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1-26-2021

## Sherman's Wrath: Sports Data's Impending Collision with Antitrust Law

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### Publication Citation

Jonathan Aaron Sussler, Sherman's Wrath: Sports Data's Impending Collision with Antitrust Law, 9 Ind. J.L. & Soc. Equality 116 (2021).

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## NOTE

### Sherman's Wrath: Sports Data's Impending Collision with Antitrust Law

*Jonathan Aaron Sussler\**

#### INTRODUCTION

In 2018, the Supreme Court turned the world of sports betting on its head with its ruling in *Murphy v. National Collegiate Athletic Ass'n*.<sup>1</sup> In *Murphy*, the Court struck down the Federal Professional and Amateur Sports Protection Act (PASPA) as unconstitutional under the anti-commandeering doctrine, effectively opening the door for states to legalize sports gambling as they deemed fit.<sup>2</sup> Since the Court's decision, twenty states and the District of Columbia have passed sports betting legislation, with several more states currently debating measures.<sup>3</sup> The post-*Murphy* era has turned out to be very lucrative for these entrepreneurial states, with gambling revenues exceeding \$1.3 billion and state taxes from those proceeds exceeding \$155 million.<sup>4</sup> Implicit in this new industry (and the basis for the following analysis) is a complex network of companies looking to get data from sportsbooks as quickly and as accurately as possible.<sup>5</sup>

Given the amount of sporting events they hold every season, both the National Basketball Association (NBA) and Major League Baseball (MLB) produce large amounts of event data that are used by gambling outlets to provide timely and accurate betting odds.<sup>6</sup> While a sportsbook might be able to manually input statistics on a slower night (during Monday Night Football), that process is neither logistically nor budgetarily realistic for busy Sunday afternoons, when as many as fifteen games can be simultaneously occurring in the MLB alone.<sup>7</sup> To solve this problem, sportsbooks have turned to third-party data suppliers, like industry leader

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<sup>1</sup> 138 S. Ct. 1461 (2018).

<sup>2</sup> *See id.* at 1478.

<sup>3</sup> *See Legislative Tracker: Sports Betting*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sportsbetting-bill-tracker/> (last visited Mar. 22, 2020, 10:28PM).

<sup>4</sup> *US Sports Betting Revenue and Handle*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/sportsbetting/revenue/> (last visited Mar. 22, 2020, 6:16 PM).

<sup>5</sup> A "sportsbook" is an "establishment that takes bets on sporting events and pays out winnings." *Sportsbook*, LEXICO, <https://www.lexico.com/en/definition/sportsbook> (last visited Jan. 11, 2021).

<sup>6</sup> *See* Scott Polacek, *NBA to Give Sportsbooks Real-Time Data for In-Game Betting Odds*, BLEACHER REP. (Nov. 28, 2018), <https://bleacherreport.com/articles/2808217-nba-to-give-sportsbooks-real-time-data-for-in-game-betting-odds>.

<sup>7</sup> *See, e.g.*, Jacob Janower, *MLB Opening Day 2019: Schedule for All 30 Teams*, SPORTING NEWS (Mar. 28, 2019), <https://www.sportingnews.com/us/mlb/news/mlb-opening-day-2019-schedule-for-all-30-teams/16vg11pnw02ql1pt42fofkth3y>.

Sportradar, to access the MLB's data feed in real time to populate sports gambling sites.<sup>8</sup>

As the interest in legal sports betting nationwide has increased, so too has the need for sportsbooks to provide the most accurate betting lines. To best explain this phenomenon, take the example of the 2019 Home Run Derby champion and New York Mets first baseman Pete Alonso.<sup>9</sup> Alonso is widely regarded as one of the best hitters in baseball and is a constant threat to pitchers every time he steps up to the plate.<sup>10</sup> As such, it follows that a sportsbook would want to drive in additional revenue by writing a prop bet on whether Alonso would hit a home run in his next at bat.<sup>11</sup> To set the line, or the odds in which the occurrence will take place, the sportsbook could conceivably use a simple analysis of Alonso's past performance as a hitter, perhaps even fine-tuned to the pitcher he is currently facing.<sup>12</sup> As technology advances, however, so does the information betters can glean about a certain player. Thus, it is conceivable that a sportsbook, and even a sports data supplier, has more incentive to access the most nuanced and detailed data available.

In 2016, Blast Motion entered into an exclusive agreement with the MLB to be the league's official "bat sensor technology" supplier.<sup>13</sup> Per Blast Motion's press release regarding the agreement, its product consists of a "water proof sensor and bat attachment [that] slips over the knob of any baseball or softball bat and ha[s] been designed to capture highly accurate swing metrics and analyze performance."<sup>14</sup> Then, collected data would be transmitted to the team in hopes of providing a more useful insight into someone like Alonso's hitting tendencies, thus enabling teams to better tailor practice sessions.<sup>15</sup> So, just as easily as this technology can be used for team improvement, it could also be used by sportsbooks to hone in on players' swing metrics, allowing for more accurate prop bets and better sportsbook odds in the long

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<sup>8</sup> See Robert Mann, *Understanding the NBA's Sports Betting Data Deals with Sportradar*, Genius Sports, SPORTS HANDLE (Dec. 5, 2018), <https://sportshandle.com/nba-sports-betting-sportradar-genius-sports-federal/>.

<sup>9</sup> See Mark Feinsand, *Polar Bear Pete! Alonso Wins Home Run Derby*, MLB.COM (July 9, 2019), <https://www.mlb.com/news/pete-alonso-wins-2019-home-run-derby>.

<sup>10</sup> See *id.*

<sup>11</sup> A prop bet, or proposition bet, is one of the fastest growing betting phenomena in sports betting. Similar to a futures bet, a prop bet can cover any single in-game occurrence, ranging from which player would score the first run to which teams win the coin toss at the Super Bowl. *What are Sports Prop Bets?*, LINES (Oct. 22, 2019), <https://www.thelines.com/betting/prop-bets/>.

<sup>12</sup> This stat is commonly referred to as "batting average against," and can be calculated by "Hits Allowed" divided by ("Batters Faced" minus "Walks" minus "Hit Batsmen" minus "Sacrifice Hits" minus "Sacrifice Flies" minus "Catcher's Interference"). While this may seem like an intensive analysis, it is one of the more commonly used measurements of a hitter's success. *What Is a Batting Average (AVG)?*, MLB.COM, <http://m.mlb.com/glossary/standard-stats/batting-average> (last visited Jan. 2, 2020).

<sup>13</sup> I will be using the Mets as an example in this Note, but many MLB teams are entering into similar agreements. Press Release, Blast Motion, Blast Baseball Named the Official Bat Sensor Technology of Major League Baseball® (June 30, 2016), <https://blastmotion.com/about/press/blast-baseball-named-official-bat-sensor-technology-major-league-baseball/>.

<sup>14</sup> *Id.*

<sup>15</sup> See *id.* (discussing the viability of Blast Motion technology to "provide a 360-degree game improvement solution, optimized for both major and minor league practice sessions and equipment management").

run.

Another example follows in the case of baseball pitchers, such as New York Mets National League Cy Young Award winner Jacob deGrom.<sup>16</sup> As a dominant pitcher, deGrom has the ability to change the dynamic of any game and, as previously mentioned, the betting lines.<sup>17</sup> In August 2018, deGrom and the Mets faced off against fellow all-star pitcher Cole Hamels and the Chicago Cubs.<sup>18</sup> The game went into the tenth inning, at which time MLB suspended play due to inclement weather.<sup>19</sup> When play picked up the next day, a Las Vegas sportsbook noticed the current odds did not account for deGrom's departure in favor of lackluster Mets relief pitcher Paul Sewald, who sported an abysmal 5.00 Earned Run Average.<sup>20</sup> It is likely that many bets were placed on the Cubs at much better odds than there would have been had the pitching change been accounted for, and sportsbooks likely lost thousands of dollars as a result.<sup>21</sup>

Technology startups, such as Motus, have begun to gather this invaluable data.<sup>22</sup> The MLB recently entered into an agreement to allow teams to monitor their pitcher's performance using the MotusTHROW training platform.<sup>23</sup> The MotusTHROW sensor sits below the pitcher's Ulnar Collateral Ligament, measuring "peak valgus torque on the arm."<sup>24</sup> The sensor not only has the ability to measure pitching velocity but can also measure pitcher fatigue, telling teams when it is time to make a switch on the mound.<sup>25</sup> Access to this information is valuable for players, teams, and sportsbooks alike.

It is exactly this kind of advanced data that gives rise to the markets analyzed in this Note. Both the MLB and the NBA have entered into non-exclusive partnerships with previously mentioned "official game data suppliers."<sup>26</sup> While the NBA's official non-exclusive agreements are with the companies Sportradar and Genius Sports,<sup>27</sup> the MLB signed a non-exclusive deal with only Sportradar (with

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<sup>16</sup> See Anthony DiComo, *deGrom Runaway NL Cy Young Award Winner*, MLB.COM (Nov. 14, 2018), <https://www.mlb.com/news/jacob-degrom-wins-nl-cy-young-award-c300738088> (awarding deGrom for being the best pitcher in his league).

<sup>17</sup> See *id.*

<sup>18</sup> Matt Rybaltowski, *Here's How Much 'Official' League Data Actually Costs*, SPORTS HANDLE (Mar. 12, 2019), <https://sportshandle.com/sports-betting-official-data-cost/>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *motusTHROW*, MOTUS, <https://www.motusglobal.com/motusbaseball> (last visited Nov. 6, 2019).

<sup>23</sup> Darren Rovell, *MLB Approves Device to Measure Biometrics of Players*, ESPN (Mar. 6, 2017), [https://www.espn.com/mlb/story/\\_/id/18835843/mlb-approves-field-biometric-monitoring-device](https://www.espn.com/mlb/story/_/id/18835843/mlb-approves-field-biometric-monitoring-device).

<sup>24</sup> *motusTHROW*, *supra* note 22.

<sup>25</sup> *Id.*

<sup>26</sup> See Rybaltowski, *supra* note 18.

<sup>27</sup> Press Release, Nat'l Basketball Ass'n, *NBA Announces First Betting-Data Partnerships in U.S. with Sportradar, Genius Sports* (Nov. 28, 2018), <https://www.nba.com/article/2018/11/28/nba-sportradar-genius-sports-partnership-official-release>.

the option of adding “additional authorized distributors”).<sup>28</sup> Sportradar entered into an agreement to have the “exclusive distribution rights for official MLB real-time game statistics, as collected at every ballpark via *the league’s* proprietary technology and stat operators, to both media companies and regulated sports betting operators.”<sup>29</sup>

The following analysis will show how the MLB and the NBA’s agreements run afoul of antitrust law. Part I of this analysis will discuss the relevant markets, including the preexisting sports data supply market and the market shift post-*Murphy*. Part II will explore the applicable areas of intellectual property to the ownership of sports data. Part III will analyze the antitrust implications of the non-exclusive agreements under Section 1 of the Sherman Act. Part IV will then detail the negative implications of allowing this anticompetitive conduct to continue.\

## I. MARKETS

Most antitrust litigation hinges on the precise definition of the relevant market.<sup>30</sup> A proper market definition identifies firms that compete against each other in order to home in on the relevant anticompetitive conduct.<sup>31</sup> To determine whether a joint venture truly produces tangible anticompetitive effects among firms, it must first be determined with whom they are actually in competition. Market definition analyses, while often labor-intensive and factually specific, are “an indispensable ingredient of every claim under the full rule of reason” analysis under Section 1 of the Sherman Act.<sup>32</sup>

Traditionally, markets have been defined in relation to buyer preferences.<sup>33</sup> This doctrinal test was first defined by the Supreme Court in the seminal *Cellophane* decision, which described a market as one that consists of goods “reasonably interchangeable by consumers for the same purposes.”<sup>34</sup> Courts typically analyze various factors depending on the specificities of the product, including the interchangeability of goods and the cross-elasticity of demand of the product.<sup>35</sup> At trial, evidence of market definition can vary, but the evidence involves

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<sup>28</sup> Press Release, Sportradar, Major League Baseball and Sportradar Announce Official Exclusive Global Partnership (Feb. 27, 2019), <https://sportradar.us/2019/02/major-league-baseball-and-sportradar-announce-official-exclusive-global-partnership/>.

<sup>29</sup> *Id.* (emphasis added).

<sup>30</sup> *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 n.15 (1992).

<sup>31</sup> Markets are, contrary to popular belief, defined by the products and not the participants. *See, e.g.*, U.S. DEPT OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES §§ 1.12, 1.22 (1992, revised 2010).

<sup>32</sup> Brandon Grusd, *The Antitrust Implications of Professional Sports’ League-Wide Licensing and Merchandising Arrangements*, 1 VA. J. SPORTS & L. 1, 35 (1999).

<sup>33</sup> *See United States v. E.I. du Pont de Nemours & Co. (Cellophane)*, 351 U.S. 377, 395 (1956). Buyer substitution was deemed the preferential analysis by governmental agencies in the 1982 Merger Guidelines. *See Gregory J. Werden, The History of Antitrust Market Delineation*, 76 MARQ. L. REV. 123, 194 (1992).

<sup>34</sup> *Cellophane*, 351 U.S. at 395.

<sup>35</sup> *Id.* at 394–95.

an “assessment of the magnitude of the economic force of buyer substitution.”<sup>36</sup> Before and even during litigation, business executives will often try to introduce internal evidence of whom they deem to be their competitors, but courts are typically wary of this and only introduce evidence gathered from the normal course of business.<sup>37</sup>

To determine the relevant market in an analysis of sports data markets, priority must be given to understanding the various forms of sports data. The market for sports data collected during the sporting event itself has existed for a long time.<sup>38</sup> Event data encompasses statistics representing all facets of a sporting event, including: the weather, field conditions, team achievements, and individual achievements such as home runs, rebounds, and touchdowns thrown.<sup>39</sup> Rapid technological development has led to another subset of metrics—performance data that cannot be seen by the naked eye.<sup>40</sup> The NBA, and subsequently NBA sports bettors, have especially embraced the benefits of this new performance data, with many players using wearables<sup>41</sup> during games, and some even wearing these devices during sleep to measure fatigue levels in order to avoid injury.<sup>42</sup> Technology-intensive statistical analysis has led to a seismic shift in team philosophies and has impacted the way general managers scout talent.<sup>43</sup>

Given the need for accurate and timely sports data, the question becomes: who will collect it? There are three main accumulators of sports data: governing associations, individual teams, and private companies.<sup>44</sup> The collection of sports data by governing associations is a relatively new phenomenon.<sup>45</sup> Though more common internationally, a large number of professional soccer leagues have begun to use private databases to engage with data from their competitions.<sup>46</sup> For example, the German soccer league, the Bundesliga, recently began to invest in a

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<sup>36</sup> Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 ANTITRUST L.J. 129, 138 (2007).

<sup>37</sup> Amanda J. Parkison Hassid, Note, *An Oracle Without Foresight? Plaintiffs' Arduous Burdens Under U.S. v. Oracle*, 58 HASTINGS L.J. 891, 906 (2007) (“[T]he courts and the Guidelines look to company documents to support assertions about competition in the marketplace. The Guidelines explicitly suggest that agencies should look to normal course of business documents from industry participants . . . .” (internal quotation omitted)).

<sup>38</sup> See Christian Frodl, *Commercialisation of Sports Data: Rights of Event Owners Over Information and Statistics Generated About Their Sports Events*, 26 MARQ. SPORTS L. REV. 55, 58, 60 (2015).

<sup>39</sup> Event data attributable to actions taken during the event can vary widely but is all considered raw data. *Id.* at 58–59.

<sup>40</sup> Dan Kopf, *Data Analytics Have Made the NBA Unrecognizable*, QUARTZ (Oct. 18, 2017), <https://qz.com/1104922/data-analytics-have-revolutionized-the-nba/>.

<sup>41</sup> “Wearables” are wearable performance monitors that allow coaches and training staff to monitor and record various metrics, such as temperature and heart rate. See Shourjya Sanyal, *How Are Wearables Changing Athlete Performance Monitoring?*, FORBES (Nov. 30, 2018, 8:56 PM), <https://www.forbes.com/sites/shourjyasanyal/2018/11/30/how-are-wearables-changing-athlete-performance-monitoring/?sh=1f389f17ae09>.

<sup>42</sup> Kopf, *supra* note 40.

<sup>43</sup> See *id.*

<sup>44</sup> Frodl, *supra* note 38, at 59–60.

<sup>45</sup> *Id.* at 62.

<sup>46</sup> *Id.*

private database for collection and distribution of sports data, while using third-party companies to manage the licensing scheme of the data.<sup>47</sup>

Individual teams also collect data for their own analysis.<sup>48</sup> While baseball was the first sport to have teams collect and use player performance data domestically, the most salient example exists in the NBA's Houston Rockets.<sup>49</sup> Daryl Morey, Rockets general manager and Massachusetts Institute of Technology graduate, spearheaded the team's effort to better understand player performance data.<sup>50</sup> Morey and the Rockets noticed a fundamental problem in NBA game plans—most teams take a staggeringly low number of three-pointers.<sup>51</sup> Morey then adjusted the team's game plan, opting to create more plays that included opportunities to take as many three pointers as possible from the corner, statistically proven as basketball's most efficient shot.<sup>52</sup>

The most important and largest players in the sports data industry are private sports data supply organizations.<sup>53</sup> Sports Team Analysis and Tracking Systems (STATS) is a Chicago-based company, specializing in sports data, technology, and content.<sup>54</sup> Founder John Dewan (another Massachusetts Institute of Technology graduate) transformed STATS from a small regional data supplier to the primary sports data provider of the digital age through a series of competitor acquisitions.<sup>55</sup> As of 2014, STATS had employed over 350 employees and covered sporting events around the world.<sup>56</sup> Current clients include the NBA, MLB, National Hockey League (NHL), and Fédération Internationale de Football Association (FIFA).<sup>57</sup> In 2014, STATS acquired Bloomberg Sports's data collection arm and gained a large majority of the sports data market.<sup>58</sup> These sports data suppliers are indispensable to the success of betting platforms across the world, given the inevitable rise in demand for advanced analytical data by sportsbooks.

Given that background of the current state of sports data, it is prudent to

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Zach Sarnoff, *Moreyball: The Houston Rockets and Analytics*, HARV. BUS. SCH.: DIGITAL INNOVATION & TRANSFORMATION (Apr. 5, 2018), <https://digital.hbs.edu/platform-digit/submission/moreyball-the-houston-rockets-and-analytics/>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Alyssa Schroer, *From Fantasy Football Predictions to Baseball's Statcast, Big Data in Sports Is a Real Game Changer*, BUILT IN (Dec. 5, 2018), <https://builtin.com/big-data/big-data-companies-sports>.

<sup>54</sup> Shayna Goldman, *The Evolution of STATS LLC and Its Place in the Sports Technology Landscape*, SPORTTECHIE (Apr. 16, 2015), <https://www.sporttechie.com/the-evolution-of-stats-llc-and-its-place-in-the-sports-technology-landscape/>.

<sup>55</sup> *Id.*

<sup>56</sup> Jonathan El Kordi-Hubbard, *With Clients Like the NBA and Google, STATS is the Coolest Data Company You've Never Heard of*, BUILT IN CHI. (Feb. 25, 2014), <https://www.builtinchicago.org/2014/02/25/clients-nba-and-google-stats-coolest-data-company-youve-never-heard>.

<sup>57</sup> *Id.*

<sup>58</sup> Eric Fisher, *Stats LLC Buys Bloomberg Sports in First Major Move Under Vista Equity Partners Control*, SPORTS BUS. J. DAILY (Sept. 4, 2014), <https://www.sportsbusinessdaily.com/Daily/Issues/2014/09/04/Finance/Stats.aspx>.

discuss how courts have previously analyzed market power in sports antitrust litigation. In 1984, the Supreme Court analyzed the antitrust liability of college athletics in *National Collegiate Athletic Ass'n v. Board of Regents*, focusing on the limitations of the NCAA's broadcasting agreements for college football games.<sup>59</sup> The Court determined that an agreement centralizing the broadcasting rights of member schools that limited the number of times certain schools could be televised constituted a restraint of trade.<sup>60</sup> Justice Stevens, writing for the majority, rejected the NCAA's argument that it lacked the necessary market power to be liable under antitrust laws.<sup>61</sup> The Court found the NCAA to be a unique entity, and reasoned that a lack of market power does not result in a license to freely restrain competition.<sup>62</sup> The issue ultimately was that advertisers can conceivably pay a premium price to reach viewers, and a joint agreement fully inhibits any competition in that market.<sup>63</sup>

The Seventh Circuit revisited the market for sport broadcasting agreements in a professional sports context in *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n (Bulls II)*.<sup>64</sup> In *Bulls II*, the agreement at issue was very similar to that in *Board of Regents*, wherein the NBA limited the number of Chicago Bulls games that could be broadcast on WGN, a large television network in the metro Chicago area.<sup>65</sup> The court concluded that the NBA had a wider product market for its games than the NCAA, and, thus, the NBA likely competed for viewership with other forms of entertainment, as opposed to just sports.

The Second Circuit took up a non-broadcast-related antitrust challenge to the MLB's licensing scheme in *Major League Baseball Properties v. Salvino, Inc.*<sup>66</sup> In *Salvino*, the issue was whether the MLB could force Salvino, a California corporation that produces, sells, and distributes sports collectables, to obtain a license to sell its line of stuffed animals adorned with MLB team logos.<sup>67</sup> The Second Circuit focused closely on how narrow the market should be defined, ultimately ruling in favor of MLB, in large part because Salvino's expert could not support the contention of an extremely narrow market.<sup>68</sup>

These cases underscore two key points about analyses of sports markets. First, potential challengers to impermissible joint ventures, such as those of the NBA and MLB outlined in this Note, should seek to define the market as narrowly as possible. As seen in *Salvino*, this is a make-or-break point in litigation. If a court determines that the market in question is only each individual team's advanced

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<sup>59</sup> 468 U.S. 85, 88, 92–95 (1984).

<sup>60</sup> *Id.* at 98, 113.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 88, 109, 111–12.

<sup>63</sup> *Id.* at 112.

<sup>64</sup> 95 F.3d 593 (7th Cir. 1996).

<sup>65</sup> *Id.* at 595.

<sup>66</sup> 542 F.3d 290, 294–95 (2d Cir. 2008).

<sup>67</sup> *See id.*

<sup>68</sup> Salvino argued that the relevant market should be limited to just MLB licensed products. *Id.* at 294, 300–01, 329. The court disagreed. *Id.* at 294, 329–30.



game data, rather than all game data, complainants could more easily prevail.

Second, these cases demonstrate the importance of specifying the exact anticompetitive market in question. While the market for sports data has been around a long time,<sup>69</sup> this rise of advanced data that can prove to be immensely valuable, not only for teams but also other entities that seek to profit off of sports data, such as betting houses. Even so, the specific product market should not deal with consumers (both bettors and betting facilitators) but instead the entities that are selling the data on the frontend, the teams. Being overly precise about this specificity will pay dividends in an eventual joint-venture analysis.<sup>70</sup>

As such, a sports data supply company challenging the NBA or MLB's agreements should seek to (1) define the product market as narrowly as possible and (2) learn from the mistakes of the complainant in *Salvino* by properly backing up the market definition with empirical data.

## II. OWNERSHIP OF SPORTS DATA

The MLB and NBA's agreements with Sportradar violate Section 1 of the Sherman Act as impermissible joint ventures regarding the sale of advanced team data. For MLB and NBA teams to enter a joint venture regarding data supply, they must first own the advanced data from their games. As previously mentioned, there is a burgeoning market for advanced data resulting from the rise of in-game betting.<sup>71</sup> Growth of technological capabilities has expanded the available wagers one can make on games.<sup>72</sup> Seasoned "trading veteran[s]" are now being commissioned to assist with real-time odds making as play progresses in a sporting event.<sup>73</sup> Because of the short-lived demand of in-game statistics, sportsbooks are incentivized to have all the data possible at their disposal to write the most accurate betting lines possible.<sup>74</sup>

Specifically regarding baseball games, the Western District of Pennsylvania held in *Pittsburgh Athletic v. KQV Board Co.* that "it is perfectly clear that the exclusive right to broadcast play-by-play descriptions of the games played by [a professional sports team] at their home field rests in [that team]."<sup>75</sup> While limited in precedential value because of its originating venue and its age, *Pittsburgh Athletic* has been cited by the Supreme Court to propose that the First Amendment does not give a broadcasting company the right to film and broadcast a baseball game "where the promoters or the participants had other

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<sup>69</sup> See *supra* text accompanying notes 51–55.

<sup>70</sup> See *infra* Part III.

<sup>71</sup> See 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/>.

<sup>72</sup> *Id.*

<sup>73</sup> See *id.* (noting the example of famed trader Craig Mucklow).

<sup>74</sup> See *id.*

<sup>75</sup> 24 F. Supp. 490, 492 (W.D. Pa. 1938).

plans for publicizing the event.”<sup>76</sup> Along these lines, the Seventh Circuit has held that player performance data collected during baseball games was sufficiently creative to confer copyright protection.<sup>77</sup>

However, some statistics that are products of advanced technology owned by MLB and NBA teams are copyrightable. While a team could not copyright the weather at the time of first pitch or a “naked eye statistic” such as the number of rebounds a player had, most advanced statistics previously discussed go far beyond that data, providing a window into the game that was not available even a decade ago.<sup>78</sup> In *Kregos v. Associated Press*, the Second Circuit discussed the copyright availability of baseball data and stated that normal data off of a scoresheet would not convey copyright protection.<sup>79</sup> To confer copyright protection, however, all that was needed was a simple display of “cognizable creativity.”<sup>80</sup> Creativity could even take the simple form of a specific author’s use of a heading to display information in a manner that is “out of the ordinary.”<sup>81</sup>

Following this logic, advanced data produced by MLB and NBA teams is sufficiently creative to confer copyright protection. Gone are the days of writing down simple statistics by hand to measure a player’s basic performance. Instead, teams are using proprietary technology, such as wearable sleeves and advanced bat sensors, to fully measure a player’s performance and optimize the team’s practice regimen.<sup>82</sup> This data is beyond anything a fan or scout can see with their naked eye and is the result of many years and millions of dollars of creative research and development.<sup>83</sup> Also, this data is not used in its raw form, but meticulously and creatively arranged to produce reliable metrics that will give teams a competitive advantage.<sup>84</sup> Gathered and processed by sophisticated data research analysts, such data is, by every definition under *Kregos*, copyrightable by teams as creative information.<sup>85</sup>

Trade secrecy laws also can confer intellectual property protections to advanced data. Legal claims under the doctrine of trade secrecy would likely be

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<sup>76</sup> *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977).

<sup>77</sup> *Balt. Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 669 n.7 (7th Cir. 1986) (“Only a modicum of creativity is required for a work to be copyrightable.”)

<sup>78</sup> For an example of a widely used advanced baseball statistic, see Steve Slowinski, *wOBA*, FANGRAPHS (Feb. 15, 2010), <https://library.fangraphs.com/offense/woba/>.

<sup>79</sup> 937 F.2d 700, 708 (2d Cir. 1991).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> See *supra* text accompanying note 11.

<sup>83</sup> As an example, teams have devoted entire salaried positions to this type of research. See Meg Rowley, *Job Posting: Nationals Baseball Research & Development Analyst and Data Engineer*, FANGRAPHS (Oct. 18, 2019), <https://blogs.fangraphs.com/instagrams/job-posting-nationals-baseball-research-development-analyst-and-data-engineer/>.

<sup>84</sup> See Sam Miller, *What Happens When Baseball-Stats Nerds Run a Pro Team?*, N.Y. TIMES (Apr. 23, 2016), <https://www.nytimes.com/2016/04/24/opinion/sunday/what-happens-when-baseball-stats-nerds-run-a-pro-team.html> (discussing how a minor league baseball team improved with the addition of advanced statistics).

<sup>85</sup> See *Kregos*, 937 F.2d at 708.

adjudicated under the Uniform Trade Secrets Act (UTSA).<sup>86</sup> The UTSA has gained widespread acceptance, as it has been adopted in forty-six states and the District of Columbia.<sup>87</sup> Under the UTSA, a trade secret is defined as:

- [I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:
- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
  - (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>88</sup>

Under these requirements, advanced data created by teams using proprietary technology could qualify for trade secret protection. A trade secret must only be “sufficient to confer an actual potential economic advantage.”<sup>89</sup> Proprietary technology used by teams serves that exact purpose. Teams are engaged in an arms race to give themselves the best competitive advantage they can.<sup>90</sup> It is only natural that teams seek to keep this advantage private, both in the data and in the ways and means of obtaining that data.<sup>91</sup>

An exemplary case exists in *Daktronics, Inc. v. McAfee*.<sup>92</sup> In *Daktronics*, longtime coach David Baker pitched the sports data company Daktronics on a new technology that could read and display the type and speed of a pitch to spectators in real time.<sup>93</sup> After many meetings, Daktronics helped Baker build a prototype of the product, and the pair began to pitch the idea to MLB teams.<sup>94</sup> Shortly thereafter, Daktronics began manufacturing its own version of the radar product, using sturdier and more permanent hardware, including a display that showed information other than just the pitch speed and type—a design better suited for an MLB stadium.<sup>95</sup> The South Dakota Supreme Court rejected McAfee’s claim that the “concept of displaying speed and type of pitch thrown for the public to view at a ballpark” constituted an identifiable trade secret claim.<sup>96</sup> Specifically, the court focused on the absence of novelty of the information gathered by Baker’s machine, reasoning that the information on pitch speed and type was already available at multiple ballparks, and this technology was simply an alternative means to a

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<sup>86</sup> UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 529 (2005).

<sup>87</sup> Matthew J. Frankel, *Secret Sabermetrics: Trade Secret Protection in the Baseball Analytics Field*, 5 ALB. GOV'T L. REV. 240, 244 (2012).

<sup>88</sup> See UNIF. TRADE SECRETS ACT, *supra* note 86.

<sup>89</sup> Frankel, *supra* note 87, at 253.

<sup>90</sup> *Id.* at 264–65.

<sup>91</sup> See *id.* at 267–68.

<sup>92</sup> 1999 SD 113, 599 N.W.2d 358.

<sup>93</sup> *Id.* ¶ 2, 599 N.W.2d at 360. Today, this technology is colloquially referred to as a radar gun.

<sup>94</sup> *Id.* ¶ 4, 599 N.W.2d at 360.

<sup>95</sup> *Id.* ¶ 6 n.\*, 599 N.W.2d at 360.

<sup>96</sup> *Id.* ¶¶ 14–21, 599 N.W.2d at 361–63.

common end.<sup>97</sup>

The case of advanced data is vastly different. The UTSA extends protection to “methods” and “techniques” that are secretive and valuable.<sup>98</sup> This protection could very well apply to advanced data. Unlike the publicly available data discussed in *Daktronics*, advanced data produced is not available to the naked eye and is the product of sophisticated and expensive equipment procured by a team and its partners.<sup>99</sup> The process of procuring advanced data, from designing and manufacturing the equipment, to turning the raw output into sophisticated metrics, is a process that involves an enormous team investment.<sup>100</sup> Not only can the inner workings of the technology be protected, so too can the usable data that comes from that technology.

International jurisdictions have also grappled with the issues of sports data protection. In 2004, the Court of Justice of the European Union (CJEU) decided two cases related to the protection of fixture lists, commonly known in the United States as team scheduling. The first case, *Fixtures Marketing Ltd. v. Organismos Prognostikon Agonon Podosfairos AE*, involved an alleged unauthorized use of soccer schedules by betting companies in various European Union countries.<sup>101</sup> In *Fixtures Marketing*, the CJEU denied property protection to fixture lists.<sup>102</sup> The court focused on the allocation of monetary resources, reasoning that one of European soccer’s flagship league, the English Premier League, had not expended additional resources, and a lack of a separate investment indicated a lack of importance of the fixtures beyond its mere requirement for competition.<sup>103</sup> The CJEU later affirmed this reasoning in *British Horseracing Board Ltd. v. William Hill Organization Ltd.*, finding that scheduling of horse races was a fundamental task of governance of the sport, and no separate investment was required to create the lists beyond the board’s day-to-day tasks.<sup>104</sup> Thus, courts make special note of the time and personnel investment that goes into scheduling when determining whether various kinds of sports data merits intellectual property protection.

### III. ANTITRUST ANALYSIS

American antitrust laws are mainly concerned with two types of business conduct: that of unilateral firms and that of concerted action between competitors.<sup>105</sup> While unilateral conduct is subject to a rigorous Section 2 analysis,

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<sup>97</sup> *Id.* ¶¶ 18–19, 599 N.W.2d at 362.

<sup>98</sup> *See* UNIF. TRADE SECRETS ACT, *supra* note 86.

<sup>99</sup> *See supra* notes 11–13 discussion and accompanying text.

<sup>100</sup> *See supra* notes 11–13 discussion and accompanying text.

<sup>101</sup> *See, e.g.*, Case C-444/02, *Fixtures Mktg. Ltd. v. Organismos Prognostikon Agonon Podosfairos AE (OPAP)*, 2004 E.C.R. I-10555.

<sup>102</sup> *Id.* ¶ 52.

<sup>103</sup> *Id.* ¶ 51.

<sup>104</sup> Case C-203/02, *British Horseracing Bd. Ltd. v. William Hill Org. Ltd.*, 2004 E.C.R. I-10417.

<sup>105</sup> *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY, THE LAW OF COMPETITION AND ITS PRACTICE chs. 6–8 (5th ed. 2016).

this Note is focused on Section 1 conduct.<sup>106</sup> Section 1 of the Sherman Act states:

[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.<sup>107</sup>

As articulated by Professor Herbert Hovenkamp, there are three main reasons for closer scrutiny of concerted joint-venture conduct.<sup>108</sup> First, the more stringent scrutiny is based in large part on the textual structure of the Sherman Act, Section 1 of the Sherman Act precedes Section 2.<sup>109</sup> It almost certainly bears some historical significance as the Sherman Act was created in large part to “prevent[] restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.”<sup>110</sup>

Second, most joint-venture agreements involve concerted actors who are seeking to privately benefit.<sup>111</sup> Joint ventures result in gains to a company's overall efficiency and power in its specific product market.<sup>112</sup> From an economic perspective, the joint venture then acts as a distinct monopoly, where the venture can raise prices above the optimal value or reduce output to harm consumers.<sup>113</sup>

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<sup>106</sup> See Sherman Act § 2, 15 U.S.C. § 2 (2012).

<sup>107</sup> 15 U.S.C. § 1 (2012).

<sup>108</sup> HOVENKAMP, *supra* note 105, at 258.

<sup>109</sup> See 15 U.S.C. §§ 1–2.

<sup>110</sup> *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940).

<sup>111</sup> HOVENKAMP, *supra* note 105, at 258.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 24.

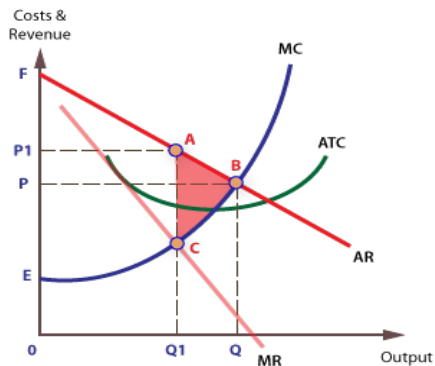


Figure 1<sup>114</sup>

In Figure 1—showing monopolistic pricing effects—normal market competitive price, such as that with sports data suppliers prior to the joint venture, would be at  $P$ , which is the market equilibrium price at the intersection of marginal cost (MC) and amount of revenue sold (AR). After the teams merge to create a joint venture, the market price shifts to  $P1$ , where price is higher than that of the competitive market equilibrium.<sup>115</sup>

The third reason for heightened judicial scrutiny is that, through the joint venture's shift of output from  $Q$  to  $Q1$ , trade is artificially restrained in direct violation of the Sherman Act.<sup>116</sup> This restraint results summarily in lower market output, both in quality and quantity.<sup>117</sup> The end goal of a permissible joint venture should be to improve the product and experience for the consumer.<sup>118</sup> If a joint venture harms consumers *and* competition in the specific market, there is summarily no reason to allow for its existence.<sup>119</sup>

Historically, joint venture antitrust analyses have centered around two main issues: (a) whether a joint venture between wholly distinct entities exists, or whether the agreement is simply a vertical restraint; and (b) if the agreement is between legally distinct entities, whether it is ancillary to a larger procompetitive purpose.<sup>120</sup>

<sup>114</sup> *Monopoly*, ECON. ONLINE, [https://www.economicsonline.co.uk/Business\\_economics/Monopoly.html](https://www.economicsonline.co.uk/Business_economics/Monopoly.html) (last visited Jan. 19, 2021).

<sup>115</sup> HOVENKAMP, *supra* note 105, at 16.

<sup>116</sup> *Id.* at 258.

<sup>117</sup> *Id.*

<sup>118</sup> See Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 837 (2014) (discussing Judge Bork's reimagining of the principles of antitrust not to prohibit competition but only to prohibit conduct that in turn harms "consumer welfare").

<sup>119</sup> See HOVENKAMP, *supra* note 105, at 259.

<sup>120</sup> See Matthew Bester, *Joint Ventures and the Single Entity Doctrine After American Needle, Inc. v. National Football League*, 1 ARIZ. ST. U. SPORTS & ENT. L.J. 1, 9 (2011).

### A. *Distinct Entities*

Since firms cannot legally compete with themselves,<sup>121</sup> a court must first determine the level of integration of venture firms.<sup>122</sup> Determining what constitutes a permissible level of integration has puzzled judges for decades, but it is a crucial step to the ultimate goal of concluding whether further litigation is needed.<sup>123</sup>

Following *Copperweld Corp. v. Independent Tube Corp.*, parents and subsidiary firms are not considered legally separate competitors.<sup>124</sup> The reasoning behind this notion is important to this analysis—firms that function in a parent-subsidiary format lack competitive motives but share an overarching common goal.<sup>125</sup> A parent firm may also show a lack of competition between it and a subsidiary firm when it acts in a way not conducive to the firm's best interest, showing an underlying anticompetitive motive.<sup>126</sup>

The nuances of joint venture agreements are best illustrated by two contrasting cases decided by the Supreme Court. First, in *Texaco Inc. v. Dagher*, the defendants successfully argued that their venture was fully integrated.<sup>127</sup> Two major oil companies, Texaco and Shell, jointly formed a corporation to sell and market gasoline on the west coast of the United States.<sup>128</sup> The Court determined that there was no issue with the joint venture; the companies not only integrated their facilities and operations but also still competed with each other.<sup>129</sup>

In contrast to *Dagher*, in *Arizona v. Maricopa County Medical Society*, the defendants, medical societies, were found to be liable for price fixing fees charged to patients.<sup>130</sup> A variety of factors, including the lack of operational integration, the lack of new products, and the lack of profit sharing differentiated the societies' operations from permissible joint ventures.<sup>131</sup>

In the sports context, most joint ventures fall under the category of partial integration. If categorized as partially integrated, courts will still consider the

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<sup>121</sup> *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

<sup>122</sup> Bester, *supra* note 120, at 10.

<sup>123</sup> Courts have long sought to limit unnecessary antitrust litigation, given the exorbitant discovery production costs. *E.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (restating the principle that "proceeding to antitrust discovery can be expensive").

<sup>124</sup> *Copperweld Corp.*, 476 U.S. at 771.

<sup>125</sup> While this forecloses most competitive motives, some intrabrand competition may exist—for example, between various brands of General Motors vehicles.

<sup>126</sup> *See Robertson v. Sea Pines Real Estate Cos.*, 679 F.3d 278, 285 (4th Cir. 2012).

<sup>127</sup> *Texaco Inc. v. Dagher*, 547 U.S. 1, 4 (2006).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 8.

<sup>130</sup> 457 U.S. 332, 357 (1982).

<sup>131</sup> *Id.* at 356.

same analysis—the level of integration of the firms.<sup>132</sup> This categorization was squarely addressed in the seminal sports case of *American Needle, Inc. v. National Football League*, where the issue was the NFL’s joint licensing of intellectual property.<sup>133</sup> Prior to 2000, the jointly formed National Football League Properties (NFLP) coordinated the development and licensing of team merchandise.<sup>134</sup> In December 2000, the NFLP decided to grant an exclusive license to Reebok as the sole NFL apparel manufacturer, rescinding licenses with other manufacturers, including American Needle.<sup>135</sup>

The Court concluded that regardless of the formal name to which the joint venture is given, concerted action under Section 1 revolves around how the entities act in concert.<sup>136</sup> Justice Stevens, in a unanimous decision of the Court, likened the issue to that from *Copperweld Corp.*, stating that the inquiry turns to simply whether the venture is created through separate decision makers with the result depriving the marketplace of previously *independent* decision makers.<sup>137</sup> In *American Needle, Inc.*, the Court determined that NFL teams are independently owned and operated entities that compete regularly on things such as ticket sales, sponsorships, and broadcast revenue.<sup>138</sup> Thus, while some concerted action is required to produce NFL football, that does not mean the teams have a blanket immunity to all Section 1 liability.<sup>139</sup> After *American Needle, Inc.*, courts should look to whether each team is actively pursuing unique economic interests that are an “instrumentality of the teams.”<sup>140</sup> If so, separate-entity status exists, and courts move on to the next step of the analysis.

### B. Restraint of Competition

Antitrust litigation is an extraordinarily time-consuming and expensive venture for all parties involved.<sup>141</sup> In a perfect world, the Department of Justice, the Federal Trade Commission, and private plaintiffs would have unlimited resources to examine every agreement’s most minute inner workings to determine its credibility. Unfortunately, that is not our current reality.<sup>142</sup> Given the extreme complexity and uncertainty involved in determining liability on a case-by-case

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<sup>132</sup> Sports league are considered partially integrated when members are required “to surrender a large amount of their autonomy to ensure the efficient management of the relevant sport.” Thomas A. Piraino, Jr., *A Proposal for the Antitrust Regulation of Professional Sports*, 79 B.U. L. REV. 889, 923 (1999).

<sup>133</sup> 560 U.S. 183, 187, 198 (2010).

<sup>134</sup> *Id.* at 187.

<sup>135</sup> *Id.*

<sup>136</sup> Bester, *supra* note 120, at 8.

<sup>137</sup> *Id.*

<sup>138</sup> *Am. Needle, Inc.*, 560 U.S. at 198.

<sup>139</sup> *Id.* at 199.

<sup>140</sup> *Id.* at 201.

<sup>141</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007).

<sup>142</sup> See Christopher R. Leslie, *De Facto Detrebling: The Rush to Settlement in Antitrust Class Action Litigation*, 50 ARIZ. L. REV. 1009, 1010 (2008).



basis, courts have developed a series of shortcuts in analyzing restraints of trade that are inherently anticompetitive, namely the per se analysis.<sup>143</sup> The Supreme Court's adoption of the per se analysis truncates the necessary inquiries, permitting the court to conclude illegal conduct without further inquiry.<sup>144</sup>

When anticompetitive consequences of a restraint are clear but viable procompetitive justifications that could merit scrutiny exist, courts occasionally employ a quick-look analysis.<sup>145</sup> This application is appropriate primarily when similar conducts have been found to be violation of Section 1.<sup>146</sup> Courts have historically done a balancing test, analyzing whether, in the constrained market, the joint venture's procompetitive justifications outweigh the procompetitive effects by looking at whether the restraints are considered "ancillary."<sup>147</sup>

Courts will commonly examine a restraint in relation to the purpose of the joint venture.<sup>148</sup> Restraints are categorized as either affecting competition inside the venture or outside it.<sup>149</sup> Restraints that are inside the venture are those that have an underlying purpose related to the venture's primary function.<sup>150</sup> Historically, this function was defined as whether the venture's purpose comes from decisions of a single, unitary focal point.<sup>151</sup> Recently, the definition of a restraint has become more controversial. The center of much of this debate surrounds Justice Thomas's characterization in *Dagher* of internal restraints as those that affect "core activity."<sup>152</sup> Many commentators and judges have noted that this definition can be overbroad, especially in relation to sports leagues.<sup>153</sup>

Conversely, restraints can occur outside of the venture, such as those in *American Needle*. In effectuating the need for a specialized inquiry for sports teams, the Court reasoned that teams need to cooperate, and the "special characteristics of this industry may provide a justification' for many kinds of agreements."<sup>154</sup> Invoking the Court's prior reasoning in *NCAA v. Board of Regents of the University of Oklahoma*, Justice Stevens noted that some aspects of joint agreements are

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<sup>143</sup> *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Justice Burger articulated the usefulness of a per se analysis as a "protection of the public welfare." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 621 (1972) (Burger, J., dissenting).

<sup>144</sup> *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

<sup>145</sup> *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999).

<sup>146</sup> *See id.* at 770.

<sup>147</sup> *Id.*

<sup>148</sup> *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984).

<sup>149</sup> *See* 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 1478d2 (4th ed. Supp. 2020).

<sup>150</sup> *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 113–15 (1984)

<sup>151</sup> *See Copperweld Corp.*, 467 U.S. at 766–67.

<sup>152</sup> *See Texaco, Inc. v. Dagher*, 547 U.S. 1, 7–8 (2006).

<sup>153</sup> The most widely cited criticism of this approach comes from Justice Stevens's opinion in *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 199 n.7 (2010); *see also* James A. Keyte, *American Needle: A New Quick Look for Joint Ventures*, *ANTITRUST*, Fall 2010, at 48, 51–52 (arguing that "core" activities of professional sports leagues do not fall within purview of antitrust scrutiny).

<sup>154</sup> *Am. Needle, Inc.*, 560 U.S. at 202 (quoting *Brown v. Pro Football, Inc.*, 518 U.S. 231, 252 (1996) (Stevens, J., dissenting)).

necessary to make “the entire league successful and profitable,” including that of scheduling, sharing necessary rules to provide uniform playing standards, etc.<sup>155</sup>

Since *Board of Regents*, courts have delineated three interrelated tests for determining whether a restraint is ancillary or not.<sup>156</sup> The first test is whether the restraint has the potential to accomplish “legitimate objectives.”<sup>157</sup> The second is whether the restraint is itself reasonable.<sup>158</sup> Third is whether the restraint is reasonably necessary for an “efficiency-enhancing purpose[].”<sup>159</sup>

Regarding the second test of reasonableness, most agreements are themselves inherently reasonable—that is precisely why we have the quick-look analysis.<sup>160</sup> Agreements always have the potential to accomplish legally cognizable objectives, but the inquiry should go further and look to the motives found below the surface.<sup>161</sup> The reasonably necessary test is the most workable; it is stringent enough to look at an underlying purpose by asking whether the market really needs this restraint. The question then becomes: How does this all apply to the agreements made by the NBA and MLB?

The short answer is that it depends. The Supreme Court has construed Section 1 to apply to all agreements of separately owned and operated entities, such as MLB and NBA teams.<sup>162</sup> The entity structures in the MLB and NBA are most analogous to those present in *American Needle*. MLB and NBA teams are separate legal entities that engage in regular competition, just like NFL teams from *American Needle*.<sup>163</sup> Especially regarding national sponsorships, MLB and NBA teams are in direct competition with each other and different leagues. For example, the New York Mets signed a twenty-year \$400 million stadium naming rights sponsorship to Citigroup in 2007.<sup>164</sup> In response, the NBA’s Brooklyn Nets signed a similar agreement with fellow major bank, Barclays PLC, for \$20 million per year.<sup>165</sup> Unlike most other revenue-sharing agreements, individual clubs keep all profit they gain from sponsorship contracts, so there is intense

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<sup>155</sup> *Id.* at 202–03.

<sup>156</sup> Allen G. Haroutounian, *Shedding Light on the Federal Courts’ Treatment of Horizontal Restraints Under Section 1 of the Sherman Antitrust Act*, 45 LOY. L.A. L. REV. 1173, 1182–85 (2012).

<sup>157</sup> *Id.* at 1183.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1184.

<sup>160</sup> See *supra* text accompanying notes 145–48.

<sup>161</sup> While proving motive is often helpful for the bigger picture in an antitrust investigation, “good motives will not validate an otherwise anticompetitive practice.” Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 n.23 (1984).

<sup>162</sup> See *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 239–41 (1918).

<sup>163</sup> Under the same factors articulated for NFL teams, MLB teams regularly compete for business resources in similar markets. See *Mid-South Grizzlies v. Nat’l Football League*, 720 F.2d 772, 787 (3d Cir. 1983) (“Conceivably within certain geographic submarkets two league members compete with one another for ticket buyers.”).

<sup>164</sup> Marc Edelman, *Why the “Single Entity” Defense Can Never Apply to NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 914 (2008).

<sup>165</sup> *Id.*

competition to court those corporations that will pay the most.<sup>166</sup> As such, individual MLB and NBA clubs lack the “complete unity of interest” to be considered a single entity, and are subject to a rigorous Section 1 joint venture analysis.<sup>167</sup>

The next part of the inquiry rests in the relationship of the competitive restraint to the objective of the perceived joint venture.<sup>168</sup> The restraints at issue in *American Needle*, as well as the corollary restraints at issue in a potential challenge to the MLB and NBA sports data agreements, are subject to an analysis as “outside venture restraints.”<sup>169</sup> This analysis was a crucial part of the Court’s opinion in *American Needle*, and the main reason the NFL’s argument fell apart.<sup>170</sup> There, the NFL argued that the competitive nature of sports leagues is such that concerted action is necessary to keep the league functioning properly.<sup>171</sup> The Court found this argument unpersuasive.<sup>172</sup> Justice Stevens noted that “for many such ventures, the participation of others is necessary. But that does not mean that necessity of cooperation [in certain respects] transforms concerted action into independent action. . . .”<sup>173</sup> But in true Supreme Court fashion, the Court’s most widely cited view on this topic occurs in a footnote.<sup>174</sup> In footnote seven, the Court further stated that just because “leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.” The Court feared that should this conduct be immunized, “[m]embers of any cartel could insist that their cooperation is necessary to produce the ‘cartel product’ and compete with other products.”<sup>175</sup>

Just as the Court did not go so far as to immunize NFL teams from all Section 1 liability because of a small need to collude to produce their product, that same principle would follow for NBA and MLB teams. Professional sports require some interaction between two independent firms to create a marketable product.<sup>176</sup> One can conceive of the necessary aspects of professional baseball and basketball that merit collusion and standardization—scheduling, rules adoption, and even uniform ownership requirements ensure teams are, at the very least, in qualified hands.<sup>177</sup>

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<sup>166</sup> *Id.* at 914–15.

<sup>167</sup> *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771 (1984).

<sup>168</sup> Bester, *supra* note 120, at 21.

<sup>169</sup> *See id.* at 23–24.

<sup>170</sup> *See Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 198 (2010).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 199.

<sup>174</sup> *Id.* at 199 n.7.

<sup>175</sup> *Id.*

<sup>176</sup> *See* Nathaniel Grow, *American Needle and the Future of the Single Entity Defense Under Section One of the Sherman Act*, 48 AM. BUS. L.J. 449, 487 (2011).

<sup>177</sup> *See* Jorge E. Leal Garrett & Bryan A. Green, *Considerations for Professional Sports Teams Contemplating Going Public*, 31 N. ILL. U. L. REV. 69, 81 (2010).

In a similar vein, even though NBA and MLB teams happen to operate jointly in some regards, they are not wholly immune to Section 1 liability for their conduct surrounding the sale of sports data.<sup>178</sup> Here, just as with the high degree of competition for team intellectual property rights in *American Needle*, there is a distinct future need of a robust market for a team's advanced data.<sup>179</sup> The more technology progresses, the more sportsbooks will have the ability and desire to create new and innovative wagers for their consumers.<sup>180</sup> Likewise, the more nuanced and complex wagers that sportsbooks can offer, the higher the demand will be for advanced data metrics to ensure accurate betting lines for sportsbooks to optimize their profits.<sup>181</sup> This market is unrelated to the necessary cooperation to run the MLB and NBA, and must be similarly treated as wholly independent conduct akin to that of the NFL in *American Needle*.<sup>182</sup>

#### IV. IMPLICATIONS

The effect of permitting unregulated joint ventures extends far beyond sports. Since the passage of the Sherman Act, antitrust laws have advanced the noble mission of representing the “Magna Carta of free enterprise.”<sup>183</sup> In the Sherman Act's early days, Presidents Roosevelt and Taft were steadfast in breaking up large conglomerate corporations, including the railways<sup>184</sup> and the infamous Standard Oil.<sup>185</sup> Justice Douglas called monopoly a “curse of bigness” and reasoned that antitrust law is “founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.”<sup>186</sup>

Justice Douglas's concerns still persist. The United States consistently has one of the highest rates of income inequality in the industrialized world, with the richest .1% of Americans taking in as much wealth as the bottom 90%.<sup>187</sup> This wealth gap more than doubled between 1989 and 2016—the same time period as the growth of economic theories popularized by conservatives such as Ronald Reagan and Robert Bork.<sup>188</sup> Ever since, large corporations have begun to overtake

<sup>178</sup> See *Am. Needle Inc.*, 560 U.S. at 199.

<sup>179</sup> See *Changing the Game: How Data Analytics is Upending Baseball*, WHARTON SCH. U. PA.: KNOWLEDGE@WHARTON (Feb. 21, 2019), <https://knowledge.wharton.upenn.edu/article/analytics-in-baseball/>.

<sup>180</sup> See *supra* text accompanying notes 74–76.

<sup>181</sup> See *supra* text accompanying notes 74–76.

<sup>182</sup> See *Am. Needle Inc.*, 560 U.S. at 199.

<sup>183</sup> This famous quote comes from Justice Scalia's opinion in *Trinko*. *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415–16 (2004) (quoting *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972)).

<sup>184</sup> See *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

<sup>185</sup> See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

<sup>186</sup> *United States v. Columbia Steel Co.*, 334 U.S. 495, 535–36 (1948) (Douglas, J., dissenting).

<sup>187</sup> See Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RES. CTR. (Feb. 7, 2020), <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/>.

<sup>188</sup> *Id.*; see Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 837–840 (2014) (detailing the main facets of Bork's economic theories from his magnum opus *The Antitrust Paradox*).

and control the American markets, concentrating power into the hands of the privileged and wealthy.<sup>189</sup>

Allowing large joint ventures, such as those undertaken by the MLB and NBA, would further exacerbate the issues plaguing America's lower and middle classes. Large-scale conglomeration of market power negatively manifests in many ways including the widespread losses of jobs to overseas labor markets and the changes in corporate governance policies that allow executives to take larger pieces of the pie while leaving their workforce struggling.<sup>190</sup>

Effective competition policy, like that enacted during the Obama Administration,<sup>191</sup> can help to alleviate some of these concerns. For antitrust enforcement mechanisms to take on these issues, they need to use the tools already at their disposal. This principle—helping the average American—is well enshrined into our antitrust laws as the “Consumer Welfare” standard.<sup>192</sup> A continued adherence to this standard will not require any changes from the courts, but could increase wealth redistribution into smaller, locally owned businesses. Additionally, in regulating the conglomeration of market power, enforcers must be wary of efficiency-related excuses by company executives. While good for profits, this end goal can leave workers and their families with suppressed wages and can contribute to the “vicious cycle of widening inequality.”<sup>193</sup>

## CONCLUSION

From bat sensors that measure hitting velocity to pitching sleeves that measure arm fatigue, both the MLB and NBA have “established a framework that could unlock a deep trove of player performance data” expanding upon key priorities of player improvement and injury prevention.<sup>194</sup> But just as quickly as teams try to improve their product by adopting new and emerging technology, so too do sportsbooks and sports data suppliers. As the market to offer the best and latest statistical information to suppliers grows in the near future, it will be interesting to see how centralized data policies such as the ones adopted by the MLB and the NBA

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<sup>189</sup> This idea has become much of a political soundbite, stemming mainly from the 2020 presidential campaigns of Bernie Sanders and Elizabeth Warren. See Bernie Becker, *Sanders and Warren Want to Tax the Rich. Here's Why Their Plan Could Work.*, POLITICO (Nov. 18, 2019, 10:33 AM), <https://www.politico.com/news/2019/11/16/sanders-warren-tax-the-rich-plans-071198>.

<sup>190</sup> See Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1, 10 (2015).

<sup>191</sup> See Bill Baer, Assistant Att'y Gen., U.S. Dept. Just., Reflections on Antitrust Enforcement in the Obama Administration at the New York State Bar Association (Jan. 30, 2014), <https://www.justice.gov/atr/file/517761/download>.

<sup>192</sup> John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 211–12 (2008) (“In recent years, the case law has largely adopted the view that the ultimate goal of the antitrust laws is to protect consumers, not to increase efficiency.”)

<sup>193</sup> Baker & Salop, *supra* note 190, at 9.

<sup>194</sup> Eric Fisher, *Wearable Tech Wins over MLB*, SPORTS BUS. J. (Mar. 13, 2017), <https://www.sportsbusinessdaily.com/Journal/Issues/2017/03/13/Technology/MLB-analytics.aspx>.

survive antitrust scrutiny.

While it is still too soon to predict the outcome of any such litigation that may result, these agreements should, at the very least, be subject to the same rigorous analysis as the NFL's in *American Needle*. For the sake of consistency, the Department of Justice and the Federal Trade Commission should provide guidance on the exact concerted action permissible for professional sports teams. If left unresolved, teams can and will conceivably use the Department and Commission's tacit approval to further restrict competition in markets wholly unrelated to those necessary to produce their sport's entertainment product.