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The Sport of Cybersecurity: How Professional Sport Leagues Can Better Protect the Competitive Integrity of Their Games

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THE SPORT OF CYBERSECURITY: HOW PROFESSIONAL SPORTS LEAGUES CAN BETTER PROTECT THE COMPETITIVE INTEGRITY OF THEIR GAMES

NATHANIEL GROW
SCOTT J. SHACKELFORD

INTRODUCTION	474
I. INTRODUCING THE MULTIFACETED CYBER THREAT	476
<i>A. Exploring the Internet of Everything</i>	477
<i>B. Public Facilities and Critical Infrastructure Protection</i>	479
II. ANALYZING THE APPLICABLE LEGAL REGIMES PROTECTING THE INTEGRITY OF PROFESSIONAL SPORTS TEAMS, FACILITIES, AND INTELLECTUAL PROPERTY	481
<i>A. The Computer Fraud and Abuse Act</i>	481
<i>B. The Law of Trade Secrecy</i>	483
1. Uniform Trade Secrets Act	485
2. Economic Espionage Act.....	487
3. Defend Trade Secrets Act	488
III. POTENTIAL CYBER THREATS TO THE U.S. PROFESSIONAL TEAM SPORTS INDUSTRY	489
<i>A. Security of In-Game Technology</i>	490
<i>B. Security of Shared Data</i>	492
<i>C. Security of Proprietary Databases</i>	495
<i>D. Security of Biometric Tracking Devices</i>	496
<i>E. Gambling-Related Concerns</i>	497
IV. LEAGUES’ CURRENT FRAMEWORK FOR CYBER-RISK MANAGEMENT	499
<i>A. Existing Applicable League Rules</i>	500
1. Major League Baseball.....	500
2. National Football League	501
3. National Basketball Association	503
4. National Hockey League	504
<i>B. League Disciplinary Precedents</i>	505
1. Major League Baseball.....	505
2. National Football League	508
V. POLICY IMPLICATIONS	510
<i>A. What We Can Learn from Using the Lens of Norm Entrepreneurs and Polycentric Governance</i>	510
<i>B. Proposing an Updated Cybersecurity Policy for U.S. Professional Sports Leagues</i>	512
<i>C. A Potential Government Solution for U.S. Professional Sports Leagues’ Cybersecurity Risks</i> ...	515
CONCLUSION	521

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NATHANIEL GROW*
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Abstract: From a Major League Baseball scouting director using a cyberattack to break into a competitor's records, to an NBA franchise being compromised in a phishing scheme, U.S. professional sports leagues are waking up to the fact that cybersecurity is no longer just a problem for the government or tech firms—it has now reached into the playing field, locker room, and boardroom. This Article breaks new ground by examining how the four major U.S. professional sports leagues—Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League—are protecting themselves from these cyber risks that threaten the competitive integrity of their games, and proposes ways in which the leagues could do more to proactively mitigate their cyber risk.

INTRODUCTION

Consider the following scenario—there is less than a minute left in Super Bowl LV, and the New England Patriots are leading the Dallas Cowboys 24-20. The Cowboys are making a final drive that could win them the game, but face a fourth-down play needing to gain eight yards to score the go-ahead touchdown. During their final timeout, the Cowboys coaching staff use their league-sanctioned tablet computers to access the team playbook, and select a

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shotgun formation.¹ The Patriots are well prepared for the play, though, resulting in a quick sack of the quarterback. As a result, New England once again wins the Super Bowl championship.

Controversy ensues during a subsequent investigation when the National Football League (NFL) discovers that an insider threat from the Cowboys' staff gave the Patriots access to the teams' internal systems, and allowed the Patriots to monitor Dallas' tablet computers in order to discover which play the Cowboys would be calling. Perhaps most surprisingly of all, the public is shocked to discover that such blatantly anticompetitive conduct is not directly regulated under any current NFL rule.

From the scouting director for a Major League Baseball (MLB) team using a cyberattack to break into a competitor's records,² to a National Basketball Association (NBA) franchise being compromised in a phishing scheme,³ U.S. professional sports leagues are waking up to the fact that cybersecurity is no longer just a problem for governments or tech firms—it has now reached into the playing field, locker room, and boardroom.⁴ Unfortunately, the leagues' efforts to safeguard the competitive integrity of their sporting competition from these threats have been relatively slow to develop. Rather than formulate league-wide cybersecurity standards, U.S. leagues appear to largely defer to their teams to protect themselves from cyber intrusions.⁵ Meanwhile, the leagues have also failed to enact specific rules to deter their teams from targeting one another in cyberattacks.⁶ At the same time, the existing academic literature has completely overlooked the industry, and failed to analyze the unique cyber risks that these high-visibility leagues and franchises face.

¹ See Kyle Stack, *For NFL Teams, iPad Is Valuable Playbook*, WIRED (Dec. 14, 2011), <https://www.wired.com/2011/12/nfl-teams-gameplan-with-ipads/> [<https://perma.cc/4PUD-CNFY>] (discussing NFL teams' increased reliance on tablet computers).

² See *infra* notes 179–187 and accompanying text (discussing the hacking of the Houston Astros by a former employee of the St. Louis Cardinals).

³ See Jon Fingas, *The Milwaukee Bucks Fell Prey to a Phishing Email Scam*, ENGADGET (May 21, 2016), <https://www.engadget.com/2016/05/21/milwaukee-bucks-fall-to-phishing-scam/> [<https://perma.cc/6K43-ZRGN>] (reporting that the NBA's Milwaukee Bucks “fell victim to a phishing scam that compromised the basketball team's financial data”).

⁴ See, e.g., Chris Bing, *There's Now a Cybersecurity Organization Dedicated to U.S. Sports*, FEDSCOOP (Sept. 22, 2016), <https://www.fedscoop.com/sports-isao-cybersecurity-2016/> [<https://perma.cc/YZ7U-Z5UB>] (discussing the formation of an information sharing and analysis organization (ISAO) focused on “sports-related digital assets”).

⁵ See Bill Shaikin, *Angels, Dodgers Are Responsible for Their Own Cyber Security*, L.A. TIMES (June 16, 2015), <http://www.latimes.com/sports/la-sp-baseball-security-20150617-story.html> [<https://perma.cc/H2V6-6THJ>] (reporting that in MLB, “each team is responsible for its own cyber security, but MLB employs experts and makes them available to consult with teams”); see also *infra* note 143 and accompanying text.

⁶ See *infra* notes 94–141 and accompanying text (noting the relative dearth of cybersecurity-related rules and regulations promulgated by the four major U.S. professional sports leagues). That said, the Cyber Resilience Institute recently established a Sports ISAO to attempt to address cybersecurity risks in this area. See Bing, *supra* note 4 (discussing the initiative).

This Article breaks new ground by both identifying the numerous potential competition-related cybersecurity risks the four major U.S. professional sports leagues—MLB, the NFL, the NBA, and the National Hockey League (NHL)—currently face, and assessing the current steps that the leagues are taking to safeguard themselves from these dangers. Ultimately, this Article proposes ways in which the leagues can better protect the competitive integrity of their games in order to proactively ward off worst-case scenarios along the lines of the hypothetical offered above.

The Article is structured as follows. Part I introduces the range of cyber threats pertinent to U.S. professional sports leagues with a focus on Internet of Things (IoT) security and critical infrastructure protection.⁷ Part II surveys the existing U.S. legal regime regulating cybersecurity, including most prominently the law of trade secrecy.⁸ Part III examines potential competition-related cyber risks already manifest in the U.S. professional team sports industry, including the manipulation of in-game technology, shared data, proprietary databases, and biometric-tracking devices, along with gambling-related concerns.⁹ Part IV summarizes the leagues' existing frameworks to help mitigate these cyber risks.¹⁰ Part V identifies potential shortcomings in the leagues' current approach to cybersecurity issues and proposes measures the leagues could adopt to better protect the competitive integrity of their competitions from future cyberattack.¹¹

I. INTRODUCING THE MULTIFACETED CYBER THREAT

It is no secret that the cost of cyberattacks on both the public and private sectors is mounting.¹² According to a 2018 National Bureau of Economic Research report, for example, large companies that are victims of a cyberattack in which customers' personal data are compromised realize an approximately 1.1 percent loss in market value and a 3.4 percentage point drop in sales growth.¹³ These statistics are sobering, given the prevalence of cyberattackers successfully penetrating even the most guarded corporate networks. One recent example of this all too familiar phenomenon was the alleged Chinese government hacking of a U.S. Navy contractor charged with developing a top-secret super-

⁷ See *infra* notes 12–39 and accompanying text.

⁸ See *infra* notes 40–93 and accompanying text.

⁹ See *infra* notes 94–141 and accompanying text.

¹⁰ See *infra* notes 142–212 and accompanying text.

¹¹ See *infra* notes 213–271 and accompanying text.

¹² See Elizabeth A. Rowe, *RATs, TRAPs, and Trade Secrets*, 57 B.C. L. REV. 381, 384 (2016) (noting “[c]yber criminals have stolen up to \$1 trillion worth of intellectual property in a single year”).

¹³ Shinichi Kamiya et al., *What Is the Impact of Successful Cyberattacks on Target Firms?*, 1, 4, 25 (Nat'l Bureau of Econ. Research, Working Paper No. 24409, 2018), <https://www.nber.org/papers/w24409.pdf> [<https://perma.cc/2WQY-SQZK>].

sonic missile.¹⁴ In fact, one leading cybersecurity scholar has reported that “[n]inety-seven percent of Fortune 500 companies have been hacked . . . and likely the other [three] percent have too, they just don’t know it.”¹⁵ Three trends in particular are making it much more difficult for organizations of all sizes to mitigate the array of cyber risks they face: (1) the evolution of the “Internet of Everything”; (2) the difficulty of protecting trade secrets in such an interconnected digital ecosystem; and (3) the proliferation of threats to critical infrastructure, including public facilities. Each of these trends is analyzed in turn to provide context for these debates before focusing in on the specific issues confronting the U.S. professional sports industry.

A. Exploring the Internet of Everything

In late 2016, a distributed denial of service (DDoS) attack, later known as the Mirai botnet,¹⁶ curtailed internet servers run by a tech firm called Dyn.¹⁷ That, in and of itself, might not have been newsworthy; in fact, botnet-enabled DDoS attacks are now commonplace.¹⁸ Nevertheless, the Mirai botnet was noteworthy, given the havoc it wrought by slowing, and in some cases stopping, internet services for much of the eastern United States.¹⁹ The Mirai bot-

¹⁴ See *China Hackers Steal Data from US Navy Contractor—Reports*, BBC (June 9, 2018), <https://www.bbc.com/news/world-us-canada-44421785> [<https://perma.cc/S2UY-R9KE>].

¹⁵ *All Fortune 500 Companies Have Been Hacked: 97% Know It, the Other 3% Don't*, HOMELAND SECURITY NEWS WIRE (Jan. 8, 2014), <http://www.homelandsecuritynewswire.com/srcybersecurity20140108-all-fortune-500-companies-have-been-hacked-97-know-it-the-other-3-don-t> [<https://perma.cc/XA98-TP4S>].

¹⁶ See Theresa E. Miedema, *Engaging Consumers in Cyber Security*, 21 J. INTERNET L. 3, 6 (2018) (describing how “the Mirai botnet . . . perpetrated one of the largest DDOS attacks in history in September 2016”); Dalmacio V. Posadas, Jr., *After the Gold Rush: The Boom of the Internet of Things, and the Busts of Data-Security and Privacy*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 69, 99 (2017) (“In September and October 2016, DDoS attacks on several IoT devices used the infamous Mirai botnet.”); see also Neena Kapur, *The Rise of IoT Botnets*, AM. SECURITY PROJECT (Jan. 13, 2017), <https://www.americansecurityproject.org/the-rise-of-iot-botnets/> [<https://perma.cc/4HJJ-M4BT>] (“A bot is defined as a computer or internet-connected device that is infected with malware and controlled by a central command-and-control (C2) server. A botnet is the term used for all devices controlled by the C2 server, and they can be used to carry out large scale distributed denial of service (DDoS) attacks against websites, resulting in an overload of traffic on the website that renders it unusable.”). See generally Scott J. Shackelford et al., *When Toasters Attack: A Polycentric Approach to Enhancing the “Security of Things,”* 2017 U. ILL. L. REV. 415 (introducing cybersecurity governance issues in the IoT context).

¹⁷ Nicky Woolf, *DDoS Attack That Disrupted Internet Was Largest of Its Kind in History, Experts Say*, THE GUARDIAN (Oct. 26, 2016), <https://www.theguardian.com/technology/2016/oct/26/ddos-attack-dyn-mirai-botnet> [<https://perma.cc/7LZN-V24H>].

¹⁸ See Ryan Patterson, *Silencing the Call to Arms: A Shift Away from Cyber Attacks as Warfare*, 48 LOY. L.A. L. REV. 969, 977 n.41 (2015) (describing DDoS attacks as “[a] common cyber attack tactic”).

¹⁹ See Lily Hay Newman, *What We Know About Friday’s Massive East Coast Internet Outage*, WIRED (Oct. 21, 2016), <https://www.wired.com/2016/10/internet-outage-ddos-dns-dyn/> [<https://perma.cc/64XE-DMXP>].

net was so successful, and noteworthy, because it took advantage of security vulnerabilities in the IoT.²⁰ Initially, some thought that the attack was politically motivated, but investigators determined that it was not, in fact, a shadowy group or nation state behind the botnet—instead it was college students, trying to get an edge on the video game *Minecraft*.²¹ According to one observer, the students “didn’t realize the power they were unleashing” and compared their actions to the Manhattan Project.²²

Although accounts differ as to the origin of the “Internet of Things,” many point to the pivotal role played by Kevin Ashton in popularizing the term during a 1999 presentation he gave to Procter & Gamble.²³ But the global push to make our businesses, homes, toasters, and even our bodies smarter through technology in fact dates back decades.²⁴ For example, in the 1980s, researchers at Carnegie-Mellon University installed sensors and switches in a vending machine to count the number of bottles present and check their temperature.²⁵ By the 1990s, despite the rapid scaling of the internet infrastructure, dial-up internet connectivity with relatively slow connection speeds continued to hold back the growth of IoT applications, a hurdle that has only been overcome since 2010 with the advent of faster computers.²⁶ Still, IoT issues are not well under-

²⁰ See Garrett M. Graff, *How a Dorm Room Minecraft Scam Brought Down the Internet*, WIRED (Dec. 13, 2017), <https://www.wired.com/story/mirai-botnet-minecraft-scam-brought-down-the-internet/> [<https://perma.cc/5NUF-8J7H>] (noting the botnet was “powered by unsecured internet-of-things devices like security cameras and wireless routers”); see also Lawrence J. Trautman, *Cybersecurity: What About U.S. Policy?*, 2015 U. ILL. J.L. TECH. & POL’Y 341, 348 (discussing changes brought on by IoT applications); Brendan Alan Melander, Note, *Smart Stadiums: An Illustration of How the “Internet of Things” Is Revolutionizing the World*, 6 ARIZ. ST. U. SPORTS & ENT. L.J. 349, 350–51 (2017) (“IoT is a broad array of interconnected devices that use sensors to gather data, share that data between devices, and store or evaluate that data. This machine-to-machine (M2M) communication, in combination with the sensors, allows for devices that traditionally had no use for the Internet (e.g., such as coffee makers, alarm clocks, and refrigerators) to become ‘smart.’”).

²¹ Graff, *supra* note 20.

²² *Id.*

²³ Kevin Ashton, *That ‘Internet of Things’ Thing*, RFID J. (June 22, 2009), <https://www.rfidjournal.com/articles/view?4986> [<https://perma.cc/2SX2-HQQK>]; see also Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CAL. L. REV. 805, 813 (2016) (“Technologist Kevin Ashton coined the term ‘the Internet of Things’ in 1998 during a presentation to Procter and Gamble when he stated, ‘Adding radio-frequency identification and sensors to everyday objects will create an Internet of Things, and lay the foundations of a new age of machine perception.’”).

²⁴ See, e.g., Meghan Neal, *The Internet of Bodies Is Coming, and You Could Get Hacked*, MOTHERBOARD (Mar. 13, 2014), https://motherboard.vice.com/en_us/article/gvyqgm/the-internet-of-bodies-is-coming-and-you-could-get-hacked [<https://perma.cc/6CZG-22ZM>] (discussing how the next step in the evolution of technology could be the computerization of human bodies).

²⁵ See John A. Rothchild, *Against Notice and Choice: The Manifest Failure of the Proceduralist Paradigm to Protect Privacy Online (or Anywhere Else)*, 66 CLEV. ST. L. REV. 559, 572 n.61 (2018) (noting one of the first IoT devices may have been a Coca-Cola vending machine that was connected to Carnegie Mellon University’s computer network in 1982 in order to allow users to check whether the machine was stocked and the temperature of the soda bottles).

²⁶ See JIM CHASE, TEX. INSTRUMENTS, *THE EVOLUTION OF THE INTERNET OF THINGS* 1 (2013).

stood or appreciated. One 2014 survey, for example, found that eighty-seven percent of respondents had never even heard of the “Internet of Things.”²⁷ This apathy, though, does not mask the real vulnerabilities that the explosion in smart devices creates, which by some estimates could reach 200 billion devices by 2020.²⁸

IoT vulnerabilities can cause widespread disruptions, such as when they are utilized to spread ransomware attacks. This occurred during the WannaCry and later NotPetya attacks, which impacted more than 7,000 firms globally and cost the shipping giant Maersk more than \$200 million.²⁹ These IoT vulnerabilities can, in turn, help fuel the theft of invaluable trade secrets, which are the lifeblood of major Fortune 500 firms as well as the professional sports industry. Indeed, sports teams are increasingly relying on IoT applications to track their players’ movements, training, and dietary regimens.³⁰

B. Public Facilities and Critical Infrastructure Protection

The phrase “critical infrastructure” can conjure the most important aspects of national life and includes the services on which all of us ultimately rely from electricity and water to finance and healthcare.³¹ As has been argued, “[c]ontaminated water sanitation systems may injure thousands before any issue is detected; vulnerable electrical grids may blackout cities; and disrupted financial systems may destabilize economies.”³² The United States, and na-

²⁷ See Chris Merriman, *87 Percent of Consumers Haven’t Heard of the Internet of Things*, THE INQUIRER (Aug. 22, 2014), <https://www.theinquirer.net/inquirer/news/2361672/87-percent-of-consumers-havent-heard-of-the-internet-of-things> [https://perma.cc/MF9C-V23Z].

²⁸ See *A Guide to the Internet of Things*, INTEL, <https://www.intel.com/content/www/us/en/internet-of-things/infographics/guide-to-iot.html> [https://perma.cc/QQQ7-3GEE].

²⁹ See Jill Leovy, *Cyberattack Cost Maersk as Much as \$300 Million and Disrupted Operations for 2 Weeks*, L.A. TIMES (Aug. 17, 2017), <http://www.latimes.com/business/la-fi-maersk-cyberattack-20170817-story.html> [https://perma.cc/XL7Q-RY88]; see also Andrew Moshirnia, *No Security Through Obscurity: Changing Circumvention Law to Protect Our Democracy Against Cyberattacks*, 83 BROOK. L. REV. 1279, 1294 (2018) (“WannaCry ransomware infected roughly a quarter of a million machines in 150 countries . . .”).

³⁰ See *infra* notes 127–133 and accompanying text.

³¹ See Robert Kenneth Palmer, *Critical Infrastructure: Legislative Factors for Preventing a “Cyber-Pearl Harbor,”* 18 VA. J.L. & TECH. 289, 293 (2014); Catherine J.K. Sandoval, *Net Neutrality Powers Energy and Forestalls Climate Change*, 9 SAN DIEGO J. CLIMATE & ENERGY L. 1, 4 (2018) (describing “critical infrastructure . . . as the energy, water, and communications sectors which are foundational to America’s economy and democracy”).

³² Scott Shackelford et al., *Making Democracy Harder to Hack*, 50 U. MICH. J.L. REFORM 629, 634 (2017). An assault on critical infrastructure through cyberattacks has already been dramatized in film:

The 2007 blockbuster [*Live Free or Die Hard*] dramatized the prospect of a large-scale cyber assault: in it, a frustrated former Pentagon insider and a team of hackers interrupted U.S. air traffic control, power, telecommunications, and financial services. According to Richard Clarke, such a scenario is feasible under certain circumstances.

tions around the world, have long grappled with the appropriate mix of laws and policies to help safeguard vital industries, which the Department of Homeland Security has defined in the U.S. context to encompass sixteen sectors.³³ These sectors are not fixed. For example, elections were included under the public facilities sector in January 2017.³⁴ Professional sports are, in fact, part of U.S. critical infrastructure under the “Commercial Facilities Sector,” which includes “professional sports leagues and federations” along with operations that “draw large crowds” including stadiums and arenas.³⁵ Indeed, there is now even an information sharing and analysis organization (ISAO) to help professional sports leagues pool cybersecurity expertise more effectively, an organization that mirrors the Information Sharing and Analysis Center (ISAC) system prevalent across industries from retail to automobiles.³⁶

Many critical infrastructure sectors in the U.S. boast an array of federal and state regulations, given their vital status to national life³⁷—examples range from the North American Electric Reliability Corporation standards³⁸ to the

Id. at 634 n.19; see LIVE FREE OR DIE HARD (Twentieth Century Fox 2007); see also RICHARD A. CLARKE & ROBERT K. KNAKE, CYBER WAR: THE NEXT THREAT TO NATIONAL SECURITY AND WHAT TO DO ABOUT IT 70, 234–35 (2010) (discussing cyber weapons and cyber espionage); Michiko Kakutani, *The Attack Coming from Bytes, Not Bombs*, N.Y. TIMES (Apr. 27, 2010), <https://www.nytimes.com/2010/04/27/books/27book.html> [<https://perma.cc/5BW3-82JD>] (reviewing CLARKE & KNAKE, *supra*).

³³ See OFFICE OF THE PRESS SEC’Y, PPD-21, CRITICAL INFRASTRUCTURE SECURITY AND RESILIENCE (2013); *Supporting Policy and Doctrine*, U.S. DEP’T HOMELAND SECURITY, <https://www.dhs.gov/cisa/supporting-policy-and-doctrine> [<https://perma.cc/N9MU-BFWC>]. The U.S. Cybersecurity and Infrastructure Security Agency (CISA), which is part of the Department of Homeland Security (DHS), identifies sixteen critical infrastructure sectors consistent with Presidential Policy Directive 21, including: agriculture, banking and finance, chemical, commercial facilities, critical manufacturing, dams, defense industrial base, drinking water and water treatment systems, emergency systems, energy, government facilities, information technology, nuclear systems, public health and healthcare, telecommunications, and transportation systems. *Frequently Asked Questions*, CISA, <https://ics-cert.us-cert.gov/Frequently-Asked-Questions> [<https://perma.cc/99BY-9KLG>].

³⁴ *Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector*, U.S. DEP’T HOMELAND SECURITY (Jan. 6, 2017), <https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical> [<https://perma.cc/NDS7-S2BW>].

³⁵ *Commercial Facilities Sector*, U.S. DEP’T HOMELAND SECURITY, <https://www.dhs.gov/commercial-facilities-sector> [<https://perma.cc/3X5Q-PYDM>].

³⁶ See Bing, *supra* note 4 (discussing the formation of the Sports ISAO).

³⁷ See Chris Laughlin, Note, *Cybersecurity in Critical Infrastructure Sectors: A Proactive Approach to Ensure Inevitable Laws and Regulations Are Effective*, 14 COLO. TECH. L.J. 345, 355 (2016) (observing that “‘under current law . . . many [federal agencies] have sector-specific cybersecurity responsibilities for critical infrastructure, such as the Department of Transportation for the transportation sector’” (quoting ERIC A. FISCHER, CONG. RESEARCH SERV. R42114, FEDERAL LAWS RELATING TO CYBERSECURITY: OVERVIEW AND DISCUSSION OF PROPOSED REVISIONS 4 (2013))).

³⁸ See *Mandatory Standards Subject to Enforcement*, NORTH AM. ELECTRIC RELIABILITY CORP., <http://www.nerc.net/standardsreports/standardssummary.aspx> [<https://perma.cc/6EC8-BZJA>].

Health Insurance Portability and Accountability Act (HIPAA)³⁹—but, as we will see below, professional sports leagues have long enjoyed a special status in which policymakers have allowed leeway to self-regulate. The question going forward is whether this should continue in light of the serious cyber risks facing these organizations, their players, staffs, and fans.

II. ANALYZING THE APPLICABLE LEGAL REGIMES PROTECTING THE INTEGRITY OF PROFESSIONAL SPORTS TEAMS, FACILITIES, AND INTELLECTUAL PROPERTY

Any potential cyber intrusion against a professional sports team operating in the United States would potentially run afoul of several existing laws. In some cases—such as the Computer Fraud and Abuse Act (CFAA) and the Economic Espionage Act (EEA)—these laws impose potential criminal liability against the wrongdoer, while in other cases—including the Uniform Trade Secrets Act (UTSA) and the Defend Trade Secrets Act (DTSA)—the victim must instead seek civil remedies.⁴⁰

A. The Computer Fraud and Abuse Act

Perhaps most significantly, attempts to engage in unauthorized cyber intrusions could run afoul of the CFAA.⁴¹ The story of the CFAA begins, strangely enough, with a blockbuster movie. In 1983, the movie *WarGames* illustrated the potential of hackers to break into the nation's nuclear arsenal.⁴² Reagan Administration officials took the threat seriously enough that they worked with Congress to pass the 1986 CFAA.⁴³ Among other things, the CFAA criminalizes “unauthorized access” to a computer or the unauthorized “transmission” of malware (malicious software).⁴⁴

³⁹ Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104-191, 110 Stat. 1936.

⁴⁰ See *infra* notes 41–93 and accompanying text.

⁴¹ See generally Amanda N. Craig et al., *Proactive Cybersecurity: A Comparative Industry and Regulatory Analysis*, 52 AM. BUS. L.J. 721 (2015).

⁴² See *WAR GAMES* (United Artists 1983).

⁴³ See, e.g., Michael S. Dorsi & Keenan W. Ng, *Computer Criminal Intent*, 51 U.S.F. L. REV. 469, 474 (2017) (“Congress passed the CFAA after legislators watched the movie *WarGames*.”); Obie Okuh, *When Circuit Breakers Trip: Resetting the CFAA to Combat Rogue Employee Access*, 21 ALB. L.J. SCI. & TECH. 637, 646 (2011) (“Congress enacted the Counterfeit Access Device and Computer Fraud and Abuse Act of 1984, the CFAA precursor, in part due to the notoriety given to hackers in the 1983 classic film [*WarGames*].”) (footnote omitted).

⁴⁴ 18 U.S.C. § 1030 (2018); see Jennifer Granick, *Amendments to Computer Crime Law Are a Dark Cloud with a Ray of Light*, ELECTRONIC FRONTIER FOUND. (June 15, 2009), <https://www.eff.org/deeplinks/2009/06/amendments-computer-> [<https://perma.cc/BWF7-28P2>] (discussing the scope of the CFAA).

On its face, then, the CFAA would seem to deter hackers from targeting professional sports teams, their networks, and their trade secrets. Disagreement persists about the bounds of the CFAA, however, including its treatment of active defense.⁴⁵ For example, could a team that has been hacked supposedly by a competitor engage in active defensive measures against the supposed perpetrator, such as the Cowboys hacking back against the Patriots, as discussed in the introduction? Again, such a response would seem to run afoul of the CFAA, but questions remain over the interpretation of “unauthorized access” along with the likelihood of enforcement. The U.S. Department of Justice, for instance, has only gone so far as to call the practice “likely illegal.”⁴⁶ Meanwhile, some critics contend that the CFAA bars organizations from responding to cyberattackers, even those located in foreign nations.⁴⁷ Yet that has not stopped organizations from hacking back. For example, “[a]t the Black Hat USA security conference in 2012, [thirty-six] percent of respondents said they had engaged in ‘retaliatory hacking’ on at least one occasion.”⁴⁸

Historically, U.S. law enforcement has not looked favorably upon such a “vigilante view” of cybersecurity, with some indicating that the problem is too large for law enforcement to manage and that “problems still arise when companies ‘get caught or when innocent bystanders are harmed.’”⁴⁹ Attribution is a central, and challenging aspect of this problem. Richard Ledgett, the former deputy director of the NSA, has said “[a]ttribution is really hard. Companies have come to me with what they *thought* was solid attribution, and they were

⁴⁵ See Jeff Kosseff, *Defining Cybersecurity Law*, 103 IOWA L. REV. 985, 1019 (2018) (“The CFAA also has attracted criticism from some commentators for its likely—though far from certain—prohibition on the ability of private parties to ‘hack back’ against those that attack them.”); see also Jay P. Kesan & Carol M. Hayes, *Mitigative Counterstriking: Self-Defense and Deterrence in Cyber-space*, 25 HARV. J.L. & TECH. 429, 435 (2012) (equating “cyber counterstrikes” to “hack[ing] back”).

⁴⁶ U.S. DEP’T OF JUSTICE, BEST PRACTICES FOR VICTIM RESPONSE AND REPORTING OF CYBER INCIDENTS 12 (2015), https://www.justice.gov/sites/default/files/opa/speeches/attachments/2015/04/29/criminal_division_guidance_on_best_practices_for_victim_response_and_reporting_cyber_incidents.pdf [https://perma.cc/M37X-LKA5].

⁴⁷ See CHARLES DOYLE, CONG. RESEARCH SERV., CYBERCRIME: AN OVERVIEW OF THE FEDERAL COMPUTER FRAUD AND ABUSE STATUTE AND RELATED FEDERAL CRIMINAL LAWS 6–7 (2014), <https://fas.org/sgp/crs/misc/97-1025.pdf> [https://perma.cc/BBN6-YG53]; Ellen Messmer, *Hitting Back at Cyberattackers: Experts Discuss Pros and Cons*, NETWORK WORLD (Nov. 1, 2012), <https://www.networkworld.com/article/2161144/hitting-back-at-cyberattackers--experts-discuss-pros-and-cons.html> [https://perma.cc/W582-NXCV].

⁴⁸ Craig Timberg et al., *Cyberattacks Trigger Talk of ‘Hacking Back,’* WASH. POST (Oct. 9, 2014), https://www.washingtonpost.com/business/technology/cyberattacks-trigger-talk-of-hacking-back/2014/10/09/6f0b7a24-4f02-11e4-8c24-487e92bc997b_story.html?utm_term=.2264a3e3d1d7 [https://perma.cc/V6RQ-PGN2].

⁴⁹ Craig et al., *supra* note 41, at 732 (quoting Robert Anderson et al., *Offense vs. Defense* 1, 22 (White Paper 2005), <https://pdfs.semanticscholar.org/4918/c5cf455fe22af1e342edfcf640d3b83687af.pdf> [https://perma.cc/GQ45-HVXX]).

wrong.”⁵⁰ Stewart Baker, former assistant secretary for policy at the U.S. Department of Homeland Security (DHS), has asserted that defenders, for example, who seek to reacquire data—including trade secrets—that were stolen without authorization might not run afoul of the CFAA prohibitions.⁵¹ Other commentators, such as Professor Orin Kerr, point out that the CFAA is focused on protecting the rights of *computer* owners, not data owners, and so the argument does not pass legal muster.⁵² Professor Kerr’s interpretation seems to be consistent with the majority view internationally, as seen in the Paris Call for Trust and Security in Cyberspace.⁵³ In practice, however, Baker’s view seems to be winning out, given that, according to Ben Wittes of the Brookings Institution, “[a] fair bit of [hacking back] is going on. No one is saying it is OK. But no one is getting prosecuted for it.”⁵⁴

B. The Law of Trade Secrecy

In addition to the computer-specific protections afforded by the CFAA, the law of trade secrecy also provides parties with protection from unauthorized cyber intrusion. Although definitions vary, a trade secret may be defined under American law as “any confidential business information which provides an enterprise [with] a competitive edge” and is not publicly known.⁵⁵ Common exam-

⁵⁰ Nicholas Schmidle, *The Digital Vigilantes Who Hack Back*, NEW YORKER (Apr. 30, 2018), <https://www.newyorker.com/magazine/2018/05/07/the-digital-vigilantes-who-hack-back> [<https://perma.cc/28Z7-FW2F>].

⁵¹ Stewart Baker et al., *The Hackback Debate*, STEPTOE CYBERBLOG (Nov. 2, 2012), <http://www.steptoecyberblog.com/2012/11/02/the-hackback-debate/> [<https://perma.cc/ZNL8-626C>].

⁵² *See id.*

⁵³ *See, e.g.*, Louise Matsakis, *The US Sits Out an International Cybersecurity Agreement*, WIRED (Nov. 12, 2018), <https://www.wired.com/story/paris-call-cybersecurity-united-states-microsoft/> [<https://perma.cc/4K5E-DRJW>].

⁵⁴ Hannah Kuchler, *Cyber Insecurity: Hacking Back*, FIN. TIMES (July 27, 2015), <https://www.ft.com/content/c75a0196-2ed6-11e5-8873-775ba7c2ea3d> [<https://perma.cc/AR9Y-PFLU>].

⁵⁵ *What Is a Trade Secret?*, WIPO, https://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm [<https://perma.cc/BG6W-XK7G>]. Under U.S. federal law, trade secret is defined as:

[A]ll forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—(A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information

ples include formulas, sales methods, and industrial processes.⁵⁶ Although nations' rules vary regarding the manner in which they protect trade secrets—with some providing express protection under their laws, and others merely protecting trade secrets under general laws governing unfair competition—the unauthorized use of trade secrets is generally regarded internationally “as an unfair practice and a violation of the trade secret.”⁵⁷ As has already been noted, cyberspace permits the theft of trade secrets at a scale never before seen in human history. Some estimates have suggested that 5.2 trillion dollars in economic value is at risk of cyberattacks for the years 2019 to 2023.⁵⁸ Although a staggering figure, if true, it becomes more believable when considering that the vast majority of the value of S&P 500 firms are now tied up in intangible assets, namely trade secrets and other intellectual property, as shown in Figure 1.

⁵⁶ The UTSA, which is generally followed by local authorities within the United States, defines a trade secret as information that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

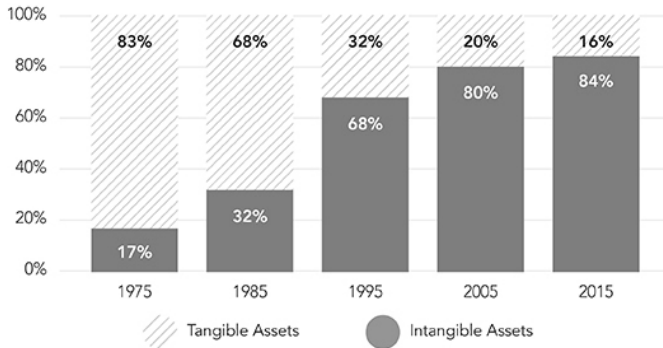
UNIF. TRADE SECRETS ACT § 1(4) (UNIFORM L. COMM'N 1985); see J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345, 378 (1995) (noting the UTSA “is widely adopted at the local level in the United States”). This definition is reinforced by the *Restatement (Third) of Unfair Competition Law*, which defines a trade secret as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (AM. LAW INST. 1995).

⁵⁷ *What Is a Trade Secret?*, *supra* note 55. See generally, e.g., Scott J. Shackelford et al., *Using BITs to Protect Bytes: Promoting Cyber Peace and Safeguarding Trade Secrets Through Bilateral Investment Treaties*, 52 AM. BUS. L.J. 1 (2015).

⁵⁸ See KELLY BISSELL & LARRY PONEMON, ACCENTURE SEC., NINTH ANNUAL COST OF CYBERCRIME STUDY 14 (2019), https://www.accenture.com/_acnmedia/pdf-96/accenture-2019-cost-of-cybercrime-study-final.pdf [<https://perma.cc/3RLF-DBTC>]. Other estimates place the value of lost intellectual property at approximately \$300 billion per year. See Reuters, *Congress Just Passed Tough New Trade Secret Protection Legislation*, FORTUNE (Apr. 28, 2016), <http://fortune.com/2016/04/28/congress-trade-secret-legislation/> [<https://perma.cc/PVJ8-V9UM>].

Figure 1: The Increasing Value of Intangible Assets⁵⁹

COMPONENTS of S&P 500 MARKET VALUE



SOURCE: INTANGIBLE ASSET MARKET VALUE STUDY, 2017

Given the potential value of these assets to the U.S. economy, a series of different legal protections have been promulgated at both the federal and state levels in order to deter parties from stealing one another's trade secrets.

1. Uniform Trade Secrets Act

Dating back to 1979, the UTSA has historically provided the most important legal protection for trade secrets in the United States.⁶⁰ Currently, the UTSA has been adopted in some form by forty-eight states and the District of Columbia.⁶¹ Meanwhile, the two remaining jurisdictions—New York and Massachusetts—have both adopted similar requirements for trade secret protection, despite not adopting the UTSA outright.⁶²

Under the UTSA, a trade secret is entitled to legal protection so long as it meets two requirements. First, the information⁶³ in question must “derive[]

⁵⁹ *Intangible Asset Market Value Study*, OCEAN TOMO, <http://www.oceantomo.com/intangible-asset-market-value-study/> [<https://perma.cc/37DF-GRD5>].

⁶⁰ See Christopher Rebel J. Pace, *The Case for a Federal Trade Secrets Act*, 8 HARV. J.L. & TECH. 427, 432–33 (1995) (discussing the history of the UTSA).

⁶¹ See Lara Grow & Nathaniel Grow, *Protecting Big Data in the Big Leagues: Trade Secrets in Professional Sports*, 74 WASH. & LEE L. REV. 1567, 1583 (2017).

⁶² See David Orozco, *Amending the Economic Espionage Act to Require the Disclosure of National Security-Related Technology Thefts*, 62 CATH. U. L. REV. 877, 889 (2013) (observing that although New York and Massachusetts have not passed the UTSA into law, they have adopted laws that are similar in their effect).

⁶³ Under the UTSA, “information” is defined broadly to include “a formula, pattern, compilation, program, device, method, technique, or process.” UNIF. TRADE SECRETS ACT § 1(4).

independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.”⁶⁴ Specifically, rather than require “absolute secrecy,”⁶⁵ courts have instead interpreted this requirement to merely demand that the information sought to be protected has not “escaped into the mainstream of public knowledge.”⁶⁶

Second, a plaintiff pursuing a case under the UTSA must also show that the trade secret “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”⁶⁷ Courts applying this requirement aim to strike a balance between enabling companies to use “sufficient precautions to protect a company’s secret on the one hand, while not imposing overly-burdensome precautions that would impair the functioning of its business on the other hand.”⁶⁸ Along these lines, companies “need not undertake ‘[h]eroic efforts’” to protect the secrecy of their information, but instead simply employ sufficient measures under the circumstances.⁶⁹ Examples of sufficient reasonable efforts may include utilizing electronic protective measures such as password protection and computer firewalls, along with more traditional options such as utilizing contractual provisions like non-disclosure and non-compete agreements.⁷⁰

Assuming that the two UTSA requirements are met, a company can then pursue legal relief against anyone who has misappropriated its trade secret. Under the UTSA, misappropriation can occur in one of two ways: (i) through the “acquisition of a trade secret . . . by improper means,” or (ii) through the knowing “disclosure or use of a trade secret” acquired by improper means.⁷¹ The act defines “improper means” to include methods such as “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.”⁷² Should the plaintiff prevail in a misappropriation case under the UTSA, potential remedies include injunctive relief, damages for “both the actual loss caused by [the] misappropriation and [any] unjust enrichment” received by the infringer, along with pu-

⁶⁴ *Id.*

⁶⁵ Elizabeth A. Rowe, *Contributory Negligence, Technology, and Trade Secrets*, 17 GEO. MASON L. REV. 1, 9 (2009) (offering that it is well established that “reasonable efforts do not require absolute secrecy”).

⁶⁶ JAMES POOLEY, TRADE SECRETS § 4.04(2)(a) (2017).

⁶⁷ UNIF. TRADE SECRETS ACT § 1(4)(ii).

⁶⁸ Rowe, *supra* note 65, at 9.

⁶⁹ Grow & Grow, *supra* note 61, at 1586 (quoting Matthew J. Frankel, *Secret Sabermetrics: Trade Secret Protection in the Baseball Analytics Field*, 5 ALBANY GOV’T L. REV. 240, 253 (2012)).

⁷⁰ See Frankel, *supra* note 69, at 253 (discussing potential reasonable measures).

⁷¹ UNIF. TRADE SECRETS ACT § 1(2).

⁷² *Id.* § 1. Notably, the law also “identifies actions that do not qualify as misappropriation, including reverse engineering, observing the information in public display, and discovery by independent creation.” Grow & Grow, *supra* note 61, at 1592–93.

nitive damages and attorney's fees in cases involving willful and malicious misappropriation.⁷³

2. Economic Espionage Act

The 1996 enactment of the EEA marked the first attempt to federalize and criminalize the law of trade secrecy.⁷⁴ The passage of the act was motivated by the fact that federal prosecutors had, at times, previously struggled to shoehorn the theft of a trade secret into other, more generally applicable laws—such as those prohibiting mail and wire fraud—as well as Congress's increased concern over foreign economic espionage.⁷⁵

Specifically, the EEA prohibits two different forms of trade secret theft. First, the law prohibits the misappropriation⁷⁶ of a trade secret in order to benefit a foreign entity.⁷⁷ Second, the law criminalizes any domestic theft of a trade secret for economic gain.⁷⁸ For purposes of both provisions, the EEA defines the concept of a trade secret in a manner similar to that adopted in the UTSA.⁷⁹ Specifically, the EEA requires that the information's owner take reasonable measures to keep it secret and that “the information derives independent economic value, actual or potential, from not being generally known.”⁸⁰

The EEA, however, diverges from the UTSA in several important respects. For starters, in order to trigger liability under the EEA, the trade secret must be used in interstate or foreign commerce.⁸¹ Similarly, in contrast to the UTSA, the EEA also imposes a *mens rea* requirement by mandating a showing

⁷³ UNIF. TRADE SECRETS ACT § 3.

⁷⁴ See Grow & Grow, *supra* note 61, at 1594.

⁷⁵ See Kelley Clements Keller & Brian M.Z. Reece, *Economic Espionage and the Theft of Trade Secrets: The Case for a Federal Cause of Action*, 16 TUL. J. TECH. & INTELL. PROP. 1, 8–12 (2013) (noting that pre-existing federal criminal statutes “were not designed to penalize trade secret theft,” before summarizing the legislative history of the EEA).

⁷⁶ Specifically, the EEA defines misappropriation as an act involving one who:

(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret; (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret; [or] (3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization . . .

18 U.S.C. § 1831(a)(1)–(3).

⁷⁷ *Id.* § 1831(a).

⁷⁸ 18 U.S.C. § 1832(a).

⁷⁹ See H.R. REP. NO. 104-788, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 4021, 4031 (“The definition of the term ‘trade secret’ [employed in the EEA] is based largely on the definition of that term in the Uniform Trade Secrets Act.”); *see also* Grow & Grow, *supra* note 61, at 1595 (noting the same).

⁸⁰ 18 U.S.C. § 1839(3)(B).

⁸¹ *Id.* § 1832.

that the defendant acted with unlawful intent.⁸² Finally, unlike the UTSA—which only applies in cases of actual misappropriation—the EEA “prohibits both attempted trade secret theft and conspiracies to commit misappropriation.”⁸³

Those convicted of unlawful trade secret misappropriation under the EEA face a potential jail sentence of ten years in cases of domestic theft, or fifteen years for foreign espionage, along with maximum fines of five million dollars.⁸⁴ Meanwhile, an organization held in violation of the foreign espionage provision faces a fine of the greater of ten million dollars or three times the value of the misappropriated trade secret.⁸⁵

3. Defend Trade Secrets Act

Finally, and most recently, Congress helped U.S. firms better protect their trade secrets through the passage of the DTSA in 2016.⁸⁶ The DTSA was intended to foster “uniform standards for what constitutes trade secret theft,” while also empowering aggrieved organizations to file civil suits in federal court.⁸⁷ Technically, the DTSA amended the EEA to add a new federal civil cause of action for the misappropriation of a trade secret.⁸⁸ As with the EEA, the DTSA similarly tracks the definition of a trade secret employed by the UTSA. The DTSA requires the trade secret owner to take reasonable measures to maintain the secrecy of its information, and that the information have “economic value . . . from not being generally known.”⁸⁹ Similarly, like the UTSA, the DTSA also defines misappropriation to include either (i) “the acquisition of a trade secret . . . by improper means,” or (ii) the “disclosure or use of a trade secret” acquired by improper means.⁹⁰

Where the DTSA diverges from the UTSA—and, for that matter, the EEA—is with respect to its *ex parte* seizure provision. Specifically, the act provides that under “extraordinary circumstances, [courts may] issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret.”⁹¹ In addition, unlike the UTSA, the DTSA

⁸² See Christopher B. Seaman, *The Case Against Federalizing Trade Secrecy*, 101 VA. L. REV. 317, 333 (2015) (“Unlike trade secret misappropriation under state law, the EEA demands proof of unlawful intent.”).

⁸³ Grow & Grow, *supra* note 61, at 1596; see 18 U.S.C. §§ 1831(a)(4)–(5), 1832(a)(4)–(5).

⁸⁴ 18 U.S.C. §§ 1831(a), 1832(a).

⁸⁵ *Id.* § 1831(b).

⁸⁶ *Id.* § 1836.

⁸⁷ Reuters, *supra* note 58.

⁸⁸ Grow & Grow, *supra* note 61, at 1597.

⁸⁹ 18 U.S.C. § 1839(3).

⁹⁰ *Id.* § 1839(5)(A)–(B).

⁹¹ *Id.* § 1836(b)(2)(A)(i).

also provides plaintiffs with access to the federal courts.⁹² Otherwise, the DTSA generally offers plaintiffs the same remedies that are available under the UTSA: injunctive relief and monetary damages.⁹³

As will be seen in the next section, teams belonging to the four major U.S. professional sports leagues possess an array of information that would qualify for protection under the various federal and state protections for trade secrets.

III. POTENTIAL CYBER THREATS TO THE U.S. PROFESSIONAL TEAM SPORTS INDUSTRY

U.S. professional sports teams have typically been quick to adopt emerging new technology,⁹⁴ acquiring everything from iPads⁹⁵ to wearable devices capable of biometric tracking.⁹⁶ Despite their teams' increased reliance on these devices, however, the leagues themselves have been relatively slow to develop rules regulating their teams' use—and, perhaps more importantly, potential manipulation—of these emerging technologies.⁹⁷ Indeed, there are a variety of areas in which teams could potentially seek to obtain a competitive advantage over their rivals through the manipulation of commonly used technology.

⁹² See David S. Levine & Christopher B. Seaman, *The DTSA at One: An Empirical Study of the First Year of Litigation Under the Defend Trade Secrets Act*, 53 WAKE FOREST L. REV. 105, 116 (2018) (“From its inception, the DTSA allowed trade secret owners to bring a civil action in federal court for trade secret misappropriation.”).

⁹³ 18 U.S.C. § 1836(b)(3)(A)–(B).

⁹⁴ See Ben Sin, *The NBA Is the Most Tech-Savvy Sports League in the World, and It's Not Even Close*, FORBES (June 2, 2016), <https://www.forbes.com/sites/bensin/2016/06/02/the-nba-is-the-most-tech-savvy-sports-league-in-the-world-and-its-not-even-close/#392f750657f6> [<https://perma.cc/A4FB-Q2U2>] (observing that teams in the NBA have “long been forward-thinking and tech-savvy in every facet and on every level”).

⁹⁵ See Stack, *supra* note 1.

⁹⁶ See Kristy Gale, *Evolving Sports Technology Makes Its Mark on the Internet of Things: Legal Implications and Solutions for Collecting, Utilizing, and Disseminating Athlete Biometric Data Collected Via Wearable Technology*, 5 ARIZ. ST. SPORTS & ENT. L.J. 337, 351 (2016) (“With respect to biometric data specifically, [new] technologies provide teams and leagues with more information about their players, ‘theoretically allow[ing] them to identify problem areas, improve more rapidly and avoid preventable injuries,’ says Alan C. Milstein, a leading bioethics attorney and sports litigator who often represents NBA players.” (quoting Eric Freeman, *Has the NBA's Biometric Data Tracking Boom Gone Too Far?*, YAHOO SPORTS (Oct. 7, 2014), <https://sports.yahoo.com/has-the-nba-s-biometric-data-tracking-boom-gone-too-far-070039861.html?y20=1> [<https://perma.cc/NR43-W2MC>])); Rian Watt, *New Technologies Are Forcing Baseball to Balance Big Data with “Big Brother.”* VICE (May 27, 2016), https://sports.vice.com/en_us/article/8qygbp/new-technologies-are-forcing-baseball-to-balance-big-data-with-big-brother [<https://perma.cc/98YR-55SC>] (discussing MLB teams' use of wearable technology to measure the duration and quality of their players' sleep).

⁹⁷ See *infra* notes 148–177 and accompanying text.

A. Security of In-Game Technology

The greatest area of potential concern for professional sports leagues is likely to be ensuring the security of the technology relied on by teams while competing on the playing field itself during the course of a game. Like most other areas of commerce, sports teams have increasingly digitized their work environments, with players and coaches now relying on technology to perform a variety of tasks.

Perhaps most significantly, teams have increasingly utilized tablet computers to take the place of more traditional hard-copy versions of their playbooks.⁹⁸ Digitized playbooks offer teams several potential advantages over paper copies. Digitized versions are quicker and easier to modify. They allow players immediate and constant access to their coaches' latest strategic planning, and provide teams with a potential cost savings of as much as \$100,000 per year in printing costs by dispensing with the need to reprint the playbooks on a daily or weekly basis.⁹⁹ Digitized playbooks have also proven to be more secure than their hard-copy counterparts by not only enabling teams to utilize password protection but also allowing them to quickly erase a player's team-issued tablet computer immediately upon his being traded to another franchise.¹⁰⁰ At the same time, teams have used tablet computers to streamline other areas of communication with their players. For example, teams use the devices to disseminate practice schedules and departure times for road trips.¹⁰¹

Although certainly convenient, teams' increased reliance on tablets also poses a host of potential cybersecurity threats. Even if the potential nightmare scenario discussed in the introduction above—for example, an NFL team gaining access to its rival's digitized playbook during the closing minutes of the Super Bowl—never emerges, teams could still gain any number of potential competitive advantages over their competitors by securing unauthorized access

⁹⁸ See Gregory N. Hoole & Robert A. Bailey, *The iPad and the Law*, FED. LAW., May 2012, at 26 (reporting that “the Tampa Bay Buccaneers became the first NFL club to discontinue the use of paper copies of playbooks; instead the team distributed its playbook and videos to all its players in electronic format via an iPad”); see also Nicole Martinelli, *iPad a Slam Dunk with NBA*, CULT OF MAC (Apr. 7, 2011), <https://www.cultofmac.com/89516/ipad-a-slam-dunk-with-nba/> [<https://perma.cc/B3A9-98MT>] (observing that “a number of NBA teams” are using iPads for everything “[f]rom playbooks to bus schedules”); Stack, *supra* note 1 (discussing NFL teams' use of iPad playbooks).

⁹⁹ See Ryan Faas, *Why Most Teams Are Ditching Their Playbooks for iPads*, CULT OF MAC (Sept. 5, 2012), <https://www.cultofmac.com/188847/why-most-nfl-teams-are-ditching-their-playbooks-for-ipads-feature/> [<https://perma.cc/C87G-U6E7>] (noting that one NFL team reportedly spent over \$100,000 per year printing over 100 copies of its playbook each week for its players and coaching staff).

¹⁰⁰ See Joe Aimonetti, *The iPad Has Revolutionized the NFL*, CNET (July 18, 2012), <https://www.cnet.com/news/the-ipad-has-revolutionized-the-nfl/> [<https://perma.cc/4HKN-M6QM>] (“iPads can be remotely erased, even before a player realizes he has been released or traded.”).

¹⁰¹ See Martinelli, *supra* note 98 (“Our whole calendar is mapped out [on the team-issued iPads]. Guys can know when buses are leaving, when planes are leaving.”) (quoting then-Washington Wizards assistant coach Ryan Saunders).

to their rivals' tablet computers. Pre-game access to a competitor's playbook, for instance, could provide invaluable insight into the opposition's strategic game plan. Meanwhile, teams could secure a potential competitive advantage by manipulating other franchises' digitized practice or travel schedules ahead of key matchups.

In addition to tablet computers, professional sports teams also rely on other potentially vulnerable technologies during the course of a game. In MLB, for example, teams are permitted to review a video replay before deciding whether to use their only opportunity to contest an umpire's call on the field during a given game.¹⁰² These video signals could be used to interfere with the outcome of a game in several ways.

Recently, for instance, the potential manipulation of these video replays was thrust into the spotlight when reports emerged that both the Houston Astros and Boston Red Sox—the 2017 and 2018 World Series champions, respectively—had impermissibly used video replay feeds to decipher the signs used by the opposing team's catcher to call each pitch.¹⁰³ In the case of the Astros, players from the team then relayed this information to the batter at the plate in real time, via a series of whistles, claps, or banging of a trash can.¹⁰⁴ Although the extent to which these schemes ultimately affected the outcome of the game on the field is unclear, they have nevertheless highlighted the potential impact that the manipulation of video replay systems can have on the integrity of the underlying competitions.¹⁰⁵

Alternatively, in the future, because MLB teams must decide whether to challenge a call within thirty seconds from the end of the play, a team could potentially delay or otherwise interfere with a rival team's video replay signal,

¹⁰² See Kenneth K. Kilbert, *Instant Replay and Interlocutory Appeals*, 69 BAYLOR L. REV. 267, 292 (2017) (explaining that in MLB “[e]ach team’s manager now gets one challenge per game; that is, he may initiate instant replay review on one reviewable play per game,” and that “if the manager’s challenge is successful and the play is overturned, the manager retains the ability to challenge one more play during the game, but in no event may the manager challenge more than two plays in a game”); see also *A Guide to MLB’s New Expanded Replay Rules*, CBS CHI. (Feb. 25, 2014), <https://chicago.cbslocal.com/2014/02/25/a-guide-to-mlbs-new-expanded-replay-rules/> [<https://perma.cc/XL39-D4Z9>] (“A member of each team’s video staff can communicate his opinion of a call to his team’s dugout. Each team will have access to the same video feeds for review in any given ballpark. There will be a phone connecting the video room and dugout.”).

¹⁰³ See, e.g., Nick O’Malley, *Astros (and Red Sox) Sign-Stealing Scandal, Explained: How Did They Cheat? Why Is Alex Cora MLB’s Main Culprit?*, MASS LIVE (Jan. 14, 2020), <https://www.masslive.com/redsox/2020/01/mlb-sign-stealing-scandal-explained-what-did-astros-red-sox-do-to-cheat-why-is-alex-cora-the-main-culprit.html> [<https://perma.cc/3B76-H33Z>].

¹⁰⁴ See Jacob Bogage, *What Is Sign Stealing? Making Sense of Major League Baseball’s Latest Scandal*, WASH. POST (Feb. 8, 2020), <https://www.washingtonpost.com/sports/2020/01/14/what-is-sign-stealing-baseball/> [<https://perma.cc/3UM6-AXRC>].

¹⁰⁵ See Jake Mailhot, *How Much Did the Astros Really Benefit from Sign-Stealing?*, FANGRAPHS (Nov. 20, 2019), <https://blogs.fangraphs.com/how-much-did-the-astros-really-benefit-from-sign-stealing/> [<https://perma.cc/F7V9-ZE6Q>].

thereby providing the wrongdoer with a potentially critical competitive advantage.¹⁰⁶ Similar concerns may also arise in the NFL, where teams sometimes rely on an assistant coach monitoring a video feed to decide whether to contest a particular call made on the field by a referee.¹⁰⁷

B. Security of Shared Data

In addition to the technology relied on by teams' playing and coaching staffs on the field during the course of a game, franchises in the four major U.S. professional sports leagues also rely on a plethora of shared data off the field in order to formulate strategies for upcoming games, make player personnel decisions, and analyze potential trades. Thus, preserving the accuracy and reliability of this data is of increasingly critical importance for the sports industry.

Perhaps most notably, the leagues recently began to employ new technology to capture detailed data regarding the events that transpire on the playing field. Specifically, through the use of intricate camera and sensor systems, teams can now track and record every event that occurs during the course of a game.¹⁰⁸ MLB teams, for instance, implemented a system called StatCast that can not only record every movement a player makes on the field, but also track the flight of the baseball itself. Moreover, StatCast can also capture the velocity at which a ball is hit or tossed, as well as the number of times it rotates after being thrown by a pitcher.¹⁰⁹ Similar systems are installed in NFL stadiums¹¹⁰

¹⁰⁶ *Manager Challenge*, MAJOR LEAGUE BASEBALL, <http://m.mlb.com/glossary/rules/manager-challenge> [<https://perma.cc/5GNR-HLE8>] (“A manager has a 30-second time limit to inform the umpire (by verbal communication or hand signal) whether he wishes to use his manager challenge to invoke replay review, and the challenge may not be rescinded once it has been exercised.”).

¹⁰⁷ See John Kelly, *How NFL Review Rules Work*, HOW STUFF WORKS, <https://entertainment.howstuffworks.com/nfl-review-rules2.htm> [<https://perma.cc/9SYC-TYKQ>] (noting that NFL coaches may “receive advice from an assistant coach in the booth who’s watching the network television feed”); see also Kilbert, *supra* note 102, at 287 (“[The NFL’s] current system allows each team’s coach to initiate instant replay review of two plays per game, with the potential of a third challenge if both of the earlier challenges are successful. Each challenge requires the team to use one of its timeouts. If a challenge is unsuccessful (i.e., the call on the field is not overturned), that team loses one of its timeouts. If a challenge is successful (i.e., the call on the field is overturned), the timeout is restored and no timeout is charged to that team.”) (footnotes omitted).

¹⁰⁸ See Grow & Grow, *supra* note 61, at 1577.

¹⁰⁹ See Michael Hattery, Comment, *Major League Baseball Players, Big Data, and the Right to Know: The Duty of Major League Baseball Teams to Disclose Health Modeling Analysis to Their Players*, 28 MARQ. SPORTS L. REV. 257, 265 (2017) (“The most recent collection breakthrough publicized in 2015 incorporates radar technology with three high-definition cameras known publicly as Statcast. Their purpose is to collect three dimensional snapshots of every single movement that occurs on a baseball field in great detail, using roughly ‘40,000 frames per second converted [in]to digital data.’”) (quoting Bruce Schoenfeld, *Can New Technology Bring Baseball’s Data Revolution to Fielding?*, N.Y. TIMES MAG. (Sept. 30, 2016), https://www.nytimes.com/2016/10/02/magazine/can-new-technology-bring-baseballs-data-revolution-to-fielding.html?_r=0 [<https://perma.cc/WQH7-A7C9>]); see also Ben Lindbergh, *Ready, Set, Statcast: What the New Data Stream Can Teach Us About MLB*, GRANTLAND (Apr. 9, 2015), <http://grantland.com/the-triangle/mlb-2015-statcast-advanced-hitting->

and NBA arenas as well,¹¹¹ with an analogous system scheduled to be implemented by the NHL in time for its 2020 playoffs.¹¹² The data recorded by these systems is then typically shared among all of the leagues' teams.

Teams are increasingly relying on the data produced by these systems to make a host of decisions. Most notably, the data produced by advanced tracking systems can be used to better assess a player's physical abilities, data that not only helps inform a team's decision on whether to acquire or trade a particular player but also how much money to offer the player during a salary negotiation.¹¹³ In addition, the data revealed by these systems can be used to help a team craft its in-game strategy, and allow clubs to pinpoint opposing players who may be moving a bit slower on the field in recent weeks, for instance.¹¹⁴

As a result, sports teams could potentially obtain a competitive advantage by manipulating the tracking data that is captured by these systems. The precise mechanisms through which these data could be altered, and the extent to which they can be changed, will vary by league depending on the type of tracking systems used. Using MLB's StatCast system as an example, it is theoretically possible that a team could seek to recalibrate the radar and high-speed cameras installed in their stadium in a way that would skew the resulting data. Because this radar and camera equipment is permanently installed in each team's stadium, a team could presumably gain access to these devices relative-

pitching-defensive-stats/ [https://perma.cc/QH28-3JRH] (explaining that StatCast "captur[es] the physical position of every player, pitch, and batted ball many times per second").

¹¹⁰ See Kristy Gale, *The Sports Industry's New Power Play: Athlete Biometric Data Domination. Who Owns It and What May Be Done with It?*, 6 ARIZ. ST. SPORTS & ENT. L.J. 7, 55 (2016) ("[T]he NFL already uses player-tracking data that includes, in part, athlete acceleration rate for its Next Gen Stats."); Jessica L. Roberts et al., *Evaluating NFL Player Health and Performance: Legal and Ethical Issues*, 165 U. PA. L. REV. 227, 246 (2017) ("Zebra is 'The Official On-Field Player Tracking Provider' of the NFL."); see also Kevin Clark, *The NFL's Brewing Information War*, THE RINGER (June 2, 2016), https://theringer.com/nfl-information-war-data-advanced-stats-73b6eee2d39f#.dl8hz9sfi [https://perma.cc/3X6S-RB5A] (noting that the NFL's tracking system "decipher[s] all movements on the field, measuring everything from player speed to how open a pass-catcher manages to get on a given play").

¹¹¹ See Christian Frodl, *Commercialisation of Sports Data: Rights of Event Owners over Information and Statistics Generated About Their Sports Events*, 26 MARQ. SPORTS L. REV. 55, 62 (2015) (observing that "[t]he National Basketball Association (NBA) announced an agreement with STATS in 2013 to install player-tracking systems at all NBA games").

¹¹² See Nicholas J. Cotsonika, *NHL Expects Puck and Player Tracking to Be Ready for Playoffs*, NAT'L HOCKEY LEAGUE (Nov. 18, 2019), https://www.nhl.com/news/nhl-optimistic-puck-and-player-tracking-will-be-ready-for-playoffs/c-311467264 [https://perma.cc/8P5J-K9B8] (noting the tracking system "uses sensors in pucks and on players to create hundreds of data points per second" and should be ready for deployment "around the [2020] Stanley Cup Playoffs").

¹¹³ See Bill Plunkett & Jeff Fletcher, *Baseball 2016: Moneyball 2.0—Welcome to the Next Wave of Analytics*, ORANGE COUNTY REG. (Apr. 2, 2016), https://www.ocregister.com/2016/04/02/baseball-2016-moneyball-20-welcome-to-the-next-wave-of-analytics/ [https://perma.cc/VGS4-VGKT] (stating that all MLB teams are "using advanced analysis [of StatCast data] to some degree in player evaluation").

¹¹⁴ See *id.* (reporting that StatCast data is "even [being used to formulate] in-game strategy").

ly easily whenever it desires.¹¹⁵ Alternatively, a team could theoretically manipulate this data by intercepting it before it is transmitted to the rest of the league, or by accessing the league-wide server on which it is centrally stored. Either way, the offending franchise would then be in a position to adjust the resulting data accordingly when using it internally, while leaving the rest of the league to unwittingly rely on skewed data.

In addition to the on-field tracking systems employed by the various leagues, the teams in each league are also increasingly sharing electronic medical records for their players in order to help facilitate trades and other player transactions.¹¹⁶ In MLB, for instance, the league maintains a central database into which teams record any medical treatment the clubs' training staffs provide to their players—all the way “down to hot tubs, aspirin and anti-inflammatories.”¹¹⁷ Teams can then access the electronic medical records relating to an opposing team's player during the final stages of discussion surrounding a proposed trade to assess the current physical condition of the potential trade target(s).¹¹⁸ Similar systems are currently utilized by the other leagues as well.¹¹⁹

As with the on-field tracking systems discussed above, this shared medical data is also a potentially attractive target for manipulation by teams. Most obviously, some teams may be incentivized to underreport medical treatment provided to their own players in order to mitigate any potential concern from

¹¹⁵ See, e.g., *StatCast*, MAJOR LEAGUE BASEBALL, <http://m.mlb.com/glossary/statcast> [https://perma.cc/6RFQ-H38W] (describing StatCast as consisting of “a combination of two different tracking systems—a Trackman Doppler radar and high definition Chyron Hego cameras” each installed in every team's ballpark).

¹¹⁶ See CHRISTOPHER R. DEUBERT ET AL., PROTECTING AND PROMOTING THE HEALTH OF NFL PLAYERS: LEGAL AND ETHICAL ANALYSIS AND RECOMMENDATIONS 62 (2017), <https://footballplayershealth.harvard.edu/law-and-ethics-protecting-and-promoting/> [https://perma.cc/L92N-YLBA] (“[I]n 2013, the NFL launched an electronic medical records (‘EMR’) system on a pilot basis with eight NFL clubs, which was expanded to all clubs in 2014.”); Christopher R. Deubert et al., *Comparing Health-Related Policies and Practices in Sports: The NFL and Other Professional Leagues*, 8 HARV. J. SPORTS & ENT. L. 1, 49 (2017) (noting that “medical records [are] maintained in MLB's league-wide electronic medical records system”).

¹¹⁷ Buster Olney, *Padres Could Face Discipline After Hiding Players' Medical Information from MLB Database*, ESPN (Sept. 15, 2016), http://www.espn.com/mlb/story/_/id/17554327/san-diego-padres-face-discipline-hiding-players-medical-information-mlb-database [https://perma.cc/ZA98-8MN3].

¹¹⁸ See *id.* (“All MLB teams feed medical information into a central database known as the Sutton Medical System, designed to both maintain the privacy of individual players and to be accessible to teams when needed—such as when trades are made.”).

¹¹⁹ See Anne Zieger, *NFL Uses eCW to Do Concussion Assessment*, HEALTHCARE IT TODAY (July 29, 2013), <https://www.healthcareittoday.com/2013/07/29/nfl-uses-ecw-to-do-concussion-assessment/> [https://perma.cc/YT9P-RDGR] (“Late last year, the NFL announced that it was using eClinical-Works' EMR to standardize their healthcare documentation for players. (Around the same time, the NBA announced that it was implementing Cerner's EMR.)”).

their prospective trading partners.¹²⁰ More nefariously, teams could even theoretically seek to modify the medical records relating to players on other teams. By fabricating additional, troubling entries in a particular player's medical history, for example, a team could attempt to drive down trade interest in the player across the rest of the league, and thereby lower the price the offending team ultimately has to pay in order to acquire him. Alternatively, a team could even try to remove entries from an opposing player's record in hopes of duping a rival into unwittingly acquiring an injured player.

C. Security of Proprietary Databases

In order to harness the increasingly large amounts of data that U.S. professional sports franchises are accumulating from the advanced tracking systems discussed above¹²¹—and in an effort to centralize other, more traditional forms of data such as in-person scouting assessments and trade discussions with other teams—most teams have built their own internal, proprietary database systems to help inform their personnel and strategic decision-making processes.¹²² These databases represent a potential goldmine of information, as they document most of a team's current internal thinking. By acquiring access to a rival franchise's proprietary database, a team could thus discover a plethora of valuable information, including new methods of statistical analysis, the competitor's trade strategies, and the players it is targeting in an upcoming draft.¹²³

Consequently, these internal, proprietary databases represent an extremely attractive target for potential cyber espionage. Indeed, in the professional sports industry's most noteworthy cybersecurity breach to date, an executive from MLB's St. Louis Cardinals accessed the proprietary database belonging to the rival Houston Astros—a system whimsically dubbed “Ground Control”—without authorization on a number of occasions throughout 2013 and

¹²⁰ Indeed, MLB's San Diego Padres were accused of underreporting medical treatment in 2016, as discussed in greater detail below. *See infra* notes 198–202 and accompanying text (discussing the incident).

¹²¹ *See supra* notes 108–114 and accompanying text (describing tracking systems).

¹²² *See, e.g.*, John Niyo, *Hail, Caesar! Tigers Finally Ready to Play Numbers Game*, DETROIT NEWS (May 15, 2017), <https://www.detroitnews.com/story/sports/columnists/john-niyo/2017/05/15/niyo-tigers-adapting-evolving-numbers-game/101736818/> [<https://perma.cc/7AG9-6E8N>] (reporting that MLB's Detroit Tigers are developing a “new central[ized] data hub for the organization,” and quoting the team's senior director of baseball analytics and operations as stating that “most—if not all—teams have a similar type of system now”).

¹²³ *See* Associated Press, *Christopher Correa, Former Cardinals Executive, Sentenced to Four Years for Hacking Astros' Database*, N.Y. TIMES (July 18, 2016), <https://www.nytimes.com/2016/07/19/sports/baseball/christopher-correa-a-former-cardinals-executive-sentenced-to-four-years-for-hacking-astros-database.html> [<https://perma.cc/W5TL-8NWD>] (noting that an executive from MLB's St. Louis Cardinals accessed the Houston Astros' proprietary database and downloaded scouting reports and information related to trade discussions).

2014.¹²⁴ Although the subsequent sanctions issued in the case of the Cardinals “hacking”—as discussed in further detail below¹²⁵—will undoubtedly provide some deterrence against future breaches of this sort within MLB, these databases, given their value, are likely to remain an enticing cyber-target for some rival executives in what is often a particularly cut-throat industry.¹²⁶

D. Security of Biometric Tracking Devices

As noted above, professional sports franchises are increasingly utilizing wearable fitness-tracking devices to monitor their players in a variety of ways.¹²⁷ Indeed, as one author recently noted, “[t]he use of biometric data in the sports industry is not new. Historically, teams have collected and used a wide variety of biometric and biomechanical measurements, including vertical jump, pitch speed, reaction time, heart rate, body composition, and self-reported wellness information.”¹²⁸ Today, however, emerging technologies enable teams to monitor their players in ever more detailed—and potentially invasive—ways by allowing them to “measure the number of calories their players consume and burn in a given day, their heart rate during practice and games, and even the amount and quality of their sleep each night.”¹²⁹ At the same time, other new devices—such as MotusTHROW¹³⁰—let teams monitor their players physiologically in real-time during practices or games and detect the stress level that players are placing on various joints and tendons.¹³¹ The

¹²⁴ See Plea Agreement at 7–8, *United States v. Correa*, No. 4:15-CR-00679 (S.D. Tex. Jan. 8, 2016), ECF. No. 15 (discussing the time frame of the unauthorized access).

¹²⁵ See *infra* notes 179–187 and accompanying text.

¹²⁶ See WEBROOT, DENVER BRONCOS MAINTAINS COMPETITIVE EDGE WITH WEBROOT SECURE ANYWHERE BUSINESS - ENDPOINT PROTECTION 1 (2016), <https://www.webroot.com/shared/pdf/case-study-broncos.pdf> [<https://perma.cc/VKW3-EMCG>] (“In today’s highly competitive sports environment, a team’s information can be a key competitive advantage, both on the field and in their business operations.”).

¹²⁷ See *supra* note 96 and accompanying text.

¹²⁸ Barbara Osborne, *Legal and Ethical Implications of Athletes’ Biometric Data Collection in Professional Sport*, 28 MARQ. SPORTS L. REV. 37, 37 (2017).

¹²⁹ Grow & Grow, *supra* note 61, at 1578; see also Osborne, *supra* note 128, at 41–45 (listing biometric data collection devices currently in use in the professional sports industry); Rachel Arrison, Note, “You’re Wearing That?”: *Why Data Generated from Wearable Technology Should Be Protected Under Privacy Law*, 26 SPORTS LAW. J. 211, 213–14 (2019) (discussing the sensitive nature of data collected by wearable biometric trackers).

¹³⁰ See MotusTHROW, MOTUS GLOBAL, <https://motusglobal.com/motusbaseball.html> [<https://perma.cc/EC5F-5TCX>] (describing MotusTHROW as a wearable device that “records biomechanical data from every throw made in practice and games” to “increase your arm’s fitness in a safe manner” and “determine[] optimal throwing levels that go beyond age-old pitch counts and inning totals”).

¹³¹ See Nicholas Zych, *Collection and Ownership of Minor League Athlete Activity Biometric Data by Major League Baseball Franchises*, 14 DEPAUL J. SPORTS L. 129, 133–34 (2018) (“More advanced and costly Wearables, such as *Whoop Strap* and the *Catapult Sensor* (‘*Catapult*’), have made a splash in the professional sports market while remaining relatively small in the public market. . . . These Wearables gather information regarding body strain, recovery, and sleep analytics.”).

collection and use of such forms of biometric data is only expected to grow in the future.¹³²

Although much of the resulting data collected from these IoT devices is likely to be stored on the proprietary team databases discussed above,¹³³ the biometric collection devices themselves represent a potential source of cybersecurity risk. By gaining unauthorized access to wearable devices used by the players on an opposing team, a franchise could potentially gain valuable information about its opponent's players ahead of a key game. Knowing how well an opposing team's players slept the night before, for instance, could allow a club to find a potential point of attack by repeatedly challenging an individual who got less than the ideal amount of rest ahead of the game. Similarly, data regarding the stress levels that various players' joints had incurred during recent practices could yield insight into which opposing players may be nursing an injury, and thus might be unable to perform at his or her highest level.

E. Gambling-Related Concerns

Finally, another area in which cybersecurity threats may endanger the integrity of a league's games is the emerging sports gambling marketplace. Following the U.S. Supreme Court's 2018 decision in *Murphy v. National Collegiate Athletic Association*¹³⁴—in which the Court struck down the Professional and Amateur Sports Protection Act (PASPA),¹³⁵ and thereby cleared the way for the legalization of sports gambling at the state-level—a number of new municipalities are expected to legalize gambling on professional sporting events in the coming years.¹³⁶

Legalized gambling could trigger a number of cybersecurity-related concerns for professional sports leagues. With the advent of more widespread sports betting, leagues will need to invest resources to detect the potential fix-

¹³² See Joe Ciolli, *Goldman Sachs: There's a Fortune to Be Made Analyzing Sports Stats*, BUS. INSIDER (July 13, 2017), <http://www.businessinsider.com/goldman-sachs-sports-economy-analytics-statistics-2017-7> [<https://perma.cc/7D8G-CWCV>] (“[T]eams across sports at all levels are increasingly using GPS trackers, accelerometers, biometric sensors and advanced optical player tracking.”).

¹³³ See *supra* notes 121–126 and accompanying text.

¹³⁴ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

¹³⁵ See 28 U.S.C. §§ 3701–3704 (2018). The PASPA created “a ban on state-sponsored sports gambling nationwide” but “exempt[ed] Nevada and at least eight other states from its scope via a perpetual grandfathering clause.” Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 1–2 (2017), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1024&context=dj_online [<https://perma.cc/D5GJ-XAAR>].

¹³⁶ See Mark Brnovich, *Betting on Federalism: Murphy v. NCAA and the Future of Sports Gambling*, 2018 CATO SUP. CT. REV. 247, 247 (“Sports gambling is a big business already, and it will likely grow bigger still after *Murphy*.”).

ing of matches.¹³⁷ These efforts, in turn, will need to be protected against potential unauthorized intrusions into the computer systems being utilized to help the leagues detect unusual betting activity. Similarly, with the leagues pushing for laws requiring betting houses to use official league-sanctioned statistics for their sports gambling outcomes,¹³⁸ these efforts create the possibility that the leagues' official statistics could themselves become the subject of a cyber intrusion.¹³⁹ Indeed, even slight alterations of the official league records regarding the outcomes on the playing field—such as the number of yards a running back rushed for in a particular football game—could yield significant profits for unscrupulous bettors.

At the same time, leagues may also find it necessary to monitor for unauthorized betting-related activity occurring within their own stadiums. In professional tennis, for instance, the men's and women's professional tours have been forced to monitor and ban the so-called practice of "courtsiding," in which an audience member attempts to obtain a potentially critical informational advantage by using wireless communications technology to convey the results of a particular play to his or her betting associates.¹⁴⁰ By obtaining immediate notifications regarding the results of a play, these associates may be able to quickly place a bet on the results of the already completed play before the outcome is transmitted via television broadcast and the betting market is officially closed.¹⁴¹

¹³⁷ Cf. Patrick Doughty, *Pound for Pound: A Legal Analysis of the Gambling, Alcohol, and Taxation Issues the NFL Must Weigh as It Expands to London*, 22 JEFFREY S. MOORAD SPORTS L.J. 593, 598–99 (2015) ("The leagues asserted legalized gambling would lead fans, whether rightly or wrongly, to believe the games were being played with less integrity, such as a perceived increase in match-fixing between officials and players."); see also Adam Kilgore, *For Sports Leagues, Legalized Sports Betting Offers New Risks, and Massive Rewards*, WASH. POST (May 14, 2018), https://www.washingtonpost.com/sports/for-sports-leagues-legalized-sports-betting-offers-new-risks-and-massive-rewards/2018/05/14/5ce4caf4-5790-11e8-858f-12becb4d6067_story.html?utm_term=.f1eb24a5ae6a [<https://perma.cc/M6WM-7LYH>] (observing that for professional sports leagues, legalized sports gambling "creates . . . the need for oversight").

¹³⁸ See James Glanz & Agustin Armendariz, *When Sports Betting Is Legal, the Value of Game Data Soars*, N.Y. TIMES (July 2, 2018), <https://www.nytimes.com/2018/07/02/sports/sports-betting.html> [<https://perma.cc/4JS7-PW5D>] (noting the debate over "whether the gambling industry should be required to use 'official data,' a league-approved tabulation of what happened in a sports competition").

¹³⁹ See William H. Williams, Note, *On the Clock, Best Bet to Draft Cyberdefensive Linemen: Federal Regulation of Sports Betting from a Cybersecurity Perspective*, 13 BROOK. J. CORP. FIN. & COM. L. 539, 544 (2019) (noting "many industry members are deeply concerned about cyberthreats of hackers looking to gain an edge in sports wagering using non-public data").

¹⁴⁰ See Ryan Rodenberg, *How Gambling 'Courtsiders' Are Affecting Tennis*, ESPN (Aug. 21, 2015), https://www.espn.com/chalk/story/_/id/13481104/how-courtsiders-affecting-gambling-integrity-tennis-chalk [<https://perma.cc/PAC8-BSJD>] (describing "courtsiding" as "transmitting data in real time to employers who are often continents away").

¹⁴¹ See *id.*

The same potential informational advantages are likely to materialize in the emerging betting markets relating to the four major U.S. professional sports leagues. Getting even a few seconds of advanced notice of the outcome of a critical fourth-down play in a professional football game, for instance, could enable a bettor to place a more accurate wager on the eventual outcome of the game. Deterring this sort of behavior within a team's stadium is likely to require the implementation of various network-related cybersecurity protections, along with more traditional forms of visual detection.

IV. LEAGUES' CURRENT FRAMEWORK FOR CYBER-RISK MANAGEMENT

Although the trade secret protections outlined above in Part II.B putatively apply to the U.S. professional sports industry, in reality teams are unlikely to directly rely on these laws to enforce their rights against their league rivals. Indeed, “[u]nder each league’s constitution . . . teams are generally prohibited from suing each other, or one another’s employees, in court. Instead, any dispute between rival franchises and/or their employees is generally subject to arbitration before their respective league commissioner.”¹⁴² This reality makes the formulation and enforcement of league-wide policies governing trade secrets and cybersecurity all the more critical.

Unfortunately, despite the multitude of potential cybersecurity threats afflicting U.S. professional sports teams, the four major leagues appear to have been relatively slow to address these possible vulnerabilities with specific league-wide rules or regulations. Although each of the four leagues was unwilling to share any substantive details regarding its current cybersecurity policies,¹⁴³ MLB reportedly relied on its teams to protect themselves from cyber intrusions, rather than impose any league-wide cybersecurity requirements on its franchises, as recently as 2015.¹⁴⁴ Consequently, although the industry has only experienced one publicized competition-related cybersecurity breach to date—the “hacking” of the Houston Astros’ database by their MLB rival St.

¹⁴² Grow & Grow, *supra* note 61, at 1617–18.

¹⁴³ Specifically, MLB responded to an inquiry by stating that the league currently maintains a league-wide cybersecurity policy that applies to both the league office and all clubs, but was unwilling to share any additional details regarding the policy. *See* Email from Michael Teevan, Vice President, Commc’ns, Major League Baseball, to authors (Jan. 3, 2019, 11:12 EST) (on file with authors). Meanwhile, the NFL, NBA, and NHL either failed to respond to inquiries or declined to provide any information at all regarding their policies. *See, e.g.*, Email from Tim Frank, Senior Vice President, Basketball Commc’ns, Nat’l Basketball Assoc., to authors (Jan. 2, 2019, 16:35 EST) (on file with authors).

¹⁴⁴ Shaikin, *supra* note 5 (explaining that teams in the MLB are responsible for handling their own cybersecurity, though MLB experts are available for consultation). As noted above, today MLB maintains a league-wide cybersecurity policy that applies to both the league office and all clubs. *See* Email from Michael Teevan, *supra* note 143.

Louis Cardinals, mentioned above¹⁴⁵—it is impossible to know whether other teams have simply failed to identify similar breaches to their own systems. In fact, the aforementioned Astros breach was only detected after the Cardinals' employee responsible for the intrusion leaked a number of Houston's internal team documents to the sports website *Deadspin* in 2014.¹⁴⁶

This makes the formulation of league-wide rules regulating cybersecurity all the more important. Unfortunately, although general provisions contained in the various league constitutions and bylaws could be used to penalize intra-league cybersecurity violations, it is not clear that the existing penalty structures in place sufficiently deter this sort of activity.¹⁴⁷ Indeed, prior cases in which leagues have punished teams for electronic-device-related breaches are likely to serve as key precedents, and thus limit the potential range of punishment options available to leagues in these cases.

A. Existing Applicable League Rules

Although no league currently appears to have a rule in place directly regulating cybersecurity breaches among their franchises, other, more generalized prohibitions could be used by the leagues to address future cyber intrusions.

1. Major League Baseball

Under the MLB Constitution,¹⁴⁸ the league commissioner—currently Rob Manfred¹⁴⁹—is generally empowered to investigate and punish “any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of [b]aseball.”¹⁵⁰ Should the commissioner determine that a team, or one of its officials or employees, have committed such an act not in the best interest of the sport, he may then assess one or more of a list of pre-determined punishments on the offending club or person. Specifically, under

¹⁴⁵ See *supra* notes 124–125 and accompanying text.

¹⁴⁶ See Barry Petchesky, *Leaked: 10 Months of the Houston Astros' Internal Trade Talks*, DEADSPIN (June 30, 2014), <http://deadspin.com/leaked-10-months-of-the-houston-astros-internal-trade-1597951970> [<https://perma.cc/9SM4-HNQF>] (“Documents purportedly taken from Ground Control and showing 10 months’ worth of the Astros’ internal trade chatter have been posted online at . . . a site where users can anonymously share hacked or leaked information.”).

¹⁴⁷ Of course, existing federal and state laws may provide additional deterrence.

¹⁴⁸ MAJOR LEAGUE BASEBALL, MAJOR LEAGUE CONSTITUTION (2005), https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/League%20Constitutions%20&%20Bylaws/MLConstitutionJune2005Update.pdf [<https://perma.cc/P8MS-X6FK>] [hereinafter MLB CONST.].

¹⁴⁹ See *Rob Manfred, Commissioner of Major League Baseball*, MAJOR LEAGUE BASEBALL, <https://www.mlb.com/official-information/executives/rob-manfred> [<https://perma.cc/XZ5L-3EYR>].

¹⁵⁰ MLB CONST., *supra* note 148, at art. II § 2(b); see also Matthew B. Pachman, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1420–30 (1990) (discussing the scope of this so-called “best interests of baseball” power).

the existing league constitution, any fine issued by the commissioner is “not to exceed \$2,000,000 in the case of a Major League Club, [and] not to exceed \$500,000 in the case of an owner, officer or employee.”¹⁵¹ In addition, the commissioner may also suspend or remove the offending person from the league, withhold any other benefit afforded to the team or official under “the Major League Rules, including but not limited to the denial or transfer of player selection rights” in the MLB draft, or impose any “such other [punitive] actions as the Commissioner may deem appropriate.”¹⁵²

In addition to this catch-all provision in the league constitution, MLB has also enacted a specific policy relating to the use of “Cell Phones and Electronic Devices In and Around [the] Clubhouse and On-field.”¹⁵³ This policy generally prohibits teams from using “electronic equipment or devices . . . for the purpose of stealing signs or conveying other information designed to give a [c]lub a competitive advantage,” while specifically prohibiting the use of “any type of walkie-talkies, mobile phones, ‘smart watches’ (e.g., Apple watches), laptop computers, tablets or other communication devices, in or near the dugout, in the bullpens or on the playing field” before or during a game.¹⁵⁴ Violations of the policy “will subject both the [c]lub and offending individual to discipline by the Commissioner’s Office.”¹⁵⁵

2. National Football League

As with MLB, the NFL Constitution and Bylaws also endow Roger Goodell, the league’s current commissioner, with relatively broad authority to investigate and punish any “conduct detrimental to the welfare of the [l]eague or professional football.”¹⁵⁶ Specifically, under Article VIII of the NFL Constitution, “the Commissioner shall have complete authority to,” among other potential penalties, “[s]uspend and/or fine” any person or team guilty of conduct detrimental to the league “in an amount not in excess of five hundred thousand dollars (\$500,000).”¹⁵⁷ In addition, the Commissioner may “award selection choices and/or deprive the offending club of a selection choice or choices” in

¹⁵¹ MLB CONST., *supra* note 148, at art. II § 3(a).

¹⁵² *Id.*

¹⁵³ Major League Baseball, *Cell Phones and Electronic Devices in and Around Clubhouse and On-Field* (on file with author).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ NAT’L FOOTBALL LEAGUE, CONSTITUTION AND BYLAWS OF THE NATIONAL FOOTBALL LEAGUE art. VIII § 8.13(A) (2006), https://onlabor.org/wp-content/uploads/2017/04/co_.pdf [<https://perma.cc/S88R-52KE>] [hereinafter NFL CONST.]; see also Michael Mondelli, *The Roger Goodell Standard: Is Commissioner Authority Good for Sports?*, 42 SETON HALL LEGIS. J. 191, 200 (2017) (discussing the NFL Commissioner’s authority to punish “conduct detrimental to the league”).

¹⁵⁷ NFL CONST., *supra* note 156, at art. VIII § 8.13.

the NFL Draft.¹⁵⁸ Meanwhile, in cases where the Commissioner determines that the penalties above are “not adequate or sufficient, considering the nature and gravity of the offense involved, he may refer the matter to the [NFL’s] Executive Committee,” and recommend any other potential punishment “he deems appropriate.”¹⁵⁹

As with MLB, the NFL league rules also contain some specific provisions regarding the on-field use of electronic devices. Under Article IX of the NFL Constitution, teams are prohibited from using “any communications or information gathering equipment, other than Polaroid-type cameras or field telephones, including without limitation videotape machines, telephone tapping or bugging devices, or any other form of electronic device that might aid a team” during the course of a game.¹⁶⁰ Meanwhile, aside from “[I]eague-issued Microsoft Surface tablets,” the league has enacted a specific Electronic Device Rule, which generally prohibits “the use of cellular phones, smart phones, tablet devices, computers, wearable electronic devices such as Google Glass, and other electronic equipment by coaches, players, and other club personnel” in any “club-controlled areas including, but not limited to, sidelines and coaches’ booths,” from “ninety (90) minutes prior to kickoff through the end of the game, including halftime.”¹⁶¹

Finally, with respect to the league authorized tablet computers, NFL rules specifically prohibit teams from modifying their computers’ hardware or software in any manner that might provide them with a competitive advantage.¹⁶² Moreover, should a team’s tablet computers malfunction prior to the start of a game, league rules provide that the opposing team must also refrain from using its own devices until such time that both teams’ computers are in full working order.¹⁶³ Importantly, however, if a team’s devices should malfunction after the game has begun, then the opposing team is not required to cease using its own

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at art. IX § 9.1(C)(14).

¹⁶¹ Mike Florio, *Browns Apparently Violated Electronic Devices Rule*, NBC SPORTS (Jan. 9, 2015), <https://profootballtalk.nbcsports.com/2015/01/09/browns-apparently-violated-electronic-devices-rule/> [<https://perma.cc/8WE2-M8JH>].

¹⁶² See *NFL Equity Rule*, NAT’L FOOTBALL LEAGUE, <https://operations.nfl.com/the-rules/nfl-equity-rule/> [<https://perma.cc/D7JL-8HJE>] (“The tablets, set up and maintained by league-employed purple hat technicians on game day, are configured so that clubs can’t modify them to gain an unfair competitive advantage. Attempts to alter tablet hardware or software without league approval are prohibited.”).

¹⁶³ See *id.* (“If sideline or booth devices are not working properly at kickoff, the opposing team is limited to using only as many operational devices as the affected team has. For example, if one team has seven working devices in the bench area at kickoff, the other team is limited to using seven devices in its bench area. When the malfunctioning devices are restored, both teams can resume using all of their devices.”).

devices.¹⁶⁴ This rule creates a potential incentive for teams to manipulate one another's tablets after kickoff.

Moreover, in addition to the above limitations relating to the use of electronic devices, the NFL has also formulated a specific policy relating to social media usage by players, coaches, and team personnel.¹⁶⁵ Under the policy, players, coaches, and other football operations personnel are prohibited from using social media from ninety minutes before kickoff until after the traditional post-game media interviews.¹⁶⁶

3. National Basketball Association

Similar to his counterparts in MLB and the NFL, the commissioner of the NBA—currently Adam Silver¹⁶⁷—is likewise granted broad discretion to adjudicate “matters that may adversely affect the Association or its Members.”¹⁶⁸ In cases in which a team employee has been found “guilty of conduct prejudicial or detrimental to the Association,” the commissioner is empowered to “suspend [the individual] for a definite or indefinite period, [and/or] to impose a fine not exceeding \$1,000,000.”¹⁶⁹ Meanwhile, a specific provision in the league constitution governs cases in which confidential or non-public team or league information is disclosed for gambling-related purposes.¹⁷⁰ In these cases, the punishment for the disclosure of any “information concerning the medical, personal, or other condition of any Player, Coach, or Referee; any Player transaction; any disciplinary action taken or to be taken by the Association or a Team; and Referee schedules, assignments, statistics, and ratings,” is placed “within the absolute and sole discretion of the Commissioner and may include a fine, suspension, expulsion and/or perpetual disqualification from further association with the Association or any of its Members.”¹⁷¹

¹⁶⁴ *See id.* (“The equity rule no longer applies once the tablet systems are fully functional for both clubs, or once the game has started with full functionality.”).

¹⁶⁵ *See League Announces Policy on Social Media for Before and After Games*, NAT'L FOOTBALL LEAGUE (Aug. 31, 2009), <http://www.nfl.com/news/story/09000d5d8124976d/article/league-announces-policy-on-social-media-for-before-and-after-games> [<https://perma.cc/3PMJ-FP5R>].

¹⁶⁶ *Id.*

¹⁶⁷ *See Adam Silver*, NBA CAREERS, <http://careers.nba.com/executive/adam-silver/> [<https://perma.cc/74GS-8XGM>] (reporting that “Adam Silver was unanimously elected NBA Commissioner on Feb. 1, 2014, by the NBA Board of Governors”).

¹⁶⁸ NAT'L BASKETBALL ASSOCIATION, CONSTITUTION AND BY-LAWS art. 24 § (e) (May 29, 2012), <https://ak-static.cms.nba.com/wp-content/uploads/sites/4/2018/10/NBA-Constitution-By-Laws-October-2018.pdf> [<https://perma.cc/MC6M-X22P>] [hereinafter NBA CONST.]; *see also* Zachary Stirparo, *No Privacy for the Intolerant: A Reflection on Using an Illegal Recording of Donald Sterling to Set NBA Precedent*, 13 WILLAMETTE SPORTS L.J. 1, 17 (2016) (discussing the NBA Commissioner's authority to punish wrongdoing).

¹⁶⁹ NBA CONST., *supra* note 168, at art. 35A § (d).

¹⁷⁰ *See id.* at art. 35A § (g)(ii-iv).

¹⁷¹ *Id.*

Moreover, as with the NFL, the NBA has also formulated a specific policy relating to social media usage by players, coaches, and team personnel. Under the policy:

[T]he use of cell phones, PDAs and other electronic communications devices—and thus accessing Twitter, Facebook and similar social media sites—is now prohibited during games for players, coaches and other team personnel involved in the game. The league has defined “during games” as the period of time beginning 45 minutes before the opening tip and ending “after the postgame locker room is open to the media and coaches and players have first fulfilled their obligation to be available to media attending the game.”¹⁷²

This policy thus has the secondary effect of limiting team officials’ use of electronic devices for more potentially nefarious purposes.

4. National Hockey League

Finally, the NHL Constitution similarly grants the league commissioner, Gary Bettman,¹⁷³ the power to resolve matters involving activity “that in the opinion of the Commissioner is detrimental to the best interests of the League or professional hockey.”¹⁷⁴ As with the other leagues, in such cases the commissioner has the “full and complete authority to discipline” offending individuals through expulsion or suspension with fines not to exceed one million dollars, or in cases “affect[ing] the competitive aspects of the game, by awarding or transferring players and/or draft choices and/or depriving the offending Member Club of draft choices.”¹⁷⁵

Similar to the NFL and NBA, the NHL has also enacted a social-media policy, under which team executives are prohibited from using social media “beginning at 11 a.m. on the day of the game and ending after post-game me-

¹⁷² Marc Stein, *NBA Social Media Guidelines Out*, ESPN (Sept. 30, 2009), <https://www.espn.com/nba/news/story?id=4520907> [<https://perma.cc/L86T-QMTV>]; see also SI Wire, *Report: NBA Cracking Down on Players and Teams’ Social Media Conduct*, SPORTS ILLUSTRATED (Feb. 9, 2017), <https://www.si.com/nba/2017/02/09/nba-twitter-social-media-memo-update> [<https://perma.cc/5NHD-4JML>] (noting that the NBA continues to prevent “players from tweeting from 45 minutes before scheduled tip-off through when their media availability ends after games”).

¹⁷³ See Kevin McGran, *In His 25 Years as NHL Commissioner, Gary Bettman Has Been the Boss, the Villain and Many Things in Between*, THE STAR (Jan. 31, 2018), <https://www.thestar.com/sports/hockey/2018/01/31/in-his-25-years-as-nhl-commissioner-gary-bettman-has-been-the-boss-the-villain-and-many-things-in-between.html> [<https://perma.cc/2QAF-AX6B>].

¹⁷⁴ NAT’L HOCKEY LEAGUE, CONSTITUTION OF THE NATIONAL HOCKEY LEAGUE art. VI § 6.3(b)(5), <https://www.lakelawgroup.com/wp-content/uploads/2017/02/constitution-NHL-.pdf> [<https://perma.cc/U7FK-6LPW>].

¹⁷⁵ *Id.* at art. VI § 6.3(j)(1).

dia obligations,” with players’ usage similarly curtailed “beginning two (2) hours prior to the opening face-off and ending upon cessation of post-game media obligations.”¹⁷⁶ Any violations of the policy are punishable via a monetary fine.¹⁷⁷

B. League Disciplinary Precedents

Although the authority granted to the commissioner of each league to investigate and punish activity not in the best interest of the league’s respective sport would seemingly give these individuals the power necessary to handle cybersecurity-related violations, in reality their discretion is more limited. When exerting their authority under their respective league constitution, commissioners will typically impose a punishment only after considering the extent to which parties have been penalized for wrongdoing in prior analogous cases.¹⁷⁸ Consequently, the existence of relevant prior precedent may constrain the leagues’ ability to punish cybersecurity violations between teams.

1. Major League Baseball

MLB has dealt with several disciplinary cases in recent years that would likely serve as precedent for a potential cybersecurity-related infraction in the future. The most notable of these cases is, of course, the aforementioned “hacking” incident involving the Houston Astros and St. Louis Cardinals.¹⁷⁹ Specifically, throughout the 2013 and 2014 seasons, former Cardinals’ executive Christopher Correa illegally accessed the Astros’ internal computer network and proprietary database.¹⁸⁰ Correa was able to access the Astros’ system by using the old password of a former Cardinals’ employee who had gone on to work for Houston.¹⁸¹ The Astros eventually detected the unauthorized access

¹⁷⁶ *Breaking Down NHL’s Social Media Policy*, ESPN (Sept. 15, 2011), https://www.espn.com/blog/nhl/post/_id/11247/breaking-down-nhls-social-media-policy [<https://perma.cc/8CDT-4LLR>].

¹⁷⁷ *Id.*

¹⁷⁸ See John Burritt McArthur, *The Tom Brady Award and the Merit of Reasoned Awards*, 8 HARV. J. SPORTS & ENT. L. 147, 184–85 n.121 (2017) (noting the “law of the shop” doctrine generally requires that league “rules and penalties are fair and consistent in the context of prior practices”).

¹⁷⁹ See Associated Press, *supra* note 123 (describing the incident).

¹⁸⁰ See Plea Agreement, *supra* note 124, at 7–8.

¹⁸¹ See *id.* at 8 (“Correa illegally accessed the Astros’ computers in the following way: In December 2011, as Victim A prepared to leave the St. Louis Cardinals and join the Houston Astros, he was directed to turn over his Cardinals-owned laptop to Correa—along with the laptop’s password. When Victim A joined the Astros, he re-used a similar (albeit obscure) password for his Astros’ e-mail and Ground Control accounts. No later than March 2013, Correa began accessing Victim A’s Ground Control and Astros’ e-mail accounts using a variation of the password to Victim A’s Cardinals laptop.”); see also Derrick Goold, *Cardinals’ Pain Is Astros’ Gain as MLB Levels Penalties for Hacking*, ST. LOUIS POST-DISPATCH (Jan. 31, 2017), https://www.stltoday.com/sports/baseball/professional/cardinals-pain-is-astros-gain-as-mlb-levels-penalties-for/article_bfe37c71-a48c-57be-98ed-1c5dec2

after internal team documents were leaked to the website *Deadspin* in 2014.¹⁸² This in turn prompted an inquiry by the Federal Bureau of Investigation.¹⁸³

Correa was ultimately prosecuted and—after pleading guilty to five criminal charges—sentenced by a federal judge to forty-six months imprisonment and ordered to pay over \$279,000 in restitution.¹⁸⁴ MLB then elected to issue its own punishment in the case, with Commissioner Rob Manfred placing Correa on the league’s “permanently ineligible list,” which effectively banned him from the sport for life.¹⁸⁵ In addition, Manfred decided that the Cardinals franchise itself was “liable for the misconduct” of its former employee, and stripped St. Louis of its first two picks in the 2017 MLB Draft and awarded them to the Astros.¹⁸⁶ Manfred also fined the Cardinals two million dollars—the highest amount then allowed under the league constitution—and ordered the team to send the money to Houston as restitution.¹⁸⁷ Thus, the Cardinals-Astros affair sets a clear precedent for future cases of cyber-espionage involving MLB franchises.

Meanwhile, in 2017, MLB investigated two separate incidents in which team employees were alleged to have engaged in the unauthorized use of electronic devices during the course of a game. The first incident arose after a series between the Boston Red Sox and New York Yankees, during which the Yankees believed Red Sox officials were improperly using an Apple Watch in the dugout to help steal New York’s signs.¹⁸⁸ During the ensuing league investigation, Boston reportedly admitted that a member of its coaching staff had

eee93.html [https://perma.cc/Y7M5-FF98] (“Correa was able to use Mejdal’s password for ‘unfettered access’ to Houston’s data and Mejdal’s email.”).

¹⁸² See Petchesky, *supra* note 146 (discussing the leak of ten months’ worth of the Houston Astros’ internal trade discussions and the information contained therein).

¹⁸³ See Michael S. Schmidt, *Cardinals Investigated for Hacking into Astros’ Database*, N.Y. TIMES (June 17, 2015), <https://www.nytimes.com/2015/06/17/sports/baseball/st-louis-cardinals-hack-astros-fbi.html?smid%3D=tw-nytsports> [https://perma.cc/Z2PA-WZ4Q] (discussing an inquiry by the Federal Bureau of Investigation into the hacking of the Astros).

¹⁸⁴ Associated Press, *supra* note 123.

¹⁸⁵ Goold, *supra* note 181 (“The commissioner placed Correa, who is serving a 46-month sentence in federal prison, on the permanently ineligible list, effective immediately. That is the same list that includes others banned from baseball like Pete Rose and infamous members of the 1919 White Sox.”).

¹⁸⁶ *Id.*

¹⁸⁷ See *id.* (discussing the punishment Manfred levied on the Cardinals).

¹⁸⁸ See Michael S. Schmidt, *Boston Red Sox Used Apple Watches to Steal Signs Against Yankees*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/sports/baseball/boston-red-sox-stealing-signs-yankees.html?smid=tw-nytsports&smtyp=cur&r=0> [https://perma.cc/NUV3-8T7A] (“The Yankees, who had long been suspicious of the Red Sox’ stealing catchers’ signs in Fenway Park, contended the video showed a member of the Red Sox training staff looking at his Apple Watch in the dugout. The trainer then relayed a message to other players in the dugout, who, in turn, would signal teammates on the field about the type of pitch that was about to be thrown, according to the people familiar with the case.”).

improperly used an electronic device in the dugout.¹⁸⁹ Due to the team's candor, MLB limited the punishment to a rather insubstantial monetary fine. Nevertheless, MLB warned that future incidents along these lines would face much harsher sanction, including the loss of draft picks.¹⁹⁰

Several weeks later, the unauthorized use of an Apple Watch was once again in the news when Arizona Diamondbacks coach Ariel Prieto was spotted wearing the device in the dugout during a playoff game against the Colorado Rockies.¹⁹¹ MLB's subsequent investigation later determined that Prieto had worn the watch inadvertently, and that it had not been used for any "baseball-related communication."¹⁹² Both Prieto and the Diamondbacks, however, were fined an unspecified amount due to their violation of the league's electronic device policy.¹⁹³

Most recently, MLB announced in January 2020 that it was levying several punishments against the Houston Astros for the team's aforementioned sign-stealing scheme.¹⁹⁴ Specifically, the league suspended both the team's general manager, Jeff Luhnow, and its field manager, A.J. Hinch, for the 2020 season.¹⁹⁵ (Both Luhnow and Hinch were subsequently fired by the Astros for their involvement in the scheme.)¹⁹⁶ The team also lost both its first- and second-round draft picks in the 2020 and 2021 drafts, and was ordered to pay a five million dollar fine.¹⁹⁷

Finally, MLB was confronted with a case of alleged data manipulation by one of its clubs during the 2016 season. That summer, the San Diego Padres completed two mid-season trades—one with the Boston Red Sox and the other with the Miami Marlins—in which the club traded away pitchers who received medical treatment from the team's training staff for various issues with their pitching arms.¹⁹⁸ Neither the Red Sox nor the Marlins were informed about the

¹⁸⁹ See Marc Normandin & Whitney McIntosh, *MLB Fines Both Red Sox and Yankees for Sign-stealing Incidents*, SBINATION (Sept. 15, 2017), <https://www.sbnation.com/mlb/2017/9/6/16262734/mlb-punishment-red-sox-sign-stealing-yankees-fines-hurricane-relief-apple-watch> [<https://perma.cc/U363-NHSZ>] (noting that "both the Red Sox and the Yankees have been fined for the sign-stealing incidents").

¹⁹⁰ See *id.* ("MLB did make it clear to all teams that any similar future transgressions will be handled more harshly and will involve picks.").

¹⁹¹ See *MLB Fines Ariel Prieto, Diamondbacks for Having Device in Dugout*, ESPN (Oct. 6, 2017), https://www.espn.com/mlb/story/_/id/20937938/ariel-prieto-arizona-diamondbacks-fined-having-apple-watch-dugout [<https://perma.cc/8YMB-D6KD>].

¹⁹² *Id.*

¹⁹³ See *id.*

¹⁹⁴ See *infra* notes 103–105 and accompanying text.

¹⁹⁵ See Jeff Passan, *Astros' Jeff Luhnow, AJ Hinch Fired for Sign Stealing*, ESPN (Jan. 13, 2020), https://www.espn.com/mlb/story/_/id/28476780/astros-jeff-luhnow-aj-hinch-fired-sign-stealing [<https://perma.cc/8CPU-LRHN>].

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Olney, *supra* note 117 (discussing the incidents).

medical treatment ahead of the trade, and both complained to MLB that San Diego failed to disclose this relevant information.¹⁹⁹

A league investigation ultimately revealed that the Padres maintained two sets of medical records, one for internal use and the other to be shared with other MLB teams via the electronic-medical-records database discussed above.²⁰⁰ Although Padres officials insisted that they never intended to deceive anyone, the league nevertheless suspended the team's general manager, A.J. Preller, for thirty days for his involvement in the incident.²⁰¹ In addition, MLB helped broker an agreement between the Marlins and Padres under which the teams agreed to return some of the players they exchanged in the trade.²⁰²

2. National Football League

As with MLB, several prior incidents in the NFL also serve as potential precedents for any future cybersecurity-related disciplinary cases. First, in 2006, Jim Mora, the then-head coach of the Atlanta Falcons, was caught using his cell phone on the sidelines during a late-season game against the Tampa Bay Buccaneers.²⁰³ Afterward, Mora explained that he was using the phone to call a team official to determine how a tie would affect his team's playoff status.²⁰⁴ Nevertheless, the unauthorized usage violated Article IX of the NFL Constitution, which prohibits the use of "any communications or information

¹⁹⁹ See *id.* (noting teams "were enraged by what they perceived to be strategic deception: veiling medical information that could have been pivotal in trade discussions").

²⁰⁰ See Hattery, *supra* note 109, at 268 ("[T]he Padres had compiled two sets of health records, one set to be disclosed in trade negotiations and one set to remain under confidential control of the team."); see also *supra* notes 116–118 and accompanying text (describing MLB's electronic-medical-records system).

²⁰¹ See Bob Nightengale, *MLB Suspends Padres GM A.J. Preller for His Conduct in Trade*, USA TODAY (Sept. 15, 2016), <https://www.usatoday.com/story/sports/mlb/2016/09/15/mlb-suspends-padres-gm-aj-preller/90431994/> [<https://perma.cc/3Y8L-X3JM>] ("Major League Baseball, delivering one of its harshest penalties against a club general manager in baseball history, suspended San Diego Padres general manager A.J. Preller 30 days without pay for submitting false medical records to the Boston Red Sox.").

²⁰² See Olney, *supra* note 117 (noting that after the Padres traded pitchers Colin Rea and Andrew Cashner to Miami, "MLB executives [later] facilitated the return of Rea to the Padres, with San Diego returning pitcher Luis Castillo to Miami").

²⁰³ See Associated Press, *NFL Hits Mora with \$25K Fine for Cell Use*, ESPN (Jan. 5, 2006), <https://www.espn.com/nfl/news/story?id=2281519> [<https://perma.cc/YNY7-ZRZM>] [hereinafter *NFL Hits Mora with \$25K Fine*] (discussing the incident).

²⁰⁴ See *id.* ("Victories by the Cowboys and Redskins earlier that day meant that an Atlanta loss would eliminate the Falcons from the NFC playoff race, but Mora was unsure if they could remain in contention by tying Tampa Bay. He used a cell phone in an attempt to contact team officials and seek clarification on Atlanta's status.").

gathering equipment . . . that might aid a team” during the course of a game.²⁰⁵ As a result, Mora was fined \$25,000 by the league.²⁰⁶

Perhaps more notable, however, is the punishment the NFL doled out in response to the so-called “Spygate” affair in 2007.²⁰⁷ Specifically, during a game between the New England Patriots and the New York Jets, league security officials confiscated a video camera used by the Patriots’ video assistant Matt Estrella while standing on the team’s sideline.²⁰⁸ The NFL’s subsequent investigation concluded that Estrella was using the camera to record the signals used by the Jets’ coaches to relay play calls to their players on the field. This constituted a violation of the league rule prohibiting the use of video-recording devices during the course of a game.²⁰⁹

Commissioner Roger Goodell ultimately punished New England rather harshly, in no small part due to the fact that the NFL specifically warned teams about the unauthorized use of video cameras on the sidelines a little over a year before the incident after learning of earlier alleged video-camera-related infractions by the Patriots.²¹⁰ Specifically, Goodell fined Patriots head coach Bill Belichick \$500,000—the maximum allowable amount under the league constitution—along with a \$250,000 fine for the team itself.²¹¹ In addition, Goodell stripped the team of its first-round pick in the 2008 NFL Draft.²¹² Thus, the punishment issued in the Spygate incident likely serves as the most relevant precedent for future cases in which an NFL team gains a competitive

²⁰⁵ NFL CONST., *supra* note 156, at art. IX § 9.1(C)(14).

²⁰⁶ See *NFL Hits Mora with \$25K Fine*, *supra* note 203 (“Atlanta Falcons coach Jim Mora was contrite after the NFL fined him \$25,000 for using a cell phone on the sidelines during an overtime loss at Tampa Bay two weeks ago.”).

²⁰⁷ See Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 TEX. REV. ENT. & SPORTS L. 23, 47 (2008) (describing the “Spygate” scandal as arising after “NFL security confiscated a video camera and tape from a New England Patriots’ video assistant during the Patriots’ 2007 opener against the New York Jets”).

²⁰⁸ See Alexander F. Tilton, Comment, *Mayer v. Belichick: “Spygate” Scandal Is Not the Court’s Concern*, 18 SPORTS LAW. J. 341, 341 (2011) (“League security personnel confiscated a video camera and videotape from the Patriots’ employee after he allegedly focused the camera on Jets’ coaches while they were using signals to communicate with the players on the field.”).

²⁰⁹ See Samuel J. Horovitz, *If You Ain’t Cheating You Ain’t Trying: “Spygate” and the Legal Implications of Trying Too Hard*, 17 TEX. INTELL. PROP. L.J. 305, 307 (2009) (“A subsequent investigation determined that the Patriots had violated league rules by videotaping the Jets coaches sending signals to players during the game.”).

²¹⁰ See *id.* (reporting that a “warning memo” circulated by the NFL in 2006 “was believed to have been prompted in part by suspicions of similar past videotaping violations by the Patriots”).

²¹¹ See *Belichick Draws \$500,000 Fine, but Avoids Suspension*, ESPN (Sept. 13, 2007), <https://www.espn.com/nfl/news/story?id=3018338> [<https://perma.cc/Q94X-VN48>] (“New England Patriots coach Bill Belichick was fined the NFL maximum of \$500,000 Thursday and the Patriots were ordered to pay \$250,000 for spying on an opponent’s defensive signals.”).

²¹² See *id.* (“Commissioner Roger Goodell also ordered the team to give up its first-round draft choice next year if it reaches the playoffs this season, or its second- and third-round picks if it misses the postseason.”).

advantage over one of its rivals through the use of unauthorized electronic devices on the field.

V. POLICY IMPLICATIONS

This final Part explores the policy implications of the cybersecurity risks described in Part III, and the governance gaps revealed in Part IV. First, we lay out a theoretical lens through which to view next steps in enhancing the cybersecurity practices of professional sports leagues with a focus on the literature of polycentric governance.²¹³ Next, we offer suggestions for how the sports leagues could better protect themselves from the existing competition-related cybersecurity threats.²¹⁴ Finally, we highlight the potential role that government—potentially both domestically (at the federal and state levels) and internationally—may play in helping to secure the integrity of the leagues and their games.²¹⁵

A. *What We Can Learn from Using the Lens of Norm Entrepreneurs and Polycentric Governance*

One of the ways to consider the regulation of U.S. professional sports leagues generally, and the issue of cybersecurity in particular, is the dynamic field of polycentric governance—championed by numerous scholars including Nobel Laureate Elinor Ostrom and Professor Vincent Ostrom²¹⁶—in which multiple stakeholders “negotiate rules and policies to solve common problems.”²¹⁷ This multidisciplinary approach has demonstrated the benefits of self-organization and networking regulations “at multiple scales.”²¹⁸ It can, under certain circumstances, enhance “flexibility across issues and adaptability over time,”²¹⁹ and can hasten the uptake of best practices that could generate

²¹³ See *infra* notes 216–231 and accompanying text.

²¹⁴ See *infra* notes 232–249 and accompanying text.

²¹⁵ See *infra* notes 250–271 and accompanying text.

²¹⁶ See Michael D. McGinnis, *An Introduction to IAD and the Language of the Ostrom Workshop: A Simple Guide to a Complex Framework*, 39 POL’Y STUD. J. 169, 171–72 (2011) (defining polycentricity as “a system of governance in which authorities from overlapping jurisdictions (or centers of authority) interact to determine the conditions under which these authorities, as well as the citizens subject to these jurisdictional units, are authorized to act as well as the constraints put upon their activities for public purposes”).

²¹⁷ David Feldman, *Polycentric Governance*, in HANDBOOK OF SCIENCE AND TECHNOLOGY CONVERGENCE 877, 877 (William Sims Bainbridge & Mihail C. Roco eds., 2016).

²¹⁸ Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change*, 15 ANNALS ECON. & FIN. 97, 97 (2014).

²¹⁹ Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7, 15 (2011); cf. Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes*, 2 REG. & GOVERNANCE 137, 157 (2008) (discussing the legitimacy of polycentric regimes, and arguing that “[a]ll regulatory regimes are polycentric to varying degrees”).

positive network effects and result in the emergence of a norm cascade toward the Security of Things in professional sports.²²⁰

The field of polycentric governance seems well suited to addressing the issues raised in this Article for at least two reasons. First, as has been noted here and elsewhere, the legal environment of U.S. professional sports leagues is fragmented, with the federal and state governments historically taking a hands-off approach to regulation in favor of the leagues managing their own conduct.²²¹ There are some exceptions to this general rule, such as in the case of stadiums being public facilities and their resulting classification as critical infrastructure by the U.S. Department of Homeland Security.²²² Nevertheless, the fact that multiple stakeholders—discussed further below—are collaborating in governance at multiple levels highlights the links with polycentricity.

Second, given the polycentric nature of the professional sports industry, Professor Elinor Ostrom’s design principles for institutional analysis are pertinent and can provide insights to franchise owners, players, and fans.²²³ These include the importance of: (1) “clearly defined boundaries for the user pool . . . and the resource domain”;²²⁴ (2) “[p]roportional equivalence between benefits and costs”;²²⁵ (3) “[c]ollective choice arrangements ensur[ing] that the resource users participate in setting . . . rules”;²²⁶ (4) “monitoring . . . by the appropriators or by their agents”;²²⁷ (5) “[g]raduated sanctions” for rule violators;²²⁸ (6) “[c]onflict resolution mechanisms [that] are readily available, low cost, and legitimate”;²²⁹ (7) “[m]inimal recognition of rights to organize”;²³⁰

²²⁰ See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 895–98 (1998) (discussing the point at which norms begin to cascade through a society).

²²¹ See, e.g., Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 WASH. & LEE L. REV. 573, 580–81 (2015) (observing that “[f]ederal antitrust law is the primary legal authority regulating the operation of professional sports leagues in the United States,” but noting that “despite society’s reliance on the Sherman Act to regulate the professional sports industry, antitrust law has failed to effectively govern the monopoly sports leagues”).

²²² See *Commercial Facilities Sector*, *supra* note 35.

²²³ See generally SCOTT J. SHACKELFORD, *MANAGING CYBER ATTACKS IN INTERNATIONAL LAW, BUSINESS, AND RELATIONS: IN SEARCH OF CYBER PEACE* 52–110 (2014).

²²⁴ SUSAN J. BUCK, *THE GLOBAL COMMONS: AN INTRODUCTION* 32 (1998).

²²⁵ Elinor Ostrom, *Polycentric Systems: Multilevel Governance Involving a Diversity of Organizations*, in *GLOBAL ENVIRONMENTAL COMMONS: ANALYTICAL AND POLITICAL CHALLENGES INVOLVING A DIVERSITY OF ORGANIZATIONS* 105, 118 tbl. 5.3 (Eric Brousseau et al. eds., 2012) (citing ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 90 (1990)).

²²⁶ BUCK, *supra* note 224, at 32.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Ostrom, *supra* note 225, at 118 tbl. 5.3.

and (8) “governance activities [being] . . . organized in multiple layers of nested enterprises.”²³¹

Not all of Professor Ostrom’s design principles are applicable in this context, given that cybersecurity is more of a public good than a common pool resource, but some do have salience, especially depending on the level of analysis undertaken. For example, they speak to the importance of having clear rules setting out escalating penalties for teams engaging in nefarious cybersecurity practices, and a robust monitoring and conflict resolution regime to ensure compliance to cybersecurity policies as is further discussed below. Other insights include the importance of setting adequate boundary conditions, the need for proportionality, ensuring a robust role for civil society (including fans and journalists), and effective monitoring. These insights are applied and further unpacked in the following sections.

B. Proposing an Updated Cybersecurity Policy for U.S. Professional Sports Leagues

As is apparent from the foregoing discussion, protecting trade secrets, fans, and players from the array of cybersecurity threats faced by U.S. professional sports leagues is a multi-faceted and dynamic problem. As such, this Article asserts that leagues should take the lead in improving their cybersecurity and data privacy standards for franchises and fans. To date, rather than deal with cybersecurity issues in a proactive way, the four major U.S. sports leagues have unfortunately instead largely elected to adopt a reactive posture, choosing to deal with cyber breaches on an *ad hoc* basis once they are discovered. For instance, rather than establishing league-wide cybersecurity best practices for their teams, leagues generally defer to their franchises to protect themselves from cyber intrusions.²³² Cases like the aforementioned hacking of MLB’s Houston Astros by the St. Louis Cardinals, however, highlight the need for more comprehensive, league-wide policies.²³³

In all, we argue that five steps are warranted to help better secure the professional sports leagues surveyed against the array of cyber threats they face. First, in an effort to put the principles of polycentric governance into practice, we argue that governance should happen at the level most appropriate to the envisioned harm. As such, any shared, league-wide systems necessitate league-wide policies that the franchise owners would help fashion in order to ensure that cybersecurity best practices are deployed to help manage in-stadium player tracking technology, injury-reporting databases, and gambling-detection

²³¹ *Id.*

²³² See Shaikin, *supra* note 5 (citing an unnamed MLB official who stated that MLB teams are responsible for addressing their own cybersecurity needs).

²³³ See *supra* notes 179–187 and accompanying text.

mechanisms. Such collaboration should be hastened by leveraging the new Sports ISAO discussed above.²³⁴ Moreover, this step echoes the third Ostrom design principle that good governance should take the form of defined user pools (e.g., professional sports franchises) practicing “[c]ollective choice arrangements” that ensure “that the resource users participate in setting . . . rules.”²³⁵

Second, although individual teams should continue to improve their own cybersecurity due diligence, best practices should be more easily shared through the Sports ISAO to ensure that the teams are implementing baseline cybersecurity standards such as the National Institute for Standards and Technology (NIST) Cybersecurity Framework.²³⁶ A working group relating to the European Union’s recent General Data Protection Regulation (GDPR) should also be established by the Sports ISAO to further this cause, and at the same time assist in the international expansion plans for U.S. professional sports leagues.²³⁷ The leagues could also go further and establish a joint Security Operations Center (SOC) similar to that created by the financial sector to help improve the cybersecurity standards of its constituents.²³⁸

Third, again building off of the Ostrom design principles discussed above relating to the importance of graduated sanctions,²³⁹ we recommend that league rules be formulated for data breaches with escalating penalties depending on the nature of the infraction, while also taking into consideration that a breach between two teams has ramifications for the entire league.²⁴⁰ These best

²³⁴ See *supra* notes 4, 64 and accompanying text.

²³⁵ BUCK, *supra* note 224, at 32.

²³⁶ See Shaikin, *supra* note 5 (reporting on the extent to which individual teams are responsible for their own cybersecurity). For an overview of the NIST Cybersecurity Framework, see NAT’L INST. OF STANDARDS AND TECH., FRAMEWORK FOR IMPROVING CRITICAL INFRASTRUCTURE CYBERSECURITY (2018), <https://nvlpubs.nist.gov/nistpubs/CSWP/NIST.CSWP.04162018.pdf> [<https://perma.cc/L3YV-MREJ>].

²³⁷ See *infra* note 267 and accompanying text (discussing the leagues’ varied plans to expand their operations to Europe).

²³⁸ See FAQ, FS-ISAC, <https://www.fsisc.com/faq> [<https://perma.cc/4UH6-VBH9>]. The financial services sector, however, is incentivized to take this problem seriously given that their members are on the hook for resulting losses; see, e.g., Sarah O’Brien, *More Financial Advisors Are Upping Their Cybersecurity*, *Insurance Ante*, CNBC (Apr. 25, 2017), <https://www.cnbc.com/2017/04/25/more-financial-advisors-are-upping-their-cybersecurity-insurance-ante.html> [<https://perma.cc/C7D4-UQY6?type=image>].

²³⁹ See BUCK, *supra* note 224, at 32.

²⁴⁰ For instance, although the punishment that MLB handed down in the Astros-Cardinals case appeared to assume that Houston was the sole victim of the breach, the Cardinals’ unauthorized intrusion allowed the club to gain additional knowledge that gave it a potential informational advantage over everyone in the league, arguably warranting more severe punishment than the league doled out. Cf. Tom Verducci, *Lax Hack Smack: MLB, Rob Manfred Let Cardinals Off Easy in Hacking Scandal*, *SPORTS ILLUSTRATED* (Jan. 30, 2017), <https://www.si.com/mlb/2017/01/30/cardinals-astros-hacking-chris-correa> [<https://perma.cc/HQ89-FQYY>] (arguing that the punishment the Cardinals received as a result of the hacking incident was light considering the circumstances). Indeed, the Cardinals’ breach

practices should incorporate, to the extent possible, GDPR standards discussed further below, such as establishing a 72-hour data breach notification window along with the right of data portability and heightened consent requirements, especially for sensitive data. We note that, in some cases, the formulation of new, sufficiently punitive league rules may require amending the respective league's constitution to provide for higher maximum fine amounts to help incentivize the uptake of these best practices.²⁴¹

Fourth, it is imperative for the leagues to work to protect the biometric data they collect via tracking devices, and to help ensure that players are protecting their own data responsibly. To accomplish these feats, the leagues should establish mandatory (and regularly audited) cybersecurity hygiene programs that include penetration testing and anti-phishing initiatives. Further, the leagues should proactively implement cybersecurity best practices related to IoT security, such as requiring NIST Cybersecurity Framework compliance from vendors and suppliers.²⁴² To this end, the leagues could take the affirmative step of launching a bug-bounty competition of the kind that many private and public-sector organizations—including Microsoft and the Department of Homeland Security—have already announced, to help shore up vulnerabilities.²⁴³

Fifth and finally, we recommend that leagues consider moving to an independent arbitration system for cybersecurity-related disputes, rather than relying on the league commissioner to serve as arbitrator in these cases.²⁴⁴ Indeed, arbitration-by-commissioner has previously resulted in allegations of bias, with many fans believing that a particular league's commissioner was predisposed to rule in favor of a team with a particularly influential owner, because these owners will, to a large extent, determine whether the league will ultimately elect to renew the commissioner's contract.²⁴⁵ This, again, implicates an

generated a variety of potential advantages for the team over the rest of the league, including insight into the trade discussions Houston had with a variety of other franchises around the league—potentially allowing St. Louis to exploit this knowledge in its own trade discussions with other clubs—as well as access to double the number of scouting reports relating to potential prospects in the MLB Draft.

²⁴¹ See, e.g., *id.* (observing that the maximum allowable fine permitted under MLB's constitution is \$2 million).

²⁴² See, e.g., Scott J. Shackelford, *How to Fix an Internet of Broken Things*, CHRISTIAN SCI. MONITOR (Oct. 26, 2016), <https://www.csmonitor.com/World/Passcode/Passcode-Voices/2016/1026/Opinion-How-to-fix-an-internet-of-broken-things> [<https://perma.cc/6HJQ-YSMA>].

²⁴³ See, e.g., *Public Bug Bounty List*, BUGCROWD, <https://www.bugcrowd.com/bug-bounty-list/> [<https://perma.cc/BP38-8D9Q>] (listing opportunities for individuals to report bugs and vulnerabilities for compensation).

²⁴⁴ Cf. Theresa M. Mullineaux, Note, *The Latest NFL Fumble: Using Its Commissioner as the Sole Arbitrator*, 2016 J. DISP. RESOL. 229, 229 (arguing “[t]he [NFL] Commissioner's ability to make binding decisions in . . . disputes is diminished by a clear conflict of interest”).

²⁴⁵ See Don Van Natta Jr. & Seth Wickersham, *Spygate to Deflategate: Inside What Split the NFL and Patriots Apart*, ESPN (Sept. 8, 2015), https://www.espn.com/espn/otl/story/_/id/13533995/split-nfl-new-england-patriots-apart [<https://perma.cc/UH5F-BYHA>] (observing that “[t]o many owners

Ostrom design principle—low-cost, effective dispute resolution.²⁴⁶ We further recommend that the findings of these arbitral panels be made available throughout the leagues to help build precedent and fill in cybersecurity governance gaps that are still apparent in the existing frameworks.

It should be noted that, in some cases, these issues may require leagues to reach agreement with their applicable players' union. As discussed above, several existing cyber threats—including the use of biometric-tracking devices and the storage of electronic medical records—directly implicate data relating to, and collected from, players. Consequently, any new league policies in these areas will likely have to be subjected to union approval via the collective-bargaining process.²⁴⁷ Indeed, both MLB's and the NBA's most recent collective bargaining agreements specifically discuss the permissible use of biometric-tracking devices on the playing field.²⁴⁸ The players' amenability to reach agreement with the leagues on these matters is uncertain, as in some cases players are independently seeking to monetize their biometric data themselves.²⁴⁹ Nevertheless, given the potential ramifications of a cyber breach in this area, leagues should make a concerted effort to reach an agreement with the players and their unions on these matters.

C. A Potential Government Solution for U.S. Professional Sports Leagues' Cybersecurity Risks

Should owners fail to develop sufficient cybersecurity policies independently, it is possible that government may eventually consider stepping in to fill the void. This could take the form of the federal government taking steps to protect teams' trade secrets, along with their stadiums and practice facilities, as was described in Part I. Such steps are politically difficult, given the long history of Congressional resistance to 'comprehensive' cybersecurity reform

and coaches, the expediency of the NFL's investigation" into the aforementioned Spygate scandal "seemed dubious," given Commissioner Roger Goodell's relationship with New England Patriots' owner Robert Kraft).

²⁴⁶ See BUCK, *supra* note 224, at 32.

²⁴⁷ See Jay Moyer, *The Law of Sports*, 79 COLUM. L. REV. 1590, 1593 (1979) (reviewing JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* (1979)) (observing that "virtually all player-related practices within a sports league, including the so-called player restraints, are terms and conditions of employment and are therefore mandatory subjects of collective bargaining").

²⁴⁸ See Darren Rovell, *MLB Approves Device to Measure Biometrics of Players*, ESPN (Mar. 6, 2017), https://www.espn.com/mlb/story/_/id/18835843/mlb-approves-field-biometric-monitoring-device [<https://perma.cc/M7LU-Z6R6>] (noting that MLB "approved the use of a continuous biometric monitor that can be worn by players during games" and that "[t]he NBA's new collective bargaining agreement allows players to wear biometric monitors, but only during practice").

²⁴⁹ See Rhett Jones, *NFL Players Strike a Deal to Sell Their Biometric Data*, GIZMODO (Apr. 24, 2017), <https://gizmodo.com/nfl-players-strike-a-deal-to-sell-their-biometric-data-1794616994> [<https://perma.cc/P2A8-UZWT>] (reporting that fitness wearables manufacturer Whoop "struck a deal with the NFL Players Association . . . that will make it possible for players to sell their health data").

efforts—as the history of the Cybersecurity Act of 2012 can attest²⁵⁰—as well as the federal government’s general reluctance to regulate the sports industry.²⁵¹ Nevertheless, a high-profile incident—such as a cyberattack on a major sporting event such as the Super Bowl or either the Olympics or World Cup, both of which the United States will host in the 2020s²⁵²—could change the political calculus.²⁵³

Perhaps more likely, then, is that teams may inadvertently be swept up by other, more general cybersecurity regulations enacted at the federal or state levels. For example, as with its groundbreaking 2002 privacy law that ushered in the first data-breach notification standards—an idea that has since been copied by the other forty-nine states—California’s 2018 Consumer Privacy Act is helping to set a new standard for U.S. privacy protections.²⁵⁴ Given the number of teams operating in the state, California’s new law thus has potentially significant ramifications for the U.S. professional sports industry. Although it does not go quite as far as the EU’s GDPR, it does include provisions that allow consumers to sue over data breaches, and decide when, and how, their data is being gathered and used by companies like Facebook and Google.²⁵⁵ Although there remains debate about the scope and effectiveness of this intervention,²⁵⁶ the law may well help shape the cybersecurity practices of professional sports

²⁵⁰ See generally Scott J. Shackelford, *In Search of Cyber Peace: A Response to the Cybersecurity Act of 2012*, 64 STAN. L. REV. ONLINE 106 (2012), <http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2012/03/64-SLRO-106.pdf> [<https://perma.cc/7HR4-BFF5>].

²⁵¹ Cf. Grow, *supra* note 221, at 580–81 (observing that antitrust laws regulate U.S. professional sports leagues but do so ineffectively).

²⁵² See Roger Gonzalez, *World Cup 2026: What Are the Host Cities in USA, Mexico and Canada Going to Be?*, CBS SPORTS (June 14, 2018), <https://www.cbssports.com/soccer/world-cup/news/world-cup-2026-what-are-the-host-cities-in-usa-mexico-and-canada-going-to-be/> [<https://perma.cc/X62F-T763>] (observing that the United States will host soccer’s World Cup in 2026); David Wharton, *L.A. Officially Awarded 2028 Olympic Games*, L.A. TIMES (Sept. 13, 2017), <http://www.latimes.com/sports/olympics/la-sp-la-olympics-approved-20170913-story.html> [<https://perma.cc/4KQS-86S4>] (reporting that Los Angeles will host the 2028 Summer Olympics).

²⁵³ For more on how other nations have addressed this challenge, see Scott J. Shackelford, *Rio 2016—A Gold Medal for Cybersecurity?*, HUFFPOST (Aug. 12, 2016), https://www.huffpost.com/entry/rio-2016-a-gold-medal-for_b_11459586 [<https://perma.cc/676G-9465>].

²⁵⁴ See Allen St. John, *How California’s New Privacy Law Could Affect You (Even if You Don’t Live There)*, CONSUMER REP. (June 29, 2018), <https://www.consumerreports.org/privacy/how-californias-new-privacy-law-could-affect-you/> [<https://perma.cc/SS75-QP5U>] (noting California’s “passage of a data breach notification law in 2002 led to similar legislation in all 50 states”).

²⁵⁵ See Ben Adler, *California Passes Strict Internet Privacy Law with Implications for the Country*, NPR (June 29, 2018), https://www.npr.org/2018/06/29/624336039/california-passes-strict-internet-privacy-law-with-implications-for-the-country?utm_source=facebook.com&utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_content=20180629 [<https://perma.cc/Z4EX-P7SA>].

²⁵⁶ See Jeff Kosseff, *Ten Reasons Why California’s New Data Protection Law Is Unworkable, Burdensome, and Possibly Unconstitutional (Guest Blog Post)*, TECH. & MARKETING L. BLOG (July 9, 2018), <https://blog.ericgoldman.org/archives/2018/07/ten-reasons-why-californias-new-data-protection-law-is-unworkable-burdensome-and-possibly-unconstitutional-guest-blog-post.htm> [<https://perma.cc/FAT7-H8BU>].

leagues in California, such as by requiring added efforts to protect the privacy rights of players and fans. An accounting of state-level cybersecurity laws as of July 2018 is included in Table 1.

Table 1: Status of State-Level Cybersecurity Laws²⁵⁷

Type of State Law	Coverage	Description
Hacking, Unauthorized Access, Computer Trespass, Viruses, Malware	All 50 States	All fifty states have enacted laws that generally prohibit actions that interfere with computers, systems, programs, or networks.
Data Breach Notification Laws	All 50 States	
Anti-Phishing Laws	23 States: Alabama, Arkansas, Arizona, California, Connecticut, Florida, Georgia, Illinois, Kentucky, Louisiana, Michigan, Minnesota, Montana, New Mexico, New York, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Virginia and Washington, as well as Guam	A total of twenty-three states and Guam have enacted laws targeting phishing schemes. Many other states have laws concerning deceptive practices or identity theft that may also apply to phishing crimes.

²⁵⁷ These data have been compiled from *Computer Crime Statutes*, NAT'L CONF. OF ST. LEGISLATURES (June 14, 2018), <http://www.ncsl.org/research/telecommunications-and-information-technology/computer-hacking-and-unauthorized-access-laws.aspx#Hacking> [<https://perma.cc/MKJ7-FNU2>]. It should also be noted that, in addition to these laws, twelve states maintain "data security laws," eight of which include a requirement for firms to implement "reasonable" cybersecurity practices. *See id.* One example is Indiana, where "[a] data base owner shall implement and maintain reasonable procedures, including taking any appropriate corrective action, to protect and safeguard from unlawful use or disclosure any personal information of Indiana residents collected or maintained by the data base owner." IND. CODE 24-4.9-3-3.5(c) (2018). For more on this topic, see JEFF KOSSEFF, CYBERSECURITY LAW 42–43 (2017). At least thirty-one states also boast data disposal laws that regulate when and how data is destroyed, including the use of "reasonable measures" to ensure that these data are "unreadable or undecipherable." *Id.* at 49. Special thanks to Tristen Waite for her help in compiling these data.

Anti-Denial of Service/DDoS Laws	25 States: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Louisiana, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Virginia, Washington, West Virginia, and Wyoming	
Anti-Spyware Laws	20 States: Alaska, Arizona, Arkansas, California, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Nevada, New Hampshire, New York, Pennsylvania, Rhode Island, Texas, Utah, Virginia, Washington, and Wyoming, as well as Guam, and Puerto Rico	Twenty states and two U.S. territories have laws expressly prohibiting use of spyware. Other state laws against deceptive practices, identity theft, or computer crimes in general may be applicable to crimes involving spyware.
Anti-Ransomware Laws/Computer Extortion Laws	5 States: California, Connecticut, Michigan, Texas, and Wyoming	Currently five states have statutes that address ransomware, or computer extortion; however, other state laws prohibiting malware and computer trespass may be used to prosecute these crimes as well.

Two regulatory trends are also relevant to discuss with regards to the cybersecurity of U.S. professional sports leagues: active defense and international cybersecurity standards. First is the current debate—referenced above²⁵⁸—to allow organizations to engage in active defense measures, up to and including

²⁵⁸ See *supra* notes 45–54 and accompanying text.

'hacking back,' if their intellectual property has been compromised. Although this idea has long been a relatively fringe concept, it is getting more mainstream attention, even rising to the level of being included in the 2016 Republican National Committee (RNC) platform.²⁵⁹ As noted above, according to the Department of Justice, this practice is "likely illegal" under the CFAA at the federal level,²⁶⁰ as well as at the state level as illustrated in Table 1. Nevertheless, there are efforts currently at the federal and state levels to change the status quo. Specifically, the Active Cyber Defense Certainty (ACDC) Act would permit organizations to operate beyond their network perimeter, including the potential to conduct surveillance on entities "who are thought to have done hacking in the past or who, according to a tip or some other intelligence, are planning an attack."²⁶¹ The bill also clarifies "the type of tools and techniques that defenders can use that exceed the boundaries of their own computer network."²⁶² In particular, it specifies that people facing criminal charges under the CFAA for illegal hacking can defend themselves by claiming that their activities were "active cyber defense measures."²⁶³ If passed, this could permit teams to "hack back" at opposing teams or other entities that compromise their networks. Similarly, Georgia's State Bill 315, which passed in May 2018, permitted "active defense measures that are designed to prevent or detect unauthorized computer access" until Governor Nathan Deal vetoed the bill due to its "national security implications and other potential ramifications."²⁶⁴

Such measures could have particular salience in the U.S. professional sports industry. Because executives often frequently move between franchises in a particular league,²⁶⁵ teams may worry that their former employees will wrongly take their former club's intellectual property to their new employer. This was the stated motivation behind the former St. Louis Cardinals' executive's hacking into the Houston Astros' computer system in 2013 and 2014, for

²⁵⁹ See Paul Szoldra, *This One Sentence in the GOP Platform Has Cybersecurity Experts Freaking Out*, BUS. INSIDER (July 21, 2016), http://www.businessinsider.com/gop-platform-hacking-cyber-2016-7?pundits_only=0&get_all_comments=1&no_reply_filter=1 [<https://perma.cc/PQ5C-5JFH>].

²⁶⁰ U.S. DEP'T OF JUSTICE, *supra* note 46, at 12.

²⁶¹ Schmidle, *supra* note 50.

²⁶² Josephine Wolff, *Attack of the Hack Back*, SLATE (Oct. 17, 2017), http://www.slate.com/articles/technology/future_tense/2017/10/hacking_back_the_worst_idea_in_cybersecurity_rises_again.html [<https://perma.cc/S6F9-ZRED>].

²⁶³ *Id.*

²⁶⁴ Tara Seals, *Georgia Governor Vetoes Controversial Hack-Back Bill*, THREATPOST (May 9, 2018), <https://threatpost.com/georgia-governor-vetoes-controversial-hack-back-bill/131822/> [<https://perma.cc/25AW-2DCT>].

²⁶⁵ Cf. Grow & Grow, *supra* note 61, at 1610 (observing that due to the fact that "the potential universe of qualified applicants for many of the vacancies that a sports team may need to fill can often be quite small" teams depend on outside hiring to find qualified "coaches, scouts, or front office personnel").

instance.²⁶⁶ Should such active defense measures be legalized at the state or federal level, sports teams may seek to utilize these protections in order to defend their intellectual property from perceived infringement. This possibility further highlights the need for leagues to adopt proactive measures regulating their teams in this regard.

Second, as U.S. professional sports leagues look to expand their operations abroad,²⁶⁷ they should be cognizant of new regulatory requirements, particularly in the EU. Indeed, these laws have already been called a “game changer” for European sports leagues.²⁶⁸ Generally, GDPR is an expansive regulatory regime with a wide array of requirements on covered firms, ranging from ensuring data portability and consent to mandating that firms disclose a data breach within seventy-two hours of becoming aware of the incident and conduct a post mortem to ensure that it will not recur.²⁶⁹ GDPR is particularly relevant to professional sports leagues due to its provisions regarding data portability. Under GDPR, players, staff, fans, and volunteers may now be allowed to request their data, and have it deleted, while franchises may have to transfer proprietary data regarding their former players to their new team following a trade.²⁷⁰ Although a full accounting of the potential implications of GDPR for the U.S. professional sports industry is beyond the scope of this article, the bottom line is that U.S.-based leagues considering expansion oppor-

²⁶⁶ See Chris Correa Still Alleges Astros First Stole Information from Cardinals, ESPN (Jan. 31, 2017), https://www.espn.com/mlb/story/_/id/18592311/chris-correa-maintains-allegations-houston-astros-first-stole-information-st-louis-cardinals [<https://perma.cc/SM2S-2DQV>] (reporting that Christopher Correa claimed that “the Astros were the team that first stole information,” with Correa having released a statement asserting “[o]n December 21, 2011, a Houston Astros employee accessed proprietary data on a St. Louis Cardinals server” and that “[l]ater, I would learn—through unlawful methods—that Cardinals’ data were used extensively from 2012 through 2014”).

²⁶⁷ The NFL, for instance, has been staging regular-season games in London for years, with an eye towards establishing a full-time franchise in the city as soon as 2022. See Albert Breer, *Game Plan: NFL Believes London Is Ready for Team; 2022 Target is Doable*, SPORTS ILLUSTRATED (Sept. 21, 2017), <https://www.si.com/nfl/2017/09/21/nfl-london-team-international-series-europe-football> [<https://perma.cc/2AXB-YZYZ>] (noting that the NFL’s International Series began in 2007, with the ultimate goal of having “a team in London at the International Series’ 15-year mark”). Likewise, MLB held a series of games between the Boston Red Sox and New York Yankees in London in 2019, while the NBA and NHL teams have held games in Europe for years. See Matthew Engel, *London’s MLB Crowd Offers Baseball a New Land of Opportunity*, THE GUARDIAN (July 1, 2019), <https://www.theguardian.com/sport/blog/2019/jul/01/london-mlb-red-sox-yankees> [<https://perma.cc/BYR6-LHCJ>] (discussing the two game series between the Red Sox and Yankees); *History of the NBA Global Games*, NAT’L BASKETBALL ASS’N, <https://www.nba.com/global/games2013/all-time-international-game-list.html> [<https://perma.cc/E794-H9WB>]; *NHL Overseas History*, NAT’L HOCKEY LEAGUE (Nov. 2, 2018), <https://www.nhl.com/news/history-of-international-nhl-games/c-559166> [<https://perma.cc/K2AB-ZN46>].

²⁶⁸ Trev Keane, *New Data Regulations Will Be a Game-Changer for Sport*, INDEPENDENT (Mar. 25, 2018), <https://www.independent.ie/sport/new-data-regulations-will-be-a-gamechanger-for-sport-36741211.html> [<https://perma.cc/5C4L-BC2T>].

²⁶⁹ See, e.g., *Top Ten Operational Impacts of the GDPR*, INT’L ASS’N PRIVACY PROF., <https://iapp.org/resources/article/top-10-operational-impacts-of-the-gdpr/> [<https://perma.cc/9L26-S52M>].

²⁷⁰ See Keane, *supra* note 268.

tunities to Europe need to put into place GDPR security and privacy requirements like many U.S. firms are already doing, lest they run the risk of running afoul of GDPR penalties, which can range up to four percent of an organization's total global revenue.²⁷¹

CONCLUSION

There is a long history of U.S. professional sports leagues rallying to ensure the integrity of their respective games from threats as diverse as illegal gambling to doping. So far, though, as this Article has shown, these same leagues do not appear to be doing enough to protect their franchises, players, and fans from the array of cyber threats threatening the integrity of their games. Moving forward, a polycentric approach that includes franchise owners, players unions, and federal and state-level policymakers is essential to hasten the uptake of baseline cybersecurity standards and to eventually get ahead of the curve by taking steps such as implementing GDPR requirements globally. These measures are essential to protect the sports and players we love from abuses, both online and offline, a topic that that is now more important and more timely than ever as the Internet of Everything expands.

²⁷¹ See Michelle Drolet, *GDPR Fines: How Much Will Non-Compliance Cost You?*, CSO (Oct. 23, 2017), <https://www.csoonline.com/article/3234685/data-protection/gdpr-fines-how-much-will-non-compliance-cost-you.html> [<https://perma.cc/7GNS-GWX3>].

