

4-29-2020

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Recommended Citation

Skyler R. Berman, *Bargaining Over Biometrics: How Player Unions Should Protect Athletes in the Age of Wearable Technology*, 85 Brook. L. Rev. (2020).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol85/iss2/7>

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Bargaining Over Biometrics

HOW PLAYER UNIONS SHOULD PROTECT ATHLETES IN THE AGE OF WEARABLE TECHNOLOGY

INTRODUCTION

Joel Embiid, who plays center for the Philadelphia 76ers, is one of the most entertaining players in sports.¹ He frequently gestures and showcases his emotions to the crowd, eliciting everything from cheers and boos.² He trash-talks and mocks his opponents on the court and via social media.³ Due to his vibrant demeanor, his skill, and impact on the court, Embiid has built a strong personal brand that has led to major commercial endorsements and millions of social media followers.⁴ Nevertheless, although Embiid is completely healthy as of the start of the 2019 season, a lengthy injury history has led to questions about his long-term health.⁵

Now imagine Embiid, the oft-injured superstar with commercial appeal, being asked by his team to wear a wristband or a chip on his shorts during practices and games that will track some of his vitals. The device will document Embiid's biometric or "under the skin" data such as his blood pressure, heart rate, skin temperature, sweat production, fatigue levels, and muscle

¹ See Harry Lyles Jr., *The 16 Best Moments from Joel Embiid and the Year of The Process*, SB NATION (May 10, 2018, 3:48 PM), <https://www.sbnation.com/2018/5/10/17339202/joel-embiid-76ers-season-highlights-the-process> [<https://perma.cc/B3AB-56DR>].

² Ben Wieland, *Personality and Talent Combine to Make Joel Embiid the NBA's Newest Superstar*, FANSIDED (Feb. 15, 2018), <https://thesixersense.com/2018/02/15/philadelphia-76ers-joel-embiid-gifted-on-off-court/> [<https://perma.cc/NW5P-3WYX>].

³ *Id.*

⁴ See Brian Hart, *76ers Joel Embiid Becoming a Social Media Giant Is a Major Lesson in Personal Branding. Here's Why*, INC. (Feb. 20, 2018), <https://www.inc.com/brian-hart/76ers-joel-embiid-becoming-a-social-media-giant-is-a-major-lesson-in-personal-branding-heres-why.html> [<https://perma.cc/ZB3W-SH3X>]; see also Troy Haliburton, *Report: Joel Embiid to Leave Adidas for Under Armour Endorsement*, SIXERS WIRE (Oct. 9, 2018), <https://sixerswire.usatoday.com/2018/10/09/sixers-joel-embiid-adidas-under-armour-sneaker-endorsement/> [<https://perma.cc/Q64X-FRUB>] (noting Joel Embiid's pending multi-year endorsement deal with Under Armour).

⁵ See Daniel Rapaport, *Report: Joel Embiid's Contract Includes Injury Protections for Sixers*, SPORTS ILLUSTRATED (Oct. 10, 2017), <https://www.si.com/nba/2017/10/10/joel-embiid-max-contract-injury-provisions> [<https://perma.cc/ST6C-SQHB>].

recovery.⁶ This type of device would seem to benefit both Embiid and the team that employs him. Embiid can gain a greater understanding of how to effectively recover from practices, games, and training sessions in order to optimize performance and prevent future injuries.⁷ The Philadelphia 76ers can access vast amounts of biometric data on Embiid that will aid the team in understanding how to put him in the best situations to succeed.⁸ On the surface, this seems like a mutually beneficial opportunity for both Embiid and the 76ers.

The use of wearable technology in sports, however, is a new, disruptive development that has wide-ranging impacts beyond injury prevention and performance optimization.⁹ Does Embiid have exclusive ownership of the biometric data that teams and leagues derive from the wristband he wears? Can these entities license his biometric data to third-party organizations such as television broadcasting companies, video game companies, fantasy football companies, and casino operators that are looking for new ways to engage consumers? Embiid's rights regarding his own biometric data seem unclear.¹⁰ How exactly this data can be commercialized has not been adequately addressed in league collective bargaining agreements (CBAs), which are negotiated agreements between players and owners that establish "how the league will operate."¹¹ This has led to labor and employment, intellectual property, privacy, and related business issues that can

⁶ See Daniel Adesky, *Tracking Every Move: How Wearable Tech Is Changing the Legal Landscape of the North American Sports Industry*, *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.: BLOG* (Nov. 14, 2017), <http://www.fordhamiplj.org/2017/11/14/tracking-every-move-wearable-tech-changing-legal-landscape-north-american-sports-industry/> [<https://perma.cc/7ERL-WWKE>].

⁷ See Max Rappaport, *How Wearable Technology Is Changing the NBA*, *COMPLEX* (Nov. 17, 2015), <https://www.complex.com/sports/2015/11/how-wearable-technology-is-changing-the-nba/lengthening-careers> [<https://perma.cc/3ZLT-MH77>].

⁸ *Id.*

⁹ See William Tubbs, *The Legal Implications of Wearables in Sport*, *INNOVATION ENTERPRISE* (June 3, 2015), <https://channels.theinnovationenterprise.com/articles/the-legal-implications-of-wearables-in-sport> [<https://perma.cc/TR9T-B2CN>] (noting that legal issues such as data protection and rights ownership are other byproducts of wearable usage in sports).

¹⁰ See Zachary Zagger, *4 Questions Raised by Athletes Use of Wearable Devices*, *LAW360* (July 5, 2018), <https://www.law360.com/articles/1057809/4-questions-raised-by-athletes-use-of-wearable-devices> [<https://perma.cc/3FQC-8X9X>].

¹¹ Brittany L. Forgues, *Collective Bargaining Agreements and What Has Changed in the NBA and NFL*, *MASS. SCH. L. BLOG* (Apr. 2012), <http://www.msllaw.edu/verdict-3/> [<https://perma.cc/4ZES-VHAY>]; see Rian Watt, *The New NBA CBA Addresses Wearable Technology, But What Does That Mean?*, *VICE: SPORTS* (Feb. 1, 2017, 11:05 AM), https://sports.vice.com/en_us/article/8qy5eg/the-new-nba-cba-addresses-wearable-technology-but-what-does-that-mean [<https://perma.cc/QW7X-V77K>] (noting the NBA CBA "punts" on the question of who has the right to sell biometric data); see also *What Are Collective Bargaining Agreements - and How Are They Used in Sport?*, *IN BRIEF*, <https://www.inbrief.co.uk/sports-law/collective-bargaining-agreements-in-sport/> [<https://perma.cc/4ZYK-J2NW>] (listing wages and conditions of employment as mandatory subjects of negotiation).

ultimately be resolved by creative collective bargaining and business partnerships between athlete unions (Players Associations) and league executives.

Players in the four major U.S. sports leagues, known as the big four,¹² are unionized, and the CBA governs their relationship with the league.¹³ CBAs, however, are not negotiated every year and usually have terms greater than five years.¹⁴ New technological and societal developments emerge daily, and current CBAs cannot account for these developments fully or adequately. The use of wearable technology in sports is becoming more ubiquitous, especially since sports leagues and broadcasters are constantly under pressure to perform and provide the most attractive product.¹⁵ The demand for third-party licensing of biometric data derived from wearables can provide a new revenue stream for players, teams, leagues, and third-party organizations.¹⁶ Is there a structure in place that protects player rights in their own bodies and potential monetization opportunities that stem from their biometric data? This note tackles the issues regarding the ownership rights to biometric data in the big four, and advocates for a players' bill of rights and a license agreement to be included in new CBAs. This bill of rights includes core principles, terms, and language that will ensure players have rights and ownership in the beneath the skin biometrics obtained from wearable technology.

¹² The "big four" refers to the National Football League (NFL), National Basketball Association (NBA), National Hockey League (NHL), and Major League Baseball (MLB). Steve Davis, *With 'Big Four' Mentality, MLS Still Fighting for Place Among Major Leagues*, FOURFOURTWO (Feb. 22, 2017), <https://www.fourfourtwo.com/us/features/major-league-soccer-big-four-sports-when-will-mls-pass-nhl> [<https://perma.cc/F2QN-PU67>].

¹³ See Ryan T. Dryer, Comment, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, J. DISP. RESOL., 2008, at 267, 267, <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1090&context=jdr> [<https://perma.cc/BM2Z-T4UT>]; Lyle Richardson, *Issues the NHL Must Solve to Prevent Another Lockout*, BLEACHER REP. (Nov. 14, 2016), <https://bleacherreport.com/articles/2675492-issues-the-nhl-must-solve-to-prevent-another-lockout#slide0> [<https://perma.cc/GA5C-M5EH>].

¹⁴ See Gregg Rosenthal, *The CBA in a Nutshell*, NBC SPORTS: PRO FOOTBALL TALK (July 25, 2011, 2:03 PM), <https://profootballtalk.nbcsports.com/2011/07/25/the-cba-in-a-nutshell/> [<https://perma.cc/H5M2-77P9>]; see also David Aldridge, *NBA, NBPA Reach Tentative Seven-Year CBA Agreement*, NAT'L BASKETBALL ASS'N (Dec. 14, 2016, 8:18 PM), <http://www.nba.com/article/2016/12/14/nba-and-nbpa-reach-tentative-labor-deal> [<https://perma.cc/RPS9-YGEU>] (noting that either party to the NBA CBA can opt out after six years).

¹⁵ See Denali Tietjen, *Content Wars: How Television Networks Are Fighting the Netflix Threat*, FORBES (June 9, 2015, 6:05 PM), <https://www.forbes.com/sites/denalitietjen/2015/06/09/content-wars-how-television-networks-are-fighting-the-netflix-threat/#6964562046f6> [<https://perma.cc/4K3B-PRCL>].

¹⁶ See Brian R. Socolow, *Wearables Technology Data Use in Professional Sports*, WORLD SPORTS L. REP., Apr. 2016, at 12, 12, <https://www.loeb.com/publications-articles-201604-wearablestechnologydatauseinsports> [<https://perma.cc/6YM9-9SRP>] ("The development of wearable technology to collect live data from training and competition has opened a valuable information market in the sports industry.").

Part I will delve into the history and current state of wearable technology and biometric data usage in sports. This Part will touch on the wearable technology market, describe the types and uses of those devices, and expound on the risks and opportunities associated with biometric data in sports derived from such technology. Part II will examine and investigate the various issues associated with this topic from a player's perspective, including labor and employment, intellectual property issues, ownership, and rights of publicity and privacy. This part will further reiterate how players have a strong argument for ownership in their biometric data. Part III will analyze how the big four leagues have dealt with biometric data in their respective CBAs and how other industries with unions have adapted to technological changes, new data, and employee-employer relationship issues and renegotiating terms in collective bargaining agreements accordingly. Part IV will advocate for a players' bill of rights and data ownership structure that is negotiated by the Players Association into league CBAs to ensure that athlete biometric data is protected.

I. CURRENT STATE OF WEARABLE TECHNOLOGY IN SPORTS

Sports leagues and teams have been using technology and advanced statistics to track player performance and make personnel decisions for years.¹⁷ In terms of advanced statistics, Billy Beane, General Manager of the Oakland Athletics, was quite possibly the first team executive to utilize computer-generated analysis, otherwise known as "The Moneyball thesis," to evaluate player performance.¹⁸ Beane hired a Harvard grad to build an advanced statistical analysis model to evaluate potential player transactions from a new perspective.¹⁹

Similar to "The Moneyball thesis," the proliferation of wearable technology and biometric data adds a new, exciting element to sports.²⁰ It enables teams to track a player's blood pressure, heart rate, skin temperature, sweat production, recovery

¹⁷ Leigh Steinberg, *Changing the Game: The Rise of Sports Analytics*, FORBES (Aug. 18, 2015, 3:08 PM), <https://www.forbes.com/sites/leighsteinberg/2015/08/18/changing-the-game-the-rise-of-sports-analytics/#541178444c1f> [<https://perma.cc/R8MK-BSTN>].

¹⁸ Kevin Grier & Tyler Cowen, *The Economics of Moneyball*, GRANTLAND (Dec. 9, 2011), <http://grantland.com/features/the-economics-moneyball/> [<https://perma.cc/8J68-2WWT>].

¹⁹ *Id.* More specifically, the data showed that by focusing on often-neglected statistics such as walks drawn and ground balls hit, a winning formula could emerge. *Id.*

²⁰ Biometric data is "the measurement and analysis of any particular physical characteristic, and more specifically refers to the methods for doing so." Barbara Osborne & Jennie L. Cunningham, *Legal and Ethical Implications of Athletes' Biometric Data Collection in Professional Sport*, 28 MARQ. SPORTS L. REV. 37, 38 (2017) (footnotes omitted).

time, and muscle usage to ascertain a greater understanding of overall fitness levels.²¹ This should result in the optimal performance of players and teams, which will in turn lead to the best possible live product.

A. *Wearable Technology in Sports*

Consumers buy a plethora of wearable devices and corresponding tracking systems to help improve their own health and fitness. Such wearable devices include smart watches, smart glasses, smart cameras, implantables, and fitness/activity trackers that are capable of tracking the wearer's daily activities including exercise, food intake, weight, and sleep patterns.²² As supported by a 2015 PricewaterhouseCoopers (PwC) survey, "57 percent of the individuals surveyed believed that people will rely more on wearables for support than their friends and family, 73 percent of participants expect wearables to make media and entertainment more immersive and fun."²³ In addition to this expectation that wearable technology will create new, innovative experiences, data collection from wearables has become a widespread activity that can eventually become a multi-trillion dollar business.²⁴ These wearable technologies are already heavily utilized in industries that require physical labor such as mining, construction, and trucking.²⁵ However, there are concerns as to how, when, and to what extent employers may mandate the use of such technologies.²⁶ Therefore, in the employment setting, employers must tread a fine line when requiring the use of wearables and acting on any potential biometric data that is collected.

These developments in wearable technology, both positive and negative, have also materialized in the sports industry.

²¹ Addesky, *supra* note 6.

²² Janice Phaik Lin Goh, *Privacy, Security, and Wearable Technology*, LANDSLIDE, Nov.-Dec. 2015, at 1.

²³ *Id.* (citing PRICEWATERHOUSECOOPERS (PWC), THE WEARABLE FUTURE (2014)).

²⁴ See Jessica Kitain, Note, *Beware of Wearables: Protecting Privacy in a Data-Collecting World*, 9 DREXEL L. REV. ONLINE 1, 6 (2016). Consumers can use activity trackers, such as Fitbits and Garmin's Forerunner, to track calories burned, sleeping habits, and heart rate for their own personal benefit. *Id.*

²⁵ David Schatsky & Navya Kumar, *Workforce Superpowers: Wearables Are Augmenting Employees' Abilities*, DELOITTE INSIGHTS (July 25, 2018), <https://www2.deloitte.com/insights/us/en/focus/signals-for-strategists/wearable-devices-in-the-workplace.html> [<https://perma.cc/E79G-BCYQ>]. For example, one car-manufacturing employer has used smart wristbands to detect heat stress, while a mining company has utilized smart helmets to detect driver fatigue. *Id.*

²⁶ See Patience Haggin, *As Wearables in Workplace Spread, So Do Legal Concerns*, WALL STREET J. (Mar. 13, 2016), <https://www.wsj.com/articles/as-wearables-in-workplace-spread-so-do-legal-concerns-1457921550> [<https://perma.cc/A2MS-N3UW>] (noting employees may be protected by privacy regulations or discrimination regulations such as the Americans with Disabilities Act).

Sports organizations compile statistics that reflect an athlete's performance during a season. Over the years, however, leagues and teams have started to utilize more advanced analytics, which includes biometric data, to make personnel decisions.²⁷ Currently, most sports organizations have advanced analytic departments that employ mathematicians to help general managers make personnel decisions.²⁸

Sports organizations now encourage, and sometimes require, that its players practice with wearable devices embedded in jerseys and other pieces of equipment.²⁹ The development and implementation of wearable technology into games, practices, and training sessions has been a priority for sports organizations because it enables them to effectively monitor player training and performance; this, in turn, “directly intersects with player wellness and injury prevention.”³⁰ Moreover, the use of such technologies could give team executives an advantage in player negotiations and could provide leagues with a new source of data to commercialize and sell to third-party companies.³¹ Yet, these clear opportunities for performance improvement do not come without risks.

²⁷ See Steinberg, *supra* note 17 (“This is all a part of creating an overall profile of a player to determine if that player is worth drafting, signing as a free agent, or acquiring in a trade.”); see also Aditya Kaul, *Sports Will Never Be the Same Again, Thanks to Wearables and Robotics*, TRACTICA (Apr. 8, 2016), <https://www.tractica.com/wearable-devices/sports-will-never-be-the-same-again-thanks-to-wearables-and-robotics/> [<https://perma.cc/S8DK-72EW>] (“Sports data analytics is also entering a new period, where the focus moves from analyzing historical data to analyzing real-time data, helping teams and coaches make critical on-field decisions.”).

²⁸ Steinberg, *supra* note 17; see also Jeremy Venook, *The Upcoming Privacy Battle over Wearables in the NBA*, ATLANTIC (Apr. 10, 2017), <https://www.theatlantic.com/business/archive/2017/04/biometric-tracking-sports/522222/> [<https://perma.cc/XX76-LBTP>] (“As the technology continues to advance, so do the possibilities for teams to gather ever more data on their players. Could studying a player’s brain help understand their decision-making? [NBA writer] Haberstroh thinks it might—and wouldn’t be surprised if teams start trying to track that as well.”).

²⁹ See Tom Pelissero, *Player-Tracking System Will Let NFL Fans Go Deeper Than Ever*, USA TODAY (July 30, 2014, 6:47 PM), <https://www.usatoday.com/story/sports/nfl/2014/07/30/metrics-sensor-shoulder-pads-zebra-speed-tracking/13382443/> [<https://perma.cc/QXF7-XEW6>].

³⁰ Osborne & Cunningham, *supra* note 20, at 46.

³¹ See Venook, *supra* note 28; see also Ian McMahan, *The Tricky Ethics of the NFL’s New Open Data Policy*, WIRED (Mar. 29, 2018, 8:00 AM), <https://www.wired.com/story/the-tricky-ethics-of-the-nfls-new-open-data-policy/> [<https://perma.cc/2HW2-E3UT>] (“[P]layers are apprehensive that biometric and performance data might be used against them—primarily during contract negotiations.”).

B. *The Risks and Opportunities of Athlete Biometric Data Derived from Wearable Technology*

The advantages of wearable technology use and biometric data collection seem evident to leagues and teams; however, players lack clarity regarding their own rights.³² The big four leagues have embraced the use of wearable technology at different paces and different levels.³³ Nevertheless, teams and leagues are utilizing these wearables in a multitude of ways and, in the process, are changing the ways teams think and prepare.³⁴

1. Health, Safety, and Performance: Athletes, Teams, and Leagues

An athlete's body is their livelihood, and the ability to reference their biometric data to better understand conditioning and fitness needs is vital.³⁵ Nonetheless, athletes still ponder whether the invasion of technology into sports has crossed a delicate line between privacy, security, and player rights.³⁶ As one athlete stated, "I feel like a guinea pig sometimes," while others are "concerned over the blurring line between their personal and professional lives."³⁷ Similarly, Andre Iguodala, forward for the Miami Heat, stated, "I just hope we don't become robots."³⁸ Additionally, there are lingering questions about whether the players own the data derived from their own bodies and how such data can be utilized in the more public, commercialized space.³⁹

Teams are now able to use wearable technology to analyze and track previously unquantifiable athletic performance data.⁴⁰

³² See *infra* Section III.A.

³³ See *infra* Section III.A.

³⁴ W. Scott Kim & Peter A. Nelson, *Wearable Technology Fits into Professional Sports*, PATTERSON BELKNAP: DATA SECURITY L. BLOG (May 14, 2018), <https://www.pbwt.com/data-security-law-blog/wearable-technology-fits-into-professional-sports/#page=1> [<https://perma.cc/Y95H-2CLG>].

³⁵ For example, Memphis Grizzlies forward Andre Iguodala wore a wristband during the 2013–2014 season to monitor sleep. From this, his trainer realized that his sleep patterns were off and, as a result, "implemented new routines to increase the amount and quality of Iguodala's sleep so that on-court performance improved." Kristy Gale, *Data Generated by Wearable Tech Presents Many Challenges in Sports*, SPORTTECHIE (May 13, 2016), <https://www.sporttechie.com/data-generated-by-wearable-tech-presents-many-challenges-in-sports/> [<https://perma.cc/B6KZ-B5UW>].

³⁶ See Jared Lindzon, *Wearable Tech Will Transform Sport—But Will It Also Ruin Athletes' Personal Lives?*, GUARDIAN (Aug. 9, 2015), <https://www.theguardian.com/technology/2015/aug/09/wearable-technology-sports-athletes-personal-lives> [<https://perma.cc/24DN-EQBV>].

³⁷ *Id.*

³⁸ Gale, *supra* note 35.

³⁹ Zagger, *supra* note 10.

⁴⁰ Lindzon, *supra* note 36.

For example, in the NBA, valuable players measure well athletically (i.e., tall, quick, long) and can mentally grasp plays and schemes.⁴¹ With the proliferation of wearable technology, these teams can improve performance by having their players wear devices that can “track their diet, sleep patterns and life off the field.”⁴² Nevertheless, teams and leagues experience obstacles in their efforts to recognize the full advantages associated with biometric data.⁴³ First, there are lingering questions about whether teams, leagues, or players own the data that is gathered from their bodies.⁴⁴ Second, there are also data security and privacy issues.⁴⁵ Third, there is uncertainty surrounding the use of biometric data in assessing player values in contract negotiations, with only the NBA explicitly and comprehensively addressing the prohibition of such data in negotiations.⁴⁶ Lastly, consumers are clamoring for more technological innovations to supplement their entertainment experience.⁴⁷ Due to these obstacles, there does not seem to be a clear answer as to how or whether teams and leagues can monetize the biometric data obtained from their players.

2. Commercialization Opportunities: Selling Biometric Data to Third Parties

Perhaps the most significant opportunity surrounding biometric data and wearable technology in sports is the vast commercialization opportunities that these developments present to teams and leagues. Third-party organizations such as television broadcasting companies, sports betting operators, and fantasy sports companies are “champing at the bit” to include data from wearables in their business offerings;⁴⁸ but they have

⁴¹ Mika Honkasalo, *Sorry, Old-School Guys: Modern-Day NBA Players Are Better than Ever*, HOOPS HYPE (Mar. 11, 2016), <https://hoopshype.com/2016/03/11/why-nba-players-are-better-than-ever/> [<https://perma.cc/3J68-F9HN>] (“Just as important as improvement in pure athletic ability and the increasingly available and competent talent pool is the development that’s happened to support the mental side of basketball.”).

⁴² Lindzon, *supra* note 36.

⁴³ See Zagger, *supra* note 10.

⁴⁴ *Id.*

⁴⁵ See Venook, *supra* note 28. The NBA might elect to put biometric data into public databases, which would increase the risk of an accidental medical disclosure and subject leagues and teams to potential HIPAA violations. *Id.*

⁴⁶ Watt, *supra* note 11. Additionally, the NBA CBA “punts” on the question of who has the right to sell biometric data. *Id.*

⁴⁷ NIELSEN SPORTS, COMMERCIAL TRENDS IN SPORTS 2017 (2017).

⁴⁸ Lauren Hepler, *The Quantified All-Star: How Wearable Tech Is Changing the Way Pro Sports Are Played, Paid for and Watched*, SILICON VALLEY BUS. J. (Aug. 8, 2014, 2:57 PM), <https://www.bizjournals.com/sanjose/feature/biz-of-sports/2014/the-quantified-athlete-how-wearable-tech-gets-the.html> [<https://perma.cc/9W5K-33CR>].

been unable to do so “in large part because [the] leagues haven’t granted them access.”⁴⁹ To some extent, advanced data (not including biometric data) has already been worked into sports television broadcasts.⁵⁰ For instance, the NFL uses wearable technologies to generate “Next Gen Stats” and then licenses those stats to broadcast partners to employ during the televised games.⁵¹ Picture Carolina Panthers fans celebrating as Christian McCaffrey sprints past the entire defense at a registered speed of 21.95 miles per hour (per these Next Gen Stats) en route to a touchdown.⁵² Fans are able to see these statistics during the television broadcasts,⁵³ which increases engagement.⁵⁴ If teams, leagues, and players are able to create a framework that defines who owns biometric data and how it can be used commercially, biometric data could be sold to these third parties and offered directly to sports fans.⁵⁵ The opportunities are intriguing and quite possibly endless.

From a technological standpoint, new entrants such as Facebook, Amazon, Twitter, and YouTube are starting to experiment with buying live sports broadcasting rights.⁵⁶ Consequently, traditional broadcasting companies such as ESPN, ABC, CBS, and FOX are forced to reevaluate their distribution models to adapt to this changing landscape.⁵⁷ To recapture fan attention in a time when mobile media consumption is growing, sports content owners are experimenting with new technologies and data integrations to supplement the consumer viewing experience.⁵⁸ This could and has already started to include player analytic data, but has yet to encompass biometric, physiological data.⁵⁹

Recent legal developments have immediately and profoundly altered the sports business industry and could

⁴⁹ *Id.*

⁵⁰ See Tom Pelissero, *NFL Teams to Get League-Wide Data from In-Game Player Tracking*, NAT’L FOOTBALL LEAGUE (Mar. 26, 2018, 10:17 AM), <http://www.nfl.com/news/story/0ap3000000916443/article/nfl-teams-to-get-league-wide-data-from-in-game-player-tracking> [<https://perma.cc/KH36-2BM7>] (found under the 2018 “Season” tab).

⁵¹ *Id.*

⁵² *Next Gen Stats*, NAT’L FOOTBALL LEAGUE: NEXT GEN STATS, <https://nextgenstats.nfl.com/stats/top-plays/fastest-ball-carriers> [<https://perma.cc/GWK4-9PD3>].

⁵³ Jason Hiner, *How the NFL and Amazon Unleashed ‘Next Gen Stats’ to Grok Football Games*, TECHREPUBLIC (Feb. 2, 2018, 4:00 PM), <https://www.techrepublic.com/article/how-the-nfl-and-amazon-unleashed-next-gen-stats-to-grok-football-games/> [<https://perma.cc/5VYT-QUHX>].

⁵⁴ *Id.*

⁵⁵ Hepler, *supra* note 48.

⁵⁶ NIELSEN SPORTS, TOP 5 GLOBAL SPORTS INDUSTRY TRENDS 2018, at 7 (2018).

⁵⁷ See *id.* at 5.

⁵⁸ *Id.* at 8.

⁵⁹ See Seth Walder, *Player Tracking Data Is Next Step in NFL’s Analytics Revolution*, ESPN (Aug. 23, 2018), http://www.espn.com/nfl/story/_id/24445965/player-tracking-data-next-step-nfl-analytics-revolution [<https://perma.cc/P7LG-4L2N>].

further impact the use of wearables in sports.⁶⁰ In *Murphy v. NCAA*, decided in May 2018, the Supreme Court abrogated a 1992 federal law (the Professional and Amateur Sports Protection Act) that made it illegal for most states to authorize sports betting.⁶¹ As a result of this decision, individual states can now pass legislation that would legalize sports betting in their particular state.⁶² This decision has wide-ranging implications for sports teams, leagues, and third-party organizations such as casino operators and fantasy sports companies.⁶³ As sports betting becomes more pervasive with the passing of state legislation, casino operators, teams, and leagues will want to find ways to share in the potential commercial benefits.

Television broadcasters are waiting for the ability to use biometric data in their broadcasts as a supplementary source of content.⁶⁴ Similarly, casino operators and fantasy sports companies use player statistics, as well as the names and likenesses of players to set betting lines,⁶⁵ providing consumers with information needed to make betting decisions. Being able to provide prospective bettors with complementary information regarding a player's heart rate could help them make even more informed decisions. Ultimately, the licensing of player names and likenesses, which could include biometric data, provides players and leagues with "the opportunity to pull in a lot of money."⁶⁶

The opportunities for value creation for teams, leagues, players and third parties due to utilization and commercialization of biometric data from wearables is evident. To make this a reality, the Players Associations and the leagues must negotiate and implement explicit language into CBAs that protects players' rights in biometric data so that the teams, leagues, and players can capitalize off these new developments. The first step is to recognize and address the various legal issues associated with wearable technology and biometric data.

⁶⁰ See Ariane de Vogue & Maegan Vazquez, *Supreme Court Lets States Legalize Sports Gambling*, CNN (May 14, 2018), <https://www.cnn.com/2018/05/14/politics/sports-betting-ncaa-supreme-court/index.html> [<https://perma.cc/S4GR-6N9F>].

⁶¹ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1484–85 (2018); see also 28 U.S.C. § 3702, *invalidated by* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

⁶² de Vogue & Vazquez, *supra* note 60.

⁶³ See OXFORD ECON., ECONOMIC IMPACT OF LEGALIZED SPORTS BETTING 4–5 (2017), <https://www.americangaming.org/wp-content/uploads/2018/12/AGA-Oxford-Sports-Betting-Economic-Impact-Report1-1.pdf> [<https://perma.cc/6JWM-JCG2>] (noting that third-party legal sports betting revenue totals billions of dollars).

⁶⁴ Hepler, *supra* note 48.

⁶⁵ Kristy Gale, *Sports Betting and Biometrics Will Push the Publicity Rights Envelope*, SPORTTECHIE (July 5, 2018), <https://www.sporttechie.com/sports-betting-and-biometrics-will-push-the-publicity-rights-envelope-law-legal> [<https://perma.cc/994P-WHST>].

⁶⁶ *Id.*

II. LEGAL ISSUES ASSOCIATED WITH WEARABLE TECHNOLOGY AND BIOMETRIC DATA AND WHY PLAYERS SHOULD OWN THEIR BIOMETRIC DATA

Biometric data and wearable technology raise important, unresolved issues spanning player's rights, commercialization, security, privacy, and labor and employment. Although wearable technology is not necessarily a new development, these issues have yet to be properly negotiated and outlined in each league CBA. This leaves players in the dark about the long-term impact that wearable technology can have on their career, personal privacy, and earning potential.

A. *Labor and Employment Relationship and Context*

Professional athletes are unionized and are thus considered employees rather than independent contractors.⁶⁷ This distinction has important legal implications. To determine whether an individual is an employee or an independent contractor, courts look to several factors such as company control over the individual worker, methods of payment to the worker, and the employee benefits such as pension plans and insurance.⁶⁸ Players enter into contracts with teams and leagues that outline wages and pay schedules, collective bargaining rights, and benefits such as retirement and pension plans.⁶⁹ Employees, compared to independent contractors who work at their own convenience and with more autonomy,⁷⁰ can, as part of a union, more easily bargain for better wages, fair treatment, and more rights with employers.⁷¹

So, with professional athletes being unionized employees of their respective teams and leagues, they are guaranteed certain rights spanning their wages, benefits, player contract negotiations, medical records, insurance, injury grievances, and retirement, to

⁶⁷ See *infra* Section III.A.

⁶⁸ *Independent Contractor (Self-Employed) or Employee?*, INTERNAL REVENUE SERV., <https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee> [<https://perma.cc/T7ZL-8MS5>].

⁶⁹ See Nat'l Basketball Ass'n, *Collective Bargaining Agreement*, at art. II, IV, VII, IX (2017), <https://cosmic-s3.imgix.net/3c7a0a50-8e11-11e9-875d-3d44e94ae33f-2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf> [<https://perma.cc/8UB9-CRMR>] [hereinafter NBA CBA]; see also Major League Baseball, *Collective Bargaining Agreement Attach. 56*, at 334 (2017), https://www.dol.gov/OLMS/regs/compliance/cba/2019/private/30MajorClubs_K9831_060122.pdf [<https://perma.cc/477J-Y3WE>] [hereinafter MLB CBA] (discussing wearable technology policies).

⁷⁰ 1 JONATHAN L. SUDS, *NEW YORK EMPLOYMENT LAW* § 2.02 (2d ed. 2018).

⁷¹ See *Benefits of Union Membership: Union Membership Gives You Better Pay, Better Benefits, and a Voice on the Job*, UNION PLUS, <https://www.unionplus.org/page/benefits-union-membership> [<https://perma.cc/MVL4-TMYZ>].

name a few.⁷² Nonetheless, leagues and teams are private employers that, subject to restrictions based on private association laws, are “free to establish and enforce their own governing rules.”⁷³ Additionally, as employers, leagues and teams generally own the intellectual property generated by their employees while in the scope of employment.⁷⁴ Does this include wearable technology and biometric data derived from an employee’s body?

As employers, sports leagues and teams have used work for hire principles to posit that they have certain control over their employees and their names, performances, and likenesses.⁷⁵ A work made for hire by an employee is the property of the employer if: “(1) the work satisfies the generally applicable requirements of copyrightability . . . , (2) the work was prepared by an employee, (3) the work was prepared within the scope of the employee’s employment, and (4) the parties have not expressly agreed otherwise in a signed, written instrument.”⁷⁶ In *Baltimore Orioles v. Major League Baseball Players Association*, the Players Association brought an action against various MLB clubs, alleging that game telecasts misappropriated property rights in their names, pictures, and performances.⁷⁷ The Players Association claimed that such telecasts were illegal without the consent of the players.⁷⁸ The court determined that the telecasts satisfied the copyright requirement of being fixed in a tangible medium, the performances were in front of “live and remote audiences,” thus falling under the MLB’s employ, and the specific language in MLB Player Contracts and the CBA agreement created the presumption that the teams and the league owned player information in telecasts.⁷⁹ Based on this information, sports leagues and teams might argue that any wearable technology that is used under their employ and any biometric data derived from it would logically be the property of the league under work for hire and employment laws. Nevertheless, unlike *Baltimore*, biometric data is not being used in broadcasts currently.⁸⁰ Moreover, the uniform contracts and CBA agreements lack specific, non-rebuttable language

⁷² Christopher J. McKinny, Comment, *Professional Sports Leagues and the First Amendment: A Closed Marketplace*, 13 MARQ. SPORTS L. REV. 223, 233–34 (2003).

⁷³ *Id.* at 232–33.

⁷⁴ See *Balt. Orioles, Inc., v. Major League Baseball Players Ass’n*, 805 F.2d 663, 670 (7th Cir. 1986).

⁷⁵ *Id.* at 667. See generally U.S. COPYRIGHT OFFICE, WORKS MADE FOR HIRE, <https://www.copyright.gov/circs/circ09.pdf> [<https://perma.cc/4E8R-6DRF>] (further explaining how a work made for hire is usually property of the employer).

⁷⁶ *Baltimore Orioles*, 805 F.2d at 667.

⁷⁷ *Id.* at 666.

⁷⁸ *Id.* at 671.

⁷⁹ *Id.* at 670–75 (citation omitted).

⁸⁰ Venook, *supra* note 28.

regarding biometric data collection and usage that could create the same presumption of ownership as seen in that case.⁸¹ Lastly, unlike the *Baltimore Orioles* case, there does not seem to be any “work” created that involves biometric data that would be protected under the aforementioned work for hire principles. Currently, the only “work” that is created and might involve biometric data usage is Next Gen Stats that the NFL compile and utilize in broadcasts.⁸² However, tracking speed based on radio frequency sensors imbedded in shoulder pads does not qualify as biometric data.⁸³ Characterizing such Next Gen Stats as biometric data would create a precedent for virtually unlimited biometric data usage and ownership by the leagues. This, in turn, would leave players with limited protection and would render any CBA negotiations useless.

B. General Rights to Privacy and Publicity: Context and Considerations

The rise of wearable technology and biometric data in sports has also created privacy, publicity, and anti-discrimination issues. William Prosser, former dean of UC Berkeley School of Law and a leading authority on privacy and tort law,⁸⁴ identified various rights protected under the common law right of privacy.⁸⁵ Two such rights included the right to be free from public disclosure of private facts and the right to control the commercialization of one’s name and likeness.⁸⁶ Although these rights were waived if people voluntarily appear in public places,⁸⁷ the right to publicity of these rights and the protection of the individual’s proprietary interest in their name, likeness, and performance was protected.⁸⁸ More specifically, the right of publicity is considered a right that a person retains in one’s private identity and cannot typically be exploited without consent.⁸⁹ Thus, the central question seems to be whether biometric data is considered a private fact that is protected by common law privacy rights and whether it is a property right protected by publicity laws.

⁸¹ See *infra* Section III.A.

⁸² See *supra* Section I.B.2.

⁸³ Biometric data is defined as “the measurement and analysis of any particular physical characteristic, and more specifically refers to the methods for doing so,” Osborne & Cunningham *supra* note 20, at 38 (footnotes omitted), which logically doesn’t align with Next Gen Stats.

⁸⁴ Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1888, 1897 (2010).

⁸⁵ William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

⁸⁶ *Id.*

⁸⁷ *Id.* at 394–95.

⁸⁸ *Id.* at 389.

⁸⁹ See *id.* at 392–93.

Under the right of publicity, if name, likeness, and one's identity are protected, there seems to be little reason why biometric data within one's physical body would not be. Furthermore, since one's identity is a property right that cannot be exploited without consent, it follows that there would be a presumption that professional athletes are the owners and controllers of such data. Consequently, the use and collection of such data would be protected unless the athletes explicitly contracted otherwise in league CBAs, which has yet to occur.

While players have a strong argument for ownership in their biometric data, there are significant hurdles that must be overcome before such ownership can be recognized. The aforementioned legal issues and arguments are well known, but sports teams and leagues have been unable to adequately address these issues. Accordingly, analysis of other industries that have utilized biometric data can, and will, provide much needed guidance.

III. OTHER UNIONIZED INDUSTRY RESPONSES TO CHANGES IN TECHNOLOGY AND EMPLOYEE RIGHTS

In addition to the legal issues presented by wearables, the use of biometric data they produce, and ownership of such data, it is helpful to analyze how employers and employees in other industries have addressed similar issues and changes. Such analysis will highlight how a clear players' bill of rights negotiated into CBAs by Players Associations is both a viable and strong solution.

For years, employers have been able to monitor business-related employee email and phone conversations while on the job.⁹⁰ For better or for worse, however, the emergence of new technological developments in the workplace is changing the way businesses operate.⁹¹ Technology is improving efficiency, productivity, and the ability to effectively work anywhere at any time.⁹² Additionally, employers are utilizing wearable technologies to track the whereabouts of employees, document how employees are spending their time, and analyze employee stress/fatigue levels in order to

⁹⁰ Lahle Wolfe, *Is It Legal for My Boss to Record My Phone Calls?*, BALANCE CAREERS (June 25, 2019), <https://www.thebalancecareers.com/is-it-illegal-for-your-boss-to-record-your-phone-calls-3515764> [<https://perma.cc/5ZPQ-98XM>].

⁹¹ See Orrin Broberg, *Eight Ways Technology Is Changing Business*, MODUS (Dec. 5, 2013, 1:35 AM), <https://gomodus.com/eight-ways-technology-changing-business/> [<https://perma.cc/5ZPQ-98XM>] ("Technology has literally changed every aspect of the way any business operates and never before in history has that change occurred so fast.")

⁹² See, e.g., Shelley Kramer, *The Future of Work: How the Workplace Is Changing in 2017*, TALENT CULTURE (June 16, 2017), <https://talentculture.com/the-future-of-work-how-the-workplace-is-changing-in-2017/> [<https://perma.cc/P7CE-7MLC>].

improve business performance.⁹³ Data from wearable technology gives employers a new tool to assess employee performance and further understand an employee's working tendencies.⁹⁴

Nonetheless, similar to the sports industry, there are outstanding questions relating to ownership of the data, the ways in which employers can collect data on employees without infringing on privacy rights, and whether employers must both obtain consent from, and provide detailed descriptions of their objectives to, employees.⁹⁵ An examination of other industries' response to this changing technology can offer insight into how the sports industry should address the issue.

A. *Wearable Technology, Biometric Data, and Its Coverage in the Big Four CBAs*

Each of the big four leagues is unionized,⁹⁶ with CBAs that outline division of league revenues, team salary caps, free agency requirements, disciplinary rules, overall compensation, and other issues including safety/medical rights and injury grievances.⁹⁷ Players Associations such as the National Basketball Players Association (NBPA) bargain on behalf of the players to ensure fair treatment in areas that might impact their rights and earning opportunities.⁹⁸ CBAs, however, are not negotiated every year⁹⁹ and new developments that are unaccounted for in current CBAs emerge regularly. Such deficiencies have made it difficult to adequately account for the impact of wearable technology and the biometric data with regards to data ownership, labor and employment rights, and commercialization opportunities. Additionally, each league uses biometric data and wearable technology and addresses this topic in its respective CBA in different ways.¹⁰⁰

⁹³ Patience Haggan, *How Should Companies Handle Data from Employees' Wearable Devices?*, WALL STREET J. (May 22, 2016, 10:00 PM), <https://www.wsj.com/articles/how-should-companies-handle-data-from-employees-wearable-devices-1463968803> [<https://perma.cc/24VP-XTMM>].

⁹⁴ See Jane Wild, *Wearables in the Workplace and the Dangers of Staff Surveillance*, FIN. TIMES (Feb. 28, 2017), <https://www.ft.com/content/089c0d00-d739-11e6-944b-e7eb37a6aa8e> [<https://perma.cc/WK89-L7EX>].

⁹⁵ See Richard M. Reice, *Wearables in the Workplace—A New Frontier*, BLOOMBERG L. (May 24, 2018, 6:40 AM), <https://news.bloomberglaw.com/daily-labor-report/wearables-in-the-workplace-a-new-frontier> [<https://perma.cc/BX8E-UM23>].

⁹⁶ Dryer, *supra* note 13, at 267; Richardson, *supra* note 13.

⁹⁷ *What Are Collective Bargaining Agreements*, *supra* note 11.

⁹⁸ See *About Us*, NAT'L BASKETBALL PLAYERS ASS'N, <https://nbpa.com/about/> [<https://perma.cc/XH6R-HCYA>].

⁹⁹ See *supra* note 14.

¹⁰⁰ See Associated Press, *Report: MLB Approves Players to Wear 2 Devices During Games*, ESPN (Apr. 5, 2016), http://www.espn.com/mlb/story/_/id/15140473/mlb-approves-

The NFL's current CBA, which recently passed in March 2020, includes language on wearable technology and biometric data.¹⁰¹ The league CBA permits the NFL to require players to wear certain technologies that will gather information about a player's performance and medical status.¹⁰² Currently, the NFL cannot use any data from technology to assess and track medical or health information without the consent of the NFL Players Association (NFLPA).¹⁰³ This new agreement, unlike the 2011 version, provides players with more explicit language regarding biometric data ownership; however, this ownership is not guaranteed and only subject to rights set forth in the NFL Player Contracts.¹⁰⁴

The NBA is viewed as a progressive league with regards to player rights, its CBA, and general socio-political issues.¹⁰⁵ Although the NBA has yet to permit the use of any wearable technology in games, the league has allowed for the use of wearables in practice and training sessions to track information such as heart rate, body movements, and workload to prevent injury.¹⁰⁶ The NBA has a small section of its CBA dedicated entirely

wearable-technology-two-devices-season [https://perma.cc/6HB8-EGUS]; Aaron Tilley, *How RFID Chips Are Changing the NFL*, FORBES (Feb. 6, 2016, 6:47 PM), https://www.forbes.com/sites/aarontilley/2016/02/06/how-rfid-chips-are-changing-the-nfl/#2d222f427f70 [https://perma.cc/2YK2-RG4E] (noting that the NFL uses radio frequency identification cards in shoulder pads to signal location data).

¹⁰¹ See Nat'l Football League, Collective Bargaining Agreement, at art. 51 § 14 (2020), https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf [https://perma.cc/ATT3-YQTN] [hereinafter NFL CBA]; see also Jessica L. Roberts et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, 165 U. PA. L. REV. 227, 245–50 (2017) (discussing 2011 NFL CBA).

¹⁰² Kim & Nelson, *supra* note 34; Roberts et al., *supra* note 101, at 245–50. The NFL requires its players wear devices that track acceleration, agility, force, distance travelled, sleep patterns, and heart rate. See Roberts et al., *supra* note 101; Tilley, *supra* note 100; McMahan, *supra* note 31. The data gathered from frequency sensors is shared with other teams, which can aid game-planning efforts. McMahan, *supra* note 31.

¹⁰³ NFL CBA, *supra* note 101, at art. 51, § 14.

¹⁰⁴ Compare NFL CBA, *supra* note 101, at art. 51, § 14, with Nat'l Football League, Collective Bargaining Agreement, at art. 51 § 13 (2011), https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf [https://perma.cc/RKF8-9QML]. The NFL, however, has been able to use data from uniform trackers to compile advanced statistics that are made publicly available to broadcasters and teams. Kim & Nelson, *supra* note 34. Additionally, the NFLPA has been incredibly forward thinking in its recent partnership with the human performance company WHOOP, which will provide “NFL players easy access to, ownership of, and the option to commercialize their health data.” *WHOOP Strikes Landmark Deal as the Officially Licensed Recovery Wearable of the NFL Players Association*, NAT'L FOOTBALL LEAGUE PLAYERS ASS'N (Apr. 24, 2017), https://www.nflpa.com/players/news/whoop-strikes-landmark-deal-as-the-officially-licensed-recovery-wearable-of-the-nfl-players-association [https://perma.cc/TL4K-TM6U].

¹⁰⁵ See Eillie Anzilotti, *How the NBA's Progressivism Is Helping It Thrive*, ATLANTIC (June 19, 2016), https://www.theatlantic.com/business/archive/2016/06/nba-progressivism/487610/ [https://perma.cc/2JPK-ZZ9M]. The NBA's progressivism has positioned it well for success in the digital landscape as well. *Id.*

¹⁰⁶ Diamond Leung, *In New CBA, NBA, Players Create a Path Forward for Wearable Technology*, SPORTS ILLUSTRATED (Dec. 15, 2016), https://www.si.com/tech-media/2016/12/15/nba-collective-bargaining-agreement-wearable-technology [https://per

to wearables.¹⁰⁷ In it, the league establishes a “Wearables Committee” consisting of members of the NBA and the Players Association who will “review and approve wearable devices for use by players.”¹⁰⁸ Players are not required to wear any devices; but if players agree to wear them, teams must share all data and only use such data for player health and tactical purposes.¹⁰⁹ With regards to ownership, there seems to be “a presumption that players own all data about themselves,”¹¹⁰ but a presumption does not amount to the concrete assurance that players should have. The specific language of the NBA’s CBA only discusses commercialization of data from wearables as a good faith endeavor that relies mostly on pending agreements between parties.¹¹¹ Lastly, the NBA CBA, unlike other league CBAs, explicitly forbids the use of biometric data in player contract negotiations.¹¹²

The MLB, similar to the NFL, permits the use of wearable technologies in games.¹¹³ The MLB utilizes wearable devices to collect biometric data such as pitching and swinging exertion to help improve player performance and injury prevention efforts.¹¹⁴ Wearable technology has made its way into the MLB’s CBA as a three-page appendix to the current agreement.¹¹⁵ The CBA allows for wearables such as activity trackers, bat sensors, and biomechanics compression attire that can “measure a Player’s health, performance and/or readiness” at any location both on and off the field.¹¹⁶ Player use of wearable technology is voluntary and data collected must be shared with the player upon request.¹¹⁷ All potential devices must be approved by a “Joint Committee on Wearable Technology” composed of members from the Players

ma.cc/W8JB-8UYR]; *see also* Kim & Nelson, *supra* note 34. During such practice and training sessions, the NBA allows the use of WHOOP, Catapult accelerometers, and other devices such as Adidas’ miCoach Elite and VERT Wearable Jump Monitors. These wearables track information that can be seen by the standard viewer, in addition to sensitive biometric data. Kim & Nelson, *supra* note 34.

¹⁰⁷ NBA CBA, *supra* note 69, at art. XXII § 13.

¹⁰⁸ *Id.* at art. XXII § 13(a).

¹⁰⁹ *Id.* at art. XXII § 13(e)–(h).

¹¹⁰ Watt, *supra* note 11.

¹¹¹ *See* NBA CBA, *supra* note 69, at art. XXII § 13(i).

¹¹² Watt, *supra* note 11.

¹¹³ *See* Associated Press, *supra* note 100. The MLB allows for the voluntary use of the Motus Baseball Sleeve, which analyzes elbow tension, and the Zephyr Bioharness, which tracks a player’s heart and breathing rates. *Id.*; *see also* Tilley, *supra* note 100 (noting that NFL players wear radio frequency sensors embedded in shoulder pads to track movements and location).

¹¹⁴ Eric Fisher, *Wearable Tech Wins over MLB*, STREET & SMITH’S SPORTS BUS. J. (Mar. 13, 2017), <https://www.sportsbusinessdaily.com/Journal/Issues/2017/03/13/Tech/nology/MLB-analytics.aspx> [<https://perma.cc/A3XJ-6SZ8>].

¹¹⁵ MLB CBA Attach. 56, *supra* note 69, at 334.

¹¹⁶ *Id.* at 334.

¹¹⁷ *Id.* at 334–35.

Association and the MLB.¹¹⁸ Nonetheless, similar to the NBA, there seems to be presumption of player ownership in data, given that the players can request that their team “restrict or expand the list of representatives who will have access to such [biometric] information and data.”¹¹⁹ Also similar to the NBA, there is little to no explicit language regarding player ownership rights, and the CBA clearly prohibits “[a]ny commercial use or exploitation of such information.”¹²⁰ The only real guarantee for players is that any biometric data cannot be used in contract negotiations.¹²¹

The NHL has largely trailed the other three sports leagues with regards to wearable technology and utilizing biometric data.¹²² The league, however, has started to work with wearable analytics companies such as Catapult to collect and track information on skating speed and collision impact to help prevent injuries.¹²³ But these developments, in addition to other efforts the league has initiated in the hopes of utilizing and commercializing data analytics, have not yet been translated to in-game biometric data collection.¹²⁴ This is in part due to reluctance by the NHL Players Association, who views biometric data as “player-personal, health-related and in our view, owned [by the players].”¹²⁵ The NHL’s CBA, negotiated and agreed upon in 2013, does not address wearable technology and biometric data.¹²⁶ However, given the NBA, MLB, and NFL’s explicit attention to wearable technology and biometric data usage, the potential commercialization opportunities, and the ongoing dialogue by both veteran and young players, this topic will be a key discussion point in upcoming CBA negotiations.¹²⁷

¹¹⁸ *Id.* at 335.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 336.

¹²² See Brian R. Socolow & Ieuan Jolly, *Game-Changing Wearable Devices that Collect Athlete Data Raise Data Ownership Issues*, WORLD SPORTS ADVOC., July 2017, at 15, 16, <https://www.loeb.com/publications-articles-20170712-gamechangingwearabledevicesthatcollectathletedataraisedataownershipissues> [<https://perma.cc/4ND8-3Y2G>].

¹²³ *Id.*

¹²⁴ See *Wearables to Broadcast Live Player Analytics in NHL World Cup of Hockey 2016*, SPORTS WEARABLE (Sept. 1, 2016), <https://www.sportswearable.net/wearables-broadcast-live-player-analytics-nhl-world-cup-hockey-2016/> [<https://perma.cc/D4CJ-MKC9>]; Greg Wyshynski, *Player Tracking Coming to the NHL? It's Complicated*, ESPN (Feb. 28, 2018), https://www.espn.com/nhl/story/_id/22604597/nhl-great-player-tracking-debate-ethical-questions-fan-access [<https://perma.cc/CFB5-437Q>] (noting that there is tension between the NHL and players with regards to gathering and sharing biometric data).

¹²⁵ Wyshynski, *supra* note 124 (alteration in original).

¹²⁶ Joe Lemire, *Player Tracking Data Presents Touchy Subject for Contract Negotiations*, SPORTTECHIE (Mar. 1, 2018), <https://www.sporttechie.com/player-tracking-data-contract-negotiations/> [<https://perma.cc/N4R3-KV9V>]; see Nat’l Hockey League, *Collective Bargaining Agreement* (2013), <https://www.nhlpa.com/the-pa/cba> [<https://perma.cc/7HLU-HDU2>].

¹²⁷ See Wyshynski, *supra* note 124.

B. Wearable Technology Use and Rights in Other Industries, and Employer Responses

Wearable technologies such as GPS trackers are providing employers outside of the sports field with the unique opportunity to monitor employees at an unprecedented level.¹²⁸ The use of such wearable technologies to track “physical activity, posture, location, stress level, metabolic rate, and fatigue,” however, is a new level of surveillance that gives rise to legal issues such as data protection and privacy that “should be considered as employers deploy wearables and develop related workplace policies.”¹²⁹ These devices, which produce “people analytics’ and personal health information such as vital signs, hydration levels, activity levels, and brain activity” have yet to be discussed as a mode of surveillance covered in employee handbooks and employment agreements.¹³⁰ Therefore, since the right to privacy on a constitutional level is only guaranteed to government actors, the only remedy that private employees have to protect themselves against unwanted monitoring and biometric data collection is to consult labor law, collective bargaining, and federal or state employment laws.¹³¹

From a labor law perspective, Section 7 rights outlined in the National Labor Relations Act (NLRA) protect unionized employees.¹³² The National Labor Relations Board (NLRB) has made it clear that any “out of the ordinary” or “coercive” surveillance that would have a chilling effect on an employee’s Section 7 protected rights is a violation of the NLRA.¹³³ Furthermore, it has been argued that “[f]or workplaces where there is a certified collective bargaining representative, wearable technology . . . should be a mandatory subject of bargaining.”¹³⁴ The ability to monitor physiological activity gathered from wearable technology could certainly fit into “out of the ordinary” surveillance¹³⁵ subject to mandatory bargaining, thus protecting unionized employees.

¹²⁸ Reice, *supra* note 95.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Clement L. Tsao et al., ABA Nat’l Symp. on Tech. Lab. & Emp. L, The Rise of Wearable and Smart Technology in the Workplace 1 (Apr. 2017) (unpublished manuscript), https://www.americanbar.org/content/dam/aba/events/labor_law/2017/04/tech/papers/bhall_tech_paper.authcheckdam.pdf [<https://perma.cc/VS55-3YBV>]; see 29 U.S.C. § 157.

¹³³ Tsao et al., *supra* note 132, at 1.

¹³⁴ *Id.* at 1–2

¹³⁵ *Id.*

Although there is no federal law that governs biometric data collection in the workplace, various states, starting with Illinois in 2008 with its Illinois Biometric Information Privacy Act, have imposed obligations on employers to protect employee privacy and data ownership.¹³⁶ These obligations require an employer to provide notice to employees, obtain consent from the employees to gather and utilize such data, and have data security measures in place that reflect the “reasonable standard of care in its industry.”¹³⁷ Thus, at a minimum, employers should provide complete disclosure about the use of employee biometric data, the duration of such use, and how an employer plans to protect employee data so that employee data cannot be sold to third parties without consent.¹³⁸ To adequately protect themselves, employers have been advised to draft employment handbooks and policies that reflect the obligations set forth in state laws, and then to have compliance teams constantly educating themselves and employees on data usage and corresponding security measures.¹³⁹ Since wearable technology and biometric data usage in sports is still a somewhat nascent development, there is a lack of specificity regarding data usage and security measures.¹⁴⁰ Consequently, a player bill of rights negotiated into CBAs would seem like a logical progression to ensure that the leagues and teams as employers adequately protect themselves and provide much needed clarity to players regarding their rights.

Additionally, employers and employees can seek protection in these circumstances by virtue of CBAs.¹⁴¹ Collective bargaining, a universal and crucial right across unionized industries, provides employees with an opportunity to address the issues of greatest concern in the workplace.¹⁴² Collective

¹³⁶ See *Collection of Biometric Data Raises Privacy Concerns for Employees and Compliance Issues for Employers*, FISHER PHILLIPS: EMP. PRIVACY BLOG (Mar. 15, 2018), <https://www.fisherphillips.com/Employment-Privacy-Blog/collection-of-biometric-data-raises-privacy-concerns> [<https://perma.cc/FRG8-QMRR>]; 740 ILCS 14 (West 2016).

¹³⁷ *Collection of Biometric Data*, *supra* note 136.

¹³⁸ See Allen Smith, *How to Limit Wearable Technology's Legal Risks*, SOC'Y FOR HUM. RESOURCE MGMT. (May 29, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/wearable-technology-legal-risks.aspx> [<https://perma.cc/VC4Q-6VRC>].

¹³⁹ See Lauren A. Daming, *How to Stay Within the Law When Using Biometric Information*, SOC'Y FOR HUM. RESOURCE MGMT. (Apr. 3, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/stay-within-the-law-biometric-information.aspx> [<https://perma.cc/D2B4-6YDJ>].

¹⁴⁰ See *supra* Section III.A.

¹⁴¹ See Natalie Regoli, *10 Advantages and Disadvantages of Collective Bargaining*, FUTURE WORKING, <https://futureofworking.com/10-advantages-and-disadvantages-of-collective-bargaining/> [<https://perma.cc/WLX6-UFE2>].

¹⁴² See Kenneth G. Dau-Schmidt, *Labor Law 2.0: The Impact of New Information Technology on the Employment Relationship and the Relevance of the NLRA*, 64 EMORY L.J. 1583, 1590 (2015).

bargaining has been touted as a way for employers to assuage employee privacy concerns,¹⁴³ which would logically extend to biometric data collection and the use of new technologies in surveillance. Yet, the use of collective bargaining in these types of situations has also been court-mandated, as seen in *Colgate-Palmolive Co v. NLRB*.¹⁴⁴ In this case, the NLRB determined that surveillance devices impacted employee privacy rights akin to physical examinations.¹⁴⁵ Moreover, since these devices were “germane to the working environment” and were outside the scope of core managerial control and decision-making, their use must be subject to bargaining.¹⁴⁶ Logically, the collection of biometric data by teams and leagues could create a “germane . . . working environment” where the use of biometrics becomes a large part of general analytics that provide more effectiveness in personnel decision-making.¹⁴⁷

Generally, employers and employees in a standard workplace have various avenues to protect themselves in this age of constant technological change.¹⁴⁸ Employers can draft policies that ensure compliance with state privacy and employment laws,¹⁴⁹ while employees can seek and consult collective bargaining, state privacy laws, and federal/state discrimination as a tool to advocate for protection.¹⁵⁰

There is support for the use of collective bargaining in sports to ensure that players, as employees of unionized leagues, have defined rights when it comes to their biometric data and rights to privacy. Furthermore, there is support for employers using collective bargaining as a tool to satisfy the general requirements of providing notice, obtaining consent, and outlining clear security measures to protect its players. As such, with collectively bargaining as the centerpiece tool, leagues will not only be more adequately protected against potential lawsuits but could also negotiate the commercialization of such data.

¹⁴³ Ann C. Hodges, *Bargaining for Privacy in the Unionized Workplace*, 22 INT’L J. COMP. LAB. L. & INDUS. REL. 147, 182 (2006).

¹⁴⁴ *Colgate-Palmolive Co.*, 323 NLRB 515, 516 (1997).

¹⁴⁵ *Id.* at 515.

¹⁴⁶ *Id.* at 515–16.

¹⁴⁷ *Id.* at 515; see Albert Breer, *Analytics and the NFL: Finding Strength in Numbers*, SPORTS ILLUSTRATED (June 27, 2017), <https://www.si.com/mmqb/2017/06/27/nfl-analytics-what-nfl-teams-use-pff-stats-llc-tendencies-player-tracking-injuries-chip-kelly> [<https://perma.cc/TS7E-X9D2>].

¹⁴⁸ See, e.g., Reice, *supra* note 95.

¹⁴⁹ *Id.*

¹⁵⁰ See *id.*

IV. THE POTENTIAL SOLUTION—THE PLAYERS' BILL OF RIGHTS

Professional athletes should not only own and control the use of their biometric data but also should be explicitly granted certain rights that are protected by privacy, labor, and employment laws and principles. This position also has support in other workplaces, where employers are utilizing collective bargaining and compliance policies to explicitly outline employee rights.¹⁵¹ Lastly, there are various financial reasons why players, leagues, and teams should arrive at a clear, actionable agreement with regards to the use of wearable technology and biometric data usage.

Some might argue that a uniform, legislative solution that applies to every league would be more effective than a collaborative negotiation between Players Associations and league executives. For example, an alternate solution might be for the government to get involved and implement federal legislation that will regulate and define biometric ownership rights. However, this is an impersonal solution to a very personal problem. Each of the big four leagues are private entities with specific player unions tasked with protecting the rights of its players.¹⁵² They are close to the issues and speak on behalf of the players. Taking this responsibility out of the hands of these player unions and the leagues undermines the autonomy of private entities. Additionally, there is no legitimate governmental purpose for undermining the rights of such private entities, and implementing this type of solution would be a slippery slope that will only generate more problems.

The subsequent sections will advocate for a core players' bill of rights built into license agreements that Players Associations should incorporate into league CBAs. There must be explicit language in each CBA that clearly provides that players have full ownership to anything beneath the skin, which is supported by privacy and rights of publicity laws that make private information relating to one's identity a protectable property right.¹⁵³ Additionally, in furtherance of professional athlete protection and the commercialization of biometric data, CBAs should create a new committee consisting of league executives and Players Association

¹⁵¹ *Id.*; see also Fredric D. Bellamy & Arturo Gonzalez, *Crafting Bring Your Own Device ("BYOD") Policies to Protect Your Company Data and Ensure Compliance with the Law*, NAT'L L. REV. (Oct. 11, 2018), <https://www.natlawreview.com/article/crafting-bring-your-own-device-byod-policies-to-protect-your-company-data-and-ensure-compliance> [https://perma.cc/P7FL-RG4G]

¹⁵² See *supra* Section III.A.

¹⁵³ See *supra* Section II.B.

representatives to jointly assess and negotiate group-licensing opportunities on behalf of players.

A. *CBA's Will Have Explicit Language Regarding Player Rights and Teams and Leagues Will Be Required to Obtain Consent and Provide Education on Intended Use*

CBA's lack the explicit language to ensure that professional athletes have ownership of their biometric data.¹⁵⁴ There is a presumption that these athletes own and control the use of such data; but the language in CBA's is far too broad.¹⁵⁵ Based on privacy and publicity laws, labor laws, and a general analysis of the employer-employee relationship within unionized organizations, professional athletes should have full ownership and protections in anything that relates to their physical bodies.¹⁵⁶

In negotiating new CBA's, Players Association representatives should insist on the inclusion of definitive language that clearly establishes professional athletes as the owner of their biometric data. For example, in new CBA negotiations, the Players Association should insist that all biometric data that sports leagues and teams collect is a non-transferable, non-exclusive license granted by the players. The "players' bill of rights" would be built based on the following license elements: (1) the scope of the agreement; (2) the duration of the agreement; (3) the financial arrangement of the agreement; and (4) the specific products/services granted in the agreement.¹⁵⁷ A small portion of this license might say: "Players have exclusive rights to all biometric data, as defined herein, that is generated by a sports team or league. Sports teams and leagues must obtain explicit permission from players prior to utilizing or commercializing any biometric data, except as needed for medical evaluations, and such medical evaluations cannot be used against players in contract negotiations." If biometric data collection and sharing were framed as this type of license, it would give athletes the control that they deserve, while also ensuring that teams and leagues have a practical framework for utilizing and commercializing this data. This arrangement would include specific details relating to the extent of third-party data sharing, the territories covered by the license, and the exclusive rights held by players.

¹⁵⁴ See *supra* Section III.A.

¹⁵⁵ See *supra* Section III.A.

¹⁵⁶ See *supra* Section II.B.

¹⁵⁷ Carla D. Aikens, *4 Essential Elements of a Licensing Agreement*, CARLA D. AIKENS, P.C. (June 20, 2017), <https://aikenslawfirm.com/4-essential-elements-licensing-agreement/> [https://perma.cc/9TK6-NMJH].

These representatives will ensure that the CBA requires that teams and leagues have consent provisions in the standard language of player contracts. Additionally, these representatives will guarantee that sports teams and leagues create and distribute employee handbooks and policies that distinctly outline the type of wearable technologies that teams can use, the type of data that will be derived from those technologies, the commercialization structure with regards to such data, and the limits of such data usage. This strategy aligns with how other industries are tackling privacy issues relating to surveillance and ownership issues relating to biometric data collection.¹⁵⁸

B. Opt-Out and Incentive Clauses for Professional Athletes Regarding Wearable Technology and Biometric Data

In a 2014 study conducted by PwC, the vast majority of individuals surveyed reported that they would be willing to wear employer-provided wearables “in exchange for a break on their insurance premiums.”¹⁵⁹ For all employers, healthcare costs can escalate quickly.¹⁶⁰ Thus, employers have been looking for ways to responsibly cut these costs.¹⁶¹ The use of wearable technology in the workplace has been lauded as an effective way to cut such costs.¹⁶² Employers have encouraged the use of wearables to achieve this objective by implementing rewards-based programs that provide financial incentives connected to their health and wellness.¹⁶³ If an employee can prove through their wearable’s personal data that they have been engaging in healthy habits and have displayed overall performance improvements, they can obtain credits towards healthcare deductibles and insurance premiums.¹⁶⁴

¹⁵⁸ See *supra* Section III.B.

¹⁵⁹ PRICEWATERHOUSECOOPERS, *supra* note 23, at 5. These employer-led health initiatives, however, have met pushback. Suzanne McGee, *How Employers Tracking Your Health Can Cross the Line and Become Big Brother*, GUARDIAN (May 1, 2015), <https://www.theguardian.com/lifeandstyle/us-money-blog/2015/may/01/employers-tracking-health-fitbit-apple-watch-big-brother> [<https://perma.cc/ES96-29B5>].

¹⁶⁰ See John Rampton, *Wearables in the Workplace: The Next Big Thing?*, FORBES (June 18, 2015, 2:00pm), <https://www.forbes.com/sites/johnrampton/2015/06/18/wearables-in-the-workplace-the-next-big-thing/#40dd2ab31f2e> [<https://perma.cc/Q277-S98S>].

¹⁶¹ Tami Luhby, *Employers Are Finding New Ways to Cut Health Care Costs*, CNN: BUS. (Aug. 7, 2018), <https://money.cnn.com/2018/08/07/news/economy/employer-health-care/index.html> [<https://perma.cc/M5UC-4FWU>].

¹⁶² See Rampton, *supra* note 160 (“In a day when businesses are having to fork over thousands of dollars a month to cover their employees’ health-care insurance policies, wearable technology could alter that game.”).

¹⁶³ See *id.*

¹⁶⁴ Lee Bell, *Working Wearables: What’s in It for the Employees?*, WAREABLE (Mar. 16, 2016), <https://www.wearable.com/wearable-tech/working-with-wearables-8796> [<https://perma.cc/4AMV-LTZ8>]; see also Heather Clancy, *This Wearables Startup Wants to Cut Employer Healthcare Costs*, FORTUNE (Mar. 13, 2015), <http://fortune.com/2015/>

Sports organizations should take a similar approach that is unique to the needs of the leagues, teams, and players. Teams, leagues, and players also aim to foster healthy habits and optimize performance. Furthermore, league CBAs have sections attributed to player health and wellness that focus on healthcare information such as screenings, medical records, and selection of healthcare providers.¹⁶⁵ From a healthcare cost-cutting perspective, teams and leagues would logically support wearable technology use and biometric data sharing that will help track fitness levels and, consequently, more effectively prevent injuries. Another consideration for sports leagues, however, is the value of the biometric data to other third parties.¹⁶⁶ Unlike other industries, there are companies in the sports and media space that would love to obtain biometric data to incorporate into their content offerings.¹⁶⁷ Teams and leagues can convince players to license their biometric data to take advantage of such commercialization opportunities by providing clear incentives in league CBAs and giving players more explicit rights in their bodies. Players Associations, in negotiating the new CBAs, should push for the inclusion of certain incentive-based provisions such as tax or insurance benefits that are built into the player contracts of those who agree to share their biometric data. Additionally, Players Associations should insist on a revenue sharing structure that adequately compensates players for sharing their data. This could either take the form of a higher overall percentage of total profits being allocated to players, or a separate revenue sharing structure that only accounts for biometric data licensing.

C. *Group Licensing Agreements and Committees to Protect Player Rights and Capitalize on Commercialization Opportunities*

Players Associations are capitalizing on the marketability of their global stars by taking control of group-licensing rights from the big four leagues.¹⁶⁸ These agreements enable Players Associations to

03/13/wearables-employer-healthcare-costs/ [https://perma.cc/T566-MTX9]. Various new start-ups are designed to help companies establish programs that incentivize healthier living through wearable fitness trackers. See Bell, *supra*; Clancy, *supra*.

¹⁶⁵ See NBA CBA, *supra* note 69, at art. XXII § 1–13; MLB CBA, *supra* note 69, at art. XIII.

¹⁶⁶ See Tom Taylor, *Football's Next Frontier: The Battle over Big Data*, SPORTS ILLUSTRATED (June 27, 2017), <https://www.si.com/2017/06/27/nfl-football-next-frontier-battle-big-data-whoop-nflpa> [https://perma.cc/75SB-UCGP].

¹⁶⁷ Hepler, *supra* note 48.

¹⁶⁸ See Sam Carp, *Marketing Destiny: How the NBA and NFL Stars Are Taking Back Control*, SPORTSPRO MEDIA (Oct. 1, 2018), <http://www.sportspromedia.com/from-the-magazine/nfl-nba-player-unions-interview> [https://perma.cc/JT4P-RXDB]; see also

license and market the names and likenesses of players *as a group*, accounting for a solid portion of the Players Associations' revenues.¹⁶⁹ For example, the NBA recently unveiled its Think450 initiative, which is essentially a marketing agency that works for all 450 NBA players to identify sponsorship and other revenue generating opportunities for groups of three or more.¹⁷⁰

Biometric data derived from wearable technology falls within the employee-protected rights to one's identity and likeness.¹⁷¹ Logically, the Players Associations would control the commercialization of such data with a group of players. This exact situation materialized when the NFL Players Association entered a groundbreaking agreement with WHOOP, a wearable technology company, which established the precedent that NFL players could own, license, and commercialize their individual WHOOP data through the NFLPA's group licensing program.¹⁷²

These group-licensing efforts, however, do not extend to individual player sponsorships and brand partnerships, nor to the marketing of players while in team uniform.¹⁷³ It seems that neither the players nor the teams and leagues could monetize and sell the data that is compiled while the player is in uniform, since team logos and jerseys are considered league-owned trademarked assets.¹⁷⁴ Thus, there is a clear limit on the amount of data that could be gathered and commercialized under this group-licensing pact. Consequently, this provides a great opportunity for leagues and Players Associations to come to the negotiating table to iron

NHLPA Staff, *Licensing*, NAT'L HOCKEY LEAGUE PLAYERS ASS'N, <https://www.nhlpa.com/the-pa/business-affairs/licensing> [<https://perma.cc/UK36-THWK>] (noting that the NHL's Players Association manages its group licensing program); *The Players Choice Group Licensing Program*, MAJOR LEAGUE BASEBALL PLAYERS ASS'N (July 18, 2016), http://www.mlbplayers.com/ViewArticle.dbml?DB_OEM_ID=34000&ATCLID=211072624 [<https://perma.cc/TH6M-7FXW>] (stating that the MLB Player's Association manages its group licensing program).

¹⁶⁹ See Jeff Beer, *NBA Players Union Unveils New Marketing Rights Group Think450*, FAST COMPANY (Feb. 16, 2018), <https://www.fastcompany.com/40527883/nba-players-union-unveils-new-group-for-player-marketing-rights> [<https://perma.cc/H79V-L32M>]; Carp, *supra* note 168.

¹⁷⁰ E.J. Schultz, *Emboldened by New Powers, NBA Players Union Seeks Brand Deals*, ADAGE (Apr. 12, 2018), <https://adage.com/article/cmo-strategy/emboldened-powers-nba-players-union-seeks-deals/313087/> [<https://perma.cc/TQS2-P5PZ>]. The NFL Players Association has a similar initiative to the NBA called the OneTeam Collective, which helps connect companies with NFL players. Press Release, Nat'l Football League Players Ass'n, NFL Players Association Launches First Athlete-Driven Accelerator, the OneTeam Collective, to Help Companies Incorporate Sports for Growth (Dec. 6, 2016), <https://www.nflpa.com/players/news/nfl-players-association-launches-first-athlete-driven-accelerator-oneteam-collective-to-help-start-ups-incorporate-sports-strategies-for-growth> [<https://perma.cc/NLF2-TD5W>].

¹⁷¹ See *supra* Section II.B.

¹⁷² *WHOOP Strikes Landmark Deal*, *supra* note 104.

¹⁷³ Beer, *supra* note 169.

¹⁷⁴ Schultz, *supra* note 170.

out provisions in the new CBAs that specifically outline a structure combining the reach and expertise of both parties. The leagues are able to procure billion dollar media rights deals with TV broadcasters and other corporate partners.¹⁷⁵ The Players Association works on behalf of players to further monetize their personal and collective brands, while also protecting their rights.¹⁷⁶ Both parties should agree to work together in ways that would optimize the value of player brands and league/team revenues. Capitalizing on this opportunity, however, will only work if players have certain explicit rights negotiated into CBAs.

This process would first involve including clear player rights as a license into CBAs. Subsequently, there should be certain incentives built into CBAs and player contracts for opting into sharing biometric data. Once players opt into sharing their biometric data, CBAs should have specific committees that include both league executives and Players Association representatives that evaluate each group-licensing opportunity with regards to sensitive biometric data. Consequently, the league would allow the Players Associations to gather and commercialize biometric data via group licensing while in league-owned uniforms and assets and leagues could utilize the collective names, identities, and likenesses of a group of players that could be sold to third parties. Overall, the commercialization opportunities surrounding biometric data makes it even more crucial that Players Associations insist on core “players’ bill of rights” principles to ensure that players are adequately protected.

Although complicated, the driving force here is the ability of Players Associations and league owners to come to the bargaining table and develop a creative, mutually beneficial solution that protects players first.

CONCLUSION

Imagine the NBA asking Joel Embiid, the oft-injured NBA superstar with commercial appeal, to wear a wristband or a chip on his shorts during practice and games that will track some of his vitals. The NBA and its Players Association has renegotiated a new CBA that implements new provisional, license-oriented

¹⁷⁵ See Brad Adgate, *The Sports Bubble Is Not Bursting*, FORBES (Jan. 16, 2018, 9:34 AM), <https://www.forbes.com/sites/bradadgate/2018/01/16/the-sports-bubble-is-not-bursting/#49ea763c3bba> [<https://perma.cc/VG9V-3QGK>]. According to analysts, sports media rights are expected to grow by an average of 4 percent each year and approach \$23 billion by 2021. Anthony Crupi, *Sports Media Rights to Soar to \$23B in 2021*, PWC Report Says, ADAGE (Dec. 11, 2017), <https://adage.com/article/media/pwc-report-sports-m/311578/> [<https://perma.cc/Q68U-45US>].

¹⁷⁶ See *supra* Section III.A.

language to ensure that players own their biometric data. Additionally, the CBA outlines various incentives that players can refer to when deciding whether to share their biometric data with external, third-party organizations. With this clear, provisional language and incentive/opt out clauses in place, Players Associations and leagues are thus able to work together to assess opportunities that can both leverage the marketing power of players and provide the league with an opportunity to capitalize on commercialization opportunities.

Ideally, the Players Associations will have negotiated this CBA with enough particularity to provide a player like Joel Embiid with a clear understanding of his rights regarding his biometric data. He will know how to further leverage his name and likeness, he will know that he owns his biometric data, he will know how teams and leagues are planning to use his data, and he will know what data they plan on collecting.

The legal issues surrounding the ownership, collection, and commercialization of biometric data derived from wearable technology in sports should be remedied by creative collective bargaining initiated by Players Associations. Recognizing that these issues exist is a start. Now, Players Associations must step up to the plate and fight to ensure that players are adequately protected and compensated for the use of their biometric data.

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