/sport/sportsnews/article-9246705/SPECIAL-REPORT-WTA-ATP-cash-DELIBERATELY-delaying-live-scores.html.

[191] Rodenberg et al., *supra* note 187, at 102.

[192] Keith C. Miller & Anthony N. Cabot, *Regulatory Models for Sports Wagering: The Debate Between State vs. Federal Oversight*, 8 UNLV GAMING L.J. 155 (2018); *See generally* Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001–3007.

[193] Miller & Cabot, *supra* note 192, at 156.

[194] *See* Glanz & Armendariz, *supra* note 85.

Ultimately, it is up to Congress to legislate on how sports data should be sourced, regulated, and distributed. Given the concerns over the rapid proliferation of patchwork sports betting legislation since PASPA was overturned, as well as the immense value of data in this digital age, federal intervention may be warranted.