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KNOW WHEN TO HOLD ‘EM, KNOW WHEN TO FOLD ‘EM: HOW PROFESSIONAL SPORTS LEAGUES SHOULD MONETIZE DATA IN THE ERA OF LEGALIZED SPORTS GAMBLING

❖ NOTE ❖

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I. INTRODUCTION

“You got to know when to hold ‘em, know when to fold ‘em.”¹ When Kenny Rogers first sung those words in his 1978 hit song, *The Gambler*, he immortalized the struggle of gamblers everywhere.² Incidentally, he also described the conundrum that professional sports leagues find themselves in today. Following the invalidation of the federal ban on sports wagering, professional sports leagues in the United States, particularly the National Basketball Association (“NBA”), are eager to obtain a portion of the sports wagers themselves.³ This note will argue that the NBA should shift its focus from lobbying legislatures, a largely unsuccessful initiative, to strengthening its data licensing efforts, where the league has already seen success.

The NBA has voiced and attempted a number of approaches to secure legalized gambling profits, including the following: claiming an actual intellectual property interest in game data and statistics;⁴ lobbying for legislation mandating a percentage of all sports wagers go to the

1. KENNY ROGERS, *THE GAMBLER* (United Artists Group 1978).

2. *Id.*

3. Matt Bonesteel, *If sports gambling is legalized, the NBA wants in on the profits*, THE WASHINGTON POST (Jan. 25, 2018 10:41 AM), <https://www.washingtonpost.com/news/early-lead/wp/2018/01/25/if-sports-gambling-is-legalized-the-nba-wants-in-on-the-profits/> (“And ideally, the NBA would like a cut of any money wagered on professional basketball games in the United States.”).

4. Adam Candee, *NBA’s Adam Silver On Sports Betting: ‘The Integrity Fee Is Something That We Are Entitled To’*, LEGAL SPORTS REPORT (Jun. 1, 2018 5:40 PM), <https://www.legalsportsreport.com/20904/nba-commissioner-adam-silver-talks-sports-betting/> (paraphrasing NBA Commissioner Adam Silver, “...games are the intellectual property of the league, for which [the NBA] should receive money.”).

sports leagues themselves⁵ or that sportsbooks are required to use only directly from the leagues;⁶ and licensing official NBA data to data analytics companies⁷ and sportsbooks.⁸ Part I of this note will describe the general basics of sports betting and the sports betting economy. Part II of this note will detail and analyze the aforementioned attempts the NBA has taken to monetize sports betting for themselves. Further, Part II will show the financial and legal reasons why the NBA has been moderately successful in its data licensing approach but unsuccessful in gaining traction with its intellectual property claims or legislative lobbying. Finally, part III of this note will suggest some routes the NBA can take to strengthen the value of its data licensing, primarily by following current trends in the sports gambling market and creating more sports wagering products and data in-house.

II. BACKGROUND

In 2018, the U.S. Supreme Court decided *Murphy v. NCAA* and invalidated the federal ban on sports gambling.⁹ Prior to *Murphy*, the Professional and Amateur Sports Protection Act (“PASPA”) made it unlawful for a state to operate or authorize “... betting, gambling or wagering scheme[s] based...” on sports.¹⁰ The Court held that this statutory construction amounted to Congress issuing orders directly to state legislatures and was an unequivocal violation of state sovereignty and the Constitution’s anticommandeering rule.¹¹ Remaining portions of the Act were not severable from the unconstitutional provisions, rendering PASPA entirely void.¹² In the wake of *Murphy*, state legislatures were free to act as they saw fit, and twenty three states have responded by fully legalizing sports gambling, including Illinois in March, 2020.¹³

Sports wagers can be separated into four general categories: standard bets, future bets, in-play bets, and prop bets.¹⁴ A standard bet is the most basic form of sports betting; it is simply a wager placed on the final outcome of a game. “I bet the Cavaliers will beat the Warriors tomorrow” is an example of a standard bet.¹⁵ A future bet is also simple in concept, but hinges on an outcome that is both further in the future and contingent on events between now and then. The following is a future bet, “I bet the Cavaliers will win the NBA championship

5. See Brett Smiley and Jill Dorson, *The Many Ways the NBA Has Embraced Legal Sports Betting*, SPORTSHANDLE (Oct. 22, 2019) <https://sportshandle.com/nba-sports-betting-evolution/> (explaining that the NBA is lobbying for a mandated “fee” or “royalty” that all sportsbooks must pay to the NBA).

6. *Id.* (explaining that the NBA is lobbying state legislatures to enact legislation that would mandate the use of “official” data directly from the NBA itself or from select 3rd-party partners).

7. Sam Carp, *NBA claims US first with betting data distribution deals*, SPORTSPRO (Nov. 28, 2018), <https://www.sportspromedia.com/news/nba-betting-odds-sportradar-genius-sports-data>.

8. Sam Carp, *US major league first as NBA signs US\$25m betting deal with MGM*, SPORTSPRO (July 31, 2018), <https://www.sportspromedia.com/news/nba-signs-betting-deal-mgm-25-million>.

9. *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484-85 (2018).

10. *Id.* at 1465.

11. *Id.* at 1478.

12. *Id.* at 1484-85.

13. Ryan Rodenberg, *United States of sports betting: An updated map of where every state stands*, ESPN (May 1, 2020), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization.

14. *How to bet sports – The different types of wagers*, GAMBLING SITES, <https://www.gamblingsites.com/sports-betting/introduction/bets-wagers/>.

15. *Id.*

next year.”¹⁶ An in-play bet is exactly as it sounds; it is a bet that is made after a game has already begun and is in play. An example of an in-play bet would be betting on the Cavaliers at halftime to win even though they are down by twenty points.¹⁷ Lastly, a prop bet is a bet that is not directly tied to the final outcome of the game.¹⁸ A common example would be betting on the total number of points a basketball player will finish with.¹⁹ Increasingly, sportbooks, or “books” for short, are offering prop bets that are only loosely attached to the game itself, such as a bet on how long the national anthem prior to the Super Bowl will last.²⁰

In-play bets, due to their very nature, require immediately accessible and accurate game data.²¹ When a team scores, for example, a sportsbook needs to immediately update the betting odds for that game accordingly, or else a smart bettor would be able to place a bet based on the old score, potentially to the book’s detriment.²² With most books offering betting odds on hundreds of games a month it is not practicable for a book to offer in-play odds for each game without the help of automatized data—the small group of oddsmakers a book typically employs could not humanly keep up and employing a team of oddsmakers large enough to keep up would be too costly.²³ Accordingly, books have increasingly turned to massive data aggregation and analytics companies.²⁴ The data analytics companies gather data directly from sports leagues themselves, other non-league sources, or a combination of the two.²⁵ Through the use of finely tuned proprietary algorithms, the analytics companies then supply the books with continuously updated betting odds for all games, typically for a monthly fee.²⁶

III. ANALYSIS

The NBA has expressed a possible intellectual property claim in its game data as well as lobbied for legislation mandating a percentage fee to be paid to the league²⁷ or the use of its

16. *Id.*

17. *Id.*

18. Steve Petrella, *What Is a Prop Bet?* *Sports Betting Definitions*, ACTION NETWORK (Feb. 1, 2020 7:48 am), <https://www.actionnetwork.com/education/prop-bet>.

19. *Id.*

20. *Id.*

21. See James Glanz and Agustin Armendariz, *When Sports Betting Is Legal, the Value of Game Data Soars*, THE NEW YORK TIMES (Jul. 2, 2018), <https://www.nytimes.com/2018/07/02/sports/sports-betting.html> (speaking about how important access to fast data is for in-play sports betting, a statement by sports data lawyer Steven Burton, “For betting, it’s the difference between having value and having no value at all.”).

22. See generally Matt Rybaltowski, *Here’s How Much ‘Official’ League Data Actually Costs*, SPORTS HANDLE (Mar. 12, 2019), <https://sportshandle.com/sports-betting-official-data-cost/> (describing a scenario where a sportsbook did not timely update its odds for an in-play bet).

23. See *Id.* (explaining that it is not possible for teams of oddsmakers to maintain multiple up to date in-play betting odds, a statement by Jason Simbal, Vice President of Risk Management at sportsbook CG Technology, “...it’s not scalable... You can only do so many...” Explaining that sportsbooks could not afford to employ the number of oddsmakers needed to keep up with a large amount of multiple in-play betting games, “...most sportsbook operations do not have the financial wherewithal to physically monitor dozens of contests at once.”).

24. See *Id.* (stating that sportsbooks now generally use automated data solutions for in-play betting odds, “Instead, [sportsbooks] turned to live-data feeds that spit out the raw probabilities of a betting result through an automated system.”).

25. See generally *Id.*

26. See generally *Id.*

27. See Bonesteel, *supra* note 3.

official league data.²⁸ These approaches have had little²⁹ to no success, due to a lack of legal standing³⁰ and ineffective leverage³¹ for lobbying. The NBA has found success with a third approach, data licensing, as the league has genuine value to offer to offer partners with that approach.³²

NBA Commissioner Adam Silver has said that he views the league as the “intellectual property creators” of the NBA’s game data and statistics.³³ Silver wants to use this logic to rationalize the league collecting a percent of all wagers placed on NBA games.³⁴ Unfortunately for Silver and the NBA, the federal court system seems to be steadfast in their view that there are no legal protections for game statistics whether that be an intellectual property right, like copyright,³⁵ or a right of publicity.³⁶

A. Game Statistics Are Not Copyrightable

First, in *Feist Publication, Inc. v. Rural Telephone Service Company, Inc.*, the Supreme Court’s holding affirmed a commonly understood reading of the Copyright Act of 1976—that facts are *not* copyrightable.³⁷ Rural Telephone Service Company (Rural) was a telephone service provider that also published a telephone directory.³⁸ The directory largely consisted of alphabetized lists of Rural’s subscribers’ names, addresses and telephone numbers.³⁹ Feist Publication, Inc. (Feist) published a larger telephone directory that was essentially a compilation of many surrounding telephone districts, the idea being that having all of that information combined into one common resource was a useful service.⁴⁰ Feist created its directory in part by using Rural’s directory information against Rural’s wishes.⁴¹ Rural subsequently sued Feist for copyright infringement.⁴²

Rural’s argument centered on the idea that because Rural put work into creating the directory, Rural should thus be entitled to copyright it.⁴³ The Court directly addressed the

28. See Smiley and Dorson, *supra* note 5.

29. See generally Joe Lemire, *Illinois Passes Sports Betting Bill With Official Mandate, In-Venue Kiosks*, SPORT TECHIE (June 3, 2019), <https://www.sporttechie.com/illinois-sports-betting-bill-official-data-in-venue-kiosks/> (stating that Illinois and Tennessee are the only two states that have enacted sports betting laws that include a royalty or fee to be paid to professional sports leagues).

30. See *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344 (1991); *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007) [hereinafter *C.B.C. v. MLB*].

31. See generally Martin Derbyshire, *Missouri Has A Better Idea Than Paying Sports Betting Integrity Fees*, PLAY USA (Feb. 20, 2020), <https://www.playusa.com/missouri-sports-betting-integrity-fees/> (describing how the Missouri state legislature felt sports leagues had not made a compelling case for why a sports betting law should allot a percentage of wagers to be paid to the leagues rather than to a public good such as infrastructure fund).

32. See Carp, *supra* note 7 (stating that the NBA has entered into a data licensing deal with data analytics companies); See also Carp, *supra* note 8 (stating that the NBA has entered into a data licensing deal with MGM Resorts).

33. Candee, *supra* note 4.

34. *Id.*

35. See *Feist*, 499 U.S. at 344.

36. See *C.B.C. v. MLB*, 505 F.3d at 824.

37. *Feist*, 499 U.S. at 344.

38. *Id.* at 342.

39. *Id.*

40. *Feist*, 499 U.S. at 343.

41. *Id.*

42. *Feist*, 499 U.S. at 344.

43. *Id.*

previously common misconception that “copyright was a reward for the hard work that went into compiling facts.”⁴⁴ The Court held that the focus on effort, or “sweat of the brow” for copyrights is flatly wrong.⁴⁵ The Copyright Act of 1976 states that the basis for copyright is originality, not effort, and facts are never original.⁴⁶ Further, the Act is clear that while a compilation of facts may be copyrightable, a copyright does not extend to the facts themselves.⁴⁷ A compilation still needs to meet the originality requirement in its own right, and even when it does, it is the organization or formatting of the compilation that is protected, not the facts contained in the compilation.⁴⁸

Just as in *Feist*, where Rural did not have a copyright claim for the data contained in its telephone directory, neither does the NBA have a copyright claim over its game statistics.⁴⁹ Rural and the NBA are running into the same problem: copyrightability is based on originality, not the amount of work that went into creating a work.⁵⁰ Game statistics and data seem to very plainly be facts, which are accordingly not eligible for copyright.⁵¹ Even if the NBA were to successfully argue that it had a database of statistics that was originally formatted enough to earn a copyright, that copyright would still not extend to the game statistics within the database.⁵²

B. Right of Publicity Claims and the Courts

In *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, the Eighth Circuit held that first amendment rights superseded Major League Baseball’s argument that its game statistics were protected by a right of publicity.⁵³ C.B.C. Distribution and Marketing, Inc. (“CBC”) was a purveyor of fantasy sports,⁵⁴ a form of entertainment very close to gambling.⁵⁵ Fantasy sports involve players selecting professional athletes to bring on to their fictional or fantasy team.⁵⁶ The performance of the fantasy team is based on the performance of the actual players in games they actually play.⁵⁷ In essence, the most successful fantasy teams will be those with players who perform the best and record the best statistics in actual professional games.⁵⁸

44. *Feist*, 499 U.S. at 352.

45. *Id.* at 354.

46. 17 U.S.C. § 102(b).

47. 17 U.S.C. § 103(b).

48. *Feist*, 499 U.S. at 356, 358.

49. *See id.* at 363.

50. *See id.* at 354; *See also* 17 U.S.C. § 102(b).

51. *See* 17 U.S.C. § 102(b).

52. *See* 17 U.S.C. § 103(b).

53. *C.B.C. v. MLB*, 505 F.3d at 824.

54. *Id.* at 820.

55. *See generally* Justin Moyer, *Sorry, daily fantasy sports is gambling, not a game of skill, Nevada says*, THE WASHINGTON POST (Oct. 16, 2015 2:39 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/10/16/nevada-sorry-fantasy-sports-is-gambling-not-a-game-of-skill/> (stating that Nevada state regulators have declared fantasy sports the same thing as sports betting in the past).

56. *See* Justin Sablich, *A Beginner’s Guide to Playing Fantasy Football*, NEW YORK TIMES (Aug. 24, 2017), <https://www.nytimes.com/2017/08/24/sports/fantasy-football-draft-guide-beginners.html>.

57. *Id.*

58. *Id.*

Major League Baseball (“MLB”) offered CBC the right to promote the MLB’s own fantasy sports offerings on CBC’s website in exchange for a commission.⁵⁹ CBC continued to operate its own fantasy games that used MLB player names and statistics and then sought a declaratory judgment that the MLB did not have a right to seek a licensing fee.⁶⁰ The MLB argued it was entitled to seek a licensing fee based on its players’ rights of publicity.⁶¹ A right of publicity is a protection that seeks to prevent a person’s likeness from being used for commercial purposes without her consent.⁶² The Eighth Circuit held that even though there was a valid claim for right of publicity, it was superseded by “CBC’s first amendment rights in offering its fantasy baseball products . . .”⁶³

America’s strongly held freedom of speech would also seem to prevent the NBA from enjoying a legal protection on NBA game data and statistics.⁶⁴ *C.B.C.* established that a company offering fantasy sports has a first amendment right to professional game statistics that takes precedence over any right of publicity the related professional athletes may have.⁶⁵ Given how similar fantasy sports and sports betting are⁶⁶, this same logic, first amendment rights trumping right of publicity for a fantasy sports operator, would seem to very clearly apply to sports wagering as well. In either case, the NBA does not seem to have a legal protection for its game statistics.

Perhaps in a tacit acknowledgement that it does not have any existing legal protections for its game statistics, the NBA has sought to ensure a share of sports wagers through another legal mechanism—statutory protections.⁶⁷ The league has heavily lobbied both state and federal legislatures, urging both to consider two different statutory schemes: a mandate that all sportsbooks pay one percent of all wagers placed back to the appropriate professional league (known as an “integrity fee”);⁶⁸ or a mandate that sportsbooks be required to use only data and statistics directly from professional sports leagues (known as an “official data” requirement).⁶⁹ Thus far, the lobbying for the integrity fee has failed entirely while the official data approach has been met with very limited success.⁷⁰

59. *C.B.C. v. MLB*, 505 F.3d at 821.

60. *Id.*

61. *Id.*

62. Restatement (Third) of Unfair Competition § 4 (1995).

63. *C.B.C. v. MLB*, 505 F.3d at 824.

64. *See Id.*

65. *C.B.C. v. MLB*, 505 F.3d at 824.

66. *See Moyer, supra* note 55.

67. *See Smiley and Dorson, supra* note 5 (stating that the NBA is “at the forefront of lobbying” for “official league data” mandates and integrity fees).

68. Bonesteel, *supra* note 3 (statement by Dan Spillane, then NBA senior vice president and assistant general counsel (“...we believe it is reasonable for operators to pay each league 1 percent of the total amount bet on its games.”)).

69. Smiley and Dorson, *supra* note 5 (explaining that the NBA has lobbied for legislation that would require sportsbooks to use “official league data”).

70. *See Derbyshire, supra* note 31 (stating that Missouri would have been the first state to seriously consider paying a integrity fee, but decided against it, meaning no states thus far have included an integrity fee in its sports wagering legislation); *See also Lemire, supra* note 29 (stating that only two states have passed sports wagering legislation that requires a version of an official league data requirement, meaning the NBA’s lobbying has been successful in only two out of twenty three states so far).

C. Lobbying Efforts for Integrity Fees and Official Data Mandates

Integrity fee lobbying has not been successful on a federal⁷¹ or state level.⁷² The sole Congressional sports wagering bill that has been introduced, the Sports Wagering Market Integrity Act of 2018,⁷³ does not include an integrity fee.⁷⁴ The Act, after being introduced by now retired Senator Orrin Hatch and current minority leader Chuck Schumer, stalled without making any meaningful progress.⁷⁵ Twenty-three states have now passed legislation legalizing sports wagering,⁷⁶ and none of them contain an integrity fee either.⁷⁷

The fee was an ambitious ask by the NBA, as any attempt by the league to obtain a portion of the sports wagering market would be expected to be met with opposition by sportsbooks. The books' lobbying effort here, however, was particularly fierce due to the amount the NBA was pushing for.⁷⁸ While one percent may not seem like much on its face, the NBA asked for one percent of *all wagers placed*, which is estimated to account for a whopping one fifth of an average book's profit.⁷⁹

Further, if legislatures are going to account for a percentage of the sports betting to go elsewhere, they seem to prefer it go back to the states themselves.⁸⁰ Missouri, for example, has expressed this desire but has not yet made a final decision on a sports wagering statute.⁸¹ An initial sports wagering bill was introduced with the one percent integrity fee but an alternative bill has since been introduced that removes the integrity fee altogether and replaces it with a half percent fee to be used to maintain a state infrastructure fund.⁸² Alternatively, New Jersey, with its distinctive nuance, simply called the idea of an integrity fee insulting.⁸³

The league's other lobbying approach, an official data requirement, has been met with very limited success.⁸⁴ The aforementioned Sports Wagering Market Integrity Act notably did not include an integrity fee but did include the official data requirement.⁸⁵ The cosponsor of that bill, Senator Schumer, has possibly enlisted the help of Senator Hatch's replacement,

71. See generally John Brennan, *Federal Sports Betting Bill Has 'Integrity' In The Title And Data In The Details*, SPORTS HANDLE (Dec. 19, 2018), <https://sportshandle.com/federal-sports-betting-bill-introduced/> (stating that no federal legislation has been passed to regulate sports wagering and the current proposed bill does not include an integrity fee).

72. Lemire, *supra* note 29 (explaining that no state sports wagering legislation thus far includes an integrity fee).

73. S.2793, 115th Cong. (2018).

74. Brennan, *supra* note 71.

75. See Brett Smiley, *Report: Romney To Carry Federal Sports Betting Bill Torch With New York's Schumer*, SPORTS HANDLE (Sep. 6, 2019), <https://sportshandle.com/romney-schumer-sports-betting-federal-bill-report/>.

76. Rodenberg, *supra* note 13 (twenty three states have legalized sports betting).

77. See Lemire, *supra* note 29 (no state sports wagering laws have included an integrity fee).

78. See Bonesteel, *supra* note 3 (explaining that the NBA's desire for an integrity fee was met with "skepticism that bordered on hostility").

79. *Id.* (stating that, as of 2016, one percent of all wagers placed would amount to roughly twenty percent of an sportsbooks' profits).

80. See generally Derbyshire, *supra* note 31 (explaining Missouri's legislature amended its sports wagering bill to replace the sports league integrity fee in favor of a percentage of wagers going to a state infrastructure fund).

81. *Id.*

82. *Id.*

83. *Id.* ("In fact, New Jersey went as far as to call the idea insulting.").

84. See Brennan, *supra* note 71 (stating that no federal legislation has been passed to regulate sports wagering and the current proposed bill does not include an integrity fee); See also Lemire, *supra* note 29 (no state sports wagering laws have included an integrity fee).

85. Brennan, *supra* note 71 (the Act does not include an integrity fee).

Mitt Romney, to either reintroduce the old sports wagering bill or introduce an entirely new one.⁸⁶ Out of the twenty three states that have legalized sports wagering,⁸⁷ only two—Tennessee and Illinois—have included an official data requirement of some sort.⁸⁸ Both states require official data to be used for in-play bets.⁸⁹ Illinois also requires official data to be used for prop bets.⁹⁰

The low success rate in state lobbying to add official data requirements to bills legalizing sports gambling, less than ten percent, can seemingly be chalked up to a lack of compelling argument by the NBA. The league has noted that official data is the fastest data available and helps “ensure the accuracy and consistency of betting outcomes for fans.”⁹¹ These arguments do not seem to pass muster. While faster data speed could be more desirable to a sportsbook, that is hardly a reason to statutorily mandate it for all books. The claim that official data will help ensure accuracy and consistency is not well supported itself, since Nevada, which was exempted from PASPA,⁹² has successfully maintained sports wagering for decades without any such requirements.⁹³

The lack of persuasive reasoning in favor of official data is underpinned by the difficulty of enforcing the measure. When the outcome of a professional sporting event is widely known, how can the communication of data be realistically controlled? An absurd attempt at enforcement in the English Football League is illustrative of the difficulty.⁹⁴ Here, a fan was enjoying a live soccer match while occasionally texting friends and family updates on the game.⁹⁵ The man was approached by an undercover security officer and told that if he did not stop texting information about the soccer game, including any information about whether a goal was scored, when the goal was scored, and who scored it, he would be ejected from the stadium.⁹⁶ The encounter was a result of the fact that the EFL had entered into a deal that made Genius Sports the exclusive provider of EFL betting data.⁹⁷ The security check was an effort to stop any information about the game from being disseminated—an attempt to stop data from being communicated not just to stop data from being given to sportsbooks but to any individual that might use the information to place an in-game bet.⁹⁸ It is unlikely any such enforcement could be put in to force in the U.S with the country’s strongly held notions

86. Smiley, *supra* note 75.

87. Rodenberg, *supra* note 13 (twenty three states have legalized sports wagering).

88. Lemire, *supra* note 29 (stating that only Illinois and Tennessee sports wagering bills have included an official data requirement).

89. *Id.*

90. *Id.*

91. *Official League Data*, LEGAL SPORTS REPORT (Feb. 14, 2020 1:42 PM), <https://www.legalsportsreport.com/official-league-data/>.

92. 28 U.S.C. § 3704.

93. See generally Joe Williams, *Nevada sports betting: Is legal sports betting available in Nevada?*, USA TODAY SPORTSBOOK WIRE (Apr. 25, 2020), <https://sportsbookwire.usatoday.com/2020/04/25/nevada-sports-betting-is-legal-sports-betting-available-in-nevada/> (stating that Nevada legally operated sports wagering operations since 1949).

94. Lee Jarvis, *EFL apologises to Hull fan who was told to stop texting at game*, YAHOO SPORTS UK (Aug. 12, 2019), <https://sports.yahoo.com/epl-apologises-for-spot-check-asking-a-hull-fan-to-stop-texting-100012785.html>.

95. *Id.*

96. *Id.*

97. Sam Carp, *Genius Sports lands Premier League betting data*, SPORTSPRO (May 9, 2019), <https://www.sportspromedia.com/news/premier-league-betting-data-genius-sports-data-co-epl-spfl>.

98. Jarvis, *supra* note 94.

of free speech. *C.B.C.* showed that U.S. courts have been loath to grant sports leagues any protection over game data, largely due to the conflict with the first amendment.⁹⁹

D. Licensing Official Data

That leaves the NBA’s final approach at monetizing legalized gambling—the licensing of official data to both data analytics companies and sportsbooks directly. After PASPA was struck down by *Murphy*,¹⁰⁰ the NBA agreed to non-exclusive official data licensing deals with two data analytics companies, Genius Sports and Sportsradar.¹⁰¹ Both companies are in the aforementioned business of using algorithms to produce betting odds, which are then sold to sportsbooks.¹⁰² The benefit to both sides here is clear—the NBA is monetizing its data, and Genius Sports and Sportsradar are getting the fastest data available, surely a boon to companies whose own value is in providing betting odds to sportsbooks as quickly as possible.

The league also struck a deal directly with sportsbook MGM Resorts (MGM).¹⁰³ The deal included the NBA providing real time data to MGM as well as the NBA granting MGM the right to use league trademarks in conjunction with their sports wagering outfit.¹⁰⁴ The deal is non-exclusive so the NBA is free to enter into similar agreements with other books.¹⁰⁵ This deal is not so different from a standard licensing deal, where a company with valuable branding allows another company to pay for the use of that branding.¹⁰⁶ To be clear, the value to MGM here seems to lie entirely with marketing. MGM’s sportsbook is estimating that it is worth paying the NBA for the right to say, “MGM uses official NBA data” and to use team logos and the like within its books. This was all but confirmed when MGM’s online sports betting arm,¹⁰⁷ a few months after the NBA deal, signed another deal with data analytics company Sportsradar establishing Sportsradar as the exclusive data supplier for MGM’s online sports betting operation.¹⁰⁸

In summary, the NBA has voiced and attempted a number of approaches to monetize sports wagering. Case law appears to indicate the league has no intellectual property interest¹⁰⁹ or any other legal protection for its data.¹¹⁰ Attempts to lobby for an integrity fee

99. See *C.B.C. v. MLB*, 505 F.3d at 824.

100. *Murphy*, 138 S. Ct. at 1484-85.

101. Carp, *supra* note 7

102. *Id.*

103. Carp, *supra* note 8.

104. *Id.*

105. *Id.*

106. Scott Hervey, *Six Key Points in Negotiating Brand Licensing Agreements*, THE IP LAW BLOG (Apr. 16, 2012), <https://www.theiplawblog.com/2012/04/articles/trademark-law/six-key-points-in-negotiating-brand-licensing-agreements/> (explaining that the fundamental purpose of a licensing agreement is “...to give a third party the right to benefit from the goodwill and economic value associated with an established mark.”).

107. Joss Wood, *MGM Resorts And GVC Striking \$200 Million Sports Betting Partnership*, LEGAL SPORTS REPORT (Jul. 30, 2018 5:30pm), <https://www.legalsportsreport.com/22352/mgm-gvc-us-sports-betting-partnership/>.

108. Hilary Russ, *Sportsradar to provide U.S. sports betting data to MGM-GVC joint venture*, REUTERS (Nov. 8, 2018), <https://www.reuters.com/article/us-usa-gambling-sport-data/sportsradar-to-provide-u-s-sports-betting-data-to-mgm-gvc-joint-venture-idUSKBN1ND223>.

109. See Feist, 499 U.S. at 344.

110. See *C.B.C. v. MLB*, 505 F.3d at 824.

have been unsuccessful,¹¹¹ and lobbying attempts to require official data use have seen very limited success.¹¹² The best and remaining alternative lies in the league’s data licensing efforts, where it has already seen the most success.

IV. RECOMMENDATIONS

The NBA’s approaches garnering legal protection for its game data, through both the courts¹¹³ and legislatures, have been largely met with resistance¹¹⁴ and outright rejection.¹¹⁵ The clear path forward for the league is to focus its efforts on game data licensing and how it can strengthen the value offer of its data licensing. To that end, the league should focus on two of the most rapidly growing sports wagering trends, in-play¹¹⁶ and prop bets, and developing its own products and data to serve those bets.¹¹⁷

A. The NBA Can Further Monetize the Growing Popularity of In-play Bets

The league is in the sole position to offer the fastest data to analytics companies and fast data is the most valuable resource for in-play betting.¹¹⁸ Sportsbook executives believe that, while only an estimated ten to twenty percent of bettors have placed in-play bets,¹¹⁹ in-play betting is one of the fastest growing categories of wagers and possibly the future of sports wagering entirely.¹²⁰ The expected bright future for in-play betting is due to its ability to offer continued betting options throughout a game, even for blowouts, which is desired by both the sportsbook and the bettor.¹²¹

111. See Derbyshire, *supra* note 31 (stating that Missouri would have been the first state to seriously consider paying an integrity fee, but decided against it, meaning no states thus far have included an integrity fee in its sports wagering legislation); See also Brennan, *supra* note 71 (stating that no federal legislation has been passed to regulate sports wagering and the current proposed bill does not include an integrity fee).

112. See Lemire, *supra* note 29 (stating that only two states have passed sports wagering legislation that requires a version of an official league data requirement, meaning the NBA’s lobbying has been successful in only two out of twenty three states so far).

113. See *Feist*, 499 U.S. at 344; See *C.B.C. v. MLB*, 505 F.3d at 824.

114. See Derbyshire, *supra* note 31.

115. See Lemire, *supra* note 29.

116. Frank Schwab, *Super Bowl LIV betting: The next frontier in sports betting? In-game wagering*, YAHOO SPORTS (Feb. 1, 2020), <https://sports.yahoo.com/super-bowl-liv-betting-the-next-frontier-in-sports-betting-ingame-wagering-170223545.html> (explaining the anticipated trajectory of in-play betting, a statement by Scott Butera, MGM President of Interactive Gaming, “In-game betting in the U.S. I think [is] very much the future.” Further explaining that Butera expects in-play betting will eventually “mirror the popularity [in-play betting] hold in Europe” where it is very popular).

117. Joan Mantini, *Digital Sports Tech Unveils Player Props Data Feed*, US BETTING REPORT (Apr. 3, 2019), <https://usbettingreport.com/sports-betting/digital-sports-tech-unveils-player-props-data-feed/> (explaining the increasing popularity of prop bets, a statement by Ari Lewski, executive director at analytics company Digital Sports Tech, “[Prop bets] as a betting segment continues to grow at a steep trajectory and is fast becoming an integral part of any sportsbook’s offering.”).

118. See Glanz, *supra* note 21 (speaking about how important access to fast data is for in-play sports betting) (statement of Steven Burton) (“For betting, it’s the difference between having value and having no value at all.”).

119. Brett Smiley, *The Rise And Excitement of In-Play Betting, Explained By Expert*, SPORTS HANDLE (Dec. 13, 2017), <https://sportshandle.com/in-play-sports-betting-expert-analysis/> (explaining that roughly “10-20%” of bettors place in-play bets when playing at a physical sportsbook).

120. Schwab, *supra* note 116 (estimating the future of in-play betting, a statement by Scott Butera, MGM President of Interactive Gaming) (“In-game betting in the U.S. I think [is] very much the future.”).

121. Smiley, *supra* note 119.

How in-play betting benefits both bettors and books can be illustrated by a simple hypothetical: Here, a bet is placed on the Cavaliers to win and they fall behind by forty points nearly immediately. The Cavaliers have almost no chance of winning and without in-play betting, the bettor and sportsbook have no reason to place more bets. In-play betting, however, would give the bettor a chance to recover money, by betting on the other team to win, for example. That is good for the bettor, as she would otherwise have no way to continue to invest in the game and no way to recoup money. In-play betting gives the bettor a chance to turn a nearly guaranteed loss into a win, or at the very least, to mitigate loss. That is equally good news for the sportsbook, as books are always looking for ways to increase the number of bets placed and the amount of money wagered.¹²²

As described above, the complexity of in-play betting means that books have no choice but to purchase real-time updated betting lines from analytics companies.¹²³ The NBA, rather than pushing for a tenuously supported legislation that requires league data to be used, should lean on the reality that it has the fastest data available in the market. In the short term the league can continue to leverage its market best data speed in licensing deals with analytics companies. In the long term the NBA would be best served by developing its own in-house analytics department. If the league were able to develop effective betting odds algorithms of its own, it could cut out analytics companies altogether and offer the fastest data stream possible to sportsbooks directly. The combination of the fastest data possible, reliable betting algorithms, and the cache of the NBA’s name and brand offers unparalleled value. As a bonus, the NBA would largely obviate the need to push for official data legislation, as they would have the most competitive sports wagering data offering on the market.

B. A New Opportunity for NBA Data Licensing – Prop Bets

Prop bets are a growing focus for sportsbooks for the same reason as in-play betting—they are an avenue for books to bring in more bets, and thus more money.¹²⁴ Because prop bets are not tied to the ultimate outcome of a game, they give bettors a way to bet on a game that they do not anticipate will be competitive.¹²⁵ Prop bets originated in this very way.¹²⁶ Super Bowls were, for a time, often ending in blowouts and sports books wanted to develop a way to still get people to bet.¹²⁷ The solution was the prop bet, entirely unrelated to which team won or lost the game.¹²⁸ Further, while there is a somewhat finite number of bets that can be tied to the outcome of a game, the number of prop bets possible is really only limited by a sportsbook’s creativity. The same logic undergirding in-play bets is at play here. More

122. *Id.*

123. Rybaltowski, *supra* note 22 (explaining that it is not possible for teams of oddsmakers to maintain multiple up to date in-play betting odds, a statement by Jason Simbal, Vice President of Management at sportsbook CG Technology, “...it’s not scalable... You can only do so many...”).

124. Mantini, *supra* note 117 (prop bets are growing “at a steep trajectory”).

125. See generally Gary Rotstein, *Super Bowl Prop Bets Now As Popular As Their Inspiration: Refrigerator Perry*, US BETS (Jan. 27, 2020), <https://www.usbets.com/super-bowl-prop-bets-popular-refrigerator-perry/>.

126. *Id.* (describing the creation of prop bets, a statement by Jay Kornegay, then vice president of race and sports operations for Westgate sportsbook, “We started thinking of [prop bets] as a way to keep people interested in the [Super Bowl] to the very end because so many were blowouts at the time.”).

127. *Id.*

128. *Id.*

betting opportunities are good for bettors and, of course, more opportunities are always favored by books as well.

The NBA can take advantage of this prop bet boom by creating new data that is not publicly available, and thus can only be offered by the league. A straightforward application of such prop bets could be player movement statistics. By having players wear accelerometers, perhaps sewn onto jerseys or embedded onto wearable devices such as Apple Watches, the NBA can begin to gather a host of in game information.¹²⁹ The league would be able to collect statistics such as how fast players move, how high they jump, and how far they travel over the course of a game.¹³⁰ Any of these statistics could very simply be offered as a prop bet. Which player do you think will run the fastest at tonight's game? Which player do you think will jump the highest during tonight's game? Player movement statistics are just one example of an exclusive statistic the league could develop. The larger point is that exclusive statistics are extremely valuable as no other sports wagering data source can offer them.

Unlike game statistics which, as discussed above, can be recorded by any person watching the game, these statistics would only be known by the NBA. The added value to a potential NBA data license could be significant—a sportsbook would have the choice of either using the NBA's data, or not getting access to that league exclusive data, and thus prop bet opportunities, at all.

V. CONCLUSION

In the U.S., sports gambling is a booming business, to the tune of \$17.6 billion since the overruling of PASPA in 2018.¹³¹ The NBA has led the charge amongst the professional sports world in getting a piece of the financial pie through the monetization of its game data and statistics. The league's claims of intellectual property rights¹³² and legal protections¹³³ in its data however are unpersuasive and its attempts to lobby for integrity fee¹³⁴ and official data requirements have been ineffective.¹³⁵ The league has made strides in data licensing to analytics companies¹³⁶ and sports books alike.¹³⁷ For the league, the most logical step forward therefore is to bring as much work as it can in house, both by creating its own betting algorithm and by creating exclusive game data, to further strengthen the value of its data licensing offer.

129. See generally Ryan Goodrich, *Accelerometers: What They Are & How They Work*, LIVE SCIENCE (Oct. 1, 2013), <https://www.livescience.com/40102-accelerometers.html> (explaining that accelerometers can be used to determine what direction and how fast an object is moving).

130. See *Id.*

131. US Sports Betting Revenue And Handle, Legal Sports Report (Feb. 6, 2020, 12:31pm), <https://www.legalsportsreport.com/sports-betting/revenue/>.

132. See *Feist*, 499 U.S. at 344.

133. See *C.B.C. v. MLB*, 505 F.3d at 824.

134. See Derbyshire, *supra* note 31 (no state sports wagering legislation includes an integrity fee); Brennan, *supra* note 71 (no federal sports wagering has been passed and the only bill introduced does not include an integrity fee).

135. See Lemire, *supra* note 29 (only two out of twenty three states sports wagering bills include an official data requirement).

136. Carp, *supra* note 7 (stating that the NBA entered data distribution deals with analytics companies Genius Sports and Sportsradar, becoming the first U.S. sports league to sign a betting data distribution deal).

137. Carp, *supra* note 8 (stating that the NBA signed a deal with MGM Resorts to provide MGM with official NBA data).