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## Real-Time Sports Data and the First Amendment

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REAL-TIME SPORTS DATA AND THE FIRST AMENDMENT

*Ryan M. Rodenberg, John T. Holden & Asa D. Brown*

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ABSTRACT

*Technological advancements have created an emergent challenge for organizations attempting to monetize real-time information. Real-time data as a commodity is especially relevant in the sports industry. Sports leagues increasingly seek to control the dissemination of real-time data in conjunction with lucrative distribution agreements. We analyze the legal status of real-time sports data under both intellectual property law and the First Amendment, with our case-by-case analysis extending to spectators, gamblers, journalists, and non-gambling entrepreneurs. Although we conclude that the First Amendment protections are broad across all four categories, particularly when the underlying sporting event takes place on public land, we find discrete areas where sports leagues and event organizers may claim certain types of real-time data as proprietary, bolstering their ability to sell such data and preventing others from doing the same.*

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## INTRODUCTION

*“We’re incredibly protective of our live game rights . . .”*  
– NBA commissioner Adam Silver<sup>1</sup>

*“It’s a particularly Orwellian concept to ‘own data’ . . .”*  
– Journalist Will Leitch<sup>2</sup>

The commodification of real-time information is one of the most important business issues in the global sports industry.<sup>3</sup> An outgrowth concern is the ability of sports organizations to control the dissemination of real-time data, especially when sports gambling is involved. This paper examines the First Amendment implications of sports organizations’ attempts to monetize the distribution of real-time sports data while simultaneously trying to limit others’ ability to do so.<sup>4</sup>

Technological advancements have allowed spectators, professional sports gamblers, journalists, and business-minded innovators to attend sporting events and disseminate real-time information through several mediums. Such transmission of data

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<sup>1</sup> Matt Dollinger, *Fifty notes, quotes and anecdotes from 2015 MIT Sloan conference*, SPORTS ILLUSTRATED (Mar. 1, 2015), <http://www.si.com/nba/2015/03/01/mit-sloan-sports-analytics-conference-nba-adam-silver-daryl-morey?page=4&devicetype=default>.

<sup>2</sup> Will Leitch, *Watch At Your Own Risk*, SPORTS ON EARTH (Feb. 25, 2013), <http://www.sportsonearth.com/article/41964604/>.

<sup>3</sup> See Robert Freeman & Peter Scher, *Fantasy Meets Reality: Examining Ownership Rights In Player Statistics*, 2 ENT. & SPORTS LAWYER (2006), available at [http://www.americanbar.org/content/newsletter/publications/law\\_trends\\_news\\_practice\\_area\\_e\\_newsletter\\_home/fantasymeetsreality.html](http://www.americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/fantasymeetsreality.html). The emphasis here on real-time sports data is distinguishable from historical sports information of the type typically found in a newspaper box score.

<sup>4</sup> Although legal issues pertaining to courtsiding are international, our focus is narrowly on the United States. For a non-technical global introduction, see Craig Dickson, *“Courtsiding” in Sport: Cheating, Sharp Practice or Merely Irritating?*, LAW IN SPORT (Mar. 13, 2015), <http://www.lawinsport.com/articles/item/courtsiding-in-sport-cheating-sharp-practice-or-merely-irritating>.

from inside the stadium to outside the arena is faster than a television broadcast, which is subject to a multi-second delay while censors screen for prohibited material.<sup>5</sup> Some sports leagues momentarily embargo the public domain distribution of such data to protect lucrative revenue streams derived from the direct sale to time-sensitive third parties, such as betting companies.<sup>6</sup> These delays allow gamblers, for example, to place wagers in a dead space in time where sportsbooks, exchanges, and fellow gamblers may be reacting late to what is taking place in real-time.

The high-speed dissemination of real-time data, in the wagering context, acts to “predict the future” by allowing the gambler to place bets before the information is absorbed by others, in terms of accurate odds or prices. This practice has been termed “courtsiding,” with the most coverage to date in tennis.<sup>7</sup> The term

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<sup>5</sup> See Brian Palmer, *How Does Live Television Censorship Work?*, SLATE (Oct. 1, 2012), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2012/10/fox\\_news\\_live\\_suicide\\_how\\_do\\_you\\_censor\\_live\\_television\\_.html](http://www.slate.com/articles/news_and_politics/explainer/2012/10/fox_news_live_suicide_how_do_you_censor_live_television_.html).

<sup>6</sup> See Danielle Rossingh, *Gamblers May Lose Edge as Tennis Tours Sell Live Scores*, BLOOMBERG (Sept. 28, 2011), <http://www.bloomberg.com/news/articles/2011-09-28/tennis-tours-sell-live-scores-to-curb-illegal-data-collection-raise-funds>. See also Daniel Kaplan, *ATP, WTA renew Enetpulse live-scoring deal*, SPORTS BUS. J. (Sept. 22, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/09/22/Leagues-and-Governing-Bodies/ATP-WTA-data.aspx>. In contrast, when the National Football League entered into a global data dissemination deal with Switzerland-based Sportradar, the league emphasized that such data were not intended for gambling customers. See Daniel Kaplan & Eric Fisher, *NFL buys stake in stats firm*, SPORTS BUS. J. (Apr. 20, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/04/20/Leagues-and-Governing-Bodies/NFL-sportradar.aspx>.

<sup>7</sup> See BRAD HUTCHINS, *GAME, SET, CASH! INSIDE THE SECRET WORLD OF INTERNATIONAL TENNIS TRADING* (Nero 2014) (discussing the author’s experience working various international tennis events as a courtsider). See also Carl Bialik, *Inside the Shadowy World of High-Speed Tennis Betting*, FIVETHIRTYEIGHT SPORTS (May 29, 2014), <http://fivethirtyeight.com/features/inside-the-shadowy-world-of-high-speed-tennis-betting/> (describing the value of quick information in the wagering market); Greg Bishop & John Martin, *Tennis’s New Concern: Data Harvesting*, N.Y. TIMES, Jan. 22, 2014, at B12. The term “courtsider” is synonymous with “pitchesider,” the chosen nomenclature in the context of cricket. See Andrew Wu, *‘Pitchesider’ seeks to overturn Cricket Australia ban*, THE SYDNEY MORNING HERALD (Jan. 20, 2015), <http://www.smh.com.au/sport/cricket/pitchesider-seeks-to-overturn-cricket-australia-ban-20150120-12ub0f.html>; Reuters, *Cricket-‘Courtsiders’ evicted*

“courtsider” has almost exclusively been associated with gambling. In this paper, we use the word “courtsider” generally to denote someone disseminating real-time sports data, whether there is any nexus to wagering or not. Sports organizations have alternatively deemed the dissemination of real-time data by unapproved third parties as impermissible, illegal, or a threat to sports’ integrity.<sup>8</sup>

We examine the practice of courtsiding from a United States legal perspective. Recent statements by NBA commissioner Adam Silver advocating for the adoption of a nationwide legalized sports wagering scheme have brought increased attention to sports gambling and, in turn, have generated considerable discussion regarding the ownership of data.<sup>9</sup> Disputes over proprietary data and game-related rights have been litigated for decades, resulting in sometimes conflicting decisions.<sup>10</sup> In order to inhibit the

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from first World Cup game, REUTERS (Feb. 14, 2015), <http://uk.reuters.com/article/2015/02/14/cricket-world-corruption-idUKL4N0VO07M20150214>. In more official-sounding parlance, courtsiders are sometimes labeled “live data entry specialists” and work for sports leagues or data dissemination companies.

<sup>8</sup> A leading commentator analyzed the various integrity issues and legal claims in a high-profile courtsiding incident. See Scott Ferguson, *Courtsiding at the Aussie Open has nothing to do with match-fixing*, SPORTISMADEFORBETTING.COM (Jan. 15, 2014), <http://www.sportismadeforbetting.com/2014/01/courtsiders-at-aussie-open-has-nothing.html>.

<sup>9</sup> See Mason Levinson & Scott Soshnick, *NBA’s Silver Says Legal Sports Gambling in U.S. Is Inevitable*, BLOOMBERG (Sept. 4, 2014, 8:06 AM), <http://www.bloomberg.com/news/2014-09-04/nba-s-silver-says-legal-sports-gambling-in-u-s-is-inevitable.html>. See also David Purdum, *I’m not pro sports gambling. I’m just a realist*, ESPN (Feb. 5, 2015), [http://espn.go.com/chalk/story/\\_/id/12262502/gambling-issue-adam-silver-wants-sports-gambling-legalized-other-leagues-join-him](http://espn.go.com/chalk/story/_/id/12262502/gambling-issue-adam-silver-wants-sports-gambling-legalized-other-leagues-join-him). See also Adam Silver, *Legalize Sports Betting*, N.Y. TIMES, Nov. 14, 2014, at A23. As a follow-up to Adam Silver’s *New York Times* op-ed, Dallas Mavericks owner Mark Cuban stated: “We’ll charge the casinos for information sources . . . .” See Tim McMahan, *Mark Cuban: No betting ‘hypocritical,’* ESPN (Nov. 23, 2014), [http://espn.go.com/nba/story/\\_/id/11921944/mark-cuban-agrees-adam-silver-sports-betting-legalized-united-states](http://espn.go.com/nba/story/_/id/11921944/mark-cuban-agrees-adam-silver-sports-betting-legalized-united-states).

<sup>10</sup> See, e.g., *CBC v. MLBAM*, 505 F.3d 818 (8th Cir. 2007); *Morris Commc’n Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004); *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997); *Kregos v. Assoc. Press*, 3 F.3d 656 (2d Cir. 1993); *NFL v. McBee & Bruno’s*, 792 F.2d

transmission of real-time data by others, sports leagues have attempted to incorporate (quasi-)contractual terms in their ticket purchase agreements,<sup>11</sup> spectator notices,<sup>12</sup> and media credentials.<sup>13</sup>

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726 (8th Cir. 1986); *United States Golf Ass'n v. St. Andrews Sys.*, 749 F.2d 1028 (3d Cir. 1984); *NFL v. Governor of Delaware*, 435 F. Supp. 1372 (D. Del. 1977); *Baltimore Orioles v. MLBPA*, 805 F.2d 663 (7th Cir. 1986); *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (W.D. Penn. 1938); *Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc.*, 300 N.Y.S. 159, 165 Misc. 71 (1937); *Detroit Base-Ball v. Deppert*, 27 N.W. 856 (Mich. 1886). For examples of recent sports data legal disputes outside the United States, see *Football DataCo Ltd. v. Stan James PLC and Sportradar GmbH*, [2013] EWCA Civ 27, *WC2A 2LL and Akuate Internet Services Pvt v. Star India Pvt*, 2013 I.I.C. 45 (Del.) 103-104. Two historical cases from Australia are also illustrative. See *Victoria Park Racing & Recreation Grounds Co. Ltd. v. Taylor*, [1937] HCA 45, 58 CLR 479; *Sports and General Press Agency Ltd. v. Our Dogs Publishing Co. Ltd.*, [1916] 2 K.B. 880.

<sup>11</sup> Some tickets to sporting events have “small print” on the back of the ticket that purportedly amounts to a contractual agreement. For example, the following text was included on the reverse side of ticket for a minor league professional tennis tournament in the United States: “No ticket holder may continually collect, disseminate, transmit, publish or release from the grounds of the Tournament any match scores or related statistical data during match play (from the commencement of a match through its conclusion) for any commercial, betting or gambling purposes.” See Tallahassee Challenger Ticket for Admission (Apr. 25 – May 2, 2015) (on file with authors). In a potentially ironic twist, the charging of money for a ticket may weaken a sports league’s “free riding” claim under the five-part *NBA v. Motorola* test discussed *infra* Part III.B(2)(a).

<sup>12</sup> For example, a sign with the following text was posted at a minor league professional tennis tournament in the United States: “Notice to All Spectators: Match scores may not be continuously collected, disseminated, transmitted, published or released from the grounds of the tournament during match play for commercial, betting or gambling purposes.” See Tallahassee Challenger Spectator Notice (Apr. 25 – May 2, 2015) (on file with authors).

<sup>13</sup> In relevant part, such language includes “Bearer agrees to: . . . (iii) . . . refrain from disseminating, transmitting, publishing or releasing from the grounds of the Tournament any live match score or live related statistical data until 30 seconds after the actual occurrence of the incident of match play or action that leads to such live score update (e.g. a point being scored), and that such use shall solely be for news reporting and editorial use . . . .” See Tallahassee Challenger Press Pass 2015 (on file with authors). In 2013, the PGA Tour adopted similar restrictions via the media credentialing process: “. . . our media regulations prohibit the use of real-time, play-by-play transmission in

We discuss the scope of relevant free speech protections and differentiate between the various types of protected speech. Our analysis adds a sports-specific layer<sup>14</sup> to the growing literature on First Amendment considerations in connection with data,<sup>15</sup> software,<sup>16</sup> prediction markets,<sup>17</sup> algorithms,<sup>18</sup> machines,<sup>19</sup> and the marketplace of ideas.<sup>20</sup> We also provide an illustration of how a courtsiding conflict may arise with respect to the dissemination of real-time sports data and competing claims of ownership. Finally, we critically analyze four primary scenarios regarding the use of real-time sports data and the resulting free speech implications.

## I. FIRST AMENDMENT FREE SPEECH PROTECTION GENERALLY

Free speech protections under the First Amendment are vast. The Supreme Court recently held that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”<sup>21</sup> In the same case, the Supreme Court found:

Speech deals with matters of public concern when it

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digital outlets. In order to enforce these regulations, beginning this year, we will revoke the on-site credentials of all journalists affiliated with outlets that post play-by-play coverage, whether those posts are originating from tournament site or otherwise.” See Charlie Hanger, *Let the Live Blog be live*, GOLF.COM (Jan. 25, 2013), <http://www.golf.com/tour-and-news/pga-tour-play-play-ban-hurts-golf-tournament-coverage>.

<sup>14</sup> Emerging literature has investigated whether sport itself is speech. See Genevieve Lakier, *Sport As Speech*, 16 U. PA. J. CONST. L. 1109 (2014); Jason J. Cruz, *Sport and Spectacle: Should MMA Be Protected Under the First Amendment?* 17 U. DENV. SPORTS & ENT. L.J. 63 (2015).

<sup>15</sup> Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014).

<sup>16</sup> Dan L. Burk, *Software as Speech*, 8 SETON HALL CONST. L.J. 683 (1998).

<sup>17</sup> Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833 (2008).

<sup>18</sup> Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445 (2013).

<sup>19</sup> Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495 (2013).

<sup>20</sup> Shubha Ghosh, *Informing and Reforming the Marketplace of Ideas: The Public-Private Model for Data Production and the First Amendment*, 2013 UTAH L. REV. 653 (2012).

<sup>21</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).



can be fairly considered as relating to any matter of political, social, or other concern 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.<sup>22</sup>

Citing three cases,<sup>23</sup> Fox Broadcasting and the Big Ten Network, as *amici* in *In Re NCAA Student-Athlete Name & Likeness Licensing Litigation*, recently posited that “[c]ourts broadly construe ‘matters of public concern’ to encompass news reports about all manner of subjects of interest to substantial portions of the public, including news about sports and entertainment.”<sup>24</sup>

The decision in *Snyder v. Phelps* established a two-prong test for the determination of when speech is a matter of public concern.<sup>25</sup> The Court found that speech is of a public concern “when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’” or 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.”<sup>26</sup> The challenge left after *Snyder*, as set forth by Professor Clay Calvert, is that the Court’s decision neglects to differentiate between the two prongs.<sup>27</sup> One of Calvert’s critiques is that the second prong of the Court’s test does not define “legitimate news interest,” which raises ambiguity as to whether the Court is describing a “reasonable” news interest or whether alternatively, the Court is describing a news interest that abides by professional journalistic

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<sup>22</sup> *Id.* at 1216.

<sup>23</sup> *Hilton v. Hallmark Cards*, 599 F.3d 894, 908 (9th Cir. 2010); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996); *Shulman v. Group W Prod.*, 18 Cal. 4th 200, 220 (1998).

<sup>24</sup> Brief for Fox Broadcasting Company & Big Ten Network, LLC as *Amici Curiae* Supporting Defendant, *NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09-CV-01967 CW (NC), (N.D. Cal. Dec. 19, 2013).

<sup>25</sup> *See Snyder*, 131 S. Ct. at 1216.

<sup>26</sup> *Id.* (citing *Connick v. Myers*, 461 U.S. 138 (1983) and *San Diego v. Roe*, 543 U.S. 77 (2004)).

<sup>27</sup> *See* Clay Calvert, *Defining “Public Concern” After Snyder v. Phelps: A Pliable Standard Mingles with News Media Complicity*, 19 *VILL. SPORTS & ENT. L.J.* 39, 54 (2012).

standards.<sup>28</sup>

According to Calvert, the Supreme Court's decision in *Snyder* may have also expanded the bounds of what constitutes matters of public concern.<sup>29</sup> Calvert notes that in a recent case involving a televised suicide on Fox News, an Arizona judge determined that the First Amendment and newsworthiness of the preceding car chase protected Fox News from claims that they had subjected a viewer to a tort of intentional infliction of emotional distress ("IIED").<sup>30</sup> While the two-prong test utilized in *Snyder* may have expanded the scope of First Amendment protection for media companies, and even granted additional protection to defendants in IIED claims, the *Snyder* progeny has done little to explore the scope of legitimate news interests and whether an individual live reporting sports scores is engaged in a form of protected speech.<sup>31</sup>

#### A. State Action Doctrine

Whenever there is discussion of free speech protection, the threshold issue of governmental action must be analyzed.<sup>32</sup> The state action doctrine requires a governmental actor to be infringing on an individual's free speech.<sup>33</sup> Without this initial step, there can be no constitutional issue.<sup>34</sup> The United States Constitution is "not

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<sup>28</sup> *Id.* at 18. For example, the Washington Supreme Court in *Dawson v. Daly*, 845 P.2d 995, 1004 (Wash. 1993) found that "legitimate" was synonymous with "reasonable."

<sup>29</sup> See Clay Calvert, *Public Concern and Outrageous Speech: Testing the Inconsistent Boundaries of IIED and the First Amendment Three Years After Snyder v. Phelps*, 17 J. Con. L. 437 (2014).

<sup>30</sup> See *id.* at 450-51.

<sup>31</sup> The *Snyder* holding has been observed by a number of scholars to be pro-defendant. See *id.* at 451.

<sup>32</sup> "[W]e say that state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

<sup>33</sup> See *Cent. Hardware Co. v. N.L.R.B.*, 407 U.S. 539, 547 (1972) (stating "the First and Fourteenth Amendments are limitations on state action, not on action by the owner of private property used only for private purposes").

<sup>34</sup> The state action doctrine is a penumbra in Constitutional jurisprudence—

intended to protect individual rights against individual invasion.”<sup>35</sup> Regarding courtsiding at live sporting events, the state action concern would play a pivotal role for a court’s analysis. A court would have to determine if the location where the alleged speech infringement took place was subject to protection.<sup>36</sup> An underlying sporting event taking place on public land or at a taxpayer-funded stadium would almost certainly satisfy the state action requirement, especially if duly authorized law enforcement personnel were present on-site. Once a determination that Constitutional protection has been triggered, the court would need to determine what type of speech, if any, was being infringed. This leads to the next issue of whether or not the dissemination of real-time sports data by a spectator, journalist, gambler, or businessperson would be considered free speech for purposes of this analysis.

While some professional sporting events are played in privately-owned stadiums, a large number of collegiate and professional sports are played in publicly-owned stadiums, likely implicating the First Amendment.<sup>37</sup> Professor Howard Wasserman has noted the challenges faced by public universities in limiting fan

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worthy of lengthy theoretical debate and analysis. We only wish to acknowledge it as a threshold issue. *See generally* *Marsh v. Ala.*, 326 U.S. 501 (1946); *Mahoney v. Babbitt*, 105 F.3d 1452, 1456 (D.C. Cir. 1997); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. L. REV. 503 (1985).

<sup>35</sup> The Constitution cannot be used by individuals against other individuals, but only to “nullify and make void all state legislation and state action which impairs the privileges of citizens of the United States . . . .” *See* *The Civil Rights Cases*, 109 U.S. 3 (1883). *See also* *United States v. Morrison*, 549 U.S. 598, 599 (2000).

<sup>36</sup> Sports arenas are publicly owned, privately owned (but sometimes subsidized by governmental entities), or are the product of a co-venture between governmental and non-governmental actors. There is at least one annual professional tennis tournament held on federal land at the William H.G. Fitzgerald Tennis Center in Rock Creek Park, which is located in the District of Columbia and subject to the regulatory authority of the National Park Service.

<sup>37</sup> Professional sports stadiums, even if privately-owned, may transition into a limited public forum by virtue of being open to the public during specific times and/or utilizing law enforcement officers to enforce stadium regulations. *See* Shane Kotlarsky, *What’s All the Noise About: Did the New York Yankees Violate Fan’s First Amendment Right by Banning Vuvulezas in Yankee Stadium?*, 20 JEFFREY S. MOORAD SPORTS L.J. 1 (2013).

speech, stating that:

[G]overnment never has been permitted to protect captive auditors by doing what a stadium speech code entails: singling out particular profane or offensive oral messages for selective restriction while leaving related messages on the same subject, uttered at the same volume, undisturbed.<sup>38</sup>

The analysis with respect to publicly-owned and operated stadiums is whether the limited public forum has attempted to regulate speech in a manner that is content neutral, “[a]lthough the government can define the contours of a forum, it cannot define them to allow some viewpoints and not others.”<sup>39</sup> A prohibition against courtsiding generally would likely present a challenging problem for organizers, given that in a number of instances a nefarious courtsider may be acting in the same manner, even using the same mediums and disseminating the same message as a spectator relaying information about a game to a friend. Crafting a specific set of restrictions aimed at the gambling courtsider would also likely promulgate additional constitutional questions related to enforcement.<sup>40</sup>

### *B. Tiers of Free Speech Protection*

Whenever a person’s free speech is allegedly infringed by

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<sup>38</sup> Howard M. Wasserman, *Cheers, Profanity and Free Speech*, 31 J.C. & U.L. 377, 380 (2005).

<sup>39</sup> *See id.* at 387. The limited public forum doctrine is born out of *Greer v. Spock*, 424 U.S. 828 (1976), which held that despite being governmentally-owned, military bases are not public forums. The decision meant that for government-controlled property with limited access, the government could discriminate against certain types of activity, but cannot discriminate in a content-specific manner unless that restriction served a compelling government interest and was narrowly tailored to reach that end. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1750 (1987).

<sup>40</sup> For example, if stadium personnel attempted to examine a particular individual’s cell phone or conduct a more thorough examination than customary security screenings upon entrance, the Fourth Amendment may be implicated.

governmental action, the classification of the speech must be determined.<sup>41</sup> The determination of the type of speech corresponds to a commensurate level of protection.<sup>42</sup> At the bottom of the list is categorically unprotected speech.<sup>43</sup> This includes speech such as obscenity, defamation, fighting words, or of the type likely to incite lawlessness.<sup>44</sup> A court will categorically deny First Amendment protection for any speech shown to fall within one of these categories.<sup>45</sup> Commercial speech is deemed to have First Amendment protection so long as it passes the *Central Hudson* four-prong test.<sup>46</sup> Finally, the most protected speech is that of

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<sup>41</sup> See *Cent. Hardware Co. v. N.L.R.B.*, 407 U.S. 539, 547 (1972).

<sup>42</sup> This refers to the different levels of scrutiny the court will apply to reviewing the legislation and its effect on the protected speech. Protected speech is reviewed under a “strict scrutiny” analysis where the State has the burden of showing it has a compelling state interest in infringing on the individual’s free speech and there is no less restrictive means of accomplishing the compelling interest. Commercial speech (discussed *infra* Part II.B) is reviewed under an “intermediate scrutiny” analysis. Finally, speech that is deemed as unprotected speech is subject to rational basis review where the plaintiff has the burden of proving there is no rational basis for the legislation. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (discussing the application of the various standards of review when reviewing issues of free speech protection).

<sup>43</sup> See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (discussing the distinction between suppression of protected free speech and unprotected speech).

<sup>44</sup> See generally *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 330 (1974); *Miller v. Cal.*, 413 U.S. 15, 24 (1973); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969); and *Chaplinsky v. State of N.H.*, 315 U.S. 568, 571 (1942). None of these categories are applicable in the context of real-time sports data.

<sup>45</sup> The Supreme Court has created balancing tests in each of these situations to determine whether the speech is said to fall within one of these categories and therefore not be extended protection under the First Amendment. See, e.g., *Miller*, 413 U.S. at 24 (creating the *Miller* test to determine whether certain obscene speech lacks scientific, literary, artistic, or political values or rather appeals to the prurient interest); *Gertz*, 418 U.S. at 330 (discussing the standard of proof required to claim a newspaper’s speech was defamatory); *Brandenburg*, 395 U.S. at 449 (discussing the distinction between mere advocacy and speech likely to incite imminent lawlessness); *Chaplinsky*, 315 U.S. at 571 (discussing the distinction between protected free speech and unprotected “fighting words”).

<sup>46</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980), which elucidated that corporate entities are protected as to their commercial speech so long as:

individuals engaging in political, social, or cultural discourse.<sup>47</sup> Such speech is the bedrock of the First Amendment and carries with it the greatest protection. Indeed, a person who legitimately obtains information is permitted to use it under this branch of First Amendment jurisprudence.<sup>48</sup>

This hierarchy of protected speech is relevant in the discussion of real-time sports data at live events. Disseminating real-time sports data for business or gambling purposes likely falls into the commercial speech category, provided it complies with the Wire Act as discussed *infra* Part III.A. Distribution of real-time data by non-commercial sports fans or journalists would probably move into the most protected category of free speech activities.

## II. COURTSIDING AND MONETIZING REAL-TIME SPORTS DATA

The practice of courtsiding has become increasingly common worldwide.<sup>49</sup> In tennis, for example, the commodification of technological gaps is well-documented.<sup>50</sup> The most vocal objections have come from sports leagues also looking to monetize

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[T]he communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal.

<sup>47</sup> See *Dennis v. United States*, 341 U.S. 494, 503 (1951) (recognizing the importance of free discourse and debate to create the wisest governmental policies).

<sup>48</sup> See *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). This extends to entertainment-related news as well. See *Joseph Burnstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Winters v. New York*, 333 U.S. 507, 510 (1948).

<sup>49</sup> See Dickson, *supra* note 4.

<sup>50</sup> See Australian Associated Press, *Briton charged with courtsiding 'attends tournaments around world,'* THE GUARDIAN (Jan. 23, 2014), <http://www.theguardian.com/world/2014/jan/23/briton-charged-with-courtsiding-attends-tournaments-around-world>. See also Bialik, *supra* note 7.

real-time sports data.<sup>51</sup> Indeed, a spokeswoman for tennis ATP World Tour posited: “[t]here are a lot of unauthorized people out there collecting our data, either scraping it off our website or television or sitting in the stands, keying in every shot, often with errors, and selling it for substantial profit.”<sup>52</sup> More recently, after an incident where a journalist had her media credentials revoked for using Periscope to disseminate live video during a golf practice round, PGA Tour executive Ty Votaw said: “Who owns those rights? We do, not you. If you want access to those rights, you have to pay for it. When [the journalist] posts unauthorized videos, she’s stealing. I don’t understand how you can’t get that through your head.”<sup>53</sup>

The process of courtsiding is conceptually simplistic, but operationally complex. It requires calculated logistics, coordination, and speed.<sup>54</sup> In a straightforward potential scenario, a person will purchase a ticket to a tennis tournament and have a mobile device concealed in his pocket.<sup>55</sup> As he watches the match,

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<sup>51</sup> See Rossingh, *supra* note 6. See also Kaplan & Fisher, *supra* note 6. As discussed in detail *infra* Part III.A, we note that disseminating data for gambling purposes by U.S.-based sports leagues may give rise to implications under the Wire Act, especially if the sports league is an equity owner in a bookmaking or other gambling-related company.

<sup>52</sup> See Rossingh, *supra* note 6.

<sup>53</sup> Alan Shipnuck, *The Real Loser In Wei Vs. PGA Tour Is The Golf Fans*, GOLF (May 2, 2015), <http://www.golf.com/tour-and-news/pga-tour-revokes-stephanie-weis-credentials>.

<sup>54</sup> For a detailed account of the role speed plays in high-stakes sports wagering, see SEAN PATRICK GRIFFIN, *GAMING THE GAME: THE STORY BEHIND THE NBA BETTING SCANDAL AND THE GAMBLER WHO MADE IT HAPPEN* (Barricade Books 2011). For a discussion of how important data speed is in the analogous activity of high frequency stock trading, see MICHAEL LEWIS, *FLASH BOYS: A WALL STREET REVOLT* (W.W. Norton & Company 2014).

<sup>55</sup> Daniel Dobson, the British man who was arrested at the Australian Open tennis tournament January 2014 and subsequently released from custody without charges ever being filed, provided details on how he operated as a courtsider:

You would sit on court for as long as you were needed pressing the buttons, which were sewn into my trousers and relay the scores back to London. You’d press one for Djokovic, two for Murray, for example, as fast as you could. The purpose of us being there is that we can send back

he transmits real-time data using a pre-arranged code system to assist a compatriot in placing a wager on a specific match-level

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information a lot faster than TV or betting companies can get the data.

Simon Cox, *Why tennis 'courtsiding' was my dream job*, BBC NEWS (Apr. 22, 2015), <http://www.bbc.com/news/magazine-32402945>. Steve High, Dobson's employer at London-based Sporting Data Ltd., provided additional details about the logistics inherent in courtsiding:

We had an automated system whereby the point data would come in and then we would cancel any bets that we had in the market that we deemed were at the wrong price. And then we would place bets straight back into the market that we deemed were now the correct price.

*Id.* The technology and logistics are similar in cricket:

In cricket, the so-called pitchsiders are able to get their nose in front because of television delays into overseas markets of as long as 12 to 14 seconds. Most overseas gambling organisations will have staff in their offices altering the odds based on scores and television coverage. Punters generally will have to combat a built-in delay of six to eight seconds for in-play wagers to be processed, but that leaves a slight opening for the most enterprising.

Chris Barrett, *How 'pitchsiders' who prey on Big Bash League can make a fortune*, THE SYDNEY MORNING HERALD (Dec. 23, 2014), <http://www.smh.com.au/sport/cricket/how-pitchsiders-who-prey-on-big-bash-league-can-make-a-fortune-20141224-12cz2p.html>. Sporting Data Ltd. issued a press release after Dobson's January 2014 arrest in Australia and drew an analogy between their courtsiding activities and those of the sports leagues:

An interesting side note to the discussion is that what our employee on court was doing is exactly what [tennis] umpires do. They send information from the court back to other organisations that use it to profit from betting. In this case, the organisations are bookmakers and it is done through the tennis authorities' agreement with Enetpulse. However, the principle is identical.

*See* Sporting Data, *Press Release*, SPORTING DATA LTD. (Jan. 16, 2014) (on file with authors).



outcome or a micro-level “prop bet” via an automated system using complex algorithms and computer software.<sup>56</sup> This whole process occurs in a matter of seconds and can beat the televised transmission or “official” data stream.<sup>57</sup> Scholar Jack Anderson described the technology-dependent process as follows:

A recent investigation by the BBC . . . focused on the use of “courtsiders,” who send back live data to syndicates and betting companies while tennis matches are under way. Courtsiding is linked to “in-play” betting, the purpose being to send back information faster than TV or betting companies can get the data and thus manipulate the odds on betting exchanges. The analogy is to high-frequency trading on the stock exchange where facilitated by computer programs, a micro-second advantage can translate into profit.<sup>58</sup>

The concept of courtsiding gives rise to issues about the legal ownership over the real-time data and the ability—vis-à-vis the First Amendment—to restrict the dissemination of such data

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<sup>56</sup> For example, the courtsider will text a “1” if the point is won by the server, or a “2” if the point is won by the returner, or a “3” if the serve is a fault. Based on this real-time information, the remote bettor will place a wager. See HUTCHINS, *supra* note 7.

<sup>57</sup> The Federal Communications Commission regulates the transmission of live television programs and has a mandatory multi-second delay of the television to allow producers to edit out any impermissible content. See Dominic Rushe, *‘Nipplegate’ dethroned by net neutrality at top of FCC’s comments list*, THE GUARDIAN (Sept. 10, 2014), <http://www.theguardian.com/technology/2014/sep/10/nipplegate-dethroned-net-neutrality-fcc-public-comments>. Sports leagues will also delay their own free real-time data transmission as a way to increase the value of the faster “official” data stream they are selling.

<sup>58</sup> See Jack Anderson, *Editorial*, 15 INT’L SPORTS L.J. 1 (2015). Attorney Jake Williams provided a concise definition: “Pitchesiding (or courtsiding) is the process of attending a live sporting event and relaying the scores of that event, instantaneously, to another person who uses that information for the purposes of betting.” See Jake Williams, *Pitchesiding*, JAKEWSPORT.COM (June 12, 2015), <http://jakewsport.com/2015/06/12/pitchesiding/>. In addition to in-play betting via online exchanges or sports books, live data also has applications to the emerging real-time fantasy sports industry.

among at least four categories of individuals: (i) tech-savvy and social media-friendly fans unconcerned with commercial interests; (ii) gambling-affiliated courtsiders; (iii) journalists; and (iv) a business person selling scores to an off-site third party not directly involved in gambling.<sup>59</sup>

#### A. Real-Time Data Dissemination and Sports Gambling

NBA commissioner Adam Silver appears optimistic regarding the prospect of using real-time data for sports wagering.<sup>60</sup> Ted Leonsis, the owner of NBA team Washington Wizards, provided details: “. . . [W]e’re living in the real-time, technical trading world, and there’s so much betting that goes on . . . People now are going to start to make wagers in a real-time way.”<sup>61</sup> However, there are only four states permitted to offer legal sports betting.<sup>62</sup> The Department of Justice has used the Wire Act to go after illegal sports gambling at the federal level.<sup>63</sup> As such, a requisite question

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<sup>59</sup> See *infra* Table 1.

<sup>60</sup> Dustin Gouker, *NBA Commish, NHL Owner Bullish On ‘In-Game’ Sports Betting in U.S.?*, LEGAL SPORTS REPORT (Apr. 30, 2015), <http://www.legalsportsreport.com/1256/nba-commish-nhl-owner-bullish-on-in-game-sports-betting-in-u-s/>. In addition to real-time data’s use in traditional sports wagering, real-time data also has applications in fantasy sports. See Ben McGrath, *Dream Teams*, THE NEW YORKER, Apr. 13, 2015, at 26-32. For a near-future look at how technology is shaping sports gambling, see Ryan Rodenberg, *The next generation of gambling technology*, ESPN (June 9, 2015), [http://espn.go.com/chalk/story/\\_/id/13043137/what-next-generation-gambling-technology-look-espn-chalk](http://espn.go.com/chalk/story/_/id/13043137/what-next-generation-gambling-technology-look-espn-chalk).

<sup>61</sup> Gouker, *supra* note 60.

<sup>62</sup> In 1992, Congress passed the Professional and Amateur Sports Protection Act (PAPSA) outlawing state-sponsored betting on sporting events except in those states where such betting was legal at the time the law was approved. At least four states—Nevada, Oregon, Delaware and Montana—qualify for this exemption. See John T. Holden, Anastasios Kaburakis & Ryan M. Rodenberg, *Sports Gambling Regulation and Your Grandfather (Clause)*, 26 STAN. L. & POL’Y REV. ONLINE 1 (2014).

<sup>63</sup> 18 U.S.C. § 1084 (1961). For a textured history of the Wire Act, see David G. Schwartz, *CUTTING THE WIRE: GAMING PROHIBITION AND THE INTERNET* (University of Nevada Press, 2005). In a 2011 memorandum, the Department of Justice’s Office of Legal Counsel posited that the Wire Act’s reach is “limited to bets or wagers on or wagering communications related to

is whether an individual participating in gambling-related courtsiding is “engaged in the business of betting or wagering” as required by the Wire Act.<sup>64</sup>

The Wire Act “is the main federal anti-bookmaking statute, added in 1961 as part of Attorney General Robert Kennedy’s war on organized crime.”<sup>65</sup> The phrase “engaged in the business of betting or wagering” is not defined in the Wire Act. In *United States v. Baborian*, the court found that the “Wire Act does not sweep within its prohibition a mere bettor.”<sup>66</sup> Two years later, the *United States v. Southard* court footnoted: “We take no position on this ruling [by *Baborian*] except to point out that the legislative

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sporting events and contests.” See Virginia Seitz, *Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, 35 Op. O.L.C. 1, 2 (Sept. 20, 2011), available at <http://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>. See generally *United States v. Lyons*, 740 F.3d 702 (1st Cir. 2014); *United States v. Cohen*, 260 F.3d 68, 76 (2d Cir. 2001); *United States v. Baborian*, 528 F. Supp 324 (D. R.I. 1981); *United States v. Southard*, 700 F.2d 1 (1st Cir. 1983). A majority of states also prohibit some level of sports-related gambling.

<sup>64</sup> 18 U.S.C. § 1084(a). In relevant part from the Wire Act:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

*Id.* For a detailed discussion of this issue, see Ben J. Hayes & Matthew J. Conigliaro, ‘*The Business of Betting or Wagering*’: *A Unifying View of Federal Gaming Law*, 57 DRAKE L. REV. 445 (2009).

<sup>65</sup> James H. Frey & I. Nelson Rose, *The Role of Sports Information Services in the World of Sports Betting*, 11 ARENA REV. 44 (1987).

<sup>66</sup> *Baborian*, 528 F. Supp at 331. The *Baborian* court cited *United States v. Marder*, 474 F.2d 1192, 1194 (5th Cir. 1973) for the proposition that “the burden is on the government to establish that [appellant] was in the business of gambling or in common parlance, was a ‘bookie.’”

history is ambiguous on this point at best.”<sup>67</sup> Such ambiguity has resulted in a litany of cases with sometimes disparate results on this threshold issue,<sup>68</sup> although the majority of published decisions find that the Wire Act “deals with bookmakers—persons engaged in the business of betting or wagering.”<sup>69</sup>

If a U.S.-based courtsider is deemed to be engaged in the business of betting or wagering under the Wire Act, the courtsider’s transmission of real-time sports data could be a criminal offense and, in turn, be ineligible for First Amendment protection. However, if the courtsider did not fall under the Wire Act and steered clear of any bribery-induced match-fixing illegal under the federal Sports Bribery Act, the underlying conduct does not appear to fall under any federal criminal statute.<sup>70</sup> Indeed, the Wire Act was specifically drafted to exclude from coverage any

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<sup>67</sup> *Southard*, 700 F.2d at 20 n.24. The rule of lenity, in turn, “requires ambiguous criminal laws to be interpreted in favor of defendants subject to them.” See *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008).

<sup>68</sup> *United States v. Miller*, 22 F.3d 1075 (11th Cir. 1994); *United States v. Sutera*, 933 F.2d 641 (8th Cir. 1991); *United States v. Scavo*, 593 F.2d 837 (8th Cir. 1979); *United States v. Anderson*, 542 F.2d 428 (7th Cir. 1976); *United States v. Sellers*, 483 F.2d 37 (5th Cir. 1973); *Martin v. United States*, 389 F.2d 895 (5th Cir. 1968); *Truchinski v. United States*, 393 F.2d 627 (8th Cir. 1968); *Cohen v. United States*, 378 F.2d 837 (9th Cir. 1967); *Sagansky v. United States*, 358 F.2d 195, 200 (1st Cir. 1966); *United States v. Kelly*, 254 F. Supp. 9 (S.D.N.Y. 1966).

<sup>69</sup> *United States v. Tomeo*, 459 F.2d 445, 447 (10th Cir. 1972). Prominent scholars agree:

[The phrase] “the business of betting or wagering” is not a broad, limitless phrase applicable to all businesses whose commercial activities relate to gambling in some way or manner. Rather, the phrase is very precise language directed at businesses that themselves bet or wager with others and thereby risk or stake money in a game or contest that the business may win or lose depending upon an eventuality.

Hayes & Conigliaro, *supra* note 64, at 446.

<sup>70</sup> The Sports Bribery Act is codified at 18 U.S.C. § 224. For a detailed discussion of the statute’s scope, see John T. Holden & Ryan M. Rodenberg, *Sports Bribery: A Law and Economics Approach*, N. KY. L. REV. (forthcoming 2015) (on file with authors). An analysis of state-level sports gambling crimes is beyond the scope of this article.

“transmission in interstate or foreign commerce of information for use in news reporting of sporting events.”<sup>71</sup> We are not aware of any courtsider being arrested in the United States. Internationally, the only courtsider known to be arrested was quickly released after Australian prosecutors opted not to bring formal charges.<sup>72</sup>

### *B. Intellectual Property Concerns*

If the practice of courtsiding is not categorically illegal, then the professional sports organizations will be hard pressed to inhibit the dissemination of real-time data without calling upon some other source of authority to do so. To date, that mechanism has been a combination of contractual claims via tickets, signs, media credentialing, and (quasi-)property rights claims.<sup>73</sup> The following sections discuss the various legal positions<sup>74</sup> and analyze how sports leagues try to protect the value of real-time data while simultaneously preventing others from disseminating such data.

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<sup>71</sup> 18 U.S.C. § 1084(b) (1961).

<sup>72</sup> See Michelle Innis & Gerry Mullany, *Charges Dropped Against Briton Accused of Transmitting Tennis Scores*, N.Y. TIMES (Mar. 6, 2014), [http://www.nytimes.com/2014/03/07/sports/tennis/charges-dropped-against-briton-accused-of-transmitting-tennis-scores.html?\\_r=0](http://www.nytimes.com/2014/03/07/sports/tennis/charges-dropped-against-briton-accused-of-transmitting-tennis-scores.html?_r=0).

<sup>73</sup> Sports leagues have routinely attempted to claim some ownership over real-time sports data connected to live sporting events. See Ryan M. Rodenberg et al., *Whose Game Is It? Sports Wagering and Intellectual Property*, 60 VILL. L. REV. TOLLE LEGE 1 (2014).

<sup>74</sup> Two comments are in order on this point. First, the concerted attempt by sports leagues to monetize real-time data may give rise to an antitrust issue under the Sherman Act (15 U.S.C. § 1-2) where it could be alleged that one or more sports leagues are restricting competition in the news and/or data dissemination marketplace. Second, the “ticket as contract” argument is tempered by a timing issue. Unlike an arms-length season ticket agreement where all the relevant contractual language is provided *before* the purchase takes place, the data-specific small print on the back of single event tickets is only provided *after* the purchase takes place. As a result, an aggrieved ticket holder in the latter category would have a stronger claim that the ticket language represents an unenforceable contract of adhesion.

## 1. Overview of Intellectual Property Law and Related Rights

Article I, Section 8, Clause 8, of the United States Constitution grants Congress the power “to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”<sup>75</sup> Often referred to as the “Intellectual Property Clause,” it is the source of all congressional power to regulate intellectual property. To be protected, intellectual property must fall under one of the four recognized forms—patents, copyrights, trademarks, or trade secrets.

Within the intellectual property discourse is the “idea/expression” dichotomy—an idea is the underlying “principle” which cannot be protected whereas the “expression” embodying the idea is the tangible embodiment that can be protected.<sup>76</sup> Facts are not copyrightable expressions because they are considered to be in the public domain.<sup>77</sup> Indeed, scholars have posited that “[a] fundamental principle of intellectual property is that no one should be given a monopoly on facts, ideas, or other building blocks of knowledge, thought, or communication.”<sup>78</sup> If one were able to copyright a fact, for example, the opportunity for others to use it would be foreclosed, violating the Intellectual Property Clause.<sup>79</sup> Whenever a case deals with the protection of facts, ideas, or principles, courts weigh the interest of the person with a potential property interest in the idea against the free-rider

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<sup>75</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>76</sup> See *Golan v. Holder*, 132 S. Ct. 873, 890 (2012) (stating that “[d]ue to this [idea/expression] distinction, every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication; the author’s expression alone gains copyright protection”). See also *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

<sup>77</sup> See *Feist Publ’ns v. Rural Tel. Serv.*, 499 U.S. 340, 349-50 (1991) (discussing the concept of public dedication of facts as un-copyrightable ‘ideas’).

<sup>78</sup> Julie E. Cohen & William M. Martin, *Intellectual Property Rights in Data*, in *INFORMATION SYSTEMS AND THE ENVIRONMENT* 45-55, (Deanna J. Richards et al. eds., Wash., DC: Nat’l Academic Press 2001).

<sup>79</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985) (explaining that while a work as a whole may be copyrighted, non-original elements within that work are not protected).

who wishes to benefit from the use of the information.<sup>80</sup>

The Intellectual Property Clause and the First Amendment are occasionally intertwined, as the former allows for the privatization of speech.<sup>81</sup> It has been observed that because protections, such as copyright, only extend to the manner that an author has chosen to cement her thoughts, and does not apply to the thoughts themselves, it does not run afoul of the First Amendment.<sup>82</sup> Professor Dianne Zimmerman notes that courts have been unwilling to infringe on the right to publish information in matters that meet the requirements of a “public concern” in all but a limited number of instances, despite the underlying commercial value that the facts may have.<sup>83</sup> The Supreme Court has addressed the ownership of raw data, holding in *Feist v. Rural Telephone Service* that data in a telephone book was not subject to copyright protection.<sup>84</sup>

The copyright protections afforded by the Constitution are not impeded by the First Amendment, but they are limited by restrictions requiring that ideas and facts be placed in some form of acceptable copyrightable medium of expression.<sup>85</sup> The balancing of copyright interests and First Amendment desires is an act that is focused on the method of expression, as opposed to the underlying

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<sup>80</sup> See *Feist*, 499 U.S. at 349-50. See also *Baker v. Selden*, 101 U.S. 99, 100-01 (1879) (holding that “[w]here the truths of a science or the methods of an art are the common property of the whole world, any author may express the one or explain and use the other, in his own way.”); *Harper & Row*, 471 U.S. at 548 (discussing the balancing of proprietary rights in information against the public policy of dedicating certain facts to the public domain).

<sup>81</sup> Dianne L. Zimmerman, *Information as Speech, Information as Goods: Some Thoughts on Marketplaces and the Bill of Rights*, 33 WM. & MARY L. REV. 665 (1992).

<sup>82</sup> *Id.* at 666.

<sup>83</sup> *Id.* at 722. While the dissemination of information for non-commercial purposes has generally been upheld on First Amendment grounds, Zimmerman does note that the matter is regarded differently when an individual is engaged in a commercially competitive business to the speech maker. See also *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215 (1918).

<sup>84</sup> 499 U.S. at 364.

<sup>85</sup> See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998).

facts and ideas, which compose the end manifestation.<sup>86</sup> The emerging challenge is whether information can be protected when it is inherently fact and/or idea based.

Professors Nimmer and Krauthaus have examined the concept of information as a commodity, and explained that because information is composed of “data compilation, judgment, and structure,” it bears sufficient similarities to traditionally protected intellectual property mediums.<sup>87</sup> While copyright protects information products, which result from the compilation, judgment, and design of an author, the protection does not extend to facts.<sup>88</sup> The inapplicability of copyright to facts renders spurious any claim that a result from a sporting event is subject to copyright protection when an individual such as a courtsider is merely reporting what she sees. While information most certainly has value, even with the growth of technological advancements courts have been unwilling to designate information itself as intellectually protected commercial property.<sup>89</sup>

Within the relevant realm of intellectual property litigation is the concept of free-riding or misappropriation of another’s work product.<sup>90</sup> Scholar Michael Kenneally notes that most misappropriation claims have their origins in information that is not protectable by the existing intellectual property safeguards.<sup>91</sup> The protections of common-law misappropriation are contingent on commercial advantage, meaning that in order for free-riding to take place both parties must be in competition with one another. The ability of a market actor to monetize real-time sports data is

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<sup>86</sup> *Id.* at 168-69.

<sup>87</sup> Raymond T. Nimmer & Patricia A. Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, 55 LAW & CONTEMP. PROBS. 103, 107 (1992).

<sup>88</sup> *Id.* at 116.

<sup>89</sup> *Id.* at 129.

<sup>90</sup> The concept of free-riding was the divisive issue in *Int’l News Serv. v. Assoc. Press* with the argument that if one party puts sufficient time and money into the development of product (or news story), a business competitor should not be free to then capitalize on another’s work for commercial gain. 248 U.S. 215 (1918).

<sup>91</sup> See Michael E. Kenneally, *Misappropriation and the Morality of Free-Riding*, 18 STAN. TECH. L. REV. (forthcoming 2015).



potentially lucrative.<sup>92</sup> The NBA, like other sports leagues, has taken the position that real-time information connected to a live sporting event is its property.<sup>93</sup> The commodification of real-time data has become increasingly important as a source of revenue for sports leagues. Likewise, those participating in sports wagering, news reporting, and non-gambling analytics also realize a pecuniary benefit from using such information.

## 2. Trilogy of Sports Data Cases

The commodification of real-time sports information is not a new concept.<sup>94</sup> Sports leagues have posited that they have proprietary rights in many aspects of live sporting events.<sup>95</sup>

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<sup>92</sup> See Levinson & Soshnick, *supra* note 9.

<sup>93</sup> *Id.* See also *NBA v. Motorola*, 105 F.3d 841 (2d Cir. 1997).

<sup>94</sup> See Louis Klein, *Nat'l Basketball Ass'n v. Motorola, Inc.: Future Prospects for Protecting Real-Time Information*, 64 BROOK. L. REV. 585 (1998) (discussing the importance of real-time data as a future commodity). See also Gary R. Roberts, *The Scope of the Exclusive Right to Control Dissemination of Real-Time Sports Event Information*, 15 STAN. L. & POL'Y REV. 167 (2004).

<sup>95</sup> In addition to the three cases discussed in this sub-section, there were two non-real-time data cases involving sports leagues' claims of information rights. In 1989, the NBA sued the Oregon Lottery asserting a number of property-related claims. See Associated Press, *N.B.A. Sues Over Lottery*, N. Y. TIMES, (Dec. 22, 1989), <http://www.nytimes.com/1989/12/22/sports/nba-sues-over-lottery.html>. The NBA-Oregon Lottery case was settled out of court on Dec. 17, 1990. See *Nat'l Basketball Ass'n v. Oregon*, 3:90-cv-00389-MA (Jan. 2, 1991); During 1990 Congressional testimony on legislation that was the precursor to the Professional and Amateur Sports Protection Act, former NBA senior vice president and general counsel (and current NHL commissioner) Gary Bettman testified about the NBA's motivations in the Oregon lottery litigation:

The NBA strongly believes that state lotteries that seek to capitalize on the NBA's commercial success are illegal. Using NBA team names (or even their geographic locations)—as well as the team's performances, statistic and results—violates, misappropriates and infringes upon multiple legally recognized NBA property rights.

*Legislation Prohibiting State Lotteries from Misappropriating Professional Sports Service Marks: Hearing on S. 1772 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 101st Cong. 85

However, such claims are tempered by the Supreme Court's holding in *Feist* that facts are not protected under Congress's patent and copyright powers because facts are not "writings" as set

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(1990) (summary of testimony of Gary B. Bettman). Bettman also touched on the First Amendment:

The NBA has not taken any legal action against tout services and newspapers that publish point spreads for two reasons. First, the publication of point spreads is not the problem, but merely an outgrowth of the real problem—sports gambling. Without sports betting there would be no demand for these collateral services. Second, given the nature of these activities, and publishers' First Amendment rights to publish information, policing the publication of point spreads would be virtually impossible.

*Id.* at 95-96. In 1991, former NBA commissioner David Stern testified before Congress and addressed the property rights issue inherent in the Oregon Lottery litigation: "The proposed legislation would also help protect sports leagues' valuable property rights in their games, scores, statistics, and trademarks." *Prohibiting State-Sanctioned Sports Gambling: Hearing on S. 473 and S. 474 Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 102d Cong. 46 (1991) (summary of testimony of David J. Stern). Stern also addressed the First Amendment in response to a question from Iowa Senator Charles Grassley: "We would actively support any legislation that would prohibit the media from carrying point spreads on our games, if such legislation were permissible under the First Amendment." *Id.* at 57. Prior to the NBA-Oregon Lottery case, the NFL sued to stop Delaware from offering professional football sports betting options claiming, among other things, that the state's "football lottery constitutes an unlawful interference with their property rights." *NFL v. Governor of Delaware*, 435 F. Supp. 1372, 1376 (D. Del. 1977). The District Court disagreed, finding:

The only tangible product of plaintiffs' labor which defendants utilize in the Delaware Lottery are the schedule of NFL games and the scores. These are obtained from public sources and are utilized only after plaintiffs have disseminated them at large and no longer have any expectation of generating revenue from further dissemination.

*Id.* at 1377. During the course of the litigation, both parties raised a number of First Amendment-related arguments pertaining to property right claims over game scores.

forth in the Constitution.<sup>96</sup> *Feist* is generally cited for the proposition that facts are for all to use and reside in the public domain.<sup>97</sup>

Three sports-centered cases decided in the past twenty years—*NBA v. Motorola*,<sup>98</sup> *Morris v. PGA Tour*,<sup>99</sup> and *CBC v. Major League Baseball Advanced Media*<sup>100</sup>—illustrate how courts address this issue and how sports leagues position their property claims vis-à-vis the First Amendment.<sup>101</sup> Both *NBA v. Motorola* and *Morris Communications v. PGA Tour* deal with real-time sports data issues directly. We analyze all three cases chronologically below.

a. *NBA v. Motorola* (1997)

In 1996, the NBA filed suit against Motorola and Sports Team Analysis and Tracking Systems (“STATS”) in connection with the defendants’ dissemination of real-time statistical information via a mobile pager system.<sup>102</sup> The Second Circuit ruled against the NBA, reversing the district court and concluding that certain factual information is outside the scope of what is protectable under copyright.<sup>103</sup> The *NBA v. Motorola* court set forth a five-pronged test for when “hot news” misappropriation survives

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<sup>96</sup> *Feist Publ’ns v. Rural Tel. Serv.*, 499 U.S. 340, 347 (1991) (citing U.S. CONST., art. I, § 8, cl. 8).

<sup>97</sup> *Id.* at 348.

<sup>98</sup> *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

<sup>99</sup> *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004).

<sup>100</sup> *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007).

<sup>101</sup> For the avoidance of doubt, none of the three cases directly address the dissemination of real-time sports data vis-à-vis the First Amendment.

<sup>102</sup> *Nat’l Basketball Ass’n*, 105 F.3d at 844.

<sup>103</sup> *Id.* The district court made a handful of factual findings that shaped its conclusions of law. Most notably, the district court found that “[a]lthough NBA relies on [the] public dissemination of real-time NBA game data to enhance public interest in NBA games, it must, in order to preserve the value of its proprietary interest in this information, impose limitations on its dissemination.” See *NBA v. Sports Teams Analysis & Tracking Sys.*, 939 F. Supp. 1071, 1078 (1996).

copyright preemption.<sup>104</sup> The five required elements are:

- (i) the plaintiff generates or gathers information at a cost;
- (ii) the information is time-sensitive;
- (iii) a defendant's use of the information constitutes free-riding on the plaintiff's efforts;
- (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and
- (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.<sup>105</sup>

While being careful to note that it did not address the defendant's First Amendment defense,<sup>106</sup> the Second Circuit nonetheless received considerable briefing on the free speech considerations inherent in the case. Motorola posited that "the First Amendment entitles defendants to reproduce what the District Court itself characterized as 'purely factual information'—such as the score of an NBA game and the time remaining in the game—from the NBA's copyrighted broadcasts."<sup>107</sup> STATS's argument mirrored that of its co-defendant: "the activity which defendants

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<sup>104</sup> *Nat'l Basketball Ass'n*, 105 F.3d at 845. See also *Barclays Capital v. TheFlyOnTheWall.com*, 650 F.3d 876, 887 (2d Cir. 2011) (finding that no free-riding occurred when defendant financial information provider engaged in "collecting, collating and disseminating factual information" via its own "network [that] assemble[s] and transmit[s] data . . ."); Anthony J. Dreyer & Stuart D. Levi, *Second Circuit Redefines Elements of 'Hot News' Misappropriation Claims*, SKADDEN (June 29, 2011) (" . . . [A] majority of the [*Barclays*] panel also found that the oft-cited, five-factor 'hot news' test that the Second Circuit identified in . . . *NBA v. Motorola* was dicta . . .").

<sup>105</sup> *Nat'l Basketball Ass'n*, 105 F.3d at 845.

<sup>106</sup> *Id.* at 854 n.10 ("In view of our disposition of this matter [on alternative grounds], we need not address [defendants'] First Amendment and laches defenses."). Indeed, fact patterns attached to courtsiding issues do lend themselves to an ancillary analysis on the basis of laches and unclean hands.

<sup>107</sup> Brief on Behalf of Defendant-Counter-Claimant-Appellant-Cross-Appellee Motorola, Inc. at 32, *Nat'l Basketball Ass'n, Inc. v. Motorola, Inc.*, Nos. 96-7975(L), 96-9123(XAP), 96-7983(CON) (2d. Cir. 1996), 1996 WL 33485426.

undertook—the gathering and reporting of truthful facts of interest to the public on a timely basis—is squarely within the protection of the First Amendment.”<sup>108</sup>

The NBA’s response brief aimed to refute Motorola and STATS’s First Amendment arguments. As a preliminary matter, the NBA claimed that its “principal product is the action and excitement of NBA games in progress” and that such “games achieve their greatest value while they are in progress—that is, in ‘real time.’”<sup>109</sup> As to how it regulates real-time information, the league explained that it “has adopted certain limitations with respect to reporting on NBA games in progress in order to ‘preserve the value of its proprietary interests’ in real-time NBA game information.”<sup>110</sup>

The NBA re-framed the First Amendment argument proffered by Motorola and STATS as follows: “[T]he issue here is not whether the public will receive access to real-time NBA game information, but only whether defendants are entitled to profit from what they have neither created nor paid for.”<sup>111</sup> More specifically, the NBA said: “Wherever the First Amendment line may rest, defendants’ systematic and continuous taking of detailed real-time NBA games information for their own commercial profits crosses that line.”<sup>112</sup> The NBA concluded: “On these facts, an injunction . . . poses no threat whatever to freedom of speech under the First

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<sup>108</sup> Brief for Defendant-Appellant-Cross-Appellee Sports Team Analysis and Tracking Systems, Inc., d/b/a STATS, Inc. at 37, Nat’l Basketball Ass’n, Inc. v. Motorola, Inc., Nos. 96-7975(L), 96-9123(XAP), 96-7983(CON) (2d. Cir. 1996), 1996 WL 33485428. STATS self-described: “‘Reporting the newsworthy facts’ about NBA basketball games is part of what STATS does for a living.” *Id.* at 39.

<sup>109</sup> Brief of Appellees-Cross-Appellants the National Basketball Association and NBA Properties, Inc. at 5-6, Nat’l Basketball Ass’n, Inc. v. Motorola, Inc., Nos. 96-7975(L), 96-9123(XAP), 96-7983(CON) (2d. Cir. 1996), 1996 WL 33485427.

<sup>110</sup> *Id.* at 7. In a footnote, the NBA explained that “restrictions on the use of real-time NBA game information also apply to ticket holders, who are prohibited from transmitting any information, descriptions, or accounts of games in progress.” *Id.* at 7 n.4.

<sup>111</sup> *Id.* at 38.

<sup>112</sup> *Id.* at 41.

Amendment.”<sup>113</sup>

The NBA received support in the form of an amicus brief jointly filed by the NFL, MLB, and NHL.<sup>114</sup> The NFL/MLB/NHL triumvirate reiterated a theme running throughout the NBA’s brief: “The most valuable economic asset of any professional sports league is live sports competition.”<sup>115</sup> Like the NBA, the NFL, MLB, and NHL took efforts to frame the issue for the Second Circuit:

Protecting sporting events from commercial piracy is completely consistent with the First Amendment. This case involves neither the ability of newspapers, radio and television broadcasters or online news services to provide information about NBA games after they have been completed nor their ability to provide genuine periodic reports on NBA games in progress. The issue presented is whether unauthorized third parties may present systematic and continuous accounts of NBA games in progress. The First Amendment does not grant [Motorola and STATS] any such privilege, nor does it prohibit state law from preserving the commercial value embedded in exclusive control over the distribution of real-time accounts of sporting events.<sup>116</sup>

In separate reply briefs, Motorola and STATS looked to rebut claims by the NBA and *amici* about the scope of First Amendment protection. Motorola argued that the “First Amendment guarantee

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

<sup>114</sup> Brief for The National Football League, The Office of the Commissioner of Baseball and the National Hockey League as Amici Curiae Supporting the National Basketball Association and NBA Properties, Inc. (Oct. 3, 1996), Nat’l Basketball Ass’n, Inc. v. Motorola, Inc., Nos. 96-7975(L), 96-9123(XAP), 96-7983(CON) (2d. Cir. 1996). The three amici explained that they “share a common interest with the NBA in protecting and preserving for professional sports leagues and their member clubs, the rights to, and commercial value of, exclusive presentation of real-time running accounts of the live professional sporting events that result from their efforts and investments.” *Id.* at 9.

<sup>115</sup> *Id.* at 8.

<sup>116</sup> *Id.* at 25-26.

of free speech is not limited to the ‘press,’ but extends to all speakers, including corporations that make a profit.”<sup>117</sup> Citing *Joseph Burstyn, Inc. v. Wilson*,<sup>118</sup> Motorola also claimed that “the Supreme Court has long recognized that the First Amendment applies to media which entertain.”<sup>119</sup> STATS’s reply brief was consistent on the point: “The First Amendment protects ‘entertainment’ just as zealously as it protects ‘news.’”<sup>120</sup>

b. *Morris v. PGA Tour* (2004)

In *Morris v. PGA Tour*, “the free riding justification was successfully invoked to prevent a newspaper from reporting real-time golf scores.”<sup>121</sup> The lawsuit was litigated as an antitrust case, with newspaper publisher Morris claiming that an illegal monopoly of the real-time golf score market resulted from the PGA Tour’s refusal to deal.<sup>122</sup> The court affirmed the district court’s summary

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<sup>117</sup> Response and Reply Brief on Behalf of Defendant-Counter-Claimant-Appellant-Cross-Appellee Motorola, Inc. at 20, Nat’l Basketball Ass’n, Inc. v. Motorola, Inc., No. 96-7975 (2d. Cir. 1996), 1996 WL 33485430 [hereinafter Response and Reply Brief].

<sup>118</sup> 343 U.S. 495, 501 (1952).

<sup>119</sup> Response and Reply Brief, *supra* note 117, at 20.

<sup>120</sup> Reply Brief for Defendant-Appellant-Cross-Appellee Sports Team Analysis and Tracking Systems, Inc., d/b/a STATS, Inc. at 23, Nat’l Basketball Ass’n, Inc. v. Motorola, Inc., Nos. 96-7975(L), 96-9123(XAP), 96-7983(CON) (2d. Cir. 1996), 1996 WL 33485428 (citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981)).

<sup>121</sup> See Shuba Ghosh, *When Exclusionary Conduct Meets the Exclusive Rights of Intellectual Property: Morris v. PGA Tour and the Limits of Free Riding As an Antitrust Business Justification*, 37 LOY. U. CHI. L.J. 723 (2005-06). Ghosh criticized the *Morris* decision, positing that: “By extending intellectual property-like protection to data under the antitrust law, the Eleventh Circuit created a suspect grant, one that creates monopoly in real-time golf scores.” *Id.* at 744. In connection with the Constitution, Ghosh opined: “By allowing the PGA [Tour] to protect data through an intellectual property-like justification, the Eleventh Circuit ignored the implied limits from the Intellectual Property Clause.” *Id.* at 746.

<sup>122</sup> *Morris Commc’ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004). For reasons that remain unclear, plaintiff Morris did not assert a First Amendment claim. The Eleventh Circuit footnoted this: “In its argument for summary judgment in the district court, Morris stated that ‘this case is not a First

judgment in favor of the PGA Tour, ruling that the golf tour's move to prevent "free riding" of its in-house real-time scoring system "constitutes a legitimate pro-competitive reason for imposing a restriction [on Morris]." <sup>123</sup> The Eleventh Circuit also made clear, at the outset:

Before discussing the antitrust issues in this case, it is important to note what this case is not about. Contrary to the arguments of Morris and its amici curiae, this case is not about copyright law, the

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Amendment case . . . [i]t's an antitrust case." *Id.* at n.7.

<sup>123</sup> *Id.* at 1296. Citing two pre-*Erie* "ticker cases," *Bd. of Trade v. Christie Grain*, 198 U.S. 236 (1905) and *Moore v. N.Y. Cotton Exch.*, 270 U.S. 593 (1926), the district court provided details on the underpinnings of finding a property right in the golf scores:

The PGA Tour's property right does not come from copyright law, as copyright law does not protect factual information, like golf scores . . . However, the PGA Tour controls the right of access to that information and can place restrictions on those attending the private event, giving the PGA Tour a property right that the Court will protect . . . .

. . . .

. . . . Like the "ticker cases," the instant case deals with facts that are not subject to copyright protection. The compiler of the information in both cases collects information, which it created, at a cost. Also, the events occur on private property to which the general public does not have unfettered access, and the creator of the event can place restrictions upon those who enter the private property. The vastly increased speed that the Internet makes available does not change the calculus or the underlying property right. Accordingly, the PGA Tour, like the exchanges in the ticker cases, has a property right in the compilation of scores, but that property right disappears when the underlying information is in the public domain.

*Morris v. PGA Tour*, 235 F. Supp. 2d 1269, 1281-82 (M.D. Fla. 2002). At the district court level, the judge also made an observation germane to the courtsiding issue: ". . . [A] compiler of information can limit the dissemination of that information through contracts, including contracts found on tickets." *Id.* at 1279 n.19.



Constitution, the First Amendment, or freedom of the press in news reporting.<sup>124</sup>

The court's opening statement followed considerable input from the parties and *amici* on First Amendment-related issues. Citing *PGA Tour v. Martin*,<sup>125</sup> Plaintiff Morris argued that "PGA events are not held in private domains, but in public venues . . . . Additionally, contrary to PGA's argument, private property owners do not have an absolute right to suppress First Amendment activity."<sup>126</sup> The PGA Tour argued:

Morris and the amici completely misunderstand the district court's decision. The district court's decision that PGA Tour has a protectable property interest in the product of its proprietary scoring system is predicated entirely on its determination that PGA Tour controls the right of access to its private events. And having complete control over access to its private events, PGA Tour also has the right to control access to the information occurring within its private events, at least until that information is publicly disseminated beyond the confines of those events.<sup>127</sup>

The PGA Tour also took a position with important implications at the intersection of courtsiding and the First Amendment:

Despite the amici's histrionics to the contrary, the decision below does not portend an ability of private event producers to prohibit spectators from telling others what they saw at the events or otherwise interfere with those spectators'

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<sup>124</sup> *Id.* at 1292-93.

<sup>125</sup> 532 U.S. 661 (2001).

<sup>126</sup> Reply Brief of Appellant at 8 n.8, *Morris Commc'ns Corp. v. PGA Tour, Inc.*, No. 3:00-CV-1128-J-20C (M.D. Fla. July 8, 2003), 2003 WL 23681710.

<sup>127</sup> Brief of Appellee at 34, *Morris Commc'ns Corp. v. PGA Tour, Inc.*, No. 8:00-CV-387-T-24C (M.D. Fla. June 12, 2003), 2003 WL 23681713.

constitutionally protected freedom of speech.<sup>128</sup>

Hundreds of news organizations as *amici* framed *Morris v. PGA Tour* completely differently, opining that “[t]his case goes to the heart of the media’s ability to timely report the news.”<sup>129</sup> The *amici* argued:

PGA Tour is attempting to prohibit media from exercising their [First Amendment] right to disseminate the basic facts of golf scores during tournaments . . . . [T]he district court’s decision permits PGA Tour unilaterally to abrogate the media’s right to report golf scores simply by inserting a limitation into its press pass credentials and thus impermissibly creates a contractually based substitute for the rights of the copyright holder.<sup>130</sup>

c. *CBC v. Major League Baseball Advanced Media* (2007)

CBC, a fantasy baseball game operator, filed a declaratory judgment action against Major League Baseball Advanced Media “to establish its right to use, without license, the names of and information about major league baseball players in connection with its fantasy baseball products.”<sup>131</sup> The Eighth Circuit balanced right of publicity claims with First Amendment claims and concluded “that the former must give way to the latter.”<sup>132</sup> Recognizing that the dispute was between private parties, the court found “the state action necessary for first amendment protections exists because the right-of-publicity claim exists only insofar as the courts enforce

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<sup>128</sup> *Id.* at 37 n.6.

<sup>129</sup> Brief of *Amici Curiae* for Morris Commc’ns Corp. in Support of Reversal at 3, *Morris Commc’ns Corp. v. PGA Tour, Inc.*, Nos. 03-10226-C, 03-11502-CC (M.D. Fla. May 20, 2003).

<sup>130</sup> *Id.* at 24.

<sup>131</sup> *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 820 (8th Cir. 2007).

<sup>132</sup> *Id.* at 823.

state-created obligations.”<sup>133</sup>

The Eighth Circuit’s free speech-friendly holding rested on a number of grounds. First, the court looked to the public domain nature of the data:

[T]he information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a First Amendment right to use information that is available to everyone. It is true that CBC’s use of the information is to provide entertainment, but “speech that entertains, like speech that informs, is protected by the First Amendment because ‘[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.’”<sup>134</sup>

Next, the court found “no merit in the argument that CBC’s use of players’ names and information in its fantasy baseball games is not speech at all.”<sup>135</sup> Finally, the Eighth Circuit looked to *Gionfriddo v. Major League Baseball* and found sports data to be in the public interest: “. . . [R]ecitation and discussion of factual data concerning the athletic performance of [players on Major League Baseball’s website] command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection.”<sup>136</sup> The *CBC* case makes clear that First Amendment claims trump right of publicity claims, but *CBC* could be construed narrowly to extend only to historical sports data, not data of the real-time variety.

### C. First Amendment Rights and Real-Time Sports Data

A final issue to analyze is the balance to be struck between free speech rights and sports leagues’ restrictions on the dissemination

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* (citing *Cardtoons v. Major League Baseball Players Ass’n*, 95 F.3d 959, 969 (10th Cir. 1996) (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948))).

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

<sup>136</sup> *Id.* at 823-24.

of real-time data.<sup>137</sup> In *Harper & Row v. Nation*, the Supreme Court found that “copyright’s idea/expression dichotomy ‘strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author’s expression.’”<sup>138</sup> Key to this discussion was the court’s intention to strike a balance between free expression and the economic interest of the copyright holder.<sup>139</sup>

This becomes telling in balancing an individual’s right to disseminate real-time information at a sporting event against the claimed property interest in such data by sports leagues, especially given that *NBA v. Motorola* did not address the First Amendment issue.<sup>140</sup> In contrast, the Second Circuit did discuss free speech rights at the intersection of real-time data in *Barclays v. TheFlyOnTheWall.com*, positing that the right to “make news . . . does not give rise to a right for it to control who breaks that news and how.”<sup>141</sup> Our analysis of each of the four primary categories of courtsiders is set forth in Table 1 below:

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<sup>137</sup> It is not uncommon for sporting event organizers to utilize tickets, spectator signs, and/or media credentials in an attempt to create a contractual waiver of the right to disseminate data. See examples of such language *supra* notes 11, 12, and 13.

<sup>138</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

<sup>139</sup> The *Harper & Row* court stated: “[t]he news element—the information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.” *Id.* at 556 (quoting *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215, 234 (1918)).

<sup>140</sup> See *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997).

<sup>141</sup> 650 F.3d 876, 907 (2d Cir. 2011).

**Table 1**  
**Would First Amendment Likely Apply?**

<b>"Courtsider" Category</b>	<b>Public Land</b>	<b>Private Land</b>
<b>Non-Commercial Spectator</b>	Yes	No
<b>Professional Gambler</b>		
<i>.....Illegal</i>	No	No
<i>.....Legal</i>	Yes	No
<b>Journalist</b>	Yes	No
<b>Non-Gambling Entrepreneur</b>	Yes	No

Given the state action requirement, it is difficult to envision a scenario where any category of a courtsider would qualify for First Amendment protection if the underlying activity takes place on entirely private land with no government intervention or public access.<sup>142</sup> Similarly, a courtsiding professional gambler operating illegally under the Wire Act or otherwise would probably not be deemed to be engaging in protected commercial speech.<sup>143</sup> In contrast, if taking place on public property with a nexus to a state

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<sup>142</sup> Our conclusion on this point is mildly tempered by cases such as *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), which furthers the proposition that private property owners may not suppress all First Amendment activities. *PruneYard* and its progeny likely give rise to the necessity of a case-by-case analysis of the underlying ownership and access specific to each venue. The analysis of whether private property establishes a limited public forum in a sports stadium may additionally hinge on the enforcement of policies by state or local law enforcement. See Kotlarsky, *supra* note 37.

<sup>143</sup> One scholar has opined that illegal gambling is wholly undeserving of First Amendment protection:

[T]he speech involved in a routine contract offer and acceptance, or in a conversation aimed at fixing prices between two corporate executives, or in the words used by a gambler to place an unlawful bet with an unlawful bookmaker is unprotected without application of a test of any stringency at all, and that is because these acts—all of which are “speech” in ordinary language—are simply not covered by the First Amendment.

Frederick Schauer, *Out of Range: On Patently Uncovered Speech*, 128 HARV. L. REV. 346, 348 (2015).

actor, there are several categories of courtsiders whose real-time data dissemination activities would fall under the free speech umbrella. The strongest candidates for First Amendment protection include spectators operating non-commercially and journalists reporting on-site. Although less certain, professional gamblers operating legally and entrepreneurs disseminating information for non-wagering purposes would also likely be considered engaged in First Amendment protected speech.<sup>144</sup>

The legacy of *NBA v. Motorola* and the other related cases is that accused infringers (e.g., courtsiders) have a two-part defense.<sup>145</sup> First, defendants would cite a weakness in one or more elements of the five-part test set forth in *NBA v. Motorola*. Second, defendants would independently raise a First Amendment defense. The dual argument made by Motorola and co-defendant STATS could be recycled by a courtsider. In *NBA v. Motorola*, the Second Circuit held that the practice of disseminating real-time sports statistics to a subscription-based pager was not infringing on any intellectual property right claimed by the NBA.<sup>146</sup> The court endeavored to determine which aspects of the live NBA game were protectable between competitors and which aspects were merely public domain information.<sup>147</sup>

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<sup>144</sup> Positing that the dissemination of real-time data directly connected to legal sports wagering falls under the First Amendment is our most tenuous conclusion. We are unaware of any precedent that directly addresses whether legal (or illegal, for that matter) sports betting is deserving of First Amendment protection. Such a case would apparently be one of first impression.

<sup>145</sup> It is also possible that a courtsider or courtsiding-related entity could take an offensive litigation strategy and preemptively file suit seeking a declaratory judgment on real-time sports data ownership issues. A fantasy sports operator adopted such a strategy in an (ultimately successful) effort to use player statistics without paying a licensing fee. See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007).

<sup>146</sup> *Id.* at 846 (concluding that the live sporting event itself cannot be construed as an “original work of authorship” within the meaning of the Copyright Act of 1976).

<sup>147</sup> *Id.* Potentially seeking to avoid a similar result to that of *Motorola*, the NFL has recently acquired an equity stake in data provider Sportradar, which may buttress future legal arguments that the league has a proprietary interest in certain elements of real-time data. See Kaplan & Fisher, *supra* note 6. The president of Sportradar’s US-based subsidiary spoke about the arrangement:

The court concluded that the broadcast of the game was an “embodiment” that the NBA had a pecuniary interest in protecting,<sup>148</sup> but that the real-time statistics were not the exclusive property of the NBA.<sup>149</sup> Alternatively, the NBA claimed a violation of the “hot news” doctrine.<sup>150</sup> Motorola and STATS responded that the NBA’s hot news misappropriation claim was preempted by federal copyright law.<sup>151</sup> The co-defendants also raised arguments under the First Amendment, an issue the Second Circuit ultimately did not address.<sup>152</sup> But a future court will.

Sports leagues’ ownership of factual information connected to a live sporting event is uncertain because it presupposes there is some proprietary interest at stake.<sup>153</sup> Sports organizations do not enjoy any *sui generis* right to real-time data in the United States. Accordingly, such entities would probably not be able to claim

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I think the NFL chose us as a partner, as we are not just a data distribution partner, we are also a development partner. I think in particular for them, data category tracking data, “Next Generation Stats” as they call it, is actually quite important . . . [w]e are moving downstream in the value chain to create products out of our core data, or raw material data.

Sean Cottrell, *NFL’s Next Gen Stats and Sportradar US Deal Explained: An Exclusive Interview with Ulrich Harmuth*, LAW IN SPORT (June 10, 2015), <http://www.lawinsport.com/features/podcast/item/nfl-s-next-gen-stats-and-sportradar-us-deal-explained-an-exclusive-interview-with-ulrich-harmuth>.

<sup>148</sup> In an amicus brief filed in the recent *ABC v. Aereo* Supreme Court case, the Solicitor General posited: “When a television network broadcasts a live sporting event, no underlying performance precedes the initial transmission—the telecast itself is the only copyrighted work.” Brief for the United States as *Amicus Curiae* Supporting Petitioners at 26, *Am. Broad. Co., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 828079.

<sup>149</sup> See *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 846 (2d Cir. 1997).

<sup>150</sup> See *Int’l News Serv. v. Assoc. Press*, 248 U.S. 215 (1918) (recognizing the “hot news” misappropriation claim). See also *Motorola*, 105 F.3d at 581.

<sup>151</sup> Preemption is extensively discussed in the *Motorola* opinion, but is outside the scope of this article.

<sup>152</sup> *Motorola*, 105 F.3d at 854, n.10 (“In view of our disposition of this matter [on alternative grounds], we need not address [defendants’] First Amendment and laches defenses”).

<sup>153</sup> See *id.*

ownership rights as the reason to preclude courtsiders from the practice of disseminating non-copyrightable up-to-the-second information. Sports leagues would need a stronger legal position than simply claiming a proprietary interest in the real-time data.<sup>154</sup>

#### CONCLUSION

We outlined courtsiding generally and discussed its legal status when juxtaposed with the First Amendment and the various legal theories sports leagues have furthered when looking to monetize real-time data. A resolution would likely hinge on whether a sport's organization can infringe on an individual's ability to disseminate data. This would depend on two analyses. First, the court would consider whether the quintet of elements for misappropriation under *NBA v. Motorola* were met. Second, the court would undertake a First Amendment analysis. This free speech inquiry would determine whether state action was involved and, if it was, what type of classification the speech fell under.

This two-step analysis results because there is some residual conflict among the precedent as to whether real-time sports data is a property right that a person or entity can assert over another or whether it is dedicated to the public domain. While the weight of prior cases leans toward a public domain finding, technology is changing rapidly and we see discrete areas where sports leagues may have proprietary rights over certain types of real-time data.<sup>155</sup> For example, one reading of the "hot-news" misappropriation claim that survived *NBA v. Motorola* is when a market participant pursues first publication. This could allow a professional sports league the ability to create a copyrightable compilation and claw-back against purported free-riders who are trying to beat the league

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<sup>154</sup> Indeed, this conclusion can be reached without even addressing the First Amendment issue.

<sup>155</sup> For example, sports leagues may have a stronger argument for real-time data ownership if they are viewed as a competing market participant and own or run a business in the market of compiling and disseminating real-time data. For a description of this in the gambling context, see Ryan Rodenberg, *Wagering on the Future*, ESPN THE MAG. (Mar. 2, 2015), [http://espn.go.com/chalk/story/\\_/id/12251828/gambling-issue-charles-barkley-five-voices-debating-sports-gambling-legalization](http://espn.go.com/chalk/story/_/id/12251828/gambling-issue-charles-barkley-five-voices-debating-sports-gambling-legalization).



(or other gamblers) to market.<sup>156</sup> Likewise, sports leagues could create trade secret-eligible advanced analytics to develop proprietary data and unique sports wagering options for consumers.<sup>157</sup> The emergence of mediums such as Twitter, Meerkat, and Periscope, which allow users to transmit their own real-time content from sporting events, demonstrate the continued importance of trying to control the data ownership space.<sup>158</sup>

The presence of the First Amendment looms large, however. As detailed in Table 1, free speech protections are likely triggered in a number of courtsiding categories.<sup>159</sup> Accordingly, our advice to every real-time sports data company, fantasy operator, analytics firm, or sports book, who use courtsiders and operate without the explicit or tacit consent of the relevant sports league, whether gambling-related or not, is to include a journalism division capable of generating original content as part of their core business to enhance the chances of the First Amendment attaching. Similarly, it would be prudent for sports leagues looking to monetize real-time data to become equity owners and operators of a data

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<sup>156</sup> See *Satava v. Lowry*, 323 F.3d 805, 811 (9th Cir. 2003) (stating “[i]t is true, of course, that a combination of unprotectable elements may qualify for copyright protection”).

<sup>157</sup> Fantasy operators, gambling providers, and sports data analytics/dissemination firms could pursue this as well. In a somewhat ironic legal twist, Major League Baseball’s long-standing antitrust exemption, a sanctuary other sports leagues do not enjoy, arguably puts MLB in a relatively weaker position when trying to monetize data for gambling, fantasy, and other purposes.

<sup>158</sup> See Richard Sandomir, *Periscope, a Streaming Twitter App, Steals the Show on Boxing’s Big Night*, N.Y. TIMES (May 4, 2015), <http://www.nytimes.com/2015/05/05/sports/periscope-a-streaming-twitter-app-steals-the-show-on-boxings-big-night.html>. See also Mike Vernon, *Live-streaming apps: new view of sports, challenge to broadcasters*, SFGATE.COM (May 24, 2015), <http://www.sfgate.com/sports/article/Live-streaming-apps-new-view-of-sports-6284540.php>.

<sup>159</sup> While our analysis establishes that publicly owned and operated stadiums (e.g., state-owned college football and basketball stadiums) are likely subject to First Amendment protection in non-illegal gambling-related courtsiding, there is a possibility that even events held at certain privately-owned facilities are subject to the limited public forum doctrine by virtue of their authorization of public access, use of law enforcement officers, and allowance of some forms of expression. See Kotlarsky, *supra* note 37.

transmission provider, analytics firm, journalistic venture, and at least one sports gambling/fantasy portal, putting them in direct competition with third parties also seeking to commodify the data. Such a move would not alter the First Amendment analysis among non-commercial spectators and journalists, but would strengthen the leagues' claims vis-à-vis certain commercial entities such as gambling courtsiders and entrepreneurial businesses in the same space.

