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**COLLECTION AND OWNERSHIP OF
MINOR LEAGUE ATHLETE ACTIVITY BIOMETRIC DATA BY
MAJOR LEAGUE BASEBALL FRANCHISES**

*Nicholas Zych**

INTRODUCTION

The Front Office of a Major League Baseball (“MLB”) club is tasked with building a strong team to put on the field. More wins equate to more fans; more fans equate to greater profits. The most valuable asset to an MLB club is young, “controllable” talent.¹ Young players with major league caliber tools allow maximum flexibility on an MLB roster.² Generally, these players are assigned to Minor League Baseball (“MiLB”) until they are ready for MLB competition. In most cases, these players need development for promotion.³ In other cases, the challenge is not performance as much as it is intra-organizational competition.⁴ In the former case, any information helpful in taking the next step could mean the difference between the big leagues and getting released. The latter case is, in large part, about staying healthy—as sustainable production is paramount to eventually getting an MLB opportunity. But how do you know when an MiLB player is ready for the MLB and its grueling schedule?

For MLB decision-makers, this is the \$138 million question.⁵ When it comes to prospective MLB players in the MiLB (“Prospects”), data and information create a valuable advantage. Since baseball analytics and sabermetrics transformed player analysis in the early 2000’s, MLB front offices have implemented vast data-gathering systems.⁶ Team success may depend on how well, and how efficiently, data can be quantified and turned into useful information about a club’s organizational depth. As

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¹ “Controllable” refers to “club control” over an MLB player’s contract rights. Each player typically has three (3) “option years” and three (3) years of arbitration eligibility before becoming an Unrestricted Free Agent. During these six (6) years, the player’s contract rights are under club control.

² MLB rosters are comprised of forty (40) players: twenty-five (25) being active MLB players. (For a short review of the MLB Rules see *MLB Miscellany: Rules, regulations and statistics*, MLB.COM, http://mlb.mlb.com/mlb/official_info/about_mlb/rules_regulations.jsp. (last visited Apr. 9, 2018))

³ Only twenty-one (21) players have skipped Minor League Baseball since the Amateur Draft began. See *Straight to the Majors*, MLB.com, <http://mlb.mlb.com/mlb/history/draft/index.jsp?feature=straight> (last visited Apr. 10, 2018)

⁴ Example: Player 1 plays Right Field in the MLB and has been successful; Player 2 also plays Right Field, but is in AAA. Despite success, he will need to wait for an opportunity; whether it is with his rights-holding club or another via trade.

⁵ Dayn Perry, *Here’s every MLB team’s Opening Day payroll for 2017*, CBS SPORTS (Apr. 3, 2017), <https://www.cbssports.com/mlb/news/heres-every-mlb-teams-opening-day-payroll-for-2017/> (The average MLB Team Payroll on Opening Day 2017 was \$137,746,636 (High: \$242,065,828 (LAD); Low: \$63,061,300 (MIL)).

⁶ See Rich Miller, *The Lessons of Moneyball for Big Data Analysis*, DATACENTER KNOWLEDGE (Sep. 23, 2011), <http://www.datacenterknowledge.com/archives/2011/09/23/the-lessons-of-moneyball-for-big-data-analysis> (*providing an overview of data and analytics in baseball*).

the search for the next analytical advantage progresses, teams have begun collecting the most granular data of all—biometric data drawn directly from athletes' bodies.⁷

Using wearable sensors (“Wearables”) to collect Athlete Activity Biometric Data (“AABD”)⁸ is a growing field and comes with legal concerns regarding to whom the data belongs. Wearables are part of the growing class of objects within the “Internet of Things” (or “IoT”). The IoT are objects embedded with computing devices, allowing them to send and receive data via the internet.⁹ The topic of AABD ownership rights has been a developing one since the collection of general biometric data began. These questions have encumbered other types of biometric data; from the use of human tissue for medical purposes,¹⁰ through scanning retinas and fingerprints at places of employment¹¹. Each instance led to legislation and has been subject to scrutiny. The next phase of this argument will touch Activity Biometric Data.¹² The collision course of the issue is apparent within all professional sports; particularly baseball. While some articles have addressed the issue as it related to athletes in general, this article highlights a specific class of athletes: Minor League Baseball players. While other potential claimants include the MLBPA and the companies whose proprietary technology collects the data, those claims are temporarily set aside to focus on the primary beneficiaries of the extracted data.

Generally, MiLB players are a group of professional players talented enough to have value, but presently short of the elite level necessary to earn an MLB opportunity. These players get paid *significantly* less than their MLB counterparts while committing equal parts of their lives to the sport and experiencing a more tedious lifestyle.¹³ MiLB players willingly make these sacrifices, believing it will pay off when they make the MLB. However, in baseball, players only have about a ten percent (10%) chance of accomplishing that goal.¹⁴

⁷ Eric Fisher, *Wearable tech wins over Major League Baseball*, NEW YORK BUSINESS JOURNAL (Mar. 17, 2017, 2:28 PM), <https://www.bizjournals.com/newyork/news/2017/03/17/wearable-tech-wins-over-major-league-baseball.html>.

⁸ AABD is the information harvested from Wearables worn by athletes; then gathered, uploaded, and stored through the Internet of Things (*see* note 9 below).

⁹ Jacob Morgan, *A Simple Explanation Of 'The Internet Of Things'*, FORBES (May 13, 2014, 12:05 AM), <https://www.forbes.com/sites/jacobmorgan/2014/05/13/simple-explanation-internet-things-that-anyone-can-understand/#3676b9071d09>.

¹⁰ *Moore v. Regents of University of California*, 51 Cal. 3d 120 (Cal. 1990).

¹¹ Biometric Information Privacy Act, 740 Ill. Comp. Stat. Ann. 14/1-99 (2008).

¹² Brian H. Lam, *Athletes and their Biometric Data – Who Owns It and How It Can Be Used*, THE NATIONAL LAW REVIEW (Dec. 19, 2017), <https://www.natlawreview.com/article/athletes-and-their-biometric-data-who-owns-it-and-how-it-can-be-used>

¹³ Ted Berg, *\$12,000 a year: A minor leaguer takes his fight for fair pay public*, FOR THE WIN (Jan. 31, 2017, 9:18 AM), <http://ftw.usatoday.com/2017/01/minor-league-baseball-pay-fair-labor-standards-act-minimum-wage-lawsuit-kyle-johnson>

¹⁴ Nathan Sorensen, *Minor league ballplayers' path to the bigs has major obstacles, so family is no small thing*, DESERT NEWS SPORTS (May 15, 2015, 4:25 PM), <https://www.deseretnews.com/article/865628804/Minor-league-ballplayers-path-to-the-bigs-has-major-obstacles-so-family-is-no-small-thing.html>

In addition to lower pay, MiLB players get no representation from the MLB Players' Association ("MLBPA")¹⁵ and are not governed by the Collective Bargaining Agreement ("CBA").¹⁶ This makes the MiLB a 'Wild West' of sorts; governed by few rules and leaving little-to-no negotiation power on the players' side. The Minor League Uniform Player Contract ("MiLB UPC")¹⁷ is a standard-form contract [used by every Club] and represents the only opportunity for players to live out their MLB dreams. The MLB is the proverbial "gate-keeper" to its own league and players happily sign on the dotted line for a chance to pass through.

As the developmental grounds for potential MLB players, collecting AABD from MiLB players is an opportunity to monitor development and recovery of prospects through more focused information.¹⁸ However, this will raise issues regarding the use and ownership of that data. This article will summarize potential uses of MiLB player AABD by organizations, the legal history and application of AABD, and argue why the rights-owning MLB parent team (or "Club") has a better claim to ownership of collected AABD from within their organization than the players the information is collected from. Following the body of the article, there will be league-level and legislative-level suggestions for addressing the issue of AABD ownership in regards to MiLB players.

[A]. HISTORY AND INFORMATION ABOUT AABD

Wearables attain quantifiable AABD through readings from sensors within the device.¹⁹ The sensors range from accelerometers and gyroscopes to GPS.²⁰ AABD is often stored to a private account or administrator account. Raw AABD is turned into

¹⁵ All MLB players are part of a labor union known as the MLB Players' Association. The MLBPA employs fierce advocates—typically, skilled lawyers—as liaisons to the league. The advocates work to get players the best rights and privileges possible, while also litigating disputes between the MLB—or a specific Club—and its players. Unionization, however, is a benefit reserved for MLB Players. For a detailed history of the MLBPA, see *History*, MLBPLAYERS.COM, http://www.mlbplayers.com/ViewArticle.dbml?ATCLID=211042995&DB_OEM_ID=34000, (last visited Apr. 9, 2018).

¹⁶ The MLB Collective Bargaining Agreement is negotiated by the Thirty (30) MLB Clubs and the MLBPA. It governs rights and conditions for employment as a MLB player. (For an abbreviated explanation see *Collective bargaining agreement*, BASEBALL REFERENCE, https://www.baseball-reference.com/bullpen/Collective_bargaining_agreement (last visited Apr. 10, 2018, 1:55 PM).

¹⁷ To view an example of the MiLB UPC, see <https://pennstatelaw.psu.edu/sites/default/files/milb%20std%20player%20K.pdf> (*this model of the MiLB UPC will be the reference point for this article*).

¹⁸ Jason F. Arnold & Robert M. Sade, *Wearable Technologies in Collegiate Sports: The Ethics of Collecting Biometric Data from Student-Athletes*, 17(1) *American Journal of Bioethics* 67-70 (2016) (see <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5634810/>)

¹⁹ For a simple explanation of Wearables, see Nathan Chandler, *How Wearable Technology Works*, HOWSTUFFWORKS, <https://electronics.howstuffworks.com/gadgets/high-tech-gadgets/computer-clothing1.htm> (last visited Apr. 9, 2018, 2:15 PM).

²⁰ Cashmere Lashkari, *Types of sensors in wearable fitness trackers*, NEWS-MEDICAL LIFE SCIENCES, <https://www.news-medical.net/health/Types-of-sensors-in-wearable-fitness-trackers.aspx> (last visited Apr. 9, 2018, 2:15 PM).

graphs or charts on a connected device for easy display and comprehension; then stored to a server for later use²¹. Wearables can share AABD with these accounts at a near-instantaneous rate, allowing analysis of incoming information to happen in real time.

Professional sports teams have traditionally used data to analyze players. However, the types of data collected and its application toward decisions have shifted over time. The MLB used the same statistics—such as batting average and earned run average²²—to determine value for over 100 years before sabermetrics revolutionized player analysis. With continued research, MLB clubs—as well as teams from other sports—have refined data analysis into a constantly-evolving science.²³ The AABD drawn from Wearables can show how athletes' bodies act during the data *input* stage of analytics. Theoretically, predicting the *output* result of specific *input* occurrences allows a team to make preemptive decisions regarding players rather than waiting for the *outputs* to expose trends over time. This method brings the most value, and concern, via its monitoring of health, physical capacity, and injuries. For MLB clubs, AABD could help solve one of the most expensive inefficiencies in sports; paying injured MLB players and their replacements.²⁴ To MiLB players, collection of AABD—and the potential of its use during the decision-making process for promotions and continued employment—represents another obstacle obstructing their path to the MLB.

Wearables are commonly connected to a phone or computer application for simplified feedback of collected AABD. The more popular Wearables tend to display basic health information such as steps, heart rate, and movement goals, to make feedback easily understood by the casual athlete. Some of the most recognizable—and least in-depth—Wearables, such as *Apple Watch* and *Fitbit*, are among the most popular and offer very simple feedback. The popularity of these Wearables is largely due to brand, price-point, and accessibility.

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

²¹ Francisco de Arriba-Pérez, Manuel Caeiro-Rodríguez, & Juan M. Santos-Gago, *Collection and Processing of Data from Wrist Wearable Devices in Heterogeneous and Multiple-User Scenarios*, NATIONAL CENTER FOR BIOTECHNOLOGY INFORMATION (Sep. 21, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5038811/>.

²² *Batting average: the number of hits credited to a player divided by his number of at-bats; earned run average: the number of earned runs allowed by a pitcher divided by the result of his number of innings divided by 9. (For a simple explanation of traditional stats compared to modern stats—and why statistics have evolved—see: Jacob Silverman, How Sabermetrics Works*, HOWSTUFFWORKS, <https://entertainment.howstuffworks.com/sabermetrics2.htm> (last visited Apr. 6, 2018, 5:42 PM).

²³ Leigh Steinberg, *CHANGING THE GAME: The Rise of Sports Analytics*, FORBES (Aug. 18, 2015, 3:08 PM), <https://www.forbes.com/sites/leighsteinberg/2015/08/18/changing-the-game-the-rise-of-sports-analytics/#41ec98f74c1f>.

²⁴ *By one estimation, MLB teams spent \$665 Million paying injured players and their replacements in 2013. (see Brian Kamenetzky, The Next Big Thing In Sports Data: Predicting (And Avoiding) Injuries*, FAST COMPANY (Aug. 25, 2018), <https://www.fastcompany.com/3034655/the-next-big-thing-in-sports-data-predicting-and-avoiding-injuries>

relatively small in the public market.²⁵ The *Whoop Strap* offers more complex sets of data that may not be necessary for a casual runner, but can be priceless information to a professional athlete and their rights-holding club. These Wearables gather information regarding body strain, recovery, and sleep analytics.²⁶ *Whoop Strap* is one of three Wearables approved for in-game use by the MLB.²⁷

Catapult differentiates itself with thoroughness. With current clientele throughout the National Basketball Association (“NBA”), National Hockey League (“NHL”), National Football League (“NFL”), National Collegiate Athletic Association (“NCAA”), and various international leagues²⁸, the Australian-based company recognizes its products as complete analytic systems rather than simple sensors.²⁹ *Catapult* sensors use GPS technology in addition to standard movement sensors and advanced algorithms—capturing up to 1000 data points per second—to build advanced predictive analytics out of in-game actions.³⁰ Stated simply, they can predict likely *output* events by reading real-time *input* events. For example, the Executive Chairman of *Catapult*, Adir Shiffman, claimed in a 2014 interview that *Catapult* can take real-time data to predict anything from oncoming injuries to the velocity of a ball thrown by the athlete from real-time data.³¹ To elaborate, Shiffman claimed *Catapult* can use AABD showing different stride lengths and rates to accurately predict when athletes are at high-risk for hamstring pulls.³²

Other AABD sensors have become extremely specified. Examples include the *Motus Baseball Sleeve* and *Zephyr Bioharness*; both commonly used in baseball. The *Motus Baseball Sleeve* and *Zephyr Bioharness* are the Wearables approved for in-game MLB use alongside *Whoop Strap*.³³ *Motus* is focused on arm injuries; specifically tracking factors connected to injuries to the Ulnar Collateral Ligament (“UCL”).³⁴ Surgical reconstruction of the UCL, otherwise known as “Tommy John Surgery,” has become

²⁵ See Brett Williams, *The Whoop is pro sports' favorite wearable. After training with it, I can see why.*, MASHABLE (Dec. 21, 2017), <https://mashable.com/2017/12/21/whoop-fitness-tracker-wearable-review/#HR0d932NEZqa>; see also Rainer Sabin, *Inside the technology giving Alabama a competitive edge*, AL.COM (Jul. 2, 2017, 6:03 AM), http://www.al.com/alabamafootball/index.ssf/2017/07/inside_the_technology_giving_a.html.

²⁶ *A Scientific Approach to Optimal Performance*, WHOOP, <http://whoop.com/science/> (Last visited Apr. 9, 2018).

²⁷ Billy Steele, *Major League Baseball approves another wearable for in-game use*, ENGADGET (Mar. 6, 2017), <https://www.engadget.com/2017/03/06/major-league-baseball-whoop-wearable-in-game-use/>

²⁸ CATAPULT, <http://www.catapultsports.com/clients/> (Last visited Apr. 9, 2018, 3:14 PM).

²⁹ *Id.*

³⁰ Joe Lemire, *Catapult Harnesses AI To Help Solve Baseball's Injury Problems*, SPORTTECHIE (July 19, 2017), <https://www.sporttechie.com/catapult-harnesses-ai-help-solve-baseballs-injury-problems/>.

³¹ *For video of the full interview, see Catapult is an athlete analytics powerhouse changing the game(s) of sports worldwide*, THIS WEEK IN STARTUPS (Aug. 22 2014), <https://www.youtube.com/watch?v=DZxe8BbzjWg>

³² *Id.* begin at 21 minutes; 5 seconds.

³³ *AP NewsBreak: MLB approves wearable technology*, USA TODAY (Apr. 5, 2016, 9:12 PM), <https://www.usatoday.com/story/sports/mlb/2016/04/05/ap-newsbreak-mlb-approves-wearable-technology/82660382/>.

³⁴ *How to Use the Motus Sleeve*, DRIVELINE BASEBALL (Aug. 12, 2017), <https://www.drivelinebaseball.com/2017/08/use-motus-sleeve/>

synonymous with high-velocity pitching; prompting intense interest in research for pre-emptive signals of the injury.³⁵ *Zephyr Biobarness* is a heart rate and breathing monitor used primarily as an overall health tracker.³⁶

MLB Clubs can collect multitudes of data from Wearables. While the application of AABD still needs development, potential solutions AABD offers would bring immense value to MLB decision-makers.

[B]. REGULATING COLLECTION OF AABD

Ownership of AABD is a complicated issue and requires supplemental facts for full analysis. Establishing an owner of AABD has implications on use of the data. In October, 2015, the MLBPA met with representatives from the NBA, NHL, NFL, and MLS Players Unions to discuss possible issues with the growing popularity of AABD at the major league levels of each major sport in the United States.³⁷ At the time, former MLBPA general counsel, Dave Prouty, highlighted his main concerns moving forward. His uncertainties revolved around player privacy, player rights, confidentiality, how information would be used, consent, and access to information.³⁸ Further, concerns about having AABD used against players in contract negotiations—or even sold and commercialized—have been voiced on the issue.³⁹ While these discussions were paramount to moving the discussion forward, the use of Wearables in games—or any other work for the team—would be considered a working condition, subject to collective bargaining among the MLBPA and the thirty MLB Clubs.⁴⁰ Therefore, parties may have different rights to AABD that are open to interpretation in collective bargaining periods.

The latest MLB CBA—effective from the beginning of the 2017 season through the conclusion of 2021—added guidelines for teams collecting data from Wearables on MLB players.⁴¹ Although MiLB players are not subject to the CBA, which only governs “terms and conditions of employment of all *Major League Baseball Players* for the duration of [the] Agreement,”⁴² the guidelines in place may provide insight into how the parties involved view the privacy issues posed by AABD collection. The

³⁵ Julien Assouline, *Velocity and the Likelihood of Tommy John Surgery*, FANGRAPHS Community Research (May 19, 2015), <https://www.fangraphs.com/community/velocity-and-the-likelihood-of-tommy-john-surgery/>.

³⁶ Travis Sawchik, *Plethora of new tools shows analytics' growth in MLB*, TRIB LIVE (Mar. 26, 2016, 5:48 PM), <http://triblive.com/sports/pirates/9952324-74/pirates-analytics-tools>

³⁷ Liz Mullen, *Unions meet to share information on use of sensors*, SPORTS BUSINESS JOURNAL (Nov. 2, 2015), <https://www.sportsbusinessdaily.com/Journal/Issues/2015/11/02/Labor-and-Agents/Sensors-unions.aspx>.

³⁸ Liz Mullen, *Sensor tech has attention of leagues, unions*, SPORTS BUSINESS JOURNAL (Nov. 2, 2015), <https://www.sportsbusinessdaily.com/Journal/Issues/2015/11/02/Labor-and-Agents/Sensors.aspx>

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See 2017-2021 BASIC AGREEMENT at 334 (Attachment 56), <http://www.mlbplayers.com/pdf9/5450407.pdf>.

⁴² *Id.* at 1 (emphasis added).

language of the MLB CBA policy governing collection of data from Wearables has close ties to the lone state statute governing biometric information gathering; Illinois' *Biometric Information Privacy Act* ("BIPA").⁴³

BIPA was enacted in 2008 and sat idle until first cited in a 2015 case.⁴⁴ BIPA seeks to serve "[t]he public welfare, security, and safety" by "regulating the collection, use, safeguarding, handling, storage, retention, and destruction of biometric identifiers and information."⁴⁵ While the MLBPA hopes to accomplish the same goals regarding the AABD of players they represent, the statutory definitions of "Biometric identifier" and "Biometric information" do not encompass AABD collected from Wearables.⁴⁶ "Attachment 56" of the 2017-2014 MLB CBA seems to redress this issue.⁴⁷ Regardless of whether the similarities were intentional, MLB policy mirrors BIPA in multiple ways. Below are a few side-by-side examples of these similarities:

| BIPA ⁴⁸ | Attachment 56 ⁴⁹ |
|---|---|
| <p>(b) No private entity may collect, capture, purchase, receive through trade, or otherwise obtain a person's or a customer's biometric identifier or biometric information, unless it first:</p> <p>(1) <u>informs the subject or the subject's legally authorized representative in writing that a biometric identifier or biometric information is being collected or stored;</u></p> <p>(2) <u>informs the subject or the subject's legally authorized representative in writing of the specific purpose and length of term for which a biometric identifier or biometric information is being collected, stored, and used; and</u></p> | <p>3. Before a Player can <u>voluntarily agree</u> to use a wearable technology, the <u>Club must first provide the Player a written explanation of the technology being proposed, along with a list of the Club representatives who will have access to the information and data collected, generated, stored, and/or analyzed</u> (the "Wearable Data").</p> |

⁴³ Biometric Information Privacy Act, 740 Ill. Comp. Stat. Ann 14/1-99 (2008)(LexisNexis 2018).

⁴⁴ Norberg v. Shutterfly, Inc., 152 F. Supp. 3d 1103 (N.D. Ill. 2015).

⁴⁵ Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/ 5(g) (2008)(LexisNexis 2018).

⁴⁶ Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/10 (see definitions: "Biometric identifier" and "Biometric information") (2008)(LexisNexis 2018).

⁴⁷ See 2017-2021 BASIC AGREEMENT at 334 (Attachment 56), <http://www.mlbplayers.com/pdf9/5450407.pdf>.

⁴⁸ Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/15 (2008)(LexisNexis 2018).

⁴⁹ See 2017-2021 BASIC AGREEMENT at 334 (Attachment 56), <http://www.mlbplayers.com/pdf9/5450407.pdf>.

| | |
|--|---|
| <p><u>(3) receives a written release executed by the subject of the biometric identifier or biometric information or the subject's legally authorized representative.</u></p> | |
| <p><u>(c) No private entity in possession of a biometric identifier or biometric information may sell, lease, trade, or otherwise profit from a person's or a customer's biometric identifier or biometric information.</u></p> | <p><u>5. Any commercial use or exploitation of such information or data by a Club, Major League Baseball, or any Major League Baseball-related entity or other third party is strictly prohibited.</u></p> |
| <p><u>(e) A private entity in possession of a biometric identifier or biometric information shall:</u></p> <p><u>(2) store, transmit, and protect from disclosure all biometric identifiers and biometric information in a manner that is the same as or more protective than the manner in which the private entity stores, transmits, and protects other confidential and sensitive information.</u></p> | <p><u>4. Any and all Wearable Data shall be treated as highly confidential at all times, including after the expiration, suspension or termination of this Agreement, shall not become a part of the Player's medical record, and shall not be disclosed by a Club. . .</u></p> |

These similarities, in addition to the strict requirement for consent, do not directly govern AABD collection from MiLB players. They do, however, expose a critical implication about how parties to the CBA view the collection of biometric data. Looking at the side-by-side language suggests an assumption that AABD should be afforded the same protections given to Biometric information through BIPA, regardless of the direct applicability of the statute.

Other substantial regulations associated with AABD are “medical data” protections under the *Health Insurance Portability and Accountability Act* (“HIPAA”)⁵⁰. HIPAA is a widely known and heavily exhausted topic in business and labor law.⁵¹

⁵⁰ Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, §3101, 110 Stat. 1936 (1996).

⁵¹ For an outline of HIPAA and how Wearables in the workplace fit into its regulations, see Elizabeth A. Brown, Article, *The Fitbit Fault Line: Two Proposals to Protect Health and Fitness Data at Work*, 16(1) Yale J. Health Pol'y L. & Ethics 1, 1-49 (2016).

Generally, HIPAA protects “health insurance coverage for workers and their families when they change or lose their jobs and to protect health data integrity, confidentiality, and availability.”⁵² Given the extensive legal analysis of HIPAA, and the recognition that integrity and confidentiality of AABD is of paramount importance to all parties of the MLB CBA, this article assumes all statutory requirements of HIPAA are met in regards to MiLB players and AABD collected from them. The types of AABD, if any, collected from MiLB players qualify as medical data is an important issue. However, existing confidentiality procedures protecting information about each MLB Club’s prospects—and data collected from those prospects—are considered trade secrets.⁵³ This intersection of employee information and trade secrets is a unique trait among professional sports teams; as confidentiality is equally as important for an MLB Club’s business as it is for Players at any level. Due to these circumstances, this article will set aside arguments under HIPAA for MiLB Player-ownership of AABD.

[C]. OWNERSHIP OF MiLB PLAYER AABD

AABD collection in the MiLB represents a modern-age field breaking into a historically strong business structure protected by court decisions and legislative actions. Each MiLB player signs the MiLB UPC when they agree to be assigned to an MLB Club’s organizational affiliates. The MiLB UPC includes a viable “reserve clause.” The reserve clause can be found within the *Player’s Representations* section of the MiLB UPC and stipulates MiLB players cannot play baseball for teams other than the team they sign with—regardless of the league the team belongs to.⁵⁴ While this clause would be restrictive in other professions, the business of MLB has been exempt from federal antitrust law since the decision in *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*.⁵⁵ In *Federal Baseball*, the Supreme Court held that the defendants, the American and National Leagues of the MLB, did not violate antitrust law by effectively ending a competing professional baseball league.⁵⁶ The decision was based on the principal that baseball exhibitions were state affairs rather than federally regulated interstate commerce.⁵⁷

The holding from *Federal Baseball* held firm until the legislature addressed the issue following *Flood v. Kuhn*.⁵⁸ The plaintiff in *Flood*, Curt Flood, played in the MLB while the MLB Uniform Player Contract (“MLB UPC”) included its own reserve clause.⁵⁹ Flood was traded by the St. Louis Cardinals to the Philadelphia Phillies against his

⁵² *What is HIPAA?*, AMERICAN SOCIETY OF ANESTHESIOLOGISTS, <https://www.healthmedlink.com/sitex/hssbilling/hipaa.htm>

⁵³ Eric Ostroff, *Major League Trade-Secrets Theft*, PROTECTING TRADE SECRETS (June 16, 2015), <https://protectingtradesecrets.com/2015/06/16/major-league-trade-secrets-theft/>.

⁵⁴ *Minor League Uniform Player Contract*, at sec. XV, <https://pennstatelaw.psu.edu/sites/default/files/milb%20std%20player%20K.pdf>.

⁵⁵ *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922).

⁵⁶ *Id.*

⁵⁷ *Id.* at 208-09.

⁵⁸ *Flood v. Kuhn*, 407 U.S. 258 (1972).

⁵⁹ *Id.* at 261-62.

wishes.⁶⁰ The reserve clause restricted him from playing for any team other than that which held his player rights.⁶¹ Flood's options were to report to the Phillies or end his career; he chose the latter.⁶² Three years after the court upheld the validity of the MLB reserve clause in *Flood*, the MLB allowed its first free agents and the legislature was eventually pressured into action.⁶³

In 1998, Congress passed the *Curt Flood Act* ("the Act").⁶⁴ The Act codified the first application of antitrust law to the business of the MLB.⁶⁵ Congress remedied inequities facing MLB players and their ability to negotiate labor rights with their Clubs; paving the way for the rise of the MLBPA and the MLB CBA.⁶⁶ The Act, however, specifically excludes employment and antitrust claims by MiLB players.⁶⁷ This exclusion paves the way for the ownership arguments regarding AABD. As stated by Dave Prouty, former MLBPA general counsel, the collection and use of AABD from MLB players is subject to collective bargaining.⁶⁸ However, labor issues regarding MiLB players remain subject to the federal antitrust exemption set forth in *Federal Baseball*; a restriction statutorily recognized in the *Curt Flood Act*. As a result of this legislation, MiLB players continue to play without unionization; partied to individually signed MiLB UPCs.⁶⁹

Without a union to oversee claims against right-holding Clubs, active MiLB players must come face-to-face with the challenges of the reserve clause when finding representation. First, if a case is initiated, there will likely be a challenge of the MiLB anti-trust exemption. The exemption is a long-standing right supported by federal law and remains a pillar for the principal of *stare decisis*.⁷⁰ Second, the reserve clause gives the team an incredible amount of leverage over active MiLB players. With thousands of players dreaming of opportunities to prove themselves in the MiLB and Clubs holding a contractual right to restrict players from playing for any other affiliated

⁶⁰ Flood, 407 U.S. at 264-65.

⁶¹ *Id.*

⁶² *Id.*

⁶³ David Hill, *MLB History: Andy Messersmith, Dave McNally Become Free Agents*, FANSIDED, <https://calltothepen.com/2016/12/23/mlb-history-andy-messersmith-dave-mcnally-become-free-agents/> (Last visited Apr. 9, 2018, 4:00 PM).

⁶⁴ Curt Flood Act, 15 U.S.C. § 26b (1998)(LexisNexis 2018).

⁶⁵ *Id.* at (a).

⁶⁶ For an overview of Congressional action regarding the MLB, see Alan Barra, *How Curt Flood Changed Baseball and Killed His Career in the Process*, THE ATLANTIC (July 12, 2011), <https://www.theatlantic.com/entertainment/archive/2011/07/how-curt-flood-changed-baseball-and-killed-his-career-in-the-process/241783/>

⁶⁷ Curt Flood Act, 15 USCS § 26b (b)(2) (1998)(LexisNexis 2018).

⁶⁸ Liz Mullen, *Sensor tech has attention of leagues, unions*, *supra* note 38.

⁶⁹ For an in-depth overview of a potential MiLB Union and reasons it has not surfaced, see: Lily Rothman, *Emancipation of the Minors*, SLATE (Apr. 3, 2012, 11:08 AM), http://www.slate.com/articles/sports/sports_nut/2012/04/minor_league_union_thousands_of_pro_baseball_players_make_just_1_100_per_month_where_is_their_c_sar_ch_vez_.html.

⁷⁰ See *Miranda v. Selig*, 860 F.3d 1237 (9th Cir. 2017).

Club⁷¹, replaceable, active MiLB players must decide if the issue they want to fight is worth potentially giving up the life-long dream of playing in the MLB. Due to the risk of losing a spot in the MiLB, the likely claimants in these cases project to be retired players.⁷² Due to AABD's status as a growing field within the ranks of professional baseball, fights between MiLB players and their Clubs regarding AABD are likely years from legal process, but represent a challenging issue, nonetheless.

In the approaching battle over AABD ownership, rights-holding Clubs will have a strong upper hand over MiLB players. Claims against the Clubs are limited and will likely come on contractual, property, and antitrust grounds. Below, I address two strong arguments in favor of Clubs ownership. The first states that AABD is subject to the Copyright Act and is work made for hire. The second contends that Club use of AABD is akin to DNA use in medical research. The conclusion of this article will also include suggestions for league and statutory remedies to preempt oncoming issues from AABD litigation.

[C-1]. AABD is Copyrightable Work Made for Hire

Work made for hire is used in Intellectual Property law; serving as preemption for employee suits against employers for ownership of work product pursuant to the Copyright Act.⁷³ The Copyright Act certainly encompasses software and computer programs.⁷⁴ The software used to collect AABD would likely be licensed to Clubs via contracts with data companies. While Copyright claims could exist for the data companies providing proprietary collection software, the contracts—much like the reported agreement between WHOOP and MLB—would likely provide that the licensee Clubs have full and unhindered rights to AABD collected from their players.⁷⁵ The Copyright Act defines “work made for hire” in two sections; the first—and topically relevant—describes works “prepared by an employee within the scope of his or her employment.”⁷⁶ The second section of the Copyright Act pertains to collective works and is not applicable to this issue.⁷⁷ Following the Seventh Circuit holding in *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n* audiovisual works, including telecasts of Major League Baseball games fall within the scope of employment of

⁷¹ Ted Berg, *\$12,000 a year: A minor leaguer take his fight for fair pay public*, FOR THE WIN (Jan. 31, 2017, 9:18 AM), <http://ftw.usatoday.com/2017/01/minor-league-baseball-pay-fair-labor-standards-act-minimum-wage-lawsuit-kyle-johnson>.

⁷² *Id.*

⁷³ The Copyright Act, 17 U.S.C. § 101 (1976)(LexisNexis 2018)(*see* “work made for hire”).

⁷⁴ *See* United States v. Anderson, 741 F.3d 938 (9th Cir. 2013)(*holding a cab driver liable for restitution for copyright infringement after burning Adobe Systems, Inc. software to discs and selling them as his own*); *see also* FM Indus. v. Citicorp Credit Servs., 2008 U.S. Dist. LEXIS 3575 (N.D.Ill. 2008)(*citing to the Copyright Act in reference to infringement on software*).

⁷⁵ Darren Rovell, *MLB approves device to measure biometrics of players*, ESPN (Mar. 6, 2017), http://www.espn.com/mlb/story/_/id/18835843/mlb-approves-field-biometric-monitoring-device

⁷⁶ The Copyright Act, 17 U.S.C. § 101 (1976)(LexisNexis 2018)(*see* “work made for hire”).

⁷⁷ *Id.*

players parted to the MLB UPC.⁷⁸ While courts have not decided the issue specifically, this analysis would likely extend to MiLB players and claims against Club AABD ownership.

In *Balt. Orioles, Inc.*, the MLBPA and three then-current MLB players claimed copyright ownership of MLB players' names, pictures, and performances used in telecasts of MLB games.⁷⁹ The parties alleged infringement by Clubs for recording and broadcasting the games that contained player performances.⁸⁰ In its decision, the court recognized telecasts as copyrightable material, citing the Copyright Act's threshold requirements for copyrightable status: (1) the content must be fixed in a tangible medium of expression; (2) the work must be an original form of authorship; and (3) it must come within the subject matter of copyright.⁸¹ Since the telecasts of the games were videotaped simultaneously with the broadcast, the telecasts were considered fixed in tangible form.⁸² The players' primary contention was ownership of their own performances; arguing a performance itself should not be subject to Club copyright claims as they are not "fixed in a tangible medium of expression" pursuant to the Copyright Act.⁸³ The Seventh Circuit swiftly set this contention aside, as recording and broadcasting the player performances constituted fixing them into a tangible medium.⁸⁴ The court also held players' performances are Club copyrighted material, fall squarely within the scope of employment, and further, the MLB UPC and other labor agreements contain no agreements negating the assumption that the Clubs—as employers—own the rights to work made within the scope of that employment.⁸⁵

The Seventh Circuit's decision in *Balt. Orioles, Inc.* is a great outline for predicting the future outcome of litigation regarding AABD. The court's analysis of claims directly between players and their Clubs—without MLBPA intervention—closely mimics the arrangements of present and future claims by MiLB players. Software that collects AABD, the computer chips, and the computer programs involved⁸⁶, are subject to the Copyright Act⁸⁷ and are analogous to the technology recording telecasts in *Balt. Orioles, Inc.*⁸⁸ Like a recording, AABD from MiLB players is a fixation of their

⁷⁸ *Baltimore Orioles, Inc. v. Major League Baseball Players Association*, 805 F.2d 663 (7th Cir. 1986).

⁷⁹ *Id.* at 666

⁸⁰ *Id.*

⁸¹ *Balt. Orioles, Inc.*, 805 F.2d at 667 (citing 17 U.S.C. § 102; *see also* *NFL v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986) (*holding the interception of live broadcasts of NFL games constitutes copyright infringement*)).

⁸² *Balt. Orioles, Inc.*, 805 F.2d at 667.

⁸³ *Balt. Orioles, Inc.*, 805 F.2d 663, at 667 (7th Cir. 1986).

⁸⁴ *Id.*

⁸⁵ *Balt. Orioles, Inc.*, 805 F.2d 663, at 671-72 (7th Cir. 1986).

⁸⁶ The Copyright Act, 17 U.S.C. § 102 (1976) (LexisNexis 2018); *see also* *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3rd Cir. 1983) (*holding that programs are copyrightable and the owners may allow copies of the material pursuant to section 117 of The Copyright Act*).

⁸⁷ *Supra* note 73

⁸⁸ *Balt. Orioles, Inc.*, 805 F.2d at 668.

performances into a tangible medium; making it copyrightable material subject to traditional work made for hire principals.⁸⁹

Without the support of a players' union, MiLB players will have to independently bring action against the MLB regarding AABD ownership. Not only do they fall under the baseball anti-trust exemption and lack labor rights in general⁹⁰, but the holding in *Baltimore Orioles, Inc.* sets a clear standard for the ownership rights of simultaneous recordings of player performance.⁹¹ Although MiLB games do not have the viewership, revenue, or equal fan engagement, the MiLB UPC contains a nearly identical provision⁹² as the MLB UPC which the court held to restrict players' rights to recordings of their performances.⁹³ The provision references players' rights to pictures and likeness, which is relinquished to the club.⁹⁴ In regards to the holding in *Baltimore Orioles, Inc.*, AABD should not be classified as a picture of the player, but rather, a picture of the a player's performance. This picture is captured simultaneously with the live action; similar to cameras recording a live telecast.

The holding from *Baltimore Orioles, Inc.* has been disputed by cases and treatise analysis since the decision came down in 1986.⁹⁵ *Nimmer on Copyright*, a leading treatise on the subject, provides an in-depth analysis of the two copyright law conclusions from *Baltimore Orioles, Inc.*: the first holding recordings of live telecasts are copyrightable as audiovisual works, and the second stating that professional baseball games *per se* are copyrightable works.⁹⁶ *Nimmer* marks the second part of the decision as an erroneous application of copyright law due to its preemption of the players' right to publicity.⁹⁷ Advocates of player AABD ownership could attempt to use this analysis against teams. The most likely challenge would argue that *Nimmer's* denouncement of the copyrightability of baseball games *per se* preempts copyrightability of AABD drawn from those performances. If this were the case, AABD would not qualify as works made for hire⁹⁸. While the reasoning in *Nimmer* is sound with respect to general copyright law, the treatise disputes only the publicity portion of the decision in *Baltimore Orioles, Inc.*⁹⁹ In contrast, the first portion of the opinion—analyzing the copyrightability of telecasts—evades the renunciation by *Nimmer* due to telecasts' proper classification as “audiovisual work.”¹⁰⁰ The first portion of the *Nimmer* analysis

⁸⁹ The Copyright Act, 17 U.S.C. § 101(3)(2)(B).

⁹⁰ *Supra* note 67

⁹¹ *Balt. Orioles, Inc.*, 805 F.2d 663, at 668.

⁹² *Minor League Uniform Player Contract (XIV)*,

<https://pennstatelaw.psu.edu/sites/default/files/milb%20std%20player%20K.pdf>.

⁹³ *Balt. Orioles, Inc.*, 805 F.2d at 671.

⁹⁴ *Supra* note 89

⁹⁵ See 1 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 2.09 (LexisNexis 2018); see also *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005) (*where a later 7th Circuit court expresses doubts in the Balt. Orioles, Inc. decision*).

⁹⁶ 1 DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 2.09[F][2] (LexisNexis 2018).

⁹⁷ 1 NIMMER ON COPYRIGHT § 1.02[F][2] (LexisNexis 2018).

⁹⁸ *Supra* note 76

⁹⁹ NIMMER ON COPYRIGHT § 2.09 [F][2]

¹⁰⁰ *Id.*

is the only applicable part to the collection of AABD and copyright law favors club ownership of MiLB players' in-game data.¹⁰¹

Nimmer concludes that copyrightability of athletic events is found in the activities of cameramen and directors rather than the athletic event itself.¹⁰² This reasoning follows from *Baltimore Orioles, Inc.* affirming telecasts as audiovisual works; copyrightable under § 102 of the Copyright Act.¹⁰³ *Nimmer* takes a hard stance in approval of this portion of the decision; stating that the Seventh Circuit was “clearly correct” in granting copyright protection to the “motion picture” of a game.¹⁰⁴ Motion pictures are not the only type of copyrightable works falling under “audiovisual works” pursuant to section 102(a)(6) of the Copyright Act.¹⁰⁵ To the contrary, the Copyright Act defines “audiovisual works” as:

works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.¹⁰⁶

Nimmer summarizes three additional¹⁰⁷ elements required for a copyrightable audiovisual work: (1) it must consist of images; (2) those images must be “related” and presented in a “series”; and (3) the images must be capable of being shown by a machine or device.¹⁰⁸ In addition to these elements, *Nimmer* specifically points out that the Copyright Act does not require an audio portion for consideration as an audiovisual work.¹⁰⁹

AABD unquestionably fits within the requirements for audiovisual works and mirrors the copyrightability of recorded telecasts. While Wearables monitor and record movements of baseball players through various technologies, the devices send readable data and metrics to collectors via the IoT.¹¹⁰ When the data reaches its destination, it is displayed as pictures, graphs, charts, and many other discernible forms. For example, *Catapult* sensors send data from players in real time to administrators' phones, tablets, or laptops in (or similar to) the format shown below.¹¹¹

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Balt. Orioles Inc.*, 805 F.2d at 669 (citing *WGN Continental Broadcasting Co. v. United Video, Inc.*, 693 F.2d 622, 627-28 (7th Cir. 1982) (*teletext included in news broadcasts is a copyrightable audiovisual work*)).

¹⁰⁴ 1 NIMMER ON COPYRIGHT at § 2.09[F][2].

¹⁰⁵ 1 NIMMER ON COPYRIGHT at § 2.09 [A].

¹⁰⁶ The Copyright Act, 17 U.S.C. § 101.

¹⁰⁷ *Supra* note 77.

¹⁰⁸ 1 NIMMER ON COPYRIGHT at § 2.09[A].

¹⁰⁹ *Id.* (*see* NIMMER footnote 6).

¹¹⁰ *Supra* note 9.

¹¹¹ Photo Credit: CATAPULT, *OpenField*, <https://www.catapultsports.com/products/openfield>.



When presented in this form—or a similar interface—the output AABD from Wearable sensors (1) depicts the data as pictures, (2) depicts images related through mode of collection, source, and chronology, and (3) is shown by the connected device or machine. *Nimmer* uses a footnote to call attention to the “now known or later developed” language in the Copyright Act and its applicability to the “device” or “machine” used to show related pictures.¹¹²

As an audiovisual work, the analysis for ownership of collected AABD is analogous to that of telecasts in *Baltimore Orioles, Inc.*; the part of the decision expressly supported by *Nimmer*.¹¹³ Like a telecast, AABD is a recording of a live performance made simultaneously with the live action.¹¹⁴ While *Nimmer* explicitly states that player performances and baseball games *per se* are not copyrightable—renouncing the parts of *Baltimore Orioles, Inc.* holding otherwise—AABD creates a simultaneous recording of an individual player’s performance; taking a similar form as a recorded telecast at a more focused, granular level.¹¹⁵ The conclusion follows that when copyrightable computer programs (1) record the movements of a baseball player as they are happening, (2) transfer the AABD through the IoT, (3) create visual guides to the AABD and, (4) display these pictures via a connected device, the requirements for an audiovisual work have been met; making Wearables and the software they utilize akin to cameras and the cameramen controlling the angels of video capture.¹¹⁶

Categorizing AABD as an audiovisual work subject to copyright protection opens the door to the “works made for hire” principal.¹¹⁷ According to the Copyright Act, an employer owns a copyright in a work if (1) the work satisfies the generally applicable requirements for copyrightability set forth in 17 U.S.C. § 102(a), (2) the work was prepared by an employee, (3) the work was prepared within the scope of the employee's employment, and (4) the parties have not expressly agreed otherwise in a signed, written instrument.¹¹⁸ Considering AABD an audiovisual work satisfies the first prong. The players in *Baltimore Orioles, Inc.* never disputed their status as employees—

¹¹² 1 NIMMER ON COPYRIGHT at § 2.09 (see NIMMER footnote 5).

¹¹³ 1 NIMMER ON COPYRIGHT at § 2.09[F][2].

¹¹⁴ See *Baltimore Orioles, Inc.*, 805 F.2d at 668.

¹¹⁵ See 1 NIMMER ON COPYRIGHT at § 2.09 [F][2].

¹¹⁶ See generally 1 NIMMER ON COPYRIGHT at § 2.09

¹¹⁷ *Supra* note 73

¹¹⁸ *Balt. Orioles, Inc.*, 805 F.2d at 667.

satisfying the second prong—but argued the scope of their employment did not extend to performances before live and remote audiences.¹¹⁹

As a threshold matter, the players' dispute about the scope of employment is inapplicable in the context of AABD because it can be collected without a live or remote audience. The remainder of the dispute revolves around whether performance as a baseball player is within the scope of employment of a professional baseball player. While the latter conclusion is intuitive and an explicit requirement of the MiLB UPC, the court elected to extend the scope of employment to include playing in front of a live and remote audience.¹²⁰ This conclusion unquestionably satisfies the third prong of "works made for hire." The final prong is another home run for Club ownership, as the MiLB UPC generally grants all player rights to the Club and in no way could be construed to allow a player's copyright interest to overshadow his rights-holding Club's interest.¹²¹

Works made for hire give Clubs a strong argument in support of ownership due to strong ties to existing copyright laws. If courts choose to turn away from the holding in *Baltimore Orioles, Inc.* and the supportive reasoning of *Nimmer*, the next argument in their favor looks to cases regarding human tissue.

[C-2]. *Club Use of AABD is Analogous to Human Tissue in Medical Research*

After collection by Clubs, AABD will not be used in a vacuum to make important decisions. To elaborate, an MLB Club would not be inclined to collect AABD from an MiLB player, read it as its own independent information, and decide whether to release or promote that player based on the just-acquired information. Rather, AABD will be combined with other analytics in an effort to expose trends and predictive metrics for Clubs' current players.¹²² Within baseball Research and Development departments, AABD will get fused with known data from the same player and compared with data from past, current, and future players in Clubs' organizations to assist in maintaining the physical health necessary for a professional athlete.¹²³ In 2015, Whoop strap conducted one study on recovery time and its relation to performance on 230 MiLB players; finding a major correlation between resting time and pitch velocity for pitchers and batted ball speed for hitters, respectively.¹²⁴ The Whoop strap tracks heart rate, skin conductivity, ambient temperature, and motion on a daily

¹¹⁹ Balt. Orioles, Inc., 805 F.2d at 669-70.

¹²⁰

¹²¹ See *Minor League Uniform Player Contract*,

<https://pennstatelaw.psu.edu/sites/default/files/milb%20std%20player%20K.pdf>.

¹²² See Derek Helling, *MLB wearable technology expanding into biometrics, game play*, FANSIDED, <https://fansided.com/2017/03/19/mlb-wearable-technology-expanding-biometrics-game-play/> (Last visited Apr. 9, 2018, 7:45 PM).

¹²³ *Id.*

¹²⁴ Garrett Hulfish, *Whoop and MLB discover the importance of rest in largest league performance study*, DIGITAL TRENDS (Dec. 12, 2016, 11:19 AM), <https://www.digitaltrends.com/outdoors/whoop-mlb-performance-study-results/#/1-5>

basis.¹²⁵ When used in this capacity, AABD serves as an important monitor of player health and an integral element of research seeking to improve the game of baseball.¹²⁶

Recognizing the innovative nature of AABD and its current place outside of legislation, finding comparable commodities is helpful in determining ownership because it gives insight into how a court may interpret an issue.¹²⁷ An analogical comparison of AABD and human tissue suggests that proper notice and informed consent would assign unilateral ownership of MiLB players' harvested AABD to their rights-holding Clubs for use in further research to improve the organization.¹²⁸ The seminal decision on ownership of human tissue taken for research is *Moore v. Regents of University of California*, a case argued before the California Supreme Court in 1990.¹²⁹

In *Moore*, physicians at UCLA Medical Center diagnosed the plaintiff with hairy-cell leukemia and treated him accordingly.¹³⁰ A regular part of this treatment necessitated withdrawal of blood, bone marrow, and other bodily substances.¹³¹ The physicians eventually removed plaintiff's spleen in an effort to slow the disease.¹³² Following the operation, plaintiff returned to UCLA Medical Center numerous times in a seven year period.¹³³ Each return visits entailed further withdrawal of blood, blood serum, skin, bone marrow aspirate, and sperm.¹³⁴ From the outset of plaintiff's treatment, his physicians were aware that ongoing research and the unique nature of his condition made certain blood products and blood components valuable to a number of commercial and scientific efforts.¹³⁵ Continued access to the plaintiff offered "competitive, commercial, and scientific advantage" for UCLA Medical Center.¹³⁶

Throughout their treatment of the plaintiff, the physicians continuously took potions of plaintiff's cells and performed research on them; intending to exploit their ongoing physician-patient relationship for financial and competitive benefit.¹³⁷ Sometime during 1979, a lead physician working with the plaintiff, Dr. David W. Golde, established and patented a cell line from tissues withdrawn from the plaintiff¹³⁸ One valuation of the cell line predicted a potential market of \$3.01 billion for the whole

¹²⁵ *Id.*

¹²⁶ Rick Maese, *Moneyball 2.0: Keeping players healthy*, THE WASHINGTON POST (Aug. 24, 2015), https://www.washingtonpost.com/sports/moneyball-20-keeping-players-healthy/2015/08/24/5011ac54-48e6-11e5-9f53-d1e3ddfd0cda_story.html?utm_term=.f3bd20fa87al.

¹²⁷ See *Precedent and Analogy in Legal Reasoning*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 20, 2006), <https://plato.stanford.edu/entries/legal-reas-prec/#PreAnaLegRea> § 4

¹²⁸ See *Moore v. Regents of University of California*, 51 Cal. 3d 120 (Cal. 1990).

¹²⁹ *Moore v. Regents of University of California*, 51 Cal. 3d 120 (Cal. 1990).

¹³⁰ *Id.* at 125

¹³¹ *Id.*

¹³² *Moore*, 51 Cal. 3d at 126.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Moore*, 51 Cal. 3d at 126.

¹³⁷ *Id.*

¹³⁸ *Moore*, 51 Cal. 3d at 127.

range.¹³⁹ During the plaintiff's entire treatment, Golde and the remaining physicians failed to notify him of his bodily tissue's immense commercial value.¹⁴⁰ Focusing on human tissue and its relation to personal property, the California court held that the plaintiff had no ownership interest in cells following their extraction—precluding plaintiff's action for conversion—but recognized that failure to obtain informed consent was a breach of Golde's fiduciary duty.¹⁴¹

Moore addressed excised cell ownership amidst determining whether the plaintiff had a right to tort action against Golde for conversion.¹⁴² A threshold requirement for conversion is “actual interference with ownership or right of possession.”¹⁴³ If the plaintiff has neither title to the property, or possession thereof, an action for conversion is unsustainable.¹⁴⁴ As cells cannot be possessed after their removal, the only remaining claim was for an ownership interest in the cells.¹⁴⁵ The court cited three reasons plaintiff had no property interest in the excised cells: (a) no judicial decision supported the claim; (b) state statutory law limits patient interest in excised cells; and (c) the cell line patented by Golde was a derivative of plaintiff's cells; preempting any ownership rights.¹⁴⁶ Each part of the *Moore* analysis for ownership rights in excised cells can apply to ownership rights in AABD. In *Moore*, the cells in dispute were drawn from the plaintiff's body through action of the physician; stored for preservation; studied; and later turned into a proprietary line of cells aimed toward improvement of medical care for patients suffering from hairy-cell leukemia.¹⁴⁷ A similar sequence of events takes place when Clubs collect AABD. AABD is collected when teams fit their players with Wearable technology; the Wearables collect the data and instantaneously store it via the IoT; the data is compiled, added to other analytics, and studied; and, finally, the compilations reveal comprehensive data patterns that seek to improve the overall health and performance of professional baseball players.¹⁴⁸ While the purpose of this analogy is certainly not to suggest improvements in the health and performance of professional baseball players calls for the same gravity as the health of cancer patients, it is a logical contention that AABD represents a new potential form of property that remains to be directly analyzed by courts or legislators. As such, property analysis of something so closely connected to the human body's natural function is rare, but present in *Moore*.

¹³⁹ *Id.*

¹⁴⁰ *Moore*, 51 Cal. 3d at 126.

¹⁴¹ *Moore*, 51 Cal. 3d at 129-36.

¹⁴² *Moore*, 51 Cal. 3d at 136-47.

¹⁴³ *Moore*, 51 Cal. 3d at 136.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Moore*, 51 Cal. 3d at 137.

¹⁴⁷ *Moore*, 51 Cal. 3d at 125-29.

¹⁴⁸ For an outline of AABD uses and some concerns related to them, see Rian Watt, *New Technologies Are Forcing Baseball To Balance Big Data With "Big Brother"*, VICE SPORTS (May 27, 2016, 9:20 AM), https://sports.vice.com/en_us/article/8qygbp/new-technologies-are-forcing-baseball-to-balance-big-data-with-big-brother.

[C-2-a]. Lack of Judicial Precedent

Moore's first reason for denial of ownership interest in human cells—the lack of judicial support for the conclusion—is not conclusive on its own, but is clearly matched by AABD.¹⁴⁹ Lack of precedent is not a basis for legal decision *per se*, but allows courts to perform an essential function: interpretation of the law.¹⁵⁰ In the case of AABD, no court or legislature has yet analyzed the issue of ownership; thus, courts would be free to interpret ownership as they please; leaving the *Moore* analysis for human cells open for interpretation.

[C-2-b]. Application of Statutory Law

The second reason *Moore* denies the plaintiff an ownership interest in excised cells lies in state statutory law.¹⁵¹ The California court contends that statutory requirements for the destruction of human tissues following the conclusion of scientific use effectively cause a drastic limitation on a patient's control over excised cells.¹⁵² The right to control the scientific use of the cells would be protected by informed consent, but “the statute eliminates so many of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to ‘property’ or ‘ownership.’”¹⁵³

The league's intent for MiLB players' ownership interest in AABD can be analyzed in a similar way if you look to the Wearables attachment within the MLB CBA and compare it once again to the mirrored BIPA.¹⁵⁴ Both Attachment 56 and BIPA outline procedures for the destruction of collected AABD.¹⁵⁵ The provisions differ, with the MLB policy granting MLB players the right to request destruction of their own AABD and a right to copies of AABD.¹⁵⁶ The provisions are recorded as follows:

¹⁴⁹ Moore, 51 Cal. 3d at 137.

¹⁵⁰ See Moore, 51 Cal. 3d at 135 (“*While that fact does not end our inquiry, it raises a flag of caution.*”).

¹⁵¹ *Supra* note 146.

¹⁵² Moore, 51 Cal. 3d at 140.

¹⁵³ Moore, 51 Cal. 3d at 141.

¹⁵⁴ *Supra* notes 48-49.

¹⁵⁵ See 2017-2021 BASIC AGREEMENT at 335 (Attachment 56); see also Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/15(a) (LexisNexis 2018).

¹⁵⁶ 2017-2021 BASIC AGREEMENT at 335 (Attachment 56).

| BIPA ¹⁵⁷ | Attachment 56 ¹⁵⁸ |
|--|---|
| <p>(a) A private entity in possession of biometric identifiers or biometric information <u>must develop a written policy, made available to the public, establishing a retention schedule and guidelines for permanently destroying biometric identifiers and biometric information when the initial purpose for collecting or obtaining such identifiers or information has been satisfied or within 3 years of the individual's last interaction with the private entity, whichever occurs first.</u> Absent a valid warrant or subpoena issued by a court of competent jurisdiction, <u>a private entity in possession of biometric identifiers or biometric information must comply with its established retention schedule and destruction guidelines.</u></p> | <p>4. . . . In addition, <u>all such Data must be destroyed or permanently deleted in the event a Player requests to have such Data destroyed or deleted, in which case a Player may request a copy of his data prior to its destruction or deletion.</u></p> |

Major League players' ability to obtain copies of their discarded AABD is likely an outcome of intense collective bargaining between the MLBPA and MLB.

It stands to reason that without a labor union, MLB Clubs would contend collection of MiLB players' AABD is subject to BIPA—the closest legislation to the MLB CBA requirements—including its mandatory destruction clause. For Clubs, applying the BIPA destruction requirements to MiLB AABD collection is a great advantage. The wording allows potential retention of all the raw AABD from a player during his entire tenure with the organization. This follows from the assumption that the “initial purpose for collecting and obtaining” AABD would not be satisfied until the player no longer plays in the organization or reaches the MLB.¹⁵⁹ As concluded in *Moore*—mandating destruction will limit the rights of donor MiLB players to a point that likely dismisses the notion of an ownership interest.¹⁶⁰ Arguing BIPA applicability to MiLB player AABD or an addition of AABD to the scope of BIPA would result in an analogous interpretation of AABD ownership interests and excised human tissue.

¹⁵⁷ Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/15(a) (LexisNexis 2018).

¹⁵⁸ 2017-2021 BASIC AGREEMENT at 335 (Attachment 56).

¹⁵⁹ Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/15(a) (LexisNexis 2018).

¹⁶⁰ *Supra* note 151

[C-2-c]. *Patent Law Preempted Ownership Rights*

The final prong of the *Moore* decision held that the plaintiff could not have an ownership interest in the patented cell line created from his excised tissue.¹⁶¹ The court's conclusion followed from patent law and notes that the cell line that resulted from Golde's research was a product of human ingenuity rather than a discovery of raw materials.¹⁶² This prong's application of the cell line to patent law is analogous to how a court should apply copyright law to AABD. Similar to the doctors' use of the cells to create a transformative cell line for medical treatment, teams can use AABD to supplement statistical data; creating injury-preventing and performance predicting analytics. As discussed above, AABD meets the threshold requirements for copyrightability as an audiovisual work and, as works made for hire, the intellectual property rights of AABD fall squarely in the hands of rights-holding Clubs.¹⁶³ Generally, the more Clubs add to AABD in the pursuit and creation of proprietary metrics and analytics, the weaker arguments for ownership rights in the input data become.¹⁶⁴

[C-2-d]. *Conclusion and Informed Consent*

Moore held in favor of the plaintiff on one issue: his right to informed consent regarding the nature and extent of Golde's research and commercial interest in his excised tissue.¹⁶⁵ Golde withheld his underlying intent to profit from plaintiff's excised tissue and, in doing so, infringed on the plaintiff's protected interest.¹⁶⁶ Both BIPA and the MLB CBA require a similar amount of disclosure before Clubs can collect AABD.¹⁶⁷ For a successful claim that AABD from MiLB players is subject to BIPA, a club would have to inform the subject, or his legally authorized representative (agent) (1) that AABD is being collected and stored; (2) the purpose and duration of storage of the AABD; and (3) obtain a written release for collection of AABD.¹⁶⁸ While a consent form for collection of MiLB players' AABD does not exist in the public eye, one likely was signed by the 203 MiLB players who took part in the 2015 study of rest and recovery by Whoop and MLB.¹⁶⁹ The terms within the consent form used for that study would be a great place to start for teams seeking to correct the mistake made by the hospital in *Moore*. Adequately informing MiLB players of the use and storage of their AABD satisfies each requirement of BIPA and the *Moore* decision. Following

¹⁶¹ *Moore*, 51 Cal. 3d at 141-42.

¹⁶² *Id.*

¹⁶³ *Supra* Sec. A above.

¹⁶⁴ See The Copyright Act, 17 USC § 103(a) (LexisNexis 2018) (*defining derivative works and copyright protection*).

¹⁶⁵ *Moore*, 51 Cal. 3d at 128-29.

¹⁶⁶ *Id.*

¹⁶⁷ See Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/15(b) (2008) (LexisNexis 2018); *see also* 2017-2021 BASIC AGREEMENT at 335 (Attachment 56).

¹⁶⁸ Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/15(b) (2008) (LexisNexis 2018).

¹⁶⁹ *Supra* note 124

the analysis in *Moore*, the collecting Clubs would have property rights in MiLB players' AABD and any created derivative metrics.¹⁷⁰

[D]. SUGGESTED LEAGUE-LEVEL CHANGES TO SOLIDIFY OWNERSHIP INTEREST
IN AABD

In the most recent iteration of the MLB CBA, MLB, the thirty Clubs, and the MLBPA bargained for regulation of the collection of MLB players' AABD.¹⁷¹ While the MLB CBA only applies to MLB players, the most challenging dispute over AABD ownership—as outlined above—is the one between teams and their MiLB signees. As it stands, the MLB has yet to address AABD in a lasting manner with respect to MiLB players. By adding language to the MiLB UPC, the MLB can solidify elements of the strongest arguments for Clubs ownership rights in MiLB AABD. Sufficient additions to the contract would include: (1) expanding section XIV to include audiovisual works; and (2) adding a policy for AABD collection that (a) conforms with the collection requirements of BIPA, and (b) specifically adds a written release for AABD collection to the MiLB UPC.

Currently, Section XIV of the MiLB UPC, the provision regarding “Pictures of Player” reads:

Player agrees, beginning with the date that this Minor League Uniform Player Contract is executed, that photographs, whether still or action, and motion pictures may be taken and any form of telecasts made of Player, individually or with others, at such times or places as Club may designate and agrees that all rights therein shall belong to Club and that they may be used, reproduced or otherwise disseminated or published by Club directly or indirectly for any purpose in any manner and at any time, including after the term of this Minor League Uniform Player Contract, that Club desires.¹⁷²

As discussed in section IV(A) of this article, AABD is best suited for copyrightability as an audiovisual work¹⁷³ While a “motion picture” is a closely related creation within the text of the Copyright Act, explicitly adding the term “audiovisual work” to the section would add an additional layer of protection for the works made for hire argument contending Club AABD ownership.¹⁷⁴

Along with the addition of “audiovisual work,” section XIV would have to slightly reword the subsequent rights of reproduction and distribution to preempt any privacy concerns regarding player data. Section XIV allows for uninhibited reproduction and dissemination of player pictures, while BIPA requires the confidential treatment of

¹⁷⁰ Moore, 51 Cal. 3d at 141-42.

¹⁷¹ 2017-2021 BASIC AGREEMENT at 334 (Attachment 56).

¹⁷² *Minor League Uniform Player Contract*, sec. XIV,

<https://pennstatelaw.psu.edu/sites/default/files/milb%20std%20player%20K.pdf>

¹⁷³ *Supra* note 114.

¹⁷⁴ See The Copyright Act, 17 USC § 102 (a)(6) (LexisNexis 2018).

employees' data.¹⁷⁵ To parallel BIPA and reinforce a desire to comply with the statute, an amended Section XIV could read as follows (additions underlined):

Player agrees, beginning with the date that this Minor League Uniform Player Contract is executed, that photographs, whether still or action, any audiovisual works, and motion pictures may be taken and any form of telecasts made of Player, individually or with others, at such times or places as Club may designate and agrees that all rights therein shall belong to Club and that they may be used, reproduced or otherwise disseminated or published by Club, as allowed by law, directly or indirectly for any purpose in any manner and at any time, including after the term of this Minor League Uniform Player Contract, that Club desires.¹⁷⁶

Though the changes are minimal, an amended MiLB UPC would provide protection in the contract construction rather than unilaterally relying on a written release from the player.

Adding an official AABD policy and release to the back of the MiLB UPC would be particularly advantageous for Clubs seeking ownership of MiLB AABD. The addition of a policy allows the Clubs to take control of—and possibly end—any argument against their ownership of data before it begins. Following the assumed outline of the MLB AABD policy, the MiLB should use BIPA as a guideline for a policy attached to the MiLB UPC.¹⁷⁷ Although BIPA does not currently apply to AABD as a matter of law, directly following its policies would not be a hindrance to the goals of the Clubs and may compel legislation to expand the statute to include AABD as the issue matures. A signed release form for collection of AABD, pursuant to a policy compliant with BIPA, would potentially allow collection and storage of MiLB pleyer data for up to ten years (the duration of the MiLB UPC and an additional three years to delete). Since the “original purpose” for collecting the data—finding new ways to maintain the health of players—is an ongoing goal, collection has no reason to cease while an MiLB player is on an active roster.¹⁷⁸

[E]. SUGGESTED LEGISLATIVE AMENDMENTS REGARDING AABD

As BIPA is the only existing legislation regarding biometric data, amending the Illinois statute to include Wearables and AABD would be a helpful in writing policy and determining ownership.¹⁷⁹ Although this article points to parallels between the MLB CBA policy for AABD collection and BIPA policy and suggests a similar MiLB UPC addition, officially pulling AABD under the BIPA umbrella would bring more clarity about AABD ownership and use. As suggested in *Moore*, requirements for

¹⁷⁵ Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/15(c) (2008) (LexisNexis 2018).

¹⁷⁶ *Supra* note 172.

¹⁷⁷ *Supra* note 48-49.

¹⁷⁸ Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/15(a) (2008) (LexisNexis 2018).

¹⁷⁹ *Id.*

destruction by the collector Clubs would severely limit any ownership rights players may claim in their own AABD.¹⁸⁰

Amendments to BIPA for inclusion of AABD would be best suited for the Definitions section of the statute.¹⁸¹ The BIPA definition for “Biometric Information” is reliant on which types of scans are considered a “Biometric Identifier.”¹⁸² Inclusion as a Biometric Identifier would make the regulatory aspects of BIPA applicable to AABD and provide solid grounds for Clubs to confidently claim ownership of MiLB player data pursuant to the arguments outlined above. The current BIPA definition of “Biometric Identifier” encompasses “a retina or iris scan, fingerprint, voiceprint, or scan of hand or face geometry.”¹⁸³ While there are further exceptions to what is not a biometric identifier, none would apply to AABD collected in a professional setting.¹⁸⁴

Adding AABD to BIPA would be consistent with its purpose and legislative findings.¹⁸⁵ BIPA states that biometric use and collection is a growing field and the full ramifications of it are unknown.¹⁸⁶ Considering the forward-thinking approach shown by the Illinois legislature by passing BIPA¹⁸⁷, this language suggests the Illinois legislature was open to adding more areas to its scope. Failure to amend and add on to the scope of BIPA since its enactment likely stems from the statute lying dormant. Passed in 2008, the first action pursuant to BIPA restrictions was brought in 2015.¹⁸⁸ In terms of technology, lying dormant for eight years seems like an eternity. To elaborate, technological advancements in 2008 included Apple’s App Store, the first Android phones, and GPS on cell phones—including the iPhone 3G. Needless to say, we have come a long way since BIPA was passed by the Illinois legislature.

Another catalyst for passage of BIPA was the legislature’s finding that “[m]ajor national corporations have selected the City of Chicago and other locations in this State as pilot testing sites for new applications of biometric-facilitated financial transactions, including finger-scan technologies at grocery stores, gas stations, and school cafeterias.”¹⁸⁹ This finding extends to AABD as well, as a plethora of Chicago companies have championed the use of Wearables in the private workplace and the

¹⁸⁰ Moore, 51 Cal. 3d at 140-4.

¹⁸¹ See Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/10 (*defining “Biometric Information” and “Biometric Identifier”*).

¹⁸² *Id.*

¹⁸³ Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/10 (*defining “Biometric Information” and “Biometric Identifier”*).

¹⁸⁴ *Id.*

¹⁸⁵ Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/5 (2008) (LexisNexis 2018).

¹⁸⁶ *Id.*

¹⁸⁷ *The Biometric Information Privacy Act remains the only legislation directly addressing biometric data in private workplaces.*

¹⁸⁸ See *Norberg v. Shutterfly, Inc.*, 152 F. Supp. 3d 1103 (N.D.Ill 2015).

¹⁸⁹ Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/5(b) (2008) (LexisNexis 2018).

state is home to a team in every major professional sport; including two MLB teams, two MiLB teams, and six independent professional baseball teams.¹⁹⁰

In light of the overlap of the legislature's intent when passing BIPA and the growing stage of AABD, the Illinois legislature should be innovative in the space once again and amend BIPA to expressly include AABD. The amendment would be a simple expansion within the definition of "Biometric Identifier." For example, the amended form could read: "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, can of hand or face geometry, or data generated by devices worn on the body. With this simple amendment, the Illinois legislature could give a concrete starting point for future disputes regarding the collection of AABD.

CONCLUSION

AABD is still a growing and developing field. Although many battles for its ownership will take place outside the scope of MiLB players and their rights-holding Clubs, the MiLB players today represent the MLB players of tomorrow. Within the realm of Major League Baseball, information is power and the information and insight attainable from AABD can provide extensive competitive advantage if utilized immediately. However, MLB Clubs—like any major corporation—are likely to be risk-averse when it comes to sensitive legal issues.

This article has aimed to calm those risks. Ownership rights to AABD collected from MiLB players can be seen as works made for hire and potentially fit into an analogical parallel with ownership of excised human tissue. With no changes to government or league policy, there is a strong sense that Clubs own AABD from their MiLB players. Adding new policy into the MiLB UPC and potential amendments to BIPA would turn the strong sense into a virtual certainty. Following from the interpretation of law in this article, Clubs should make the suggested changes to the MiLB UPC and equip all MiLB players with Wearables as their budgets allow.

¹⁹⁰ See Andreas Rekdal, *Forget Fitbit: these 8 Chicago companies are taking wearables to the next level*, BUILT IN CHICAGO (July 25, 2016), <https://www.builtinchicago.org/2016/07/22/chicago-wearable-startups-breaking-new-ground/>; see also Kristen Thometz, *New Type of Wearable Electronics Could Boost Stroke Patients' Recovery*, CHICAGO TONIGHT (Feb. 22, 2018, 4:58 PM), <https://chicagotonight.wttw.com/2018/02/22/new-type-wearable-electronics-could-boost-stroke-patients-recovery>.