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THE SPORTS INDUSTRY'S NEW POWER PLAY: ATHLETE BIOMETRIC DATA DOMINATION. WHO OWNS IT AND WHAT MAY BE DONE WITH IT?

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ABSTRACT

Professional sports leagues and teams utilize wearable technology to collect player tracking data, including athlete biometric data (ABD). This information is used to improve athlete performance, reduce injury and improve game play. Already player tracking data and ABD is making its way into peripheral offerings, such as enhanced fan content. In the future, ABD is set to be a critical component of content used for virtual and augmented reality, fantasy sports, sports wagering, and genetic predetermination of athleticism.

ABD is comprised of inherent characteristics that may make ABD protectable in the form of publicity rights, intellectual property, and Health Information. Because of this unique characterization and the sensitive nature of biometric information, ABD should be considered distinct from other categories of sports information, statistics, or sports data, and be afforded greater protection under privacy and property laws. This is particularly relevant as ABD is increasingly commodified, monetized, and exploited using new technologies.

Part I in this series surveyed the collection, use, and dissemination of ABD in light of emerging technology.[1] *It*

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[1] *See* Kristy Gale, *Evolving Sports Technology Makes its Mark on the Internet of Things: Legal Implications and Solutions for Collecting, Utilizing, and Disseminating Athlete Biometric Data Collected Via Wearable Technology*, 5 ARIZ. ST. SPORTS & ENT. L.J. 337 (2016).

identified potential uses for ABD, and then discussed tensions between property rights and privacy rights and the tensions between the sports industry players who contribute and distribute ABD. It further examined and discussed various definitions of ABD. These definitions lay a foundation for analyzing ABD in relation to the sports industry and under applicable statutory and common law. Finally, Part I presented recommendations for taking a strategic approach when contemplating and thoughtfully defining ABD licensing rights.

Part II in this series contemplates and analyzes the legal treatment of ABD. Specifically, Part II analyzes policymaking, the existing regulatory framework, and relevant publicity, intellectual property, and privacy rights. It identifies factors for courts to consider when hearing infringement and privacy claims. It recommends adoption of reasonable, forward-looking social policy and laws as technology evolves. It asserts that athletes own their ABD as a property right and may control its use as a personal privacy right. Finally, Part II suggests proactive ways parties who use ABD may optimize revenue-generation while mitigating their risks when handling ABD, and proposes practical interim solutions for athletes and other parties who collect, utilize, and disseminate ABD.

INTRODUCTION

Wearable technology used in the sports industry is being widely adopted to improve athlete performance, reduce injury, and improve team gameplay.[2] Significant amounts of data are being generated by wearable technology.[3] This data is incorporated into next generation statistics provided during sporting event broadcasts, mobile applications, and other fan engagement content.[4] Professional leagues and their partners who collect, analyze, and disseminate the data, are exploring

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[2] *See* Nicola K. Smith, *The Wearable Tech Giving Sports Teams Winning Ways*, BBC (Apr. 15, 2016), http://www.bbc.com/news/business-36036742.

[3] *Id.*

[4] Kieran Loftus, *Wearing to Win: Wearing Technology in Sport*, THE HUFFINGTON POST (Oct. 12, 2016, 1:11 PM), http://www.huffingtonpost.com/advertising-week/wearing-to-win-wearable-t_b_12455882.html.

new uses for athlete biometric data ("ABD").[5] It is foreseeable that player tracking data, particularly the sub-category of ABD, will make its way into fantasy sports subscriptions, sports betting information, virtual reality and augmented reality products, 3D-printed merchandise, and more as technology evolves.

Establishing ABD as intangible property accompanied by corresponding rights serves a number of purposes. By characterizing ABD as intangible property instead of mere facts, statistics, or personal information, the ownership of ABD and its attendant legal rights to control and be compensated for ABD is rightfully assigned to those to whom the data inherently belongs and those who contribute ABD. Doing so also benefits the individuals to whom it belongs who invest their own efforts and resources to enhance their ABD and increase its value. Characterizing ABD as intangible property also provides guidance to those who incorporate ABD in their products and services. It serves to inform content creators and those who use ABD for commercial and other purposes of how to protect against misappropriation, infringement and their attendant costs. This exercise also benefits courts and legislators who may encounter ABD and the challenges presented by new technologies. Society, ethics, law, and policy will all undergo change as a result of the commodification of data. Clarifying what ABD is and what it is not can aid those who examine policy, law, and ethics to find socially acceptable solutions.

The discussion in the article *Evolving Sports Technology Makes its Mark on the Internet of Things: Legal Implications and Solutions for Collecting, Utilizing, and Disseminating Athlete Biometric Data Collected Via Wearable Technology*[6] raises and analyzes some legal and ethical issues created by the adoption of wearable technology, proposes definitions that accurately identify what ABD is based upon the purpose of its collection and use, and suggests strategies for defining ABD in licensing, corresponding, publicity, and intellectual property rights. This article continues the discussion by (1) taking a deeper look into the property and privacy rights that correspond

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[5] *Id.*

[6] Kristy Gale, *Evolving Sports Technology Makes its Mark on the Internet of Things: Legal Implications and Solutions for Collecting, Utilizing, and Disseminating Athlete Biometric Data Collected Via Wearable Technology*, 5 ARIZ. ST. SPORTS & ENT. L.J. 337 (2016).

to ABD, (2) asserting that athletes own their ABD as a property right and control its use as a personal privacy right, (3) identifying factors for courts to consider when hearing infringement and privacy claims, (4) suggesting ways that parties who use ABD may optimize revenue-generation while mitigating their risk when handling ABD, (5) supporting rapid innovation by recommending the adoption of reasonable, forward-looking social policy and laws as technology evolves, and (6) proposing practical interim solutions for athletes and other parties that collect, utilize, and disseminate ABD.

First, it is important to reiterate those parties in the sports industry who have a stake in the ABD discussion. These include:

- Athletes (Primary Beneficiary);
- Data controllers including leagues, teams, players associations, and others who collect and control proprietary ABD (First-Generation Beneficiaries);
- Data processors including (i) strategic or investment partners who provide services and capabilities to maximize the utility of ABD, and (ii) vendors who process ABD on behalf of data controllers by obtaining, holding, retrieving, analyzing, utilizing, or disclosing ABD to other third-parties (collectively Second-Generation Beneficiaries); and
- Data users such as the media, sponsors, endorsers, other licensed content creators, users who are in some way contractually affiliated with athletes, data controllers, or data processors that generate revenue from the utilization of ABD (Third-Generation Beneficiaries).[7]

Some parties may fall into different categories at different times depending on the role they play in relation to the collection, use, and dissemination of ABD. Sports fans and others who participate in the sports ecosystem may be considered Fourth-Generation Beneficiaries as they increasingly create content and consume sports entertainment, both of which impact the legal rights of interested parties and impact revenue-generation in the sports industry. Collectively these parties are ABD Beneficiaries.

Second, a working definition of ABD must be understood in order to differentiate among the different

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[7] *Id.* at 341.

definitions used in the sports industry and under statutory and common law. ABD is comprised of unique biological and behavioral characteristics that identify a specific individual.[8] ABD also reflects qualities, activities, playing information, and statistics that fall within the scope of publicity rights.[9] For these reasons ABD is considered a right of publicity owned by an athlete. In some cases, ABD may be used as statistics and sports data. However, traditional definitions of sports statistics and even common law definitions of sports data are insufficient to accurately define ABD. Since ABD may be used as a statistic, content for entertainment, an employment record, and health information used for medical records and other purposes, a proposed definition of ABD must be comprised of elements that are used in practice and in legal application. This definition must also consider the different purposes for which ABD may be used. Therefore, the following definition is proposed for the purposes of this article, for the purposes of examining ABD within the sports industry, and for courts as they address ABD issues:

> ABD is "[a] measurable and distinguishable physical characteristic or personal behavioral trait used to recognize one's identity, including but not limited to name, nicknames, likeness, signatures, pictures, activities, voice, statistics, playing and performance records, achievements, indicia, data, and other information identifying a particular athlete."[10]

The purposes for which ABD may be collected and used will differ; they will correspondingly alter the definition of ABD to include the following additions to the definition:[11]

- ABD that is in the public domain;
- ABD that is collected, used and disseminated in any form and relating to past, present or future physical or mental health conditions such as to provide health care;
- ABD that is collected and/or used in real time, near-real time, and not in real time;

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[8] *Id.* at 363.
[9] *Id.* at 364–65.
[10] *Id.* at 376.
[11] *Id.* at 376–77.

- ABD that is transmitted electronically, digitally, or through another manner of transmission in any and all platforms, mediums, or technologies now existing or hereinafter developed;
- ABD used in a manner for any purpose other than to promote athlete health and safety, enhance performance, prevent injury, and/or improve gameplay;
- ABD used as a commodity or for any purpose of monetization.

In some cases, these definitions incorporate language or terms of art related to publicity rights, intellectual property, health information, personal health information (PHI), and individually identifiable health information (IIHI).

Utilizing a definition that incorporates the primary definition above and relevant distinctions will simplify the categorization of ABD in practice and for legal analysis. Possible distinctions that may be added to one of the definitions include live broadcasts of games; rebroadcasts and other programming that utilizes ABD; sports reporting, statistics, and media uses; fan engagement mediums such as in-stadium technology, mobile applications, and virtual reality and augmented reality experiences; fantasy sports; sports wagering; content creation by Beneficiaries; health, safety and injury-prevention purposes; personnel records; league, team and individual use of ABD to improve gameplay and performance; and, genetic predetermination of athletic ability. [12] Of course these categorizations will evolve and may be simplified over time. This will correspondingly simplify how ABD is classified not only in professional sports, but also in collegiate and amateur sports, as well as high school and youth sports.

Considering the lifecycle of ABD throughout an athlete's career is instructive. For example, if a high school basketball star contributes ABD to be analyzed for improved physical performance during games and for college recruiters to consider in the hopes he will be recruited, he will own the ABD as it is used for both purposes and has the right to control the privacy and property rights in the ABD. If the athlete is recruited by and plays for a university and then, subsequently, a video game maker wants to use the athlete's ABD in a video game, the video game maker must license the athlete's ABD from the

[12] *See id.* at 377–79.

owner-athlete or his authorized licensor. Additionally, if the basketball player subsequently plays in a professional league, his ABD may be used by the league to license augmented reality products, or the athlete can promote his own brand in his own social media platform. This scenario demonstrates the practicality of vesting ABD and its corresponding rights in the athlete who contributes it. Further adopting this philosophy about ABD simplifies ownership, use and rights of the athlete and third parties. This pattern of thinking rightfully allows athletes to protect and preserve their privacy and property rights from the time they contribute ABD. It also allows them opportunities to capitalize on future uses of their ABD according to the success of their career and the value of their personal brand. This is especially practical since (1) more athletes are beginning to contribute ABD at younger ages,[13] (2) ABD may be collected and used by a number of third parties,[14] (3) athletes generally play for a number of organizations throughout their amateur and professional careers, and (4) ABD may be contributed for health and safety purposes as well as for the purposes of generating revenue for themselves and others, all of which can complicate ABD ownership and its permitted uses. Utilizing definitions and approaches now that contemplate the realities of how sports and technology intersect will benefit all Beneficiaries.

Finally, the uses of ABD described above occurs as a result of the connectivity of devices and humans (where computers observe, identify, and understand the world without the limitations of human-entered data) or the Internet of Things (IoT).[15] This connectivity and communicating among devices and people, the data derived from the computing devices, and big data capabilities fuel the next generation of the Internet: the Internet of Everything (IoE).[16] The sports industry's use of cutting-edge technology prompts ethical and legal questions about the collection, use, and dissemination of ABD as part of

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[13] Ben Berkon, *Biomechanics and the Youth Pitching Injury Epidemic*, VICE SPORTS (Apr. 7, 2016), https://sports.vice.com/en_us/article/biomechanics-and-the-youth-pitching-injury-epidemic.

[14] Gale, *supra* note 5, at 341–42.

[15] *Id.* at 349.

[16] *Id.* at 350.

the IoT.[17] Further, as technology and the IoT evolve, innovation will occur more rapidly and raise additional questions. Attorneys and scholars agree that the use and commodification of real-time sports data, with or without ABD, is one of the most important business issues confronting the sports industry.[18] Therefore, it is imperative to analyze the property and privacy rights inherent in ABD and discuss ethical and legal considerations impacting the Beneficiaries.

II. POLICYMAKING AND THE LEGAL LANDSCAPE

Steven Kotler, a writer and the Director of Research for the Flow Genome Project, observed in his recent Forbes column, "the accelerating change we're seeing in the world is itself accelerating . . . for the first time in history, the world's leading experts on accelerating technology are consistently finding themselves too conservative in their predictions about the future of technology."[19] In contrast, the law takes time to advance and "usually lags behind technological developments."[20] Traditional privacy and intellectual property regulatory models and policies may be ill-fitted to emerging concerns.[21]

A. INNOVATION'S IMPACT ON POLICYMAKING AND TAKING AN "INNOVATION-ALLOWED" APPROACH

Wearable technology raises a wide variety of concerns and the shift towards utilizing implantable and ingestible innovations will raise "thorny ethical and legal issues."[22] The data privacy, security, and ownership issues inherent in the use of big data present a formidable landscape to navigate. Adam Thierer, a senior research fellow at the Technology Policy

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[17] *Id.* at 351–52.

[18] *Id.* at 361.

[19] Steven Kotler, *The Acceleration of Acceleration: How the Future is Arriving Far Faster than Expected*, FORBES (Feb. 6, 2015, 9:30 AM), http://www.forbes.com/sites/stevenkotler/2015/02/06/the-acceleration-of-acceleration-how-the-future-is-arriving-far-faster-than-expected.

[20] Ryan Rodenberg, *Who Owns Real-Time Sports Data?*, PANDO (Feb. 6, 2014), https://pando.com/2014/02/06/who-owns-real-time-sports-data.

[21] Adam D. Thierer, *The Internet of Things and Wearable Technology: Addressing Privacy and Security Concerns Without Derailing Innovation*, 21 RICH. J.L. & TECH. 6, 53 (2015).

[22] *Id.* at 35.

Program at the Mercatus Center at George Mason University, observes that new biometric technologies will "force a conversation about how much control people have over their bodies or at least about information regarding their bodies."[23] Should the creators of new technologies seek the blessing of public officials before they develop and deploy their innovations, or innovate and then later address problems as they arise? Two perspectives for approaching this question exist: the Precautionary Principle and Permissionless Innovation.

From the Precautionary Principle view, new innovations should be curtailed or disallowed until their developers can prove they will not harm "individuals, groups, specific entities, cultural norms, or various existing laws, norms, or traditions."[24] Advocates want policymakers to regulate new technology "'early and often' to 'get ahead of it' and address social and economic concerns preemptively."[25] Conversely, Permissionless Innovation is an "innovation allowed" stance that supports experimentation with new technologies until true problems arise or a compelling case can be made that the new technology will substantially harm individuals.[26] A continuum between the two approaches is desirable to promote innovation while protecting the legal rights of affected parties.

Thierer proposes a balanced approach to policy making for wearable technology. He suggests that to the extent public policy is needed to guide technological developments, "simple legal principles are greatly preferable to technology-specific, micromanaged regulatory regimes."[27] Thierer promotes a policy of forbearance – where policymakers exercise restraint and resist the urge to foresee the future and all the various scenarios that may arise. He argues against preemptive and precautionary regulation that could thwart innovation through resolving harms that may never even materialize.[28] Instead, he proposes an approach favoring development of policy after innovation advances and the issues surface. Then, ex-post measures such as common-law actions and administrative enforcement actions to

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[23] *Id.* at 36.
[24] *Id.* at 39.
[25] *Id.*
[26] *Id.* at 40.
[27] *Id.* at 118.
[28] *Id.*

address serious harms could be implemented.[29] This proposal is inspired by the success of the Internet which, as FTC Commissioner Maureen K. Ohlhausen said in her 2013 speech, was driven in large part by the "freedom to experiment with different business models . . . ."[30] Consistent with Thierer's proposal, preemptive and precautionary constraints should generally be reserved for circumstances where immediate and extreme threats to safety, security, privacy, and property exist.[31] Such an approach will likely correspond with social acceptance and norms.

Thierer notes that it is important to consider the role that social and individual adaption plays with regard to new inventions.[32] Generally peoples' attitudes transition from resistance to resilience when confronted with new technologies.[33] Based on Millennials' and post-Millenials' inclinations to readily adopt innovations and desire to drive it forward, time will tell whether this tendency will continue. However, by encouraging adaptation to technology, people will more readily adopt new technologies into their lives.[34] Policymakers can prepare for this change by educating those who are impacted most and by maintaining a long-term perspective of how technology will evolve over time. By adopting a balanced and layered approach to privacy and security concerns to wearable technology and IoT, Thierer believes economic and social innovations will be fostered and privacy and security will be adequately protected.[35]

Where the use of ABD derived from wearable and future technologies raises the greatest threats to property, privacy and security, the Beneficiaries who adopt Thierer's balanced approach will be in a better position to promote innovation,

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[29] *See id.* at 118.

[30] *Id.* at 50 (quoting Maureen K. Ohlhausen, *The Internet of Things and The FTC: Does Innovation Require Intervention?*, FED. TRADE COMMISSION (Oct. 18, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/internet-things-ftc-does-innovation-require-intervention/131008internetthingsremarks.pdf).

[31] *Id.* at 48.

[32] *Id.* at 79 (noting that people's attitudes towards new technology follow a cycle of "initial resistance, gradual adaptation, and then eventual assimilation") (emphasis omitted).

[33] *Id.* at 79–81.

[34] *See id.* at 79.

[35] *Id.* at 84–88.

adopt practices that conform to societal norms, and address ethical and legal risks based on real consequences. This approach should be considered by policymakers as they consider emerging technologies and its accompanying legal issues.

B. THE EXISTING REGULATORY MODEL: AN INTERPLAY AMONG THE RIGHT OF PUBLICITY, FIRST AMENDMENT SPEECH, INTELLECTUAL PROPERTY RIGHTS AND PRIVACY

As the proposed definition of ABD indicates, elements of intellectual property and private information are included in ABD. The legal theories that ABD owners, licensees, and assignees are most likely to raise are: (1) the right of publicity and intellectual property rights; and, (2) the right of privacy. In responding to these claims, defendants will likely raise First Amendment speech and consent defenses. They may also seek to enforce contractual obligations by arguing that ABD is included or omitted in the licensed or assigned rights.

To briefly summarize, the right of publicity refers to personal rights where the damage occurs to human dignity and the injury is the mental distress caused to the plaintiff.[36] The right of publicity is a property right where the damage is commercial injury to the business value of personal identity.[37] One commentator observed, the "[c]ourts do not always find this distinction as straightforward as [the leading scholar in this practice area] Professor [J. Thomas] McCarthy does."[38]

The rights of privacy under the Restatement (Second) of Torts recognize four types of privacy invasions: (1) intrusion; (2) appropriation of name or likeness; (3) unreasonable publicity; and, (4) false light.[39] Misappropriation of one's name or likeness under privacy law is most similar to the infringement of the right of publicity under the Restatement.[40] The claim of misappropriation is one that ABD owners are most likely to raise

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[36] Laura Stapleton & Matt McMurphy, *The Professional Athlete's Right of Publicity*, 10 MARQ. SPORTS L.J. 23, 26–27 (1999).

[37] *Id.* at 25.

[38] *Id.* at 31.

[39] *See generally* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960); *Publicity*, CORNELL U. L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/Publicity (last visited Oct. 27, 2016) [hereinafter *Publicity*].

[40] *Id.*

in litigation since third parties will likely use an athlete's name or likeness as defined under common law in an unauthorized manner, that is, in a manner that appears to exceed the scope of authorized use. Unreasonable publicity, or public disclosure of embarrassing private facts as scholar William Prosser's defining treatise puts it, is another likely claim to be made since ABD by its nature is comprised of characteristics that may be considered private details which the owner of ABD does not want to disclose.

The right of publicity, according to J. Thomas McCarthy is the "inherent right of every human being to control the commercial use of his or her identity."[41] This right is commonly raised in conjunction with other intellectual property rights. McCarthy observes that "[t]he right of publicity is a unique creature of state intellectual property law, with a 'family resemblance' to the right of privacy, trademark, copyright, false advertising, and unfair competition."[42]

Under the Lanham Act (the federal statutory law that governs trademarks) and corresponding state law, a person who can establish an aspect of his or her identity as a trademark is afforded protection and granted the ability to raise claims of infringement, false advertising, false designation of origin and unfair competition.[43] In some instances, third parties may incorporate an individual's identity or components thereof into original works of authorship that may be afforded protection under the Copyright Act.[44] Finally, in some cases the use of one's personal data may constitute a trade secret protected under state statute and the recently-enacted Defend Trade Secrets Act – a federal statute that supplements existing state laws.[45] In these instances, owners of ABD may raise claims where their property

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[41] Zachary C. Bolitho, *When Fantasy Meets the Courtroom: An Examination of the Intellectual Property Issues Surrounding the Burgeoning Fantasy Sports Industry*, 67 OHIO ST. L.J. 911, 935 (2006) (citing J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3, at 3 (2d ed. 2004)). The McCarthy treatise is "the most authoritative treatise in the area." *Id.*

[42] *Id.* at 935–36.

[43] *See Publicity, supra* note 38.

[44] Copyright Act of 1976, 17 U.S.C.A. § 102 (West 2012).

[45] Katherine Cheung et al., *Obama Signs Federal Trade Secret Bill into Law: Key Points for IP*, DLA PIPER (May 11, 2016), https://www.dlapiper.com/en/us/insights/publications/2016/05/obama-signs-federal-trade-secret-bill-into-law.

is misappropriated. Since property rights in ABD currently correspond most directly to publicity and trademark rights, these areas are the focus of this discussion.

Defenses commonly used in response to right of publicity claims include First Amendment speech and consent.[46] Under the First Amendment to the U.S. Constitution and its supporting common law, the right of a citizen to protect his right of publicity is balanced against the right to free speech; that is, the right to disclose and disseminate information that is a matter of public concern.[47] For example, in the context of ABD's collection, use and dissemination, third parties with an interest in disseminating ABD would raise a First Amendment speech defense alleging that ABD is protected speech in order to override the ABD owner's right of publicity claim and compel disclosure.

The defense of consent can be used to combat a plaintiff's claims of infringement on his right of publicity.[48] The defendant in an action may raise the defense that the plaintiff consented to the defendant's use of an element of identity.

In the event parties enter into contracts with one another related to the collection, use and dissemination of ABD, courts utilize state laws governing contracts to determine each party's rights and obligations with respect to ABD.

This existing legal framework provides markers on the road to solutions for sports industry players who provide, collect, utilize and disseminate ABD. Additional factors for court consideration are outlined here based upon the unique character of ABD.

1. Athlete Biometric Data as a Right of Publicity

Laura Lee Stapleton and Matt McMurphy wrote about the importance of a professional athlete's identity in their law journal article, *The Professional Athlete's Right of Publicity*:

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[46] *See* Bolitho, *supra* note 40, at 943 n.203.

[47] *See* Ryan M. Rodenberg et al., *Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH & ARTS 63, 95–96 (2015) (discussing the right of a fantasy sports company to use the names of and information regarding professional baseball players under the First Amendment).

[48] *See* Stapelton & McMurphy, *supra* note 35, at 42.

> The celebrity in the public eye has two concerns that go beyond his or her creative efforts. First, is to guard against intrusions to what exists of a private life. Second, is to protect the value of the celebrity's name, image and other attributes surrounding the person. A celebrity's name and image in our star-conscious society are valuable commodities. They can be commercially marketed and reap substantial rewards if done with expertise and intelligence. The celebrity's concern is that others, without authorization, will attempt to exploit their name or image.[49]

a. The Right of Publicity

These two concerns identify two inherent rights professional athletes have: privacy and the right of publicity. Publicity rights are personal rights protecting against *damage to human dignity* due to injury caused by an invasion of privacy; damages are measured by the mental distress suffered by the plaintiff.[50] The right of publicity is a property right,[51] and is "inherent to every human being to control the commercial use of his or her identity."[52] Damages for this claim are measured by the commercial injury to the business value of personal identity.[53] Damages for infringement of the right of publicity can include the "fair market value of the plaintiff's identity; unjust enrichment and the infringer's profits; and damage to the business of licensing plaintiff's identity."[54]

Professional athletes utilize the right of publicity in this era of ever-expanding commercialism to "hold onto the hottest property they know: themselves."[55] Over the years as the right of publicity developed, the concepts of privacy and property have been intertwined and at times proved confusing and difficult to

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[49] *Id.* at 23.
[50] *Id.* at 31.
[51] *Id.*
[52] *Id.* at 24 (citing J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 28:1, at 28–30 (4th ed. 1996)).
[53] *Id.* at 31.
[54] *Id.*
[55] *Id.* at 24 (citing Marcia Chambers, *Lawsuit Pits Artists' Rights vs. Athletes*, N.Y. TIMES (Feb. 16, 1999), http://www.nytimes.com/1999/02/16/sports/golf-lawsuit-pits-artists-rights-vs-athletes.html.

apply in practice. An authority on the right of publicity, Thomas McCarthy, noted that "privacy law seemed unable to accommodate that view that human identity constituted an intellectual property right with commercial value measured by supply and demand in the marketplace of advertising. The situation was ripe for a break in traditional thinking."[56]

This break in thinking evolved into the right of publicity which McCarthy defines as the "inherent right of every human being to control the commercial use of his or her identity."[57] "The right of publicity is basically the right to own, protect, and profit from the commercial value of one's name, likeness, activities, or identity, and to prevent the unauthorized exploitation of these traits by others."[58] As a separate legal doctrine, it filled gaps left by other legal theories: privacy, unfair competition, contracts and defamation.[59]

The right of publicity is created by state law. Generally, the elements required for a violation of publicity rights include: (1) plaintiff owns an enforceable right in the identity of a human being; (2) defendant uses some aspect of identity or persona in a way that plaintiff is identifiable from defendant's use; (3) defendant's use is without permission or exceeds the scope of permission granted such that the defendant misappropriates plaintiff's identity; and, (4) defendant's use causes damage to the commercial value of the plaintiff's persona.[60] Some states require a plaintiff to show a connection between the defendant's use and the commercial purpose, for advertising purposes or for the purpose of trade.[61]

The term "commercial purpose" under common law refers to the advertising of a product or the sale of goods or services.[62] Under statute, such as California's civil code, commercial purposes include the use of a person's name, voice, signature or likeness "for the purposes of advertising or selling,

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[56] *Id.* at 28 (citing MCCARTHY, *supra* note 51, at 423).

[57] *See* Bolitho, *supra* note 40, at 935 & n.149.

[58] *Id.*

[59] *Id.* at 939.

[60] Stapleton & McMurphy, *supra* note 35, at 25, 43.

[61] *See, e.g.*, Dryer v. NFL, 55 F. Supp. 3d 1181, 1196–97 (D. Minn. 2014) (illustrating the recent analysis of right of publicity claims in the United States District Court for the District of Minnesota).

[62] Stapleton & McMurphy, *supra* note 35, at 43.

or soliciting purchases of, products, merchandise goods or services" or "on or in products, merchandise, or goods."[63] The term "for purpose of trade" under Restatement (Third) of Unfair Competition pertains to the use of another person's "name, likeness and other indicia of a person's identity" in advertising for the user's goods or services, placed on merchandise marketed by the user, or use in connection with services rendered by the user.[64] This term does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to these uses.[65]

b. Defenses to Claims of Infringement of the Right of Publicity: First Amendment Speech and Consent

Most states recognize exceptions or defenses to right of publicity claims including, (1) newsworthiness, and (2) consent.[66]

i. First Amendment Speech: Newsworthiness as a Defense

Thomas McCarthy observed, "the rules governing the application of the First Amendment are often maddeningly vague and unpredictable. Even constitutional scholars admit this to be the case."[67] Additionally, "there is no judicial consensus on how to resolve conflicts between intellectual-property rights and free-speech rights."[68] Thus, applying a First Amendment speech analysis is challenging on its own, but applying it to an undeveloped area of law (i.e., the unauthorized use and dissemination of ABD as a right of publicity) requires some mind malleability.

The freedom of speech on public issues "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection," the Supreme Court held in *Snyder v. Phelps*.[69] The Supreme Court's opinion stated:

> Speech deals with a matter of public concern when it can be fairly considered as relating to any matter of political, social, or other concern

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[63] CAL. CIV. CODE § 3344(a).

[64] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (AM LAW INST. 1995).

[65] *Id.*

[66] *See, e.g.*, *Dryer*, 55 F. Supp. 3d at 1197.

[67] Bolitho*, supra* note 40, at 944.

[68] *Dryer*, 55 F. Supp. 3d at 1188.

[69] Snyder v. Phelps, 562 U.S. 443, 452 (2011); *see also* Rodenberg et al., *supra* note 46, at 69.

> to the community or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.[70]

Regarding speech pertaining to sporting events, athletes, statistics and other sports information, Fox Broadcasting and the Big Ten Network as amici in *In Re NCAA Student-Athlete Name & Likeness Licensing Litigation* cited three cases to support the proposition that news about sports and entertainment is a matter of public concern.[71] A two-prong test in *Snyder v. Phelps* was established to determine when speech is a matter of public concern: (1) "when it can be fairly considered as relating to any matter of political, social, or other concern to the community," or (2) "when the speech is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[72] This test did not define "legitimate news interest" so ambiguity remains as to whether the Court is describing a "reasonable" news interest or a news interest that abides by professional journalistic standards.[73] Subsequent cases have not explored what a "legitimate news interest" is or whether the reporting of real-time sports scores is considered to be protected speech,[74] nor have they considered whether ABD is included in the definition of "real-time sports scores." Courts will need to consider whether ABD is a matter of public concern and balance the rights of the athlete with (1) the benefits to society in having access to that information and (2) third-party use and dissemination of ABD as a way to exercise their right to freedom of expression, although use and dissemination may still constitute misappropriation.

Based upon the significant dollars generated by private individuals participating in fantasy sports and sports wagering (which may soon be legalized in the United States), this analysis

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[70] *Snyder*, 562 U.S. at 453 (internal quotes and citations omitted).

[71] Rodenberg et al., supra note 46, at 69 (citing Hilton v. Hallmark Cards, 599 F.3d 894, 908 (9th Cir. 2010); Cardtoons, L.C. v. MLB Players Ass'n, 95 F.3d 959, 969 (10th Cir. 1996); Shulman v. Group W Prod., Inc., 18 Cal. 4th 200, 220 (1998)).

[72] *Id.*

[73] *Id.*

[74] *Id.*

must consider whether the public's interest falls within the above stated tests, or under a new category whereby sports information may or may not be a matter of public concern in light of the pecuniary interest that private citizens retain in the information. Additional uses for ABD should also be examined to determine whether (1) they may be considered protected speech under common law, (2) if they either straddle or fall outside the scope of the "public concern" and "legitimate news interest" categories, or (3) require a new category of "speech" pertaining to the property of others used as a commodity, whether monetized or not.

If an athlete claims that his right of publicity has been infringed, or if a professional sports league claims that ABD provided as a component of sports information is intellectual property infringed by unauthorized use, the first step in balancing these rights requires determining the classification of the speech. Generally, "unprotected speech" includes (1) "speech such as obscenity, defamation, fighting words, or of the type likely to incite lawlessness;"[75] (2) "commercial speech" that is "speech of any form that advertises a product or service for profit or for business purpose;" [76] and (3) "communicative speech" that is considered to be "the expression of ideas and the reporting of information in the public interest for the purposes of enlightenment, education, and entertainment," although the term is not "readily definable."[77]

It should be noted that when a publicity right claim challenges the expressive, non-commercial use of a copyrighted work, the claimant may seek to subordinate the copyright holder's right to exploit the value of the work to the claimant's interest in controlling the work's dissemination.[78] This could occur if an athlete asserts publicity rights in copyrighted works produced by the league.[79] If a claimant seeks to limit the way material can be used in expressive works, then the claims extend into copyright law and exceed state publicity right laws.[80] The court will then undertake an analysis to determine whether the

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[75] *Id.*

[76] *See* Bolitho, *supra* note 40, at n.211 (explaining how this rule is a generalization rather than black letter law due to the imprecise nature of First Amendment law).

[77] *Id.*

[78] Dryer v. NFL, 814 F.3d 938, 943 (8th Cir. 2016).

[79] *E.g.*, *id.* at 942–44.

[80] *Id.* at 943.

publicity right used as speech is considered either commercial speech, which the claimant may protect, or expressive speech, which is more likely to favor the copyright holder.[81]

When the defense of newsworthiness is raised, the defendant argues that newsworthy events or matters of public interest are exempted from the publicity right rule and an athlete's identity or likeness may be used in connection with reporting of newsworthy events.[82] Statutory and common law

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[81] *See id.* at 943–44 (quoting Porous Media Corp. v. Pall Corp., 173 F.3d 1109, 1120 (8th Cir. 1999)). Under the factors in *Porous Media Corp. v. Pall Corp.*, commercial speech is not expressive speech. *See id.* at 943. Expressive speech includes artistic works that may be protected under the Copyright Act, depending on whether: (i) the speech is an advertisement, (ii) the speech refers to a specific product or service, and (iii) the speaker has an economic motivation for the speech. *See id.* In relation to ABD, if an athlete's ABD is collected and utilized in expressive works that require a modicum of originality to create and that serve to publicize and promote a league, team or sport within the scope of the elements of the *Porous* test, such as mobile applications, sports entertainment offerings, and enhanced statistics and features during gameplay, an athlete may be able to assert a copyright infringement claim. *See id.* at 942–44. This could also occur where ABD is utilized during broadcasts of games and in other programming intended to publicize and promote the sport, league, and team. *See id.* at 943–44 Additionally, copyright claims may be asserted if ABD is utilized in protectable works to indirectly publicize and promote a league, team or sport by offering products for fantasy sports participants and other endeavors to generate revenue and increase fan engagement. *See id.* In fact, an athlete can utilize his own ABD in copyrighted works produced under license by players associations and their partners or utilizing platforms such as Facebook Live and other social media where content is created. *See id.* In each situation, specific facts determining the creativity of the work and its use for expressive purposes or for purposes of trade must be examined by courts to determine an athlete's copyright claims. *See id.* at 942–44. When deciding which claims to pursue, athletes should weigh the odds of successfully establishing misappropriation and infringement claims based on laws pertaining to publicity rights and trademarks, respectively, where these claims are based upon the premise that a right exists within an aspect of identity where copyright protection generally requires creation through intellectual labor. *Id.*

[82] Dryer v. NFL, 55 F. Supp. 3d 1181, 1197–99 (D. Minn. 2014).

newsworthiness defenses protect the act of publishing or reporting.[83] California law demonstrates the majority rule that liability will not lie for a defendant utilizing certain publicity rights when reporting any "news, public affairs, or sports broadcast or account."[84] Further, the majority rule extends to reported information that is "factual data" and "true information about 'real-world football games.'"[85] Generally, information that is available in the public domain is considered protected speech.[86]

Under seminal cases regarding athlete rights of publicity, courts have held that speech is protected if "the subject matter of the communication is of 'public interest' or related to 'news' or 'public affairs.'"[87] Under *Gionfriddo v. Major League Baseball*, the court held that "[t]he recitation and discussion of factual data concerning the athletic performance of these plaintiffs commands a substantial public interest."[88] In *CBS v. NFL Players Association*, the court observed that "there is no dispute that both professional baseball and professional football . . . are closely followed by a large segment of the public."[89] In *Dryer v. NFL*, the court held that under California's newsworthiness exception, television programming showing historical video footage of athletes playing football constitutes reporting on a matter of substantial public interest and bars right of publicity claims.[90] In that case, the court considered the nature of the sports information that was used and the public value of that information finding that speech that entertains is protected by the First Amendment. Specifically, the court cited precedent from

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[83] *Id.*

[84] *Id.* at 1197–98 (quoting CAL. CIV. CODE § 3344(d) (Deering 2010)); *see* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. a (AM. LAW INST. 1995).

[85] *Dryer*, 55 F. Supp. 3d at 1198 (quoting *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1283 (9th Cir. 2013)).

[86] *Id.* at 1199 (citing C.B.C. Distrib. & Mktg. v. MLB Advanced, L.P., 505 F.3d 818, 823 (8th Cir. 2007)).

[87] *Id.* at 1198 (quoting *In re* NCAA Student-Athlete Litig., 724 F.3d at 1282).

[88] *Id.* (quoting Gionfriddo v. MLB, 114 Cal. Rptr. 2d 307, 315 (Cal. Ct. App. 2001)).

[89] *Id.* (quoting CBS Interactive, Inc. v. NFL Players Ass'n, 259 F.R.D. 398, 419 (D. Minn. 2009)).

[90] *Id.* at 1186–87, 1198.

C.B.C. v. MLBAM where professional athletes' names, images, likeness, statistics and biographical information were used for online fantasy sports games and where such information was already in the public domain and commanded substantial public interest.[91] The Court held that First Amendment speech would not be superseded by right of publicity claims.[92]

Another nuance in the newsworthiness exception was addressed in the *Dryer* case: news reporting of matters for entertainment. The newsworthy exception applies to "all matters of the kind customarily regarded as 'news' and all matters giving information to the public for purposes of education, amusement or enlightenment, where the public may reasonably be expected to have a legitimate interest in what is published."[93] Under Texas law applicable in this case, what may be reported under the newsworthiness exception may be limited to only "legitimately necessary and proper for public information"[94] In *Kimbrough v. Coca-Cola*, the court found that a public character relinquishes

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[91] *Dryer*, 55 F. Supp. 3d at 1193 (citing C.B.C. Distrib. & Mktg. v. MLB Advanced, L.P., 505 F.3d 818, 821, 823 (8th Cir. 2007)).

[92] C.B.C. Distrib. & Mktg., 505 F.3d at 824. Both C.B.C. and CBS involved the use of current professional athletes' names, images, and statistics for the purposes of online fantasy games. In *C.B.C.*, MLB and its players union challenged another entity's use of baseball players' names and playing information such as statistics and biographical information in an online fantasy baseball website. *C.B.C.*, 505 F.3d at 822. The court focused on the nature of the information used and the public value of that information, finding that even though the speech involved was entertainment, "[s]peech that entertains, like speech that informs, is protected by the First Amendment." *Id.* at 823 (quoting *Cardtoons, L.C. v. MLB Players Ass'n*, 95 F.3d 959, 969 (10th Cir. 1996)). The court noted that the information on C.B.C.'s website was not only already in the public domain, but that the information also commanded substantial public interest. *Id.* at 823–24. Although the C.B.C. court found that the players had succeeded in making out a claim for a violation of their publicity rights under Missouri law, the court determined that C.B.C.'s "first amendment rights in offering its fantasy baseball products supersede the players' rights of publicity." *Id.* at 823–24; *Dryer*, 55 F. Supp. 3d at 1193–94.

[93] *Dryer*, 55 F. Supp. 3d at 1198 (quoting Anonsen v. Donahue, 857 S.W.2d 700, 703 (Tex. App. 1993)).

[94] *Id.* (quoting Kimbrough v. Coca-Cola, 521 S.W.2d 719, 721 (Tex. Civ. App. 1975)).

part of his right of privacy, however, this waiver is limited only to that which may be legitimately necessary and proper for public information.[95] The public character's privacy may not be invaded by the use of his name or picture for commercial purposes without his consent, unless it is incidental to an occurrence of legitimate news value.[96] In jurisdictions where this limitation is not recognized, reporting of newsworthy matters may not be restricted to what is "necessary and proper" for public information.

A rule of law pertaining to whether the unique characteristics of ABD are sufficient to establish publicity rights in this data is yet to be developed. Likewise, under common law there is no rule describing factors for court consideration when analyzing publicity right infringement claims pertaining to ABD and the unique situations giving rise to infringement. Traditional tests are ill-fitted to (1) balance the rights of athletes to those of society where ABD may be newsworthy, (2) determine whether infringement of publicity rights in ABD occurred, (3) fairly define "commercial purposes" to reflect what that means in the context of ABD use and exploitation in society today, and (4) accurately assess and award sufficient damages to claimants. There are several factors specific to ABD that courts addressing these issues in the future will want to consider.

First, courts should consider the nature of ABD that may be newsworthy and reported as entertainment news – i.e. for the purposes of education, amusement or enlightenment – and whether the public may reasonably expect to have a legitimate interest in what is published. Some ABD may enter the public domain through news reports authorized by athletes. In some situations, athletes may authorize the sharing of and license rights to ABD as part of fantasy sports or sports betting information subscriptions, but which are not expected to be published in news articles. In other situations, ABD may be disclosed in forms of entertainment such as virtual reality or augmented reality experiences where the athlete authorized and licensed the use of ABD to virtual reality product creators and distributors. Each situation raises different factors for consideration. The outcome in each situation will likewise be different: either ABD is considered newsworthy information that is protected speech or it is not. Society's expectation of what

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[95] *See Kimbrough*, 521 S.W.2d at 721.
[96] *Id.*

should be protected speech, especially in relation to private information about a person's health, may evolve over time, so crafting a stringent set of factors will add another layer of challenge in creating an appropriate test.

Another consideration is how to treat ABD that is used for monetary endeavors by leagues, teams, their partners, and private individuals. Perhaps courts should consider whether a new category of "speech" is warranted for information that is not newsworthy solely because the public has a legitimate interest in the information as entertainment, but rather because the public can use ABD to generate personal income from fantasy sports or sports wagering winnings. Or perhaps the standard would remain the same, but the court could revise a definition of "commercial purposes" or "purpose of trade." This would include an analysis of what constitutes "commercial purposes" with respect to a private citizen's use of ABD to win fantasy sports prizes, for example, and other monetized uses of ABD by various parties. The analysis should also contemplate what constitutes an athlete's consent to use his or her ABD and potentially include additional factors for determining whether consent is not incidental to an occurrence of legitimate news value.

Additional factors set ABD apart from the names and player information used in fantasy sports over the past decade. ABD is personal Health Information or PHI that is subject to stricter privacy laws.[97] Additional forms of ABD and uses for ABD made available by new technology are likely to emerge. Some data included in ABD will be made available through new technology that collects PHI that only athletes and sports organizations had access to previously. New technology will also generate increasingly granular data collected by multiple parties, thereby increasing the amount of highly personal and confidential information as well as the likelihood of it being disclosed to others. Historically, PHI has not been available to

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[97] *Compare* 45 C.F.R. § 164.502 (2016), *and* 45 C.F.R. § 164.512, *with* Dryer v. NFL, 55 F. Supp. 3d 1181, 1195–99 (D. Minn. 2014). Section 164.502 protects against disclosure of Health Information with section 164.512 only allowing disclosures as required by law, whereas the publicity rights protect personal information but allow for disclosure by private groups based on newsworthiness. *Compare* 45 C.F.R. § 164.502 (2016), *and* 45 C.F.R. § 164.512, *with Dryer*, 55 F. Supp. 3d at 1195–99.

the public in order to protect the privacy of athletes.[98] And, of course, who owns ABD will be a factor.

Further, as the IoT and IoE evolve, athletes and their licensees will have many more opportunities to exploit these rights independent of leagues for the purpose of promoting the sport, league, and team. Today's athletes are much more sophisticated in their approach to building a personal brand compared to the sports stars of the past.[99] Today's technology and audience simultaneously create and demand the athlete as a brand. As a result, athletes have many more revenue streams available to them and the number of streams will increase with technological advances.[100] For example, several professional athletes engage in the sports technology startup market including LeBron James, Carmelo Anthony, and Andre Iguodala.[101] Should their ability to exploit their personal brand in non-athletic endeavors be limited? Under U.S. law and public policy, individuals have the right to protect the fruit of their labors, in all market segments that they engage in.[102] This likewise pertains to athletes and those they select as licensees.

Courts must also examine how fantasy sports products have changed over time and how they are currently transforming as a result of regulation. The factors courts considered previously will certainly be impacted by the monetized use of ABD by fantasy

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[98] *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg 82,462, 82,464 (Dec. 28, 2000).

[99] *See* Mark Fidelman, *8 Lessons from Sports Marketing Experts for Brands and Athletes Resisting Move to Digital*, FORBES (July 28, 2014, 12:06 AM), http://www.forbes.com/sites/markfidelman/2014/07/28/8-lessons-from-sports-marketing-experts-for-brands-and-athletes-resisting-move-to-digital/#5475ba2b6409.

[100] *See Infographic: Ryan Lochte, Lebron James, and Hope Solo Demonstrates Importance of Athletic Endorsements to Modern Athletes*, SPORTS TECHIE (Sept. 9, 2016), http://sportstechie.net/infographic-ryan-lochte-lebron-james-and-hope-solo-demonstrates-importance-of-athletic-endorsements-to-modern-athletes.

[101] *See* Tam Pham, *NBA Stars Who Became Successful Entrepreneurs and Investors*, THE HUSTLE (Mar. 2, 2016), http://thehustle.co/nba-stars-that-became-successful-entrepreneurs-and-investors.

[102] *See* Jay Dratler, Jr. & Stephen M. McJohn, INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, & INDUSTRIAL PROPERTY § 1.01 (Law Journal Press ed. 2016); POWELL ON REAL PROPERTY § 2.05 (Michael Allan Wolf ed., LexisNexis Matthew Bender Sep. 2016).

sports behemoths FanDuel and DraftKings[103] who offer contests valued at millions of dollars.[104] This is much different from the office pool of the past where participation and awards occurred on a much smaller scale.

Another difference from considerations of the past is how fantasy sports and daily fantasy sports (DFS) has impacted another industry that stands to gain from using ABD: sports betting. Legislation concerning fantasy sports contests has "forced action on behalf of both the leagues and the legislators," according to Will Green, a writer for *Legal Sports Report*.[105] This action could lead to modifications to or repeal of the Professional Amateur Sports Protection Act that prevents all but four states from offering some form of sports wagering.[106] Green correctly observes that "recent signs have hinted at a broadening acceptance by some of the professional sports leagues toward

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[103] Note that the fantasy sports landscape is in flux. Following a year of federal and state regulatory hearings, investigations by state attorneys general, civil litigation and new legislation, embattled fantasy sports contest operators, FanDuel and DraftKings, recently agreed to merge. Joe Drape, *DraftKings and FanDuel Agree to Merge Daily Fantasy Sports Operations*, N.Y. TIMES (Nov. 18, 2016, 10:44 AM), http://www.nytimes.com/2016/11/19/sports/draftkings-fanduel-merger-fantasy-sports.html.

[104] *See* Thomas H. Davenport, ANALYTICS IN SPORTS: THE NEW SCIENCE OF WINNING 2, 8 (International Institute for Analytics 2014); Peter Hammon, *Analyzing FanDuel's Statistical Arguments on Skill vs. Chance at the New York Hearing*, LEGAL SPORTS REP. (Dec. 1 2015, 2:13PM), http://www.legalsportsreport.com/6605/fanduels-skill-vs-chance-arguments/; Jake Pearson, *Judge Hears Arguments Over Gambling in New York Attorney General's Daily Fantasy Sports Case*, U.S. NEWS & WORLD REP. (Nov. 25, 2015, 4:39 PM), http://www.usnews.com/news/business/articles/2015/11/25/gambling-to-feature-at-new-york-daily-fantasy-sports-hearing (explaining the importance of whether the daily fantasy sports are skilled based or luck based in deciding if the game is gambling or not); Daniel Wallach, *Everything you Need to Know About the Illinois Daily Fantasy Sports Legal Battle*, LEGAL SPORTS REP. (Jan. 4, 2016, 5:00 AM), http://www.legalsportsreport.com/7106/illinois-dfs-primer.

[105] Will Green, *Lobbying Push for Legal US Sports Betting Could Start Next Year,* LEGAL SPORTS REP. (July 1, 2016), http://www.legalsportsreport.com/10638/lobbying-congress-sports-betting.

[106] *See id.*

betting."[107] American Gaming Association Vice President of Public Affairs, Sara Rayme, estimates that the organization can build on this momentum to expand legal sports wagering in the next three to five years.[108] "DFS is the gift that keeps on giving," Rayme says, "It's mainstreamed our business."[109] According to Green, DFS has also forced the hands of professional leagues into taking a stand on gaming.[110] Certainly any commodified and monetized ABD that makes its way into fantasy sports and DFS products will also fuel sports wagering.

This new dynamic – where fantasy sports and wagering operations generate revenue from delivering ABD to participants who then use ABD to make decisions for the purpose of generating winnings – warrants the consideration of additional factors for courts to consider when assessing whether ABD has been used for commercial purposes or for the purpose of trade through either advertising or in connection with the sale of goods and services. This dynamic also prompts considering traditional factors when determining damage awards for violations of privacy, and other factors including revenue generated by companies and individuals as a result of using ABD. Intellectual property expert Kevin Goering suggests that, "if a court were to find a right of publicity violation in these circumstances, the court might consider, among other things, in awarding damages the reasonable royalty that a player or group of players would obtain from licensing those rights."[111]

These factors differentiate ABD from other information made available to the public for money-making endeavors such as investing in stocks. Courts should use the above considerations during their analysis when a newsworthiness defense is raised. In appropriate instances, courts may want to consider what type of disclosure is necessary and proper, then limit it pursuant to facts relevant to each case.

ii. Consent as Defense

The other defense that is frequently used in right of publicity claims is that of consent. No infringement occurs if the

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] Personal interview with Kevin Goering, Partner, Norwick, Schad & Goering (Aug. 23, 2016).

plaintiff consents to the defendant's use of the plaintiff's identity or persona.[112] Generally, discussions concerning consent center on "whether the defendant had consent to take the particular actions in question."[113] Under common law, a sports figure can recover damages only if he has not consented to the defendant's use of the athlete's name or likeness in advertising or if such use or advertising exceeds the consent granted.[114] Under Restatement (Second) of Torts § 892 & cmt. c, "words or acts or silence or inaction" may constitute consent in right of publicity claims.[115] State laws may vary in defining consent.

For example, in *Dryer v. NFL*, NFL Films created television productions showing historic game footage and depicted retired NFL players engaged in football games. In the lawsuit, the players alleged that their publicity rights were infringed as a result.[116] The NFL contended that the players consented, explicitly or impliedly, to the NFL's use of game footage.[117] The court held that where the evidence presented indicated that the retired players knew of and did not object to the use of their image in the new NFL Films productions, the players consented to the use of their likeness and image.[118]

c. Right of Publicity Analysis: How Athletes Can Protect This Right in ABD

The use of ABD as a publicity right is untested in courts. Because ABD is increasingly being used for health, safety, and commercial purposes, and rapidly-evolving technology increases access to it, the conditions are ripe for a break in traditional thinking. By being proactive now, athletes and their licensees can strengthen their rights in ABD as a right of publicity. If they take specific actions before potential claims arise, athletes may overcome the defenses of First Amendment speech and owner consent. It is imperative for athletes to be aware of how and when they consent to specific uses of ABD in order to preserve

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[112] Stapleton & McMurphy, *supra* note 35, at 41–42.

[113] *Id.* at 42.

[114] *Id.* (citing Sharman v. C. Schmidt & Sons, Inc., 216 F. Supp. 401 (E.D. Pa. 1963)).

[115] Dryer v. NFL, 55 F. Supp. 3d 1181, 1200 (D. Minn. 2014).

[116] *Id.* at 1186.

[117] *Id.* at 1199–1200.

[118] *See id*. at 1200.

their rights to damages for infringement. Athletes who are proactive in protecting their ABD as a publicity right have a greater chance of success in infringement claims.

The focus here will be on scenarios where ABD from wearable technology is used for commercial purposes including: (1) using ABD to publicize and promote a league, team or sport either ***directly*** by (a) improving athlete performance and gameplay through improved safety and performance, and (b) playing in games and appearing in broadcasts or other programming to promote and publicize the league, team or sport; versus (2) using ABD to publicize and promote ***indirectly*** by commodifying and monetizing ABD to be distributed to and by Second-, Third- and Fourth-Generation Beneficiaries for enhanced statistics and other content and product offerings designed to generate revenue and increase fan engagement (e.g., fantasy sports, sports wagering, virtual and augmented reality products, mobile applications, and sponsor promotions and activation). Finally, in an age that is hyper-aware of individual brand creation and enhancement and in an environment that provides access to easy-to-use technological tools which make brand creation relatively simple and inexpensive, an athlete's right to exploit his own publicity and intellectual property rights in revenue streams must be considered.

To address the collection, use, and dissemination of ABD in these scenarios, a court must recognize that the purposes for which the ABD is collected, used, and disseminated will determine which definition and corresponding analysis applies. Generally, a plaintiff will be an athlete, the Primary Beneficiary, who has standing to assert the right of publicity in relation to his ABD. A Primary Beneficiary's assignees and licensees, or the First-Generation Beneficiaries, may have standing to assert infringement of a Primary Beneficiary's right of publicity depending on the circumstances. Further, an athlete will likely have standing to assert trademark and other intellectual property rights inherent in his identity and the commercial purposes it serves such as the promotion and provision of products and services. In some circumstances, the Primary Beneficiary's assignees and licensees, again First-Party Beneficiaries, may also have standing to assert intellectual property claims. Since ABD consists of Health Information, an athlete will likely be the sole party who can establish standing to challenge the use of his Health Information. The situation in which ABD is collected, used, and disseminated also determines whether a court analyzes ABD as part of an employment record, a form of protected

speech, or unprotected due to the athlete's consent to use the ABD and other relevant factors.

Therefore, it is from this understanding that an analysis of the legal implications of collecting, using, and disseminating ABD must be analyzed. Based upon the basic tenets of publicity right law, which may differ in subtle ways from state to state, an athlete must demonstrate that he has a valid and enforceable right in his identity or persona.[119] ABD, by nature and as defined previously, is a characteristic or trait that is used to recognize one's identity.[120] ABD may be in the form of a statistic, a playing or performance record, achievement or other characteristics or data recognized as publicity rights under common law.[121] By common law definitions, ABD should be considered a characteristic identifying an individual, thereby granting its owner an enforceable right to publicity in the athlete's ABD.[122] An athlete may assign or license this right to third parties.[123] As a result, licensees such as professional sports leagues have attempted to assert rights of publicity on behalf of assignors and licensors with mixed success.[124] Thus, an athlete, or Primary

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[119] Bolitho, *supra* note 40, at 942.

[120] Gale, *supra* note 5.

[121] *See generally Dryer*, 814 F.3d at 941; Bolitho, *supra* note 40; CHAMPION ET AL., INTELL. PROP. LAW IN THE SPORTS & ENT. INDUSTRIES 132 (2014); Rodenberg et al., *supra* note 46; Stapleton & McMurphy, *supra* note 35.

[122] *See id.*

[123] Many claims have been raised by professional sports leagues and players associations asserting rights of publicity, privacy, and intellectual property. *See generally* Rodenberg et al., *supra* note 46; Bolitho, *supra* note 40 (discussing athletes' rights of publicity); Stapleton & McMurphy, *supra* note 35 (discussing a court's reluctance to apply right of privacy protections to professional athletes).

[124] *See* C.B.C. Distrib. & Mktg. v. MLB Advanced, L.P., 505 F.3d 818 (8th Cir. 2007). *See also* Rodenberg et al., *supra* note 46, at 82 n.73 (noting that "[s]ports leagues have routinely attempted to claim some ownership over real-time sports data connected to live sporting events."). Professional sports leagues do so to protect proprietary interests in statistics that they collect and disseminate. *See* NBA v. Motorola, Inc., 105 F.3d 841, 853–54 (2d Cir. 1997). Sports information cases have led to the development of the sports industry's information amalgamation and dissemination paradigm as it exists today. As a result, leagues have adopted strategies allowing them to successfully assert claims of misappropriation, and survive claims that

Beneficiary as owner of his ABD (which is an element of his identity), has a valid and enforceable right in his identity and is in the strongest position to assert a right of publicity.

The second element in a right of publicity claim addresses whether an athlete may be identified from the defendant's use of a publicity right, or ABD in this case.[125] Due to its identifying qualities, ABD inherently identifies the athlete who contributed it. For example, in the sports industry, ABD is used to (1) describe characteristics of an athlete's in-game performance, (2) evaluate and influence an athlete's health and training regimen in preparation for game day which may also appear in programming and in other social media formats, (3) add dimension to enhanced statistics that are used to describe an athlete's propensity for performance on a given day, such as in live game programming, and (4) promote a product by incorporating ABD in marketing messages, advertisements, promotions, and content that corresponds to that product.[126]

Player tracking data, including ABD, is already being used to provide enhanced statistics for live game broadcasts, mobile applications, second-screen platforms, and in in-game entertainment for fan engagement.[127] It is also foreseeable that ABD will make its way into fantasy sports and sports wagering information, virtual and augmented reality, and other content created by and for the benefit of the Beneficiaries as the sports

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sports information distributed by third parties is protected as First Amendment speech and that sports information is comprised of facts existing in the public domain which do not belong exclusively to the leagues. "Sports organizations have alternatively deemed the dissemination of real-time data by unapproved third parties as impermissible, illegal, or a threat to sports' integrity." Rodenberg et al., *supra* note 46, at 67 . "Disputes over proprietary data and game-related rights have been litigated for decades, resulting in sometimes conflicting decisions." *Id.* In order to prevent the transmission of real-time data by others, "sports leagues have attempted to incorporate (quasi-)contractual terms in their ticket purchase agreements, spectator notices, and media credentials." *Id.* at 68. The NFL has acquired a stake in sports data business Sportradar in a move that may "buttress future legal arguments that the league has a proprietary interest in certain elements of real-time data." *Id.* at 99 n.147.

[125] Stapleton & McMurphy, *supra* note 35, at 35–36.

[126] Smith, *supra* note 1; Loftus, *supra* note 3; Gale, *supra* note 5.

[127] Gale, *supra* note 5.

ecosystem evolves. Athletes may use their ABD in their own product offerings and on social media platforms such as Facebook Live or Uninterrupted. As eSports grows, ABD will likely be included in on-screen statistics – providing eSports teams and fans information about opponents that are otherwise unavailable when watching competitors play. It is important to understand that the value of ABD comes from its use in identifying a particular athlete.[128] It is therefore likely that any and all uses of ABD in the manners described above will be for the purpose of identifying the athlete who supplied it. As a result, a defendant's use of an athlete's ABD would most certainly satisfy this element.

Note that under common law, the test for "identifiability" refers to the unaided identification of the plaintiff by the audience based on the use of "any indicia by which the plaintiff is identifiable,"[129] such that the audience understands to whom the identity pertains.[130] The test for infringement here is "identifiability."[131] The right of publicity may be infringed without any endorsement being attached.[132] Thus, so long as the audience recognizes an athlete's identity from the use of his ABD, this "identifiability" standard is met, whether or not the audience believes the athlete is endorsing a product that his ABD is being used in conjunction with. This rule of law bolsters a plaintiff's position that he is identifiable from the use of his identity (specifically his ABD), particularly to an audience of sports fans and consumers.

The third element of a right of publicity claim is satisfied if the defendant's use of the plaintiff's identity occurs without the plaintiff's permission resulting in the misappropriation of the plaintiff's identity "in a way that is likely to cause damage to the commercial value of that identity or persona."[133] Consent concerns whether the defendant had the plaintiff's permission to take the particular action in question and whether such consent occurred expressly through words or actions, or implicitly

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[128] *See generally* Stapleton & McMurphy, *supra* note 35, at 36.

[129] Stapleton & McMurphy, *supra* note 35, at 39.

[130] *See id.* at 38.

[131] *Id.* at 35–36.

[132] *Id*. at 36.

[133] *Id*. at 41.

through silence or inaction.[134] In *Dryer*, the court determined that the plaintiffs, former professional athletes whose game footage was used by NFL Films, consented to such use.[135] In that case, the plaintiff's knew that the defendant regularly captured game footage and used it in subsequent productions, and the plaintiffs voluntarily and willingly appeared in the subsequent productions by giving interviews in those productions.[136] When raising their claims, the plaintiffs did not challenge the use of their name and likeness for the interviews, but challenged such use in the footage of the historic games.[137] However, the court found that the plaintiffs' consent to use of their interviews was in conjunction with the game footage because they knew that the defendant, NFL Films, would use both in its productions.[138] Further, the plaintiffs did not challenge the defendant's use of the game footage or interviews over the years between the athletes' retirement and the time the claims were brought.[139] Supporting the court's finding was evidence of one plaintiff expressing that he was "just glad to be interviewed."[140] The court held that the plaintiffs, through their words and actions, consented to and encouraged the defendant's use of game footage which barred recovery of damages.[141]

Even when a plaintiff (1) remains silent as to a defendant's use of some aspect of the plaintiff's identity or (2) does not act to prevent such use, such may be considered consent that bars a plaintiff's recovery of damages awards.[142] Consenting by silence or inaction is something athletes may be especially susceptible to given that the choice generally lies between either consenting to ABD collection or foregoing play.[143] However, to preserve rights and recover damage awards, athletes must retain

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[134] *Dryer*, 55 F. Supp. 3d at 1200 (holding that through their own actions and words, Plaintiffs consented, and even encouraged, NFL films' use of game footage in which they appeared).

[135] *Id*.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *See id.* (stating that the "NFL recognizes, consent does not bar Plaintiffs' publicity-rights claims, but rather prevents them from recovering damages for any pre-suit act").

[143] *See id.*

control of how publicity right material is used. This means they will want to thoughtfully consider what they consent to – whether expressly or impliedly.

State laws vary in the statutory requirements of consent. Some state laws require a plaintiff to show a connection between the defendant's use and the commercial purpose, whether for advertising purposes or for the purpose of trade as mentioned previously.[144] Courts will consider the facts in each case to determine whether a plaintiff consented to a defendant's use of a publicity right for a commercial, advertising or trade purpose occurring in connection with the use.[145]

An athlete's consent to the collection, use, and dissemination of ABD is a thorny issue. Under the scenarios described previously, ABD may be used (1) by a league or team to publicize and promote a league, team or sport *directly* by improving athlete performance and gameplay or by utilizing it during broadcast games in the form of statistics and sports information and in later broadcasts and programming, (2) by a league or team to *indirectly* publicize and promote a league, team or sport by commodifying and monetizing ABD to be distributed to Second-, Third- and Fourth-Generation Beneficiaries such as in mobile applications and fantasy sports offerings, and (3) by an athlete and the players association that represents him for an *athlete's self-promotion*, exploitation of his publicity and other intellectual property rights, even during contract negotiations.[146]

In the first scenario presented above, ABD is used to publicize or promote a league, team or sport by improving

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[144] Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090, 1093 (N.D. Cal. 2011); *See also* Valentine v. C.B.S., Inc.*,* 698 F.2d 430, 433 (11th Cir. 1983) (recognizing that the proper interpretation of Fla. Stat. § 540.08 requires the plaintiff to prove that the defendants used a name or likeness to directly promote a product or service); *see also Dryer*, 55 F. Supp. at 1196–97.

[145] *See Dryer,* 55 F. Supp. at 1200.

[146] *See generally Dryer*, 55 F. Supp. at 1200; Liz Mullen, *Sensor Tech Has Attention of Leagues, Unions*, SPORTS BUS. J. (Nov. 2, 2015), http://www.sportsbusinessdaily.com/Journal/Issues/2015/11/02/Labor-and-Agents/Sensors.aspx; *Collective Bargaining Agreement*, NFL PLAYERS ASS'N at 258 (Aug. 4, 2011), https://nfllabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf.

athlete performance and gameplay. ABD may also be used during broadcast games in the form of statistics and sports information, and in later broadcasts and programming. Using the NFL as an example, the collective bargaining agreement (CBA) requires that an athlete explicitly consent to the collection and use of ABD via sensors used at practices and in games which collect information regarding the player's performance and movement, and medical and other player safety-related data.[147] The NFL may only collect data relating to medical or other safety-related data after it obtains the NFLPA's consent.[148] The athlete's consent given directly to the NFL and given indirectly through the NFLPA to the NFL is adequate to meet this element of a right of publicity claim.[149]

Where ABD is collected to *directly* publicize and promote a league, team, or sport during broadcast games and programming, the matter of consent is not as straight forward. For example, under the NFL's CBA described above, one could argue that the "characteristics" included in the Publicity Rights licensed to the NFL include ABD. If ABD is a Publicity Right, the athlete will likely be deemed to have consented to the NFL's collection, use, and dissemination of his ABD to publicize and promote the league, teams, and the sport of football. The language of the NFL Player Contracts and CBA may be interpreted to include many more ways in which the NFL may utilize ABD, thus procuring an athlete's consent either directly or through the NFLPA.

Conversely, if ABD is not considered a "characteristic" licensed to the NFL, it could be argued that an athlete did not explicitly consent to the NFL's collection, use, and dissemination of his ABD by words or actions. However, an athlete's silence and inaction against the NFL's collection, use, and dissemination of ABD may be construed as consent. This is precisely why athlete consent to the manner in which his ABD is used is imperative.

Under the second scenario, a league or team uses ABD to *indirectly* publicize and promote a league, team or sport by commodifying and monetizing ABD to be distributed to Second-, Third-, and Fourth-Generation Beneficiaries for uses such as in mobile applications, virtual reality sports entertainment, and

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[147] Mullen, *supra* note 145.
[148] *Id.*
[149] *See generally Dryer*, 55 F. Supp. at 1200.

fantasy sports and sports wagering information offerings. Such use of ABD may or may not be included in "characteristics" licensed to the NFL as an element of Publicity Rights. The same analysis applies as for ABD used for broadcasts and programming, leaving ambiguity around whether or not an athlete implicitly consents to this use of his ABD by his words. Again, if ABD is collected, used, and disseminated by a league and the athlete does not act to prevent the same or remains silent, his actions will be deemed to be consent.

In the third scenario where an *athlete desires to exploit his right of publicity*, either directly or through an assignee such as the players association, determining whether or not consent is given can be difficult. For example, under the NFL Player's Contract, an athlete assigns "rights" including "indicia" to the players association.[150] This may not be analogous to the "characteristics" licensed to the NFL as part of the athlete's Publicity Rights.[151] Further, the Rights assigned to the NFLPA designate the use of those rights for use in connection with any product, brand, service, appearance, product line or other commercial use.[152] This type of use is outside the scope of rights granted to the NFL.[153] Yet there is some overlap when ABD is used by an athlete under contract to promote or endorse a fantasy sports service provider, but the same ABD is included in the providers' subscription package for determining fantasy player picks. Does the athlete's consent to use in this way constitute consent to the NFL's grant of ABD to a fantasy sports service provider as part of its product offerings?

Consent of an athlete to one party's collection, use, and dissemination of his ABD for a narrowly defined purpose is already unclear and can expand quickly and unintentionally. Athletes will naturally be opposed to this since it has the potential to erode their rights and diminish licensing fees. These negative consequences are more likely to result if consent may be inferred from inaction and silence. This is concerning because the athlete's recovery for damages may be severely limited or prohibited. Not only is this an inequitable result, but it may also result in misappropriation by, and unjust enrichment of

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[150] *Collective Bargaining Agreement*, *supra* note 145.
[151] *See id.* at 256–57.
[152] *Id.* at 258.
[153] *Id.*

defendants who expand their use of ABD without making good faith efforts to respect the publicity rights of thousands of athletes.

The final element of a right of publicity claim requires a plaintiff to prove that the defendant used plaintiff's identity or persona in a way that is likely to cause damage to its commercial value.[154] To recover, the plaintiff must demonstrate some amount of actual commercial damage,[155] backed by evidence of the fair market value of the plaintiff's identity, unjust enrichment in the infringer's profits, or damage to the business of licensing the plaintiff's identity. One way to measure damage awards is to calculate the royalties a plaintiff would have received for the defendant's use of the misappropriated rights.[156] For injunctive relief, the plaintiff need not prove a quantifiable amount of damages.[157] If a plaintiff cannot establish damages, he may succeed in his claim for infringement, but will be barred from recovery.[158] As far as ABD is concerned, this could be highly prejudicial to athletes since their ABD has the potential to generate billions of dollars without compensating them adequately for its use.

Although athletes co-promote themselves, their teams, the league, sponsors, and endorsers, the use of such an inherently personal characteristic or trait such as ABD has far-reaching implications and risks that merit fair compensation to athletes for the use of their ABD. Situations may arise where an athlete's commercial value is damaged due to impaired contract negotiation leverage, lower compensation, or a shortened career span. Or, third parties would be unjustly enriched from using ABD in an unauthorized manner. For example, a team may decide not to sign a player due to information derived from ABD that supersedes the athlete's on-field performance or may use ABD for other dystopian purposes.

Under the common law, the amount of damage awarded for the infringing use of ABD has not been determined. Courts will consider the situations where ABD was used and affix a dollar amount to the harm. The matter of consent is crucial in

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[154] Stapleton & McMurphy, *supra* note 35, at 41.

[155] Bolitho, *supra* note 40, at 942.

[156] Personal interview with Kevin Goering, Partner, Norwick, Schad & Goering, *supra* note 110.

[157] *Id.*

[158] *Id.*

determining the value of harm suffered by a plaintiff and his ability to recover damages. Calculating the value of billions of bytes of ABD collected, used, and disseminated by First-, Second-, Third- and Fourth-Generation Beneficiaries will be a challenge. Clearly, this data is of great worth to the owner, the athlete and Primary Beneficiary. Where ABD is commodified and monetized, perhaps a method of looking to the amount leagues charge to Second-, Third- and Fourth-Generation Beneficiaries for the use of ABD and then working back to the value of the raw data can be a starting point in determining the value to an athlete and third parties. This calculation must also take into account the value of the individual athletes as well as the market value of ABD belonging to a team's star as opposed to a bench player whose performance may be less impactful on a team's success. Injunctive relief may be an adequate remedy pending a determination of a reasonable damage award amount.

i. First Amendment Speech Defense

In the event a defendant raises the defense of First Amendment speech under any of these scenarios, courts will take a traditional approach and look to whether reporting of ABD is newsworthy, of concern to the community, or a subject of general interest of value and concern to the public.[159] Avid sports fans want as much information as possible about their favorite athletes and teams. The sports industry and courts both recognize sports information as being of concern and value to the public.[160] Sports fans want to know the inside scoop and feel involved in the action. Utilizing ABD to increase fan engagement makes sense to provide this sports entertainment experience. Also, factual data and true information is generally protected speech under common law.[161] ABD qualifies as factual data and true information in addition to being a proprietary right. However, there are factors that may mitigate application of the "protected speech" designation to ABD provided to the public. One distinguishing factor in the newsworthiness of ABD is the heighted confidentiality of Health Information due to privacy laws. Another distinguishing factor is that, historically, individual biometric data has not been included in sports

[159] Rodenberg et al., *supra* note 46, at 69–70.
[160] *Id.* at 70.
[161] *See id.* at 96.

information or statistics which have been the subject of First Amendment protection. Nor has ABD been available in the public domain, especially to the extent available under new technologies. ABD cannot be collected through one's senses like traditional sports information can.

With ABD a spectator can watch a game to see the Golden State Warriors' player Steph Curry's athletic ability when shooting and see how he utilizes his body mechanics, controls his energy, hydrates, and stretches to enhance his performance. Conversely, spectators can see when the New England Patriots' wide receiver Julian Edelman suffers a knee injury during game play. ABD cannot be ascertained by a third party's senses. For this reason, ABD is typically not in the public domain and will only be in the public domain if it is placed there by the athletes themselves or data collectors.

Another distinguishing feature is that ABD can be a matter of public concern because it generates value from fantasy sports and sports wagering participants. Courts may adopt additional factors to determine whether ABD used by private citizens as a means of generating personal income falls into the newsworthiness exception, or if a class of quasi-protected speech is warranted as personal data is increasingly used as a commodity. A balance may be struck between the rights of the public to access information for pecuniary interests and the rights of athletes to protect their ABD. For example, courts may determine to what extent disclosure of ABD is acceptable for the purpose of generating income from fantasy sports or sports betting. They may also revise the definition of "commercial speech" to include new forms of information derived from personal data. If courts recognize that some ABD is not protected speech this will carve out additional protection of athletes' publicity rights or contemplate ways in which athletes may be compensated for these types of confidential, but financially valuable, property rights. To balance the potential risk to athletes, perhaps more compensation should be provided to them either before disclosure or in the form of damages after disclosure. Conversely, in the event ABD is determined to be protected speech, restricting disclosure of ABD to that which is "legitimately necessary and proper for public information" under *Kimbrough* is a fair limitation on disclosure. This supports public policy to protect individual privacy and property. If an athlete's property and privacy are honored by law, it is less likely he or she will be commercially disadvantaged or that his or her

reputation will be impaired by the disclosure of Health Information that would otherwise be confidential and private.

ii. Consent Defense

The other defense a defendant may raise is that of consent. In any scenario involving ABD, courts must consider whether consent was given by an athlete or his assignees or licensees for a particular use and/or whether that use extended beyond the scope of consent granted.[162] If an athlete consents to the use of his ABD by words, acts, silence, or inaction then his ability to assert an infringement claim could be limited. However, the IoT and IoE will present more scenarios where ABD may be increasingly collected and disseminated. If ABD is collected for one purpose and then used or disclosed for another without the athlete's knowledge, he could demonstrate that the use of his ABD extended beyond the scope of permission granted and will be able to recover damages for infringement. Courts should understand that uses for ABD will develop faster than the courts can address them. Courts should also compare the bargaining power and position of data collectors and their ability to capitalize on ABD to that of athletes who may feel pressured to consent to an ABD use in order to enjoy the benefits of employment as a professional athlete. Particularly in cases involving highly confidential data such as PHI, courts should determine whether athletes knowingly consented to the use of their ABD in ways that disadvantage them.

d. Practical Solutions For Athletes and Licensees Who Want to Use ABD

Consent to a particular use of ABD can be easily construed from the owner's action, inaction, words, or silence. For these reasons, athletes will want to be proactive in determining how their ABD is used and ensure they clearly convey or withhold their consent to use ABD for a particular purpose and when consent is withheld to avoid inadvertent and unintended and consent. Conversely, Beneficiaries who use ABD should know and understand the consent requirements in each state and take measures to obtain it. In so doing, confusion

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[162] State laws will vary as to what constitutes consent. *See, e.g.*, *Dryer*, 55 F. Supp. 3d at 1202, n.7 (noting that under the New York state publicity-rights statute, any consent must be in writing).

regarding an athlete's consent will be avoided. However, these Beneficiaries must be motivated to do so. The current legal framework seems to incentivize defendants to take no pre-emptive actions because it allows Beneficiaries to utilize ABD without the explicit consent of athletes, thus resulting in violation, erosion, or infringement of athlete rights of publicity and privacy. To limit liability and risk and to ensure they can use ABD, Second- and Third-Generation Beneficiaries should require the First-Generation Beneficiaries collecting and providing data to represent and warrant that they have consent from the ABD owners to use it in a specified manner.

To summarize, each ABD Beneficiary must consider the factors of misappropriation of a right of publicity and take steps to prevent it. Athletes whose ABD has been used without consent can prevail so long as the athlete can prove that a First-, Second- or Third-Generation Beneficiary caused damage to the athlete's commercial value, was unjustly enriched, profited from, or otherwise injured the athlete's personal identity. If a league, team, or sponsor does not compensate the athlete for licensing fees associated with ABD use, then these damages become apparent. ABD collected via wearable technology that is used and disseminated to promote the athlete's health and safety and improve individual and team performance in gameplay is likely consented to through the contracts the athlete has with leagues, teams, and/or players associations provided that ABD is collected pursuant to contract terms (e.g., during authorized practice and game times). However, athletes should consider, and inquire if necessary, whether or not ABD is explicitly included in the publicity rights that he or she assigns or licenses and define when, how, and to what extent it can be disclosed in order to minimize the risk of missing out on licensing fees. Further, athletes, being the Primary Beneficiaries, must consider whether their actions, words, or silence constitute consent to use their ABD. Athletes would be wise to strategize the manner in which they authorize use of ABD, define the scope of that use, and specify what ABD is being licensed in order to maintain control of and exploit their ABD as part of their business.

Likewise, First-Generation Beneficiaries will want to ensure that ABD is included in their licenses from athletes so ABD can be used to publicize and promote the league, its teams, and the sport. While ambiguity in contracts may help leagues develop products designed to increase fan engagement, a proactive approach will reduce the risk of future litigation and promote fair practices in data collection, use, and security, for

both the sports industry and other IoT developers. For leagues, understanding athlete rights and appropriately obtaining consent and licenses can significantly reduce damage payouts for the unauthorized or unlicensed use of ABD. It will also decrease the potential payments owed to a league's or team's third-party data collector, sponsor, and other content creators under contract indemnification provisions.

Another benefit is that First-Generation Beneficiaries and their partners can adopt strategies to characterize ABD as a publicity right and track its use as such. This will allow content developers to understand what elements of identity are being included in content and programming so rights may be properly allocated and athletes can be properly compensated. First-Generation Beneficiaries, particularly leagues and players associations, should educate athletes about ABD collection, use, dissemination, and security practices to satisfy notification and consent requirements. Finally, First-Generation Beneficiaries will want to coordinate efforts with Second-Generation Beneficiaries who handle, analyze, distribute, store and transmit data, and create contractual obligations with Second- and Third-Generation Beneficiaries to control the use of ABD as required by law and the contractual obligations First-Generation Beneficiaries owe to the athletes. Likewise, Second- and Third-Generation Beneficiaries will want to protect their interests in and rights to use ABD under contract and perhaps protect their rights by incorporating ABD in proprietary products.

e. Contractual Considerations

Before leaving the topic of the right of publicity, an athlete's contractual rights and obligations with respect to ABD must be mentioned. A party's publicity rights and the use of elements of one's identity are generally described within contracts that assign or license specific rights of publicity to third parties. Such is the case with NFL players. When a contract governs, courts will generally consider the arrangement entered into by the parties. Until ABD is specifically defined and its use clearly articulated in contracts, ambiguity regarding ownership, usage rights, scope of consent, and other issues typically addressed under licenses will continue to exist. In the meantime, the issue of whether ABD is included in publicity rights granted under a contract will be a challenge to address. In the event parties enter into contracts with one another for the collection,

use, and dissemination of ABD, it would be wise for each party to memorialize their rights and obligations concerning ABD.

2. Athlete Biometric Data As Other Types of Intellectual Property

Intellectual property rights protect a variety of valuable innovations and intangibles including patents, trademarks, copyrighted works, and trade secrets. In this age of great technological advancement, social media, and shared data, nearly anyone who has access to Twitter, Facebook, Instagram, Snapchat, or other *app du jour* can create intangibles for which intellectual property rights may be claimed. These technologies raise a myriad of complex legal issues needing to be addressed and resolved.

The primary intellectual property claims that are likely to arise with ABD include trademark claims under the Lanham Act and state trademark laws, and copyright infringement under the Copyright Act. In some cases, athletes may even raise trade secret claims under state and federal statutes.[163] This section will summarize fundamental laws, the issues most likely to arise under them, considerations for analyzing infringement claims, and how courts address these claims. A comprehensive analysis of how ABD is likely to be treated in these circumstances is reserved for a different discussion focused on the application of all potential intellectual property claims that may be brought in relation to the use of ABD.

a. Trademark Claims Under the Lanham Act

Under the Lanham Act and its corresponding common law, a person who can establish an aspect of his or her identity as a trademark is afforded certain protections and may raise claims of infringement, unfair competition, and false designation of origin.[164] At their core, these claims assert that a defendant used a word, term, name, symbol, device, or any combination of these elements and made a false or misleading representation of fact that is likely to cause confusion or mistake, or deceive consumers about the affiliation, connection, or association of a plaintiff with the defendant.[165] Plaintiffs also have a claim if a defendant's activities confuse consumers so that they are

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[163] *See* Cheung et al., *supra* note 44.
[164] 17 U.S.C. § 102.
[165] 15 U.S.C. § 1125(a)(1)(A).

uncertain whether the defendant's products or services originated from a plaintiff or if a plaintiff sponsored or approved of a defendant's use of plaintiff's trademark.[166] Courts will analyze Lanham Act claims only if a defendant's use of a plaintiff's identifier constitutes commercial speech under the Supreme Court's First Amendment jurisprudence.[167] Therefore, if a court undertakes this analysis, it is because it has found that the use of an athlete's ABD is protected speech rather than a publicity right.

In these circumstances, a plaintiff must demonstrate that false advertising and similar claims occur from the collection, use, and dissemination of his ABD by First-, Second-, and Third-Generation Beneficiaries for the purpose of publicizing and promoting a sport and the league and team for which an athlete plays. The viability of an athlete's successful claim weakens if a substantial amount of time lapses between the initial offending use of ABD and the time the claim is raised (due to the defenses of laches, estoppel and acquiescence that a defendant may raise against plaintiffs).[168] The legal treatment of this topic serves as a warning to athletes to control the use of their ABD as soon as collection of ABD begins in order to hedge such defenses. Further, in *Dryer v. NFL*, the court held that professional athletes' trademark-related claims failed because the retired athletes did not timely object to the league's use of intellectual property.[169]

Where ABD is "indicia" of an athlete's identity, the athlete must treat their ABD like a trademark to the extent reasonably possible and enforce corresponding rights to the same. Likewise, assignees and licensees can raise these claims to protect their interests and those of the athletes. Athletes should raise claims of false advertising and unfair competition early to ensure ownership rights are not eroded. Adequately defining ABD as a trademark right and describing the scope of its use in written contracts is important to protect rights. As with other intellectual property rights, the use of ABD may be licensed. Primary Beneficiaries or their assignees and licensees can be compensated accordingly. Utilizing these measures allows

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[166] *Id.*
[167] *Dryer*, 55 F. Supp. 3d at 1202.
[168] *Id.*
[169] *Id.* at 1200.

licensors and licensees to control the use of ABD via trademark law to reduce the number of infringement claims in the courts.

b. Copyright Infringement Claims Under the Copyright Act and Common Law

There is much under statutory and common law to draw on for a comprehensive analysis of whether ABD may be entitled to copyright protection. A complete analysis of each scenario exceeds the scope of this discussion. The issues and rules of law discussed here serve as a survey only of basic concepts impacting ABD, the parties who are most likely to raise copyright-related claims, and potential considerations applicable to the emergence of ABD as a commodity.

The types of claims most likely to arise under copyright law when ABD is characterized as intangible property include: (1) an athlete's claim of copyright protection of his ABD and (2) a league or other third party's claim of copyright protection in the expressive works it creates by incorporating ABD. This may occur, for example, where leagues and other Beneficiaries utilize ABD in broadcasts and programming, mobile applications and second-screen offerings, advertising, virtual and augmented reality products, sponsor products, and fantasy sports and sports wagering products and services.

Under the Copyright Act, "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated" qualify for copyright protection.[170] The Copyright Act seeks to protect original works "founded in the creative powers of the mind," or the "fruits of intellectual labor."[171]

i. Athlete Claims of Copyright Protection in Their ABD

Observing how courts have handled the incorporation of athlete property into another work provides a useful comparison for the treatment of ABD as a property right. Professional athletes have claimed that copyright law protects their image, likeness and other personal features.[172] For example, in *Dryer v. NFL* the court recognized that the plaintiffs had plausibly alleged

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[170] 17 U.S.C. § 102.

[171] Feist Publ'ns Inc. v. Rural Tel. Serv. Co. Inc., 499 U.S. 340, 346 (1991).

[172] *See Dryer*, 55 F. Supp. 3d at 1186–87.

that the players' identities were the copyrighted work at issue,[173] thus providing a potential copyright claim for athletes. Upon further development of the case, however, it became clear that the copyrighted works that the athletes claimed were infringed were, in fact, NFL Films' productions containing game footage of the athletes playing football.[174] The Court reasoned that the athletes could not succeed in their claims of copyright infringement because broadcast games are copyrighted works owned by the NFL.[175] Later reproductions of these games for NFL Films' expressive, non-advertising, programs were not used "for the purposes of trade."[176] As a result, the NFL used this footage in accordance with its rights.[177] Essentially, the court held that when an athlete's performance on the football field is part of the copyrighted material, their likenesses cannot be detached from the copyrighted performances.[178] This position allows the NFL to exploit its copyrighted game footage in later expressive works and the NFL's valid copyright in game footage forecloses the athletes' publicity claims.[179]

If an athlete claims his ABD is protected under copyright law, a court may consider whether ABD is included in another's creative expression or copyrighted work. Likewise, the court may consider whether the copyrighted work that incorporates ABD is used for the purpose of trade. An additional analysis of what constitutes the purpose of trade as the IoT develops is likely to emerge. Whether claims will receive the same treatment with respect to ABD remains to be seen. Case-specific factors will certainly impact the court's analysis.

ii. Athlete Claims of the Right of Publicity in Their ABD

An athlete may also bring claims of misappropriation of a right of publicity under state law to limit how publicity right material can be used in expressive works. However, these claims will be preempted by the Copyright Act unless they are wholly based upon the assertion that the publicity rights are incorporated

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[173] *Id.* at 1202.
[174] *Id.*
[175] *Id.* at 1203.
[176] *Id.* at 1202.
[177] *Id.*
[178] *Id.*
[179] *Id.*

in a copyrighted work that constitutes advertising used by the defendant for the purposes of trade.[180] Again, the *Dryer* case is demonstrative. Former NFL players sued the NFL under claims of misappropriation of publicity rights, among other things, based upon the NFL's use of game footage in later-developed television programming.[181] The court first chose to analyze the plaintiff's right of publicity claims noting that the claims raised under the statutes of four different states set forth different requirements, then found that the claims failed under each state's newsworthiness defense.[182] Ultimately the court found that the state claims failed since the athletes' play in the NFL was the subject of public interest (i.e., it was newsworthy) and that the athletes consented to the use of their likenesses in gameplay footage and subsequent interviews.[183] The court noted that if the publicity-right claims had not been barred by the First Amendment or the defenses of newsworthiness and consent, they would have been preempted by the Copyright Act if: (1) the disputed work is within the subject matter of copyright; and (2) the state-law-created right is equivalent to any of the exclusive rights within the general scope of the Act.[184] In *Dryer*, the court found that the Copyright Act preempted statutory publicity-rights claims since (1) the disputed works (the NFL Films productions) were expressive works protected by valid copyright not used for the purpose of trade or advertising, and (2) the plaintiffs' claims of publicity-right misappropriation alleged that NFL Films included clips of the plaintiffs that were reproduced, used to create derivative works, copied, and distributed as video

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[180] *Id.* at 1201–2; *see also* Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 428 (8th Cir. 1993) (quoting 17 U.S.C. § 301(a)) (stating that federal copyright law preempts "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright." The test for determining when federal copyright law will preempt a state law claim is whether (1) the disputed work is within the subject matter of copyright; and (2) the state-law-created right is equivalent to any of the exclusive rights within the general scope of the act.).

[181] *Dryer*, 55 F. Supp. 3d. at 1186.

[182] *Id.* at 1196–97.

[183] *Id.* at 1198–200.

[184] *Id.* at 1200–01 (quoting 17 U.S.C.A. § 301(a) (West 1998)).

recordings to the public, all of which are "encompassed by copyright law."[185]

In the event publicity rights in ABD are established and athletes seek to limit the use of publicity right material in copyrighted works under the *Dryer* standard, courts will consider whether the publicity right material is included in an expressive work, which is protected by copyright law, and whether that work is used for the purpose of trade or advertising. As this pertains to ABD, copyrighted works may include broadcast games, rebroadcasts, video games, mobile applications, virtual and augmented reality products, and fantasy sports and sports wagering services. Many of these formats will incorporate the name, likeness, or identity of an athlete through the use of his ABD. The manner in which these elements are utilized may be similar or significantly different from how video of athletes playing football was used in television productions.

For example, the use of ABD in games, rebroadcasts and viewer programming may include a player's name, likeness and biometric data as well as data incorporated into statistics, analytics, computer-generated images of the player, and other visual aids that demonstrate how each player's ABD will impact individual and team performance. In this scenario there seems to be some correlation in how ABD may be used as compared to the manner in which video of an athlete has been used. Perhaps ABD utilized for virtual and augmented reality performances will be incorporated in a similar way. Alternatively, in scenarios where ABD is incorporated into fantasy sports or sports betting products, courts will likely apply fairly subjective tests to determine whether the works incorporating ABD warrant copyright protection and to what extent under the Copyright Act. This will be particularly relevant as courts consider whether ABD constitutes "facts" in compilations to determine whether the originality test is met. These determinations will impact whether the resultant works are considered to be "the subject matter of copyright" which fall within the first requirement for a publicity-right claim to be preempted by the Copyright Act.[186]

Additionally, courts will consider whether ABD is used for the purposes of trade or as an advertisement when offered to

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[185] *Id.* at 1202.

[186] *See* Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 428 (8th Cir. 1993) (quoting 17 U.S.C.A. § 301(a)).

the public in the scenarios described. New factors and tests for determining what is considered the "subject matter of copyright" and what constitutes "for the purpose of trade" in these new product offerings are likely to emerge.

If the first prong of the test is satisfied, courts will also consider whether the state-law-right is equivalent to any of the exclusive rights within the general scope of the Copyright Act. This assessment will correspond with exclusive rights enumerated in § 106 of the Copyright Act.[187] These rights may evolve as well. For example, the manner in which copyrighted works may be duplicated or distributed may change. In light of the many technological advancements and its impact on the use and dissemination of copyrighted works, the U.S. Copyright Office recently undertook a public study to evaluate the effectiveness of safe harbor provisions contained in § 512 of title 17 of the United States Code governing copyrights.[188] This section also specifically addresses copyright infringement under the Digital Millennium Copyright Act (DCMA).[189] Perhaps the U.S. Copyright Office will undertake studies to determine the impact that new technologies have on exclusive rights under the Copyright Act and take legislative action to modify these rights. In any event, as the IoT develops and ABD is incorporated into copyrighted works, additional factors will come into play impacting the rights of athletes claiming ABD as a right of publicity and the rights of those creating copyrighted works.

iii. League or Third Party Claims of Copyright Protection in Expressive Works That It Creates Which Incorporate ABD

Leagues and other content creators may use ABD in their own copyrighted works. These works may be subject to copyright protection based upon a number of factors as previously set forth. The ability of a content creator to incorporate ABD within each work and to claim copyright protection of an entire work will vary with the various intellectual property and privacy laws affecting ABD and the requirements for obtaining copyright protection.

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[187] 17 U.S.C.A. § 106 (West 2002).

[188] U.S. COPYRIGHT OFFICE, *Section 512 Study* (Dec. 31, 2015), http://www.copyright.gov/policy/section512/; *see also* 17 U.S.C.A. § 512 (West 2010).

[189] 17 U.S.C.A. § 512.

In many instances, professional sports leagues have taken steps to protect their game broadcasts, statistics, and other features of the game.[190] Sports information, real-time data, and the works they are incorporated into are protected under law and recognized by courts under common law.[191] The question is whether ABD constitutes facts or property subject to certain rights, like privacy rights. As ABD is incorporated into more products and services – for commercial purposes or otherwise – Beneficiaries and courts will be challenged by laws that foster inconsistent results.

For example, the NFL already uses player-tracking data that includes, in part, athlete acceleration rate for its Next Gen Stats.[192] These Next Gen Stats are reported on-screen during football game broadcasts, incorporated into the 2015 NFL application for Xbox One and Windows 10 within the "Next Gen Replay" feature, and is integrated with the NFL's fantasy football offerings.[193] In the future, paid subscriptions for this data will be available to fans.[194] In each of these scenarios the final work that may claim copyright protection may receive different levels of protection.

In the first scenario explained above, the final product is the football game broadcast which is subject to copyright protection. In the second scenario, the final product is a software program, which is also entitled to copyright protection. The third scenario involving fantasy football offerings may or may not be entitled to copyright protection, depending on the originality of the work and other factors. In each scenario, ABD may be categorized as: (1) facts or statistics in the public domain not subject to intellectual property or privacy protection; (2) names, likenesses, and athlete information subject to protection as a publicity right; (3) indicia or characteristics protectable as a trademark; or, (4) original works of authorship subject to copyright protection. The extent of copyright protection afforded to the league or content creator in each of these scenarios will

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[190] *See generally* Ryan M. Rodenberg et al., *Real-Time Sports Data and the First Amendment,* 11 WASH J. L. TECH. & ARTS 63, 65 (2015).

[191] *Id.*

[192] Gale, *supra* note 5, at 342.

[193] *Id.* at 343.

[194] *Id.*

depend on which category or categories the ABD is deemed to belong to by courts.

Courts will also consider whether the final work is distributed for commercial purposes, whether athletes consented to the use of their ABD in that manner, and whether the newsworthiness defense limits use and disclosure of ABD. For these reasons, the resultant copyright protection in each medium will vary as will the right-holder's ability to enforce these rights.

One of the primary factors that must be addressed when leagues and others claim copyright protection of works that incorporate ABD is whether ABD is merely a fact, or property subject to corresponding rights. Under *Feist Publications*, the seminal case concerning the extent to which facts may be entitled to copyright protection, the Court held that facts utilized in copyrighted works lack the requisite originality if they are merely copied and compiled.[195] The *Feist* court also found that if data is not considered to be "original" then it "may not be copyrighted and [is] part of the public domain available to every person."[196] Factual compilations may possess the originality required for copyright protection if the selection and arrangement of facts warrants it, though protection is limited.[197]

This is true even if the compiler expends substantial time and resources in compiling a fact-based work. Under the "sweat of the brow" doctrine, copyright protection was extended to factual information within the compilation in order to reward the compiler for "industrious collection" of facts.[198] However, this doctrine contradicts the premise that "copyright rewards originality, not effort"[199] and the "sweat of the brow" doctrine was invalidated by the Copyright Act of 1976.[200]

In the event that leagues and other content creators claim ABD is merely facts while simultaneously claiming their works are entitled to copyright protection (and the U.S. Copyright Office and the courts agree with them) these parties must construct the works in a manner that is original under the statute and common law

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[195] *Feist Publ'ns*, 499 U.S. at 347.

[196] *Id.* at 347–48 (quoting Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1369 (5th Cir. 1981)).

[197] *See id.* at 348.

[198] *Id.* at 360.

[199] *Id.* at 364.

[200] *See id.* at 354–56.

because it is unlikely that they will obtain copyrights based upon their "industrious collection" of facts.

It remains to be seen whether ABD will be treated as (1) facts that are not protected by copyright, (2) creative expressions entitled to copyright protection, or (3) rights of publicity or trademarks that are subject to their own protections. To be sure, arguments in favor of each of these positions will be made.

For example, it will be advantageous, albeit challenging given the current regulatory and legal framework, for athletes to assert viable claims to protect ABD as a copyrighted work or publicity right, thereby allowing them to control and be compensated for the use of their ABD. For content creators such as leagues or their data collectors, it could be beneficial to take the position that ABD is merely facts in the public domain that are not entitled to copyright protection. This would allow these Beneficiaries to utilize ABD at will without compensating athletes.

Alternatively, leagues, sponsors, and others who create content incorporating ABD may claim their works are protected under copyright in order to prevent infringement by others. This may be a challenging argument to make if a work is comprised of "facts." One option for leagues and other content creators is to ensure these works meet the three-prong test to qualify compilations for copyright protection.[201]

Certainly the categorization of ABD is an important issue needing to be resolved as law and policy develops. Determining whether ABD is considered to be facts, property, or both will promote equitable division of rights. The U.S. Copyright Office, the legal community, and the sports industry must consider when facts are not merely facts. As far as ABD is concerned, such data is not merely facts, but rather a form of intangible property that contains extremely private information not in the public domain. Data that is not only property with corresponding rights, but also data that is subject to greater

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[201] *See id.* at 357 (holding that "the statute identifies three distinct elements and requires each to be met for a work to qualify as a copyrightable compilation: (1) the collection and assembly of pre-existing material, facts, or data; (2) the selection, coordination, or arrangement of those materials; and, (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an 'original' work of authorship.").

privacy protection should be treated differently from "facts" that are not comprised of these elements. As courts sift through the issues presented by ABD as property, Beneficiaries should take a proactive approach to ensure that ABD is properly licensed for use in creative works and determine when doing so is necessary.

3. Trade Secret Misappropriation Claims

During the summer of 2015, news broke of an alleged computer network hack of Major League Baseball's Houston Astros.[202] The FBI and U.S. Justice Department investigated the St. Louis Cardinals in what was believed to be the first time that a professional sports team had hacked the network of another team.[203] The hack was purported to have been carried out by vengeful front-office employees of the Cardinals.[204] By July 2016, Christopher Correa, a former Cardinals executive, was sentenced by a federal judge to nearly four years in prison after pleading guilty to five counts of unauthorized access to a protected computer.[205] Correa used a computer password belonging to a former Cardinals employee to hack into the Astros' player personnel database and email system.[206] The proprietary information that Correa accessed included scouting reports, trade discussions, player statistics, and notes on recent performances and injuries of team prospects.[207] Federal prosecutors estimated the Astros' cost of the data hack to be $1.7 million, which included the value of the information Correa used to draft players for the Cardinals.[208]

This situation emphasizes the value of trade secrets in sports, particularly proprietary information developed by sports organizations to track athlete health and performance. ABD falls

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[202] Michael S. Schmidt, *Cardinals Investigated for Hacking into Astros' Database*, N. Y. TIMES (June 16, 2015), http://www.nytimes.com/2015/06/17/sports/baseball/st-louis-cardinals-hack-astros-fbi.html?_r=0.

[203] *Id.*

[204] *Id.*

[205] Bob Levey, *Christopher Correa, Former Cardinals Executive, Sentenced to Four Years for Hacking Astros' Database,* N.Y. TIMES (July 18, 2016), http://www.nytimes.com/2016/07/19/sports/baseball/christopher-correa-a-former-cardinals-executive-sentenced-to-four-years-for-hacking-astros-database.html?_r=0.

[206] *Id.*

[207] *Id.*

[208] *Id.*

into this category. This proprietary information is a critical asset – "competitively valuable information" developed by a company over time – and may be considered a trade secret.[209] Trade secrets have been protected under U.S. Code Title 18 § 1030, the Computer Fraud and Abuse Act (CFAA),[210] and by statutes in 47 states modeled after the Uniform Trade Secrets Act (UTSA).[211] In the Cardinals hacking case, Correa was charged under the CFAA with Unauthorized Access to a Protected Computer.[212] On May 11, 2016, the Defend Trade Secrets Act of 2016 (DTSA) was adopted.[213] This federal statute supplements existing state laws and provides a federal civil claim for misappropriation of trade secrets.[214] With the enactment of the DTSA, companies and individuals can file "private lawsuits to remedy a wrongful taking of their trade secret information."[215] According to John Carson and Cameron Cushman, intellectual property attorneys with Lewis Roca Rothgerber Christie LLP, the DTSA is modeled after the UTSA, but also allows for ex parte seizure orders, creates immunity from trade secret misappropriation actions for whistleblowers, imposes requirements on employers, and provides additional protections to those who own trade secrets.[216]

Trade secrets under the DTSA and the UTSA generally include those that derive independent economic value from *not* being generally known to . . . another person (under the DTSA) or other persons (under the UTSA) who can obtain economic value from its disclosure or use.[217] Trade secret misappropriation

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[209] Dean Pelletier, *Stealing Signs, Bases and, Now, Secrets,* PELLETIER L. (Mar. 8, 2015), http://www.pelletier-ip.com/?p=219.

[210] Lee et al., *supra* note 44.

[211] John Carson & Cameron Cushman, *DTSA Versus UTSA: A Comparison of Major Provisions,* LAW360 (June 8, 2016, 11:08 AM), http://www.law360.com/articles/803049/dtsa-versus-utsa-a-comparison-of-major-provisions.

[212] Plea Agreement of Christopher Correa, United States v. Correa, No. H-15-679 (S.D. Tex. Jan. 8, 2016).

[213] Carson & Cushman, *supra* note 210.

[214] Lee et al., *supra* note 44.

[215] Nineveh Alkhas et al., *The Notice Provision of the Defend Trade Secrets Act (DTSA): What Employers Must Do Now,* NAT'L L. REV. (May 20, 2016), http://www.natlawreview.com/article/notice-provision-defend-trade-secrets-act-dtsa-what-employers-must-do-now.

[216] Carson & Cushman, *supra* note 210.

[217] *Id.*

claims may be brought by employees or non-employees for wrongful access to information. Further, the statutory definitions of what constitutes "access," "unauthorized access," and the scope of authorized access are ambiguous[218] and will likely receive additional interpretation by the courts.

In a recent Ninth Circuit case concerning trade secret misappropriation, *United States v. Nosal*, the court held that misappropriation occurred when an organization's former employee accessed a protected computer without authorization by utilizing passwords and other security credentials provided to him by the organization's current employees.[219] This is different from the situation involving the St. Louis Cardinals where a current employee used a former employee's password to access a computer and trade secrets. One note from the case that is of concern is the ambiguity surrounding who is authorized to provide access to a protected computer or system. Judge Reinhardt who wrote the dissenting opinion in this case notes that the majority opinion would appear to "punish innocent cases of password-sharing."[220]

The potential for increased exposure to liability under trade secret law is real. *Nosal* demonstrates that there are various means of misappropriating trade secrets, that this area of law is unsettled, and that there are new statutory requirements for organizations to comply with to prevent trade secret misappropriation.[221] As the situation with the St. Louis Cardinals illustrates, an employee or other person who intentionally accesses information from a protected computer without authorization can incur liability on behalf of the entire organization. Data breach and hacking incidents continue to occur and will likely increase. The area of trade secret misappropriation through the unauthorized access to a protected computer will continue to develop.

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[218] *See* United States v. Nosal, 828 F.3d 865, 888–898 (9th Cir. 2016) (Reinhardt, J., dissenting).

[219] *Id.* at 878.

[220] Orin Kerr, *Password-Sharing Case Divides Ninth Circuit in Nosal II,* WASH. POST: VOLOKH CONSPIRACY (July 6, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/06/password-sharing-case-divides-ninth-circuit-in-nosal-ii/?utm_term=.b1d21f1f4277; *see also Nosal*, 828 F.3d at 889.

[221] *See Nosal*, 828 F.3d.

As a result, athletes, leagues and other ABD Beneficiaries should monitor developments in trade secret law and adopt strategies to protect ABD as a trade secret. Sports organizations and other Beneficiaries must be mindful of the liability that they may be subject to when collecting and using ABD that could qualify as a trade secret.

4. Privacy Rights and Athlete Biometric Data as Protected Information

Perhaps the legal issues that are most significant for sports technology players to understand pertain to privacy and the impact privacy laws have on not only the collection, use and dissemination of ABD, but also the transmission, storage, and protection of ABD. The IoT and IoE will evolve rapidly, fueled by technological advances and big data. As this occurs, there will be a degree of uncertainty involved in the application of law to sports technology issues. As Johnny Madill, an attorney who advises clients on technology and regulatory matters notes:

> The challenge, therefore, for everyone from athletes, clubs, governing bodies and federations, to developers, manufacturers, sports data analytics professionals, sponsors, agents and lawyers, is to fully understand the data privacy and legal challenges brought about by the sport's continuing digital revolution.[222]

Madill observes that the initial disputes related to sports technology that have surfaced represent only a fraction of those that will arise due to technology's impact on sports.[223] Again, due to the complexity of the issues and analysis, only a superficial treatment of the issues will be presented here. This will identify potential issues ABD Beneficiaries may encounter in the collection, use and dissemination of personally identifiable information (PII), present situations that are somewhat analogous to the manner in which the sports industry will utilize ABD, and analyze the impact on ABD Beneficiaries including the

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[222] Jonny Madill, *Wearable Tech in Sport: The Legal Implications of Data Collection,* LAWINSPORT (Apr. 9, 2015), http://www.lawinsport.com/articles/item/wearable-tech-in-sport-the-legal-implications-of-data-collection.

[223] *Id.*

implication of First Amendment speech on ABD from a privacy standpoint.

The term "privacy" is defined by leading scholar, Daniel J. Solove, as "a set of protections against a related cluster of problems."[224] In the U.S., the legal landscape consists of a "patchwork of privacy protections."[225] Which laws govern depend on the type of data that is used and how it is used.[226] Laws create responsibilities for parties who own, collect, manage, disclose and maintain personally identifiable information. The collection, use, and dissemination of ABD presents distinct legal issues because, on one hand, ABD is private information protected by law and, on the other hand, ABD may also be newsworthy information and a commodity subject to public disclosure. Further, leagues and teams that collect ABD are in a unique position to collect Health Information from employees which has commercial value. Are there any other employers in the possession of IIHI who have such a large market and business opportunity for that information?

Remember that Health Information, IIHI and PHI are subsets of PII. To identify the most relevant privacy laws and practices pertaining to ABD, we can look to the application of laws in the use of wearable technology at large and to the use of mobile health apps since both deal with the collection, use and dissemination of Health Information. In both instances, additional considerations specific to privacy are also identified, including requirements for the transmission, handling, and security of Health Information. Since ABD will be used in a variety of circumstances, identifying relevant standards that affect PII is also important. The focus of this discussion will be on the privacy standards most relevant to the sports industry's collection, use, and dissemination of ABD via wearable technology with an eye to the future that contemplates implantables, injectables, and the IoE.

Like mobile phone and mobile health app providers, the sports industry legally contends with health-specific laws and

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[224] Anne Marie Helm & Daniel Georgatos, *Privacy and Mhealth: How Mobile Health "Apps" Fit into a Privacy Framework Not Limited to HIPAA,* 64 SYRACUSE L. REV. 131, 134 (2014) (quoting DANIEL J. SOLOVE, UNDERSTANDING PRIVACY 40 (2008)).

[225] *Id.* at 133.

[226] *See id.* at 147.

regulations on top of all of the other legalities confronting the sports industry. Leagues and teams already collect and share data for health-related purposes and for commercial purposes. Which privacy laws and standards apply can be confusing.

The most logical place to start an examination of applicable privacy standards is with HIPAA since ABD is collected by professional leagues and teams as Health Information collectors and transmitters as well as employers of athletes. ABD is Health Information, IIHI and PHI under HIPAA requiring HIPAA compliance.[227] Under the "employment record exception" to the Rule promulgated by HIPAA enforcer, the HHS, health information that relates to an employee's job performance is part of an employee's employment record which is outside the scope of HIPAA.[228] However, ABD collected for the purpose of employee performance and included in an employment record is afforded other protections of confidentiality by law.

In 2002, the HHS considered a comment regarding the status of a professional sports team as a "covered entity" under HIPAA.[229] It reasoned that professional sports teams are unlikely to be covered entities that owe a duty of confidentiality to athletes.[230] Review of this matter by the HHS was limited in scope and certainly did not contemplate commodified and monetized PHI. While there may be a very limited exception to the treatment of athlete PHI under the HIPPA Rule, the use of athlete PHI remains limited by professional sports leagues' CBA and uniform player contracts which contain provisions authorizing leagues and teams to use some of an athlete's Health Information[231] unless the information is especially sensitive, such as when an athlete has a sexually transmitted disease.[232]

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[227] *See* Health Insurance Portability and Accountability Act, 45 C.F.R. §§ 160.103, 164.514 (2014).

[228] *Id.* at §§ 160.103, 164.512.

[229] Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 52,841, 53,193 (Aug. 14, 2002) (to be codified at 45 C.F.R. pt. 160 & 164).

[230] Michael K. McChrystal, *No Hiding the Ball: Medical Privacy and Pro Sports*, 25 MARQ. SPORTS L. REV. 163, 165 (2014).

[231] *Id.* at 166.

[232] *Id.* at 169.

Privacy rights related to athlete PHI are underscored by professional leagues and teams acting as "covered entities" under HIPAA. Covered entities have special obligations to protect PHI. In his article, *The Price of Health Privacy in Sports,* Travis Walker, Regulatory Affairs Specialist for Regence BlueCross BlueShield of Utah, notes that under HIPAA's Privacy Rule sports teams that submit a bill charge for a service or transmit PHI to an insurance plan in an electronic format is considered a covered entity.[233] Some organizations may have divisions that are considered covered entities and some that are not so the manner in which information is shared and with whom it is shared determines whether HIPAA attaches.[234]

How and when HIPAA applies to ABD that is collected, used and disseminated for other purposes is unclear. Looking to privacy considerations pertaining to wearable technology is useful. For example, scholars observe that privacy concerns arise with wearable technology in relation to wearers, users, and those in surrounding environments. [235] Wearables allow massive amounts of data to be gathered, observed, and shared, potentially without the knowledge of the person to which the ABD corresponds and belongs to.[236] The data that is collected can be very sensitive information about health or specific medical conditions. New datasets may be used by third parties for a variety of purposes including for marketing and discriminatory practices in addition to job-related purposes.[237]

Additionally, data may be shared among multiple parties and devices and transmitted to the cloud or any remote storage system creating additional risk.[238] Big data capabilities, together with sensors, pierce many spaces that were previously private. Further, "always-on wearable technologies . . . [and] whole classes of networked devices will only expand information collection still further [making] the notion of limiting information collection challenging, if not impossible." [239] In

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[233] Travis Walker, *The Price of Health Privacy in Sports*, S.J. QUINNEY C. L. (Nov. 12, 2015), http://www.law.utah.edu/the-price-of-health-privacy-in-sports.

[234] *Id.*

[235] Thierer, *supra* note 20, at 54.

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.* at 63 (citing a recent White House Big Data Report).

addition to health information privacy, other areas related to privacy may come into play as ABD is utilized in a variety of ways, including communications, location, storage, mobile, and consumer privacy.[240] Further, as mobile devices are utilized to collect Health Information they are subject to laws regarding qualification as a medical device and will be subject to relevant privacy protections.[241]

The types of data collected and the manner in which they are used will continue to expand while those collecting and handling data attempt to comply with many laws, standards, and protocols concerning this data. As this happens, different privacy laws and fair information practices (FIPS) will come into play to provide guidance for those who use ABD.

A number of FIPs models have been created and adopted by countries, regions and industries since the 1970s.[242] Robert Gellman, a privacy and information policy consultant and former Chief Counsel and Staff Director, Subcommittee on Government Information, Committee on Government Operations, U.S. House of Representatives, compiled a list of federal privacy statutes and FIPs that govern and shape information privacy practices.[243] These apply to some extent to the collection, use and dissemination of ABD. They include:

- The Privacy Act of 1974;[244]
- A 2012 White House report on consumer privacy entitled *A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy* which includes a Consumer Bill of Rights that pertains to companies that collect personal data directly from consumers;[245]
- A 2012 Federal Trade Commission report setting forth the Commission's privacy framework;[246]
- A 2012 Department of Health and Human Services Policy containing "key privacy principles and a toolkit to guide

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[240] Helm & Georgatos, *supra* note 223, at 148.

[241] *Id.*

[242] Robert Gellman, *Fair Information Practices: A Basic History* (Feb. 11, 2015), http://bobgellman.com/rg-docs/rg-FIPShistory.pdf.

[243] *Id.*

[244] *Id.* at 5.

[245] *Id.* at 33.

[246] *Id.* at 21.

efforts to harness the potential of new technology and more effective data analysis, while protecting privacy;"[247] and

- A 2014 report from the Executive Office of the President entitled *Big Data: Seizing Opportunities, Preserving Values*.[248]

The Privacy Act of 1974 [249] promulgates the law governing privacy protection in the U.S. The reports and policies protect consumer information and PII collected by companies in the private sector and by the government, and provide FIPs pertaining to the collection of Health Information. Leagues, teams, professional associations, athletes, third party data processors, sports fans, and others who participate in the collection, use, and dissemination of ABD will be impacted by these regulations and policies as technology and data collection practices evolve.

The primary privacy concern for ABD is the protection and proper use of Health Information. Health Information has long been recognized as deserving of special privacy protections.[250] Special treatment of health information was first required under the 1966 Freedom of Information Act, which prohibits disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[251] In 1996, statutory privacy protections specific to Health Information were established under HIPAA. [252] The Health Information Technology for Economic and Clinical Health Act (HITECH) was passed in 2009 as part of the ARRA to promote the adoption and utilization of a nationwide Health Information technology infrastructure.[253] This legislation gave rise to the new Breach Notification Rule and resulted in the "expansion of the HIPAA Privacy, Security, and Enforcement Rules."[254]

The 2012 Department of Health and Human Services report referenced previously includes FIPs intended to protect

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[247] *Id.* at 23–24.
[248] *Id.* at 28.
[249] *Id.* at 10.
[250] Helm & Georgatos, *supra* note 223, at 147.
[251] *Id.*
[252] *Id.*
[253] *Id.* at 152–54.
[254] *Id.* at 154.

privacy by allowing those whose Health Information is collected to control and limit access, collection, use, and disclosure of information and to ensure the accuracy of their IIHI.[255] The report also proposes that record holders take steps to ensure data integrity for Health Information and types of information not included under the HIPAA Privacy Rule.[256] Finally, parties who collect, store and otherwise handle Health Information are strongly encouraged to employ reasonable security safeguards to protect data and to comply with FIPs intended to protect privacy.[257]

In legislation and the established standards for information privacy, FIPs are most concerned with an individual's ability to make informed decisions about the collection, use, and disclosure of their IIHI, to prevent the occurrence of erroneous information, to prevent discrimination based upon IIHI and to prevent unauthorized or inappropriate access, use or disclosure.[258] FIPs also stress the importance of accountability by data collectors and handlers since they collect and control sensitive data.[259] Leagues, teams, and other Beneficiaries who collect and handle ABD will be impacted by information privacy FIPs.

According to Adam Greene, former employee of HIPAA enforcer Department of Health and Human Services and current partner in the HealthIT/HIPAA practice of the Washington D.C. law firm Davis Wright Tremaine, "whether or not [HIPPA] applies is more about who is handling the data than about the content of the data itself."[260] Although referring to mobile apps that collect Health Information from consumers, the comments are relevant to professional sport collection of ABD as electronic PHI from athletes which may be used to provide healthcare and to monetize data for revenue. This data collection may have additional implications under individual state statutes dealing

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[255] Gellman, *supra* note 241, at 23–24.

[256] *Id.* at 24.

[257] *Id.* at 25.

[258] *See id.* at 23–27.

[259] *See id.* at 24–27.

[260] Mark Sullivan, *Health Apps Could be Heading into a HIPAA Showdown*, VENTUREBEAT (June 13, 2014, 9:56 AM), http://venturebeat.com/2014/06/13/health-apps-could-be-heading-into-a-hipaa-showdown.

with biometric data privacy, even for entertainment purposes.[261] Each Beneficiary must consider his actions in relation to ABD that contains Health Information to ensure compliance with relevant privacy laws and regulations.

"[N]o silver-bullet solution to these complex privacy issues exists. As [attorneys] with Morrison Foerster have asserted, 'threats to security and privacy vary considerably and the breadth of challenges presented means that a one-size-fits-all approach to policy and/or regulation is unlikely to work.'"[262] A generally-accepted practice for data collectors has been notifying individuals that their private information is being collected and stating generally how that information may be used and obtaining consent. Due to the sophistication of wearable technology and the sheer amount of data wearables can collect, finding a notice and consent solution that can foresee every possible use and misuse of ABD is challenging.[263] For this reason, academics, government officials and private companies suggest using a model focused on the context of data use and one that promotes data control and accountability by data collectors.[264]

To illustrate how to apply existing privacy principles in a new IoT environment, many IoT players including Intel, Oracle, AT&T, and General Electric believe that a good model for managing notice and choice is based upon what happens to collected data – how it is used, real world harms, benefits and consequences – then considering what controls are needed to protect privacy within the circumscribed use.[265] Data collectors will control the collection, use and dissemination of data and be held accountable for how they manage data based upon data contributor choice and public policy.[266] Likewise, under this model, leagues, teams, and Second-Generation Beneficiaries

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[261] Eriq Gardner, *Why Hollywood Should Pay Attention to Biometric Privacy*, THE HOLLYWOOD REPORTER (May 19, 2016, 9:38 AM), http://www.hollywoodreporter.com/thr-esq/why-hollywood-should-pay-attention-895713.

[262] Thierer, *supra* note 20, at 74.

[263] *Id.* at 61.

[264] *Id.* at 65.

[265] *Id.* at 66–67 (citing Letter from Daniel W. Caprio, Jr., Senior Strategic Advisor, Transatlantic Computing Continuum Policy Alliance, to Donald S. Clark, Sec'y, U.S. Fed. Trade Comm'n 3 (Jan. 10, 2014), *available at* http://perma.cc/5JL6-23K3.

[266] *Id.* at 64–65.

who handle ABD can define fluid, logical restrictions on ABD based on the purposes for which it is collected, how it will be used, and to whom and for what purposes it will be disseminated. This set of standards guiding the collection, use and dissemination of ABD can anticipate technological advances and their impact on the use of ABD, plus promote realistic, futuristic problem-solving before legal risk escalates. This approach is desirable considering the potential data collection and use that wearable technologies could provide. Traditional FIPs certainly influence data collection, use, dissemination, and protection practices; however, serendipitous discoveries and data-driven innovation requires organically-created, flexible, and evolving privacy and security practices, some of which may occur outside the realm of public policy.[267] As they develop, new privacy and security standards will promote high transparency about data collection and use, make smart and efficient use of data, limit sharing of information with too many third-parties, and safeguard data against unauthorized interception or data breaches.[268]

Already, professional leagues and teams utilize tools to maintain the security of electronic medical records (EMRs) that may transfer from team to team as players are traded.[269] The notion of data sharing and protection of sensitive Health Information is an issue that the NFL has already addressed.[270] The NFL coordinates with medical providers and EMR integration companies to collect and maintain players' personal medical information in an employment record.[271] The result is an integrated system that shares player Health Information including images, information, video, and injury data with teams, hospitals, and other care providers beginning at the Combine through a players' career.[272] The NFL could be poised to securely collect, use, and disseminate ABD not only for the

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[267] *Id.* at 73.

[268] *See id.*

[269] *E.g.*, Lucas Mearian, *NFL CIO: Tech Isn't the Problem with Health Info Sharing,* COMPUTERWORLD (Apr. 17, 2015, 2:59 AM), http://www.computerworld.com/article/2911097/nfl-cio-tech-isnt-the-problem-with-health-info-sharing.html.

[270] *Id.*

[271] *See Id.*

[272] *Id.*

purpose of healthcare, but also for commercial purposes including commodification and monetization.

With respect to the collection, use, and dissemination of ABD for the purpose of health, safety and performance as well as for commodification and monetization, security measures for the protection of ABD will be more sophisticated. The IoT will require companies to rethink how they handle security and implement layers of security measures that contemplate how data is collected, the devices used to collect and transmit that data and the non-standard protocols on which they operate, real-time data collection and use, and big data capabilities.[273] For leagues and teams, this means that adaptive strategies must be implemented to maintain the security of ABD.

Finally, in relation to highly-sensitive Health Information, First Amendment speech protections do allow for some reporting of athlete health and injuries as matters of public concern. The protections around the use and dissemination of Health Information and ABD are somewhat diminished due to the newsworthiness of athletes' sports endeavors and because athletes authorize limited use of this Health Information through terms of their contracts with the leagues and teams. However, contractual obligations, public policy, and in some cases an athlete's actions to prevent disclosure can limit third-party disclosure and use of Health Information (consider Seattle Seahawks running back Marshawn Lynch, well-known for his limited comments to the media). Where ABD falls on the scale of private information – whether as PHI, an employment record, or a commodity – is difficult to say.

Privacy torts by nature involve a careful weighing of competing values, and courts are tasked with striking a balance among them. "The values on both sides of the scale are inordinately difficult to measure" and "[t]he need for flexibility and adaptability will be paramount if innovation is to continue in this space."[274] This will occur in light of the "high value Americans place on privacy in balancing it with other values,

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[273] Jaikumar Vijayan, *The Internet of Things Likely to Drive an Upheaval for Security,* COMPUTERWORLD (May 2, 2014, 7:07 AM), http://www.computerworld.com/article/2488878/security0/the-internet-of-things-likely-to-drive-an-upheaval-for-security.html.

[274] Thierer, *supra* note 20, at 70–71 (quoting Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 261 (2012)).

such as freedom of speech and journalistic freedoms," and "economic innovation and consumer choice."[275]

To summarize, U.S. privacy laws protect personal information. Health Information, including ABD, enjoys a higher level of protection due to its sensitive and highly confidential nature. ABD that is collected, used, and disseminated for the purpose of publicizing and promoting a league, team, or sport *directly* – such as to improve individual and team gameplay – justifies the use of ABD, but still requires leagues and teams to comply with employment law, HIPAA, and other privacy laws. This is due to the reality that leagues and teams may be considered "covered entities" under HIPAA, requiring them to maintain confidentiality and security protections of athlete PHI, which encompasses ABD. Further, athlete PHI and, therefore, ABD is part of an employment record, which also must be maintained as confidential.

Alternatively, if the collection, use and dissemination of ABD is undertaken for the purpose of *indirectly* publicizing or promoting a league, team, or sport by commercialization – that is, commodifying and selling ABD or using it to enhance or create content, these practices are governed by privacy laws and related security practices that will surely evolve as wearable technology and the IoT become more pervasive.

ABD may be collected for reporting athlete health status for the purposes presented previously, and in other ways that will continue to develop as technology evolves. As the market morphs to include products designed to increase fan engagement, these methods of indirectly publicizing and promoting leagues, teams, and individual athletes must be contemplated under existing contracts and privacy law. As wearable technology and data use evolves, all Beneficiaries in the sports ecosystem must contemplate the impact on the collection, use, dissemination and protection of ABD and alter their practices accordingly.

III. REAL WORLD SOLUTIONS FOR THE ATHLETES AS PRIMARY BENEFICIARIES, AND FOR LEAGUES, TEAMS, PLAYERS ASSOCIATIONS AND THEIR PARTNERS AS ADDITIONAL BENEFICIARIES OF ABD

[275] *Id.* at 70.

The issue of how ABD, collected via wearable technology, should be treated under the law is complex and several practical problems have been presented pertaining to its ownership and use. Sound business practices, combined with legal solutions that promote innovation while protecting ABD, will allow athletes and other ABD Beneficiaries to fully realize the potential of using ABD in sports and serve as a model of well-reasoned methods for moving into the age of the IoE. Where such complexity exists, a layered approach to providing solutions is required.

First, private actors who are "in the trenches" so to speak – the athletes, leagues, teams and players associations most closely involved with the collection, use and dissemination of ABD – can tackle ABD ownership, privacy and use issues in a strategic manner and address them in contracts. These parties should take the lead in resolving issues by taking a proactive, collaborative approach to address privacy and property right concerns before they arise in order to avoid high transactional costs that are associated with having issues decided by the courts. Solutions may be captured in collective bargaining agreements and individual player contracts.

Next, ABD should be distinct from other categories of sports information, whether or not collected, used, and disseminated in real time. This is due to the unique characteristics that make it simultaneously a right of publicity, an intellectual property right, Health Information, newsworthy information and a stand-alone commodity that commands substantial revenue available through multiple revenue streams for all ABD Beneficiaries. Once categorized, ABD should be organized, tracked and protected to comply with corresponding data privacy laws and to simplify administrative business practices when utilizing and disseminating ABD.

And last, as the issues related to ABD unfold, policymakers, legislators and courts should adopt a balanced approach that will allow all Beneficiaries in the sports industry to promote innovation, adopt practices that conform to societal norms, and address ethical and legal risks based on real consequences as technology evolves. Employing existing legal principles and allowing them to develop with technological advancements will encourage innovation.

Specifically regarding publicity rights, Brittany Lee-Richardson, a New York sports and entertainment law attorney, suggests enacting a federal statute to create uniformity in the treatment of publicity rights to accommodate this era of publicity

and promotion.[276] Her proposition is valid and may be one way to simplify resolution of legal issues made more complex by technological advances. However, such legislation may be premature because the parties who are most directly involved and affected should first be allowed to create appropriate solutions in the open market. This is particularly true where the sports industry encounters nuances that the entertainment industry may not so that a "one size fits all approach" may not be most beneficial to affected parties.

Generally, solutions to be examined and discussed include:

1. Developing a position and strategy for athletes, players associations, leagues and their partners/subsidiaries;
2. Ensuring rights with respect to ABD are properly defined and flow appropriately through all assignments, licenses and other relevant contracts, current and future;
3. Drafting and adopting policies, procedures and best practices to ensure protection of athlete property and privacy rights and reserving additional rights for athlete/player association exploitation as technology and the definition of "publicity rights" evolves;
4. Requiring by contract and under law that leagues, teams and their partners who handle ABD respect athlete rights in ABD and comply with generally accepted cyber-security practices for ABD depending on its designation as Health Information, Personally Identifiable Information, etc.; and,
5. Strategically identifying and preserving revenue streams for athletes, players associations, their representatives and media companies who may utilize ABD and other athlete characteristics as technology and mediums for ABD use evolve.

By taking a proactive approach that contemplates growth of the business and corresponding compliance factors from the start, leagues, teams, and their partners will be in a better position to optimize revenue generation opportunities as

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[276] Brittany Lee-Richardson, *Multiple Identities: Why the Right of Publicity Should be a Federal Law,* 20 UCLA ENT. L. REV. 189, 219–29, 232 (2013), *available at* http://escholarship.org/uc/item/7z58n0x8.

technology and data use evolve while minimizing the cost of related infringement, breach, and other legal claims.

A. THE MOST PROACTIVE APPROACH IS FOR ATHLETES, PLAYERS ASSOCIATIONS AND LEAGUES TO UTILIZE CONTRACTS TO BRING CLARITY AND SOLUTIONS TO THE COLLECTION, USE AND DISSEMINATION OF ABD

The athletes to whom ABD belongs have the sole ability to assign rights to ABD and control its collection, use, and disclosure. As the use of ABD expands in programming, statistics, video games, virtual reality experiences, mobile apps, fantasy sports, sports betting, and other platforms, Primary Beneficiaries must take steps to ensure control over their ABD.

1. Primary Beneficiary Athletes: Leverage Individual Contracts and Collective Bargaining Agreements

Through their contracts with leagues, teams and players associations, athletes must protect their right of privacy and their publicity and intellectual property rights in ABD. This may be accomplished by defining what constitutes ABD as clearly as possible. Next, the scope and method of its collection should be adequately identified with an eye looking forward to new technologies, capabilities and uses that will continue to shape practices in this area. Athletes should consider how, when and why ABD should be collected to determine a licensing strategy. Doing this in concert with other athletes and players associations will more effectively protect rights. Athletes and players associations can benefit as they proactively participate in discussions about ABD and act to utilize and protect it. Contracts should address the purposes for which ABD will be used and provide for its protection. Further, it is beneficial to address ABD challenges and determine solutions using a committee comprised of stakeholders as was recently agreed to by the NBA and NBPA.[277]

Terms governing athlete consent should be included as well. These terms should specify what does and does not constitute consent. Where ABD is highly sensitive information

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[277] Diamond Leung, *NBA's New Labor Deal to Address Wearables, Data, How David Stern's Vision Could Come True,* SPORTTECHIE. (Dec. 15, 2016), http://www.sporttechie.com/2016/12/15/sports/nba/nbas-new-labor-deal-address-wearables-data-david-sterns-vision-come-true.

and because state statutes governing individual privacy rights may require it, express, written consent is recommended. In order to protect player rights, requests for athlete consent to use ABD for specified purposes, and the consents that are received or withheld, should be tracked and recorded. Contracts should include provisions that require methods such as these to assure athlete rights are not eroded or waived as a result of consent by silence or acquiescence.

In any event, athletes should carefully consider what constitutes consent and thoughtfully determine what types of collection, use and dissemination of ABD will be consented to. Though it is impossible to imagine every possible scenario, athletes and their agents should determine the many ways in which ABD may be used now and in the future in order to reserve the athlete's right to protect and, if desired, use ABD in his or her own ventures where ABD may be monetized. They should consider the particular purposes for which ABD may be used currently as well as those not contemplated under the contract or that fall outside the scope of the contract. Athletes and agents may coordinate with leagues and teams to discuss how ABD that is collected will be categorized and valued. Contracts should include corresponding compensation terms for ABD since it is highly sensitive information that is also a property owned by the athlete. In the future, athletes will likely have more opportunities to utilize their publicity rights, including their ABD, in new ways. Athletes and their agents will reap greater rewards if they pre-determine how they will utilize ABD in other ventures then craft contract carve outs that retain athlete rights for these ventures or partner with media companies to capitalize on these rights by licensing them to third parties.

Finally, stringent security requirements should be set forth in contracts to protect ABD from unwanted disclosure by parties other than the athlete. In relation to this, athletes and their agents should be aware of the impact athlete disclosure of ABD may have on his ability to prevent disclosure by third parties and implement a strategy to limit or prevent disclosures that may adversely affect privacy and property rights.

Incorporating contract provisions that clarify what ABD is, how it may be collected and used, and how it will be protected are the initial, primary goals for athletes as the Primary Beneficiaries. Maintaining control of their privacy and publicity rights coupled with receiving commensurate compensation for

their ABD via contracts will reduce transactional costs of pursuing claims in court and prevent erosion or these rights.

2. First- and Second-Generation Beneficiaries: Add Relevant Provisions to Collective Bargaining Agreements, League-Professional Association Licenses and Vendor Agreements

First-Generation Beneficiaries including leagues, teams and players associations have some interests that are complimentary and others that compete with one another. Leagues and teams want to utilize ABD for altruistic reasons and for revenue generation. Players associations seek to protect player rights while capitalizing on these rights as well. All of these organizations rely upon athletes to assign, license or otherwise grant these rights. For these reasons it is in the best interest of these parties to develop a strategy that protects athlete rights and compensates them for the use of their property.

Utilizing the provisions that are recommended above for use in athlete contracts, professional associations should promote and negotiate for inclusion of appropriate provisions in collective bargaining agreements, league-players association licenses, and individual player contracts. Players associations should review the property rights assigned to them by athletes and compare them to property rights that players associations have licensed to leagues and teams via collective bargaining agreements and individual player contracts. Ambiguous definitions that may or may not include ABD should be clarified so that athletes, leagues, teams and players associations have the same understanding of what rights are being licensed and confirm that those rights match the rights assigned or licensed by athletes. The rights and obligations that are assigned from athletes to players associations and licensed from athletes and players associations to leagues and teams must consistently flow through each agreement. Definitions of assigned and licensed property must include ABD and clarify what it is, what it is not, and how it may be collected and used. This approach will reduce claims, disputes and related costs while identifying revenue streams from ABD utilization and establishing profits for each party involved.

The rights and responsibilities connected to the collection, use and dissemination of ABD conveyed within these agreements, assignments and licenses must trickle down to Second-Generation Beneficiaries who partner with First-Generation Beneficiaries to collect, analyze, process, disseminate and protect ABD. For example, in a scenario where

a league partners with or otherwise engages a vendor to collect, analyze, report on, house, and create content from ABD, the league should ensure it has procured consent from athletes to collect and use their ABD from a privacy law perspective and procured a license to utilize the ABD from a property law perspective, if the situation warrants it. If the league has taken these steps, it will then sublicense these rights to Second-Generation Beneficiaries. This approach will reduce infringement claims and related costs to First- and Second-Generation Beneficiaries. Optimally, it will also create a method for tracking parties who collect, create content, and use that may serve as the basis for compensating athletes and players associations for property rights. Additionally, security obligations described in collective bargaining agreements and other governing documents can be included in agreements between leagues and their ABD vendors to ensure league compliance and offset risk, passing some liability to those parties handling ABD. As a result, leagues may seek warranties and indemnification from Second-Generation Beneficiaries who may create infringing content or breach security obligations. Second-Generation Beneficiaries may likewise seek warranties and indemnification from leagues who may provide infringing or unauthorized property to Second-Generation Beneficiaries.

Players associations, leagues and vendors should utilize contracts to properly license rights, govern ABD collection, outline use and security practices, clearly state obligations, and precisely allocate risk. Taking this approach is a cost-effective way to procure and sublicense rights, reduce infringement claims and transaction costs, and increase profit margins.

3. Third- and Fourth-Generation Beneficiary Sponsors and Content Creators: Protect Interests by Incorporating Appropriate Contract Provisions

Leagues and players associations also have obligations to sponsors, endorsers, data disseminators and content creators. These Third-Generation Beneficiaries must also be legally obligated to observe relevant rights and responsibilities in their use of ABD as sponsors, endorsers, content creators and disseminators. They will also want to be protected from potential infringement claims from players and professional associations as well as security breach claims from Primary and First-Generation Beneficiaries.

The contracts that leagues and players associations enter into with Third-Generation Beneficiaries should clearly articulate rights and obligations with respect to ABD. Parties to these agreements must undertake practices to prevent infringement of publicity and intellectual property rights and to comply with security-related obligations in the handling of ABD. Contract provisions should state these obligations and grant appropriate rights to Third-Party Beneficiaries who utilize ABD to create content. This approach will reduce liability for Third-Party Beneficiaries and costs related to defending potential infringement and security breach claims.

B. PROPERTY CATEGORIZING AND MANAGING ABD SIMPLIFIES COMPLIANCE ACTIVITIES AND BUSINESS PRACTICES

Clear guidelines must be developed by leagues, teams, and their technology services providers regarding the collection, use, and dissemination of ABD. These must then be conveyed to Fourth-Generation Beneficiaries, sports fans and society, who may create content and incorporate elements of ABD as they engage in the sports ecosystem.

Proactively addressing the issues that are inherent in ABD collection, use and dissemination are important because this may curtail transaction costs that arise as a result of having courts or regulatory bodies determine the roles, responsibilities and rights of affected parties. Further, a "wait and see" approach, rather than strategic planning, is likely to result in a loss of the rights of Primary Beneficiaries and revenue that all Beneficiaries stand to gain. To protect ownership and privacy rights of Primary Beneficiaries, First-Generation Beneficiaries must adopt policies and procedures to govern the collection, use, protection and dissemination of ABD, anticipating to some extent how biometric data and big data practices will evolve in the coming years. Departments within leagues, teams and players associations and their affiliated entities (e.g., Digital Content Creation, Business Development, R&D, Product Development, Marketing, Legal, and Compliance) can coordinate efforts to ensure product offerings are built in a manner to respect and protect the rights of Primary Beneficiaries.

Articulating reasonable and clear practices for utilizing only that ABD which is necessary and proper in news reporting and revenue-generating endeavors such as utilizing ABD in mobile applications and fantasy sports information will allow for greater protection of athlete privacy. This may also diminish discriminatory practices due to disclosure of unfavorable Health

Information and the availability of genetic predisposition information. Categorizing ABD when it is collected based upon how it will be used will promote compliance with applicable publicity rights, intellectual property and privacy laws.

ABD collected, used and disseminated for the purpose of health, safety, performance and injury prevention should be categorized distinctly from ABD used as a commodity, which is licensed or sold to other parties to generate revenue. Such would be the case for ABD used by Third-Generation Beneficiaries such as fantasy sports providers who provide ABD to fantasy sports participants to be used in their contests. Third-Generation Beneficiaries such as sponsors and endorsers who use ABD in their own product offerings to create and must also adopt best practices to protect ABD and utilize it only within the authorizations granted by licensors. Due to the potential uses of ABD by First-Generation Beneficiaries in programming and even in broadcasts containing ABD as a component of enhanced statistics, these uses should be examined and best practices should be adopted to ensure protection of the rights of Primary Beneficiaries and compliance with law and assigned or licensed rights and other contractual obligations. Further, First-, Second- and Third-Generation Beneficiaries must employ frameworks providing for athlete notice and consent regarding collection, use, dissemination and protection practices involving ABD.

The athletes as Primary Beneficiaries and their agents must be educated regarding the collection, use, dissemination and protection of their ABD and their own rights in relation to ABD. Players associations are in a position of protecting athlete rights; however, they have their own interests at stake where ABD is concerned. Players associations are incentivized to license ABD to leagues, teams, and other Beneficiaries as well as utilize ABD in their own product offerings and through those developed by their own sports and entertainment subsidiaries, who create content and programming around professional athletes. Each Beneficiary must contemplate the risks and rewards associated with its interaction with ABD.

Specific solutions for all ABD Beneficiaries include the following:

- Primary Beneficiaries and First-Generation Beneficiaries can begin now to adopt policies, procedures and best practices that anticipate greater regulation pertaining to

their data collection, use, dissemination and protection in an attempt to reduce risk by proper handling of ABD.

- First-Generation Beneficiaries should undertake self-regulation and adopt a privacy by design model when collecting, using, and protecting ABD to create a flexible and responsive business model that can evolve based upon changes in technology and the law.
- Beginning when ABD is collected, tracking it as well as related consent and licensing obligations.
- Creating then following models for tracking notice and consent, for tracking data collectors' responsibilities and compliance based upon use-based permissions, and implementing FIPs to govern treatment of ABD promotes regulatory compliance.
- Adopting policies, procedures and best practices concerning ABD collection, use, dissemination and protection by ABD Beneficiaries based upon their role. For example, First-Generation Beneficiaries will define what types of ABD may be collected and by what means. Policies and procedures should include parameters for data tracking, use, retention, and security. Leagues and players associations should agree on what types of ABD will be licensed or disclosed and for what purposes. Second-Generation Beneficiaries should adopt policies and procedures for handling ABD and implementing them to protect against loss, destruction or damage to data, breaches, and to define permissions regarding who can access, alter or delete data. Third-Generation Beneficiaries will want policies and procedures to ensure that their use of ABD complies with the rights licensed and permissions granted to them.
- First-Generation Beneficiaries are in a position to minimize risk at the lowest cost since they and their partners, Second-Generation Beneficiaries, collect ABD and foresee its uses. They are in a position to reduce risk by securing ABD and building product offerings with security and regulatory compliance in mind from the start.
- First- and Second-Generation Beneficiaries must communicate clearly with one another regarding what data is being produced, how it is being used and whether appropriate security measures are being taken to collect data and delete it when it is no longer required.

Regularly scheduled meetings may be a good forum to identify and uniformly address these topics.

- First- and Second-Generation Beneficiaries should implement practices to (1) create databases designed with privacy in mind at every stage of development, (2) simplify the process for athletes to make choices about the use of their ABD within the defined uses agreed upon by leagues and players associations, (3) make information collection and use practices transparent, (4) promote corporate cultures that respect ABD and value its security especially during product development, (5) incorporate substantive privacy protections related to data security, collection limits, retention and disposal, and data accuracy, and (6) promote accountability.
- First- and Second-Generation Beneficiaries and their affiliates should employ content compliance managers to oversee their respective organization's treatment of ABD and other forms of information, characteristics and property that result from the use of technology in sport to ensure compliance with applicable laws and their organization's policies and procedures.
- Athletes and their agents must be educated about athlete rights in relation to ABD and understand who is collecting their ABD, the purposes for ABD collection, its impact on them and how ABD is being controlled, processed and protected.
- Athletes must understand what constitutes consent and its impact on the retention or erosion of certain legal rights.
- Creation of an Athlete Bill of Rights promulgated by players associations with input from athletes outlining principles related to ABD including an athlete's rights to (1) control the ABD collected from him and how it will be used, (2) have access to easily understandable information about privacy and security practices in relation to ABD, (3) expect that ABD will be used only in ways for which it is authorized and in a limited context of the professional sport the athlete plays, (4) rely upon secure and responsible handling of ABD by those collecting, using, disseminating and protecting it, (5) take steps to ensure accuracy of ABD and protect it from the risks of adverse consequences, (6) reasonably

limit ABD collection and retention, and (7) be assured under contract that their ABD is handled by data controllers who comply with generally-accepted information security practices.

- ABD Beneficiaries must be diligent to stay informed, shape the discussion and solutions surrounding ABD, ensure they are preserving rights, and comply with the law as it evolves.

If implemented by ABD beneficiaries, these solutions can mitigate risk while allowing for optimization of revenue. Further, when each ABD Beneficiary proactively participates in the emerging area of wearable technology, they are each in a better position to protect their interests and the corresponding compensation for the value they bring to the sports technology space.

IV. CONCLUSION

The possibilities created by wearable technology and the use of ABD are exciting. The sports industry is a leader in the wearable technology field with the ability to make a significant impact on big data practices and the development of the IoT. By embracing technology and becoming early adopters, professional sports leagues are providing exciting entertainment experiences for sports fans. New sports entertainment products and other enhancements will elevate the level of individual athlete performance and gameplay.

How ABD is collected, used, disseminated and protected will continue to evolve. As it does, sports industry players can take a collaborative approach to mitigate legal risk and optimize opportunities for revenue generation for all parties who are involved in the contribution, collection, use and dissemination of ABD. Property and privacy rights can be balanced when encountered by sports industry players and policymakers. Public policy and regulatory schemes can be pliable so as to adopt a pro-innovation approach that responds to the relevant legal issues facing society today and in the future as the IoE emerges. Additionally, those parties involved with determining the treatment of ABD are encouraged to use their collective efforts to define ABD and its attending rights and responsibilities. Sound policy and law-making will consider foreseeable uses for ABD and seek to address reasonable consequences of collecting, using and disseminating ABD.

To resolve the inherent tensions that exist, leagues, teams and players associations can implement best practices for

the collection, use, dissemination and protection of ABD that respect the rights of athletes who contribute ABD. Athletes and their agents are wise to obtain as much information as possible to understand the implications of contributing ABD, control its use, and protect the athlete's rights. ABD Beneficiaries will be benefitted by utilizing contracts to memorialize rights and obligations with respect to the collection, use, dissemination and protection of ABD. All parties can begin implementing strategies now to promote best practices for the commercialization of ABD.

Challenges are ahead as legal issues are raised by wearable technologies and the biometric information they collect. However, utilizing well-reasoned solutions and a collaborative approach will increase successful adoption of new technologies and maximize the benefits to the sports industry and its fans.