The Emergence of Wearable Technology and the Legal Implications for Athletes, Teams, Leagues and Other Sports Organizations Across Amateur and Professional Athletics

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I. INTRODUCTION

The year was 1998. The Chicago Bulls were playing in Game 6 of the NBA Finals against the Utah Jazz. Michael Jordan was wearing his iconic, bright, red number 23 Bulls jersey. Jordan had led the Bulls to their third consecutive finals appearance, pursuing their sixth NBA Championship title of the decade. However, this was not his fight alone, as his teammates were fighting merely to get on the court. Ron Harper was playing while sick, and Toni Kukoc was battling fatigue. Another teammate and future Hall of Famer Scottie Pippen was playing through an injury. The extent of the illness, fatigue, and injury were not disclosed to the fans watching the game. Of equal importance, this was only known within the Bulls locker room, while the Utah Jazz were not fully aware. The Bulls went on to battle, keeping it a close game and eventually overcoming a three-point deficit with under a minute remaining. The Bulls won the game 87-86, becoming the NBA Champions once again.

Now, decades later, one can not help but wonder, what if the Utah Jazz knew of these obstacles the Bulls players were facing? What if there was technology in place to inform the fans, and potentially the Jazz, of the individual Bulls players’ vitals and health information? What if those bright red Bulls jerseys were equipped with bio-sensing, silver fibers that could measure precisely this type of information? What if this game was catapulted 30 years into the future? What if the game took place in 2028 with the technology of the time impacting it? Would the Bulls have ever stood a chance? What information would have been private? What information would have been shared and known?

Wearable technology is infiltrating its way within the sports world and is going to continue doing so for the foreseeable future. The question league commissioners, athletic board members, business decision-makers, legal scholars, lawmakers, and even fans need to ask themselves is: is wearable technology really all for the good? Or is there an awaiting detriment intertwined with this technology that is essential to realize, in order to protect not only athletes’ individual rights, but also fair competition? Plain and short, is wearable technology really something we want in the future of our sports? Is it in the best interest of professional athletes? What about the best interest of amateur athletes?

Wearable technology raises issues of regulation, privacy, and ownership concerns of information stemming from the professional to the amateur sports levels. These are important issues because fundamental rights and liberties are at stake, and the technology of this nature is rapidly expanding. This note will analyze these issues, and address (1) the history and development of wearable technology and why it is important in sports; (2) the regulations, privacy, and ownership implications of wearable technology in amateur and professional sports;

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2 Id.
3 Id.
4 Id.
and (3) the issues present in current law and possible solutions, including the potential expansion of regulations impacting athletes.

II. THE DEVELOPMENT OF WEARABLE TECHNOLOGY

Wearable Technology in sports is a relatively recent development. It was used for the first time in live sports beginning in 2009. It began with a European soccer club tracking the overall workload of players during games.6 This development allowed coaches the real-time ability of monitoring biometrics.7 Since then, wearable technology has developed a long way. Wearable technology has evolved from biometric monitoring to the inclusion of perceptual and psychological aspects of sports.8 Through the utilization of these products, the ability to reduce potential injuries related to concussions, brain trauma, exhaustion, injured muscles, tendons, and ligaments in addition to various illnesses is greatly increased.9 In short, the idea behind wearable technology is that certain technologies can help keep athletes safe and healthy. This theory has been tested and proven successful. One example can be illustrated by the Toronto Raptors. In 2012, the Raptors had the most injuries in the NBA.10 Shortly thereafter, they implemented wearable devices and began monitoring soft tissue.11 As a result, in 2014, the Raptors had the least injuries in the NBA.12

Wearable technology includes various devices that can be placed into or around clothing, or even directly onto the body. Examples of this include a variety of equipment, fabrics of sports clothing, devices directly attached to the body, and patches worn on the skin.13 Companies like Viperpod, Zephyr Technology, Smartlife, miCoach, and Catapult have transcended the market providing many of these creations.14 The devices these companies make have the ability to track players’ balance, speed, acceleration and more.15 Some devices have the ability to monitor and record vitals like heart rate, body temperature, metabolism, and stress load in addition to a variety of other things.16 Due to the manner of use, and how the technology is implemented, the effectiveness and accuracy of the metrics are often quite precise. As success and precision increases, the usage of technology like this in the sports world has exponentially expanded.

As wearable technology rapidly grows continuously effective, its value and use in sports has and likely will continue to increase. Morgan Stanley has predicted that the wearable technology market will eventually become a $1.6 trillion business.17 While this will lead to

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7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
17 Phaik Lin Goh, supra note 5.
fascinating results, the emergence of this technology will have legal implications for the athletes, teams, leagues and other sports organizations. A main area of law in which wearable technology has raised issues includes ownership of the information. This issue leads to an array of complications including, but not limited to, privacy, medical, contractual, and even gambling issues and concerns. These concerns range from professional athletes down to the world of amateur sports and may have vastly different impacts on the individuals playing and their privacy rights.

III. OWNERSHIP AND ACCESS

A. The Impact of Wearable Technology in High School and Youth Sports

There is an increasing amount of speculation that within the next few years, wearables will be adopted on a larger scale in youth and high school sports.18 This technology will likely be implemented by becoming a part of the equipment process.19 Privacy issues are destined to arise if high school athletes are given equipment that requires their information to be monitored. To begin, many youth athletes will need to work with a trainer, or someone with experience interpreting the data in order to understand it.20 This will require high schools nationwide to have the properly certified medical personnel, whose duties would likely include having to filter out what information they can and cannot share with the coach. Ensuring this process and compliance is followed will likely prove to be difficult, as this will require additional safeguards. Furthermore, there is a concern in amateur sports due to the lack of representation for protecting the individual athletes' interests.

Another issue that arises with wearable technology being brought into amateur sports derives from the costs. The costs of many of the wearable technology devices being used in sports, like many new technologies, are not modest. The potentially high cost of wearable technology may lead to the inequality of opportunities for youth athletes across different demographics. Athletes in lower income communities may not have the same amenities and luxuries their affluent competitors have, therefore creating an imbalance in amateur sports. If high schools from different districts competing for the same level championship have different ways to game plan and strategize based on the affordability of technology, fairness concerns will become prevalent. This could largely jeopardize the integrity and fairness of amateur athletics.

B. Wearable Technology in College Athletics

Collegiate level sports are faced with many of the same issues surrounding youth sports, with additional complications added at their level. Many college athletes sign a National Letter of Intent before beginning to participate in their selected athletic program. By signing the National Letter of Intent, a legally binding contract, athletes forego an array of their rights in order to commit to play at least one year at the collegiate level. This is funded by the University

19 Id.
The National Letter of Intent is filtered through 655 NCAA DI and DII schools, which over 48,000 athletes sign annually. In the coming years, a question may arise whether by signing the National Letter of Intent and enrolling at an institution, will college athletes be providing consent, or foregoing their interest in their right to the privacy of their data? The National Letter of Intent is an extensive document that has been referred to as “The Worst Contract in America” by Andy Staples of Sports Illustrated. This is due to how incredibly one-sided and beneficial it is to the University, coupled with the fact that many of the athletes who sign it do not fully understand the entirety of the document.

Depending on the sport an athlete plays being a college athlete may come with many perks and benefits. The exact amount of benefits for a college athlete may vary based on not only the sport they play, but also which university they attend. For example, one of the frequent benefits that many football players across D1 universities enjoy is the fact that universities commonly have partnership deals with brands. Through this, football players are often given shoes to wear on and off the field at their respective universities. In 2016, the University of Michigan signed a contract with Nike. Within that contract, Nike, who provided much of the equipment to the football team, retained the right to player-generated data in exchange for a surplus of gear and equipment. This data that Nike now retained the ownership of included information collected from the team and players during games, practices, training, and other program activities. In short, the school bargained the players’ information and data to Nike without telling them or getting their permission. Nike on the flipside retained the ability to use the data in a variety of ways including marketing, multimedia marketing, manufacturing, advertising, promotions, and more.

To divulge a way athletes receive some protection, we turn to look at federal law. Schools that receive federal funding must be granted permission under the Family Educational Rights and Privacy Act (FERPA) by an eligible student or parent to release any information that is related to a student’s educational record. In lieu of FERPA, as companies engage further with students tracking their performance data, schools may have additional obligations to establish safeguards.

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27 *Id.*
C. Wearable Technology in Professional Sports and Collective Bargaining Agreements

Contrary to the collegiate and youth processes where players’ interests may not have an overarching fiduciary or similar authority ensuring their best interests are met, professional leagues differ. Professional leagues have structured player’s organizations and associations. In professional leagues, when data is sold, it is to be subjected through the collective bargaining processes and protocols. Hence, we turn to take a look at how the current collective bargaining agreements in professional sports address wearable technology, and how they may or may not be amply protecting athletes’ interests.

In the National Football League (NFL), Major League Baseball (MLB), and National Basketball Association (NBA) players commonly disclose medical information about themselves. Additionally, in these sports, players are currently wearing wearable technology devices in their gear including on-field sensors. However, in the NFL, the requirement of wearing sensors is left on the field. Recently, the National Football League Players Association (NFLPA) filed a grievance claiming that the NFL and teams should not be able to track players sleeping patterns, because the collective bargaining agreement does not include authorization that allows monitoring off the field.

Greg Aiello, an NFL spokesperson responded that the sleep sensors being worn by the players were completely voluntary. Aiello claimed players had the interest in wearing the sensors to improve their performance. According to Aiello, he is unsure why the NFLPA has an issue with the technology players chose to utilize. However, it is likely that the NFLPA has concerns for the future, and does not want to set a weary precedent that may be adverse to their future interests.

Additionally, if the NFL wants to use the information they have recorded through any sensors on the field for information related to medical purposes, they must seek permission from the NFLPA. An example of this is shown in the NFL with Zebra sensors. Currently NFL players are required to wear Zebra sensors in their shoulder pads. These Zebra sensors have been deemed non-invasive, therefore diminishing the players’ ability to claim it as a privacy interest. This is due to the fact that the sensors only track information pertaining to location, acceleration and speed during games. None of those listed metrics are considered to be protected or private

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28 Bosu, supra note 25.
32 Id.
33 Id.
34 Id.
37 Olavsrud, supra note 30.
However, the NFL collective bargaining agreement is set to expire in 2020, which will lead to an interesting conversation about how the sides decide to address this in the future.

Today, the NFL and NFLPA seem to be at a crossroads, but the NFLPA is optimistic it has the best players’ interest in mind when the time comes to utilizing this type of collected information. As of 2017, the NFLPA reached an agreement with a human performance company named WHOOP. This agreement with WHOOP allowed players to sell their data, giving the players the ability to push back against the NFL. The NFLPA seems not only optimistic about their ability to protect athletes’ privacy, but also eager to allow them the ability to benefit immensely on a personal and financial level from the information.

Contrary to some other professional leagues in the United States, the NBA seems to be on the forefront of wearable technology. Of the five major sports leagues in the United States, the NBA’s collective bargaining agreement was the first agreement that specifically mentioned wearables. Recently in 2017, the NBA and the National Basketball Players Association included a part of their bargaining agreement to address tracking devices. These provisions were included to protect athletes from the negative effects of wearables. For example, usage of wearable technology in the NBA is voluntary. An additional example is that it is not permitted in contract negotiations to use the athlete’s biometric data.

With regard to the MLB, Mathew R. Nussbaum, the Assistant General Counsel for the Major League Baseball Players Association (MLBPA), addressed wearable technology in a letter provided as an attachment to the current MLBPA collective bargaining agreement. Here, wearable technology not only refers to any equipment, device, attire, but is extended to include program or software that is designed to analyze or collect data or information. It extends on and off the field, with the intention to measure a player’s health, performance, and readiness. The agreement states that any use of such equipment must be wholly voluntary on the part of the player. The player is not to be induced to use any wearable technology by their club. The clubs even have to refrain from making any suggestion that players use these types of

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41 Id.


43 Id.

44 Id.

45 Id.

46 Id.


48 Id.

49 Id.

50 Id.

51 Id.
technologies, including, but not limited to: activity trackers, electronic bat sensors, biomechanics compression attire, GPS/tracking compression attire and any device, sensor, equipment, attire or dashboard technology.\textsuperscript{52} If a player declines or discontinues to use any of these technologies, they are not allowed to be reprimanded or given any consequences.\textsuperscript{53}

In order for a player in the MLB to voluntarily agree to use a form of wearable technology, the organization of the player must first meet an array of requirements. The organization must first provide a thorough explanation of what technology is being provided, and who within the organization will have access to the information that it collects, generates, and where it will be stored and/or analyzed.\textsuperscript{54} The agreement expressly lists a variety of organizational personnel who will have access to the information, and the player reserves the right to expand or reduce the personnel on that list.\textsuperscript{55} The agreement refers to this information as “Wearable Data.”\textsuperscript{56} The player also reserves the right to a copy of the wearable data that is generated.\textsuperscript{57}

The agreement goes on to state that the wearable data is highly confidential, including after the expiration or termination of the agreement, and shall not become a part of the Player’s medical record.\textsuperscript{58} Not only would the club need express written consent of the Player to share the information, they would also need approval from the MLBPA.\textsuperscript{59} The player reserves the right to have the information permanently destroyed or deleted upon their request.\textsuperscript{60}

The scope and usage of wearable technology is further limited. Players are unable to use them during games, or pre-game activities like batting practice.\textsuperscript{61} In order to get approval for a player to use it during one of these occasions, the club must get approval from the Playing Rules Committee (PRC) in accordance with Official Baseball Rule 3.09.\textsuperscript{62} A list of technologies that are approved are updated annually by the PRC.

In order to appropriately develop and update the list of approved technologies, in 2017 MLB established the Joint Committee on Wearable Technology (JCWT). This committee includes the Parties’ Joint Strength & Conditioning Coordinator, two members appointed by the Association and two members appointed by the Office of the Commissioner.\textsuperscript{63} The committee is tasked with annually reviewing new wearable technologies for in game and/or pre-game usage.\textsuperscript{64} After completing this review, the JCWT provides their recommendation to the PRC.\textsuperscript{65} Additionally, the JCWT is tasked with meeting biannually to discuss issues relating to player safety, data management, privacy, and confidentiality.\textsuperscript{66} Meetings are held within 45 days of the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{52} Id.
  \item \textsuperscript{53} Id.
  \item \textsuperscript{54} Id.
  \item \textsuperscript{55} Id. at 335.
  \item \textsuperscript{56} Id.
  \item \textsuperscript{57} Id.
  \item \textsuperscript{58} Id.
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} Id.
  \item \textsuperscript{63} Id.
  \item \textsuperscript{64} Id. at 336.
  \item \textsuperscript{65} Id.
  \item \textsuperscript{66} Id.
\end{itemize}
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conclusion of the World Series, where the JCWT meets to discuss whether any changes are necessary to this agreement.67

The MLB collective bargaining agreement is also unique because it addresses the use of wearable technology and wearable data in regard to salary arbitration. In the MLB, players who have three or more years of Major League service, but less than six years, are eligible for salary arbitration if they do not have a contract for the next season.68 In certain unique circumstances, players with more than two years of Major League service are also eligible.69 Salary arbitration is a deeply statistical evaluation in which players and club negotiate over salaries. During this process, a player is compared to another, or multiple other players, who have recently signed contracts. Both sides of the negotiation use a wide variety of metrics to attempt to increase their bargaining power and position. However, according to the MLB collective bargaining agreement, the usage of statistics from wearable technology in salary arbitration is not admissible.70 According to the agreement, whether the statistics are public or private, if they are generated through wearable technology, they are not admissible.71 This cloth cuts both ways as neither the team, nor the player, have the ability to utilize this to help strengthen their case. Collectively, it appears the MLBPA is protecting their players very well in the current agreement. However, the current agreement expires in 2021, which may lead to an interesting subdivision, as the MLB and MLBPA may battle over the expansion or reduction of this continuously growing field.

The current National Hockey League (NHL) collective bargaining agreement which is valid through 2022, does not address wearable technology.72 Due to this, players have had the ability on their own prerogative to sign partnerships with companies. For example, Leon Draisaitl, a center for the Edmonton Oilers announced a partnership with the wearable technology company Vexatec in 2017.73 Draisaitl said the technology helped him drive forward his conditioning, and reach his goals.74 Vexatec founder Salvatore Gandolfo said he could not be happier to have Draisaitl join their team.75 Not only was he excited to help optimize Draisaitl’s performance and development, but equally excited about the benefits it could have for amateur athletes.76 A theme that is illustrated through Gandolfo’s comments and important to mention is the intention of brands like Vexatec using professional athletes to help facilitate their reach down to youth sports.

Despite the NHL collective bargaining agreement not addressing wearable technology, this has not stopped its infiltration into the league. However, the NHL Players Association and NHL Commissioner Gary Bettman are comfortable with the implementation of some new technologies. In 2019, during the NHL All-Star break, Commissioner Bettman announced a new

67 Id.
69 Id.
70 MLB CBA, supra note 47 at 22.
71 Id.
74 Id.
75 Id.
76 Id.
partnership with German company Jogmo World Corp. With this new partnership the NHL announced it would begin to insert microchips in jerseys of players and inside of pucks used during games. The microchips then have the ability to transmit the information to antennas in all of the NHL arenas. With this, it becomes possible to gather live information. Jogmo believes with the new technology, players will not even notice the microchips on their shoulder pads. Furthermore, Jogmo also believes players and will be unable to tell the difference between the new pucks.

This development made the NHL another example of a major professional sport in the United States to adopt wearable technology. The NHL viewed the innovative implementation of wearable technology as a necessity. Commissioner Bettman stated that this implementation was for the good of the game, and most importantly for the benefit of fans. However, while benefits are anticipated, this new implementation brings a whole new wave of challenges. The new “smart puck” as Jogmo calls it, is an active puck. What that essentially means is that the puck must be activated before it is used, and when a game is finished be turned off. This adds a new layer of responsibility for officials or whoever else is tasked with this duty. Ultimately, it may lead to the NHL needing to add employees focused on the execution and handling of the new puck to ensure its functionality.

The Major League Soccer (MLS) collective bargaining agreement is being renegotiated in 2020. The 2015-2019 agreement states that the MLS, or the players’ team, may require a player to wear physiological monitoring devices during any activity in connection with training. However, a player is not required to wear any physiological monitoring devices in a game unless, in the reasonable judgment of the Commissioner and Union, they conclude it will not impede an athlete’s performance.

MLS Commissioner Dan Garber has stated his aspirations of collecting more data. Commissioner Garber believes collecting information about movement and biometrics of players will make broadcasts more interesting, which will grow their audience. However, players on the Portland Timbers have stated their mixed opinions about wearable technology due to the intrusive nature of the hardware. Though Timbers defender Zarek Valentin personally loves the technology because it can show the distance he has covered and help him understand the correlation of how he feels during the game, other players feel it is compressing, and not very comfortable. MLS Deputy Commissioner Mark Abbott believes that as technology gets better,
this issue will become less imminent. At the time of the drafting of this note, the 2020 MLS collective bargaining agreement details were not yet published. Only the key provisions were made public in which did not alter any points mentioned in this note. However, as the 2015-2019 MLS collective bargaining agreement states that, “the MLS and/or team medical staff may conduct physiological testing through the pre-season and season and, at other times, in connection with training. Such tests may include, “without limitation,” metrics such as heart rate, body fat, VO2 max, omega wave, and urine hydration levels. The league and teams are not allowed to share the results of such testing with coaching staff, technical directors, and other personnel. They’re also barred from public dissemination of such data, unless consented to by the players’ union.

There is an authentic concern that information gathered from wearable technology could be taken out of context. How this gathered data can potentially be used in an adverse manner to an athlete’s career, potential financial interests, and encroaches their privacy remains a major concern from players associations and unions. In coming years, these organizations will likely need to defend and seek changes in their respective collective bargaining agreements in order to properly protect their sports individual athletes.

D. The Impact of Wearable Technology in Individual Sports

Wearable Technology has begun to impact athletes in sports such as tennis, golf, boxing, and MMA. These athletes are presented with a unique set of differences due to the nature of their sports, and the non-team setting.

In 2019, the Association of Tennis Professionals (ATP) began its trial of wearable technology at the annual 21-and-under men’s tournament at the Next Gen ATP Finals in Milan. The devices the ATP deployed had a GPS receiver and sensors that measured velocity, direction, acceleration, force, rotation, body orientation, and heart rate. The data collected from the devices were given to the players and those that they chose to share it with. To ensure functionality, the ATP elicited one-on-one support from a vendor on-site during the entire tournament.

Tennis Industry Association director Jolyn de Boer is optimistic that as wearable technology increases within the tennis industry, it is going to bring the sport to a new and different level. Currently, a variety of options exist allowing tennis players to utilize new technologies. Companies such as QLIPP, Zepp Labs, Sony, and Babolat Play are infusing racquets with technology sensors. Lobster Phenom and Playmate are industry leaders in ball

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90 Id.
91 Id.
92 Id.
94 Id.
95 Id.
96 Id.
98 Id.
machine technology. \textsuperscript{99} PlaySight Smart Court has created an interactive full-court system using cameras to provide real-time metrics.\textsuperscript{100} PIVOT by Turing Sense, Babolat Pop, FitBit, Apple Watch, and Polar Heart Rate Monitor are just some examples of companies that provide wearables that attach to the different parts of the body.\textsuperscript{101}

Similar to many other sports, wearables in golf can be placed on the body, on the player’s clothing, or in the ball. These devices provide the ability to track distance hit, distance to the hole, and even analyze swings and accuracy. PGA Tour players such as Jim Furyk, Graeme McDowell, and Lee Westwood use shot-tracking technology Game Golf.\textsuperscript{102} Game Golf is a GPS tracking device placed on a player’s belt that collects data pertaining to shot information such as club performance, shot dispersion, greens in regulation, sand saves and putts per hole.\textsuperscript{103} This data is transmitted through the cloud, and the results are accessible on a computer, tablet, or smartphone.\textsuperscript{104} Other players like Tiger Woods, Justin Thomas, and Rory McIlroy use the technology created by Whoop.\textsuperscript{105} In the past, the PGA has allowed players to use these technologies in practice, but not during actual competition.\textsuperscript{106} Players may have the ability to access their data after a competition, but not during real-time.\textsuperscript{107} Senior Vice President of Information Systems for the PGA Tour, Steve Evans stated that the PGA tries very hard to protect the bubble around the player.\textsuperscript{108} The PGA does not want to be obtrusive making players feel pressured to implement this in their game or make players feel awkward.\textsuperscript{109}

In the professional fighting sports of boxing and MMA, technology like Healbe can make it easier to manage the process of cutting weight. Cutting weight is a difficult task for many fighters, but it is mandatory for many athletes in these combat sports. Much of this process is centralized around eliminating water weight. However, after their matches, many fighters’ systems are shocked due to the weight cutting process. Fighters at this stage need to rehydrate and replenish their bodies. That is where Healbe comes in. Healbe tracks calories and water intake by measuring fluids in cells throughout the day.\textsuperscript{110} Throughout the day, the human body breaks food down into glucose. As glucose cells fluctuate, cells absorb and release water. Healbe uses this movement to determine the calories your body has consumed.\textsuperscript{111} Healbe provides users with the ability to accurately track their calorie consumption, making it easier to determine the balance between cutting weight, and being prepared to fight.\textsuperscript{112}

\textsuperscript{99} Id.  
\textsuperscript{100} Id.  
\textsuperscript{101} Id.  
\textsuperscript{103} Id.  
\textsuperscript{104} Id.  
\textsuperscript{106} Wong, \textit{supra} note 102.  
\textsuperscript{107} Id.  
\textsuperscript{108} Id.  
\textsuperscript{109} Id.  
\textsuperscript{111} Id.  
\textsuperscript{112} Id.
StrikeTec is another example of a wearable technology that can improve the preparation process for fighters. StrikeTec uses sensors worn as a wristband or inside a glove that can measure the punch speed, force, rotation, acceleration, and deceleration. All of the metrics gathered can help fighters understand optimal attack techniques.

Wearable technology in fighting has the ability to drive the sport forward and vastly improve athlete safety. However, there are risks associated with these developments as well. Individual athletes who utilize these wearable technologies may be burdened with ensuring their own data protection and device management. For these athletes, this can turn into a major distraction. Another unique issue that athletes of individual sports may face, which team sports are not equally burdened with, is the accuracy of collected information. While technology has enhanced the lives of people worldwide, anyone who uses technology on a daily basis is aware that there can be glitches, malfunctions, and errors, leading to information that is not always accurate. While playing an individual sport, it becomes increasingly difficult for players to determine if their metrics are accurate. There is no baseline to ensure data accuracy except to compare with yourself. Due to the competitiveness and solitary nature in much of the training and preparation of these sports at the professional level determining data accuracy can prove to be strenuous.

Lastly, as seen in many sports and specifically illustrated in the PGA, without close oversight from the sport, athletes can use competing products in order to enhance their game. This adds a new additional layer of preparation, planning, and strategy for athletes. These athletes now have the additional task of ensuring they are using the best and highest performing technology on the market. If athletes are unable to stay on top of ensuring they are using the best products, they will suffer a competitive disadvantage. This further demonstrates another example how the infiltration of technology such as wearable devices are changing the game in sports. Some of the sports we have known for decades, even centuries, are starting to be changed forever through wearable devices.

E. The Expansion of Wearable Technology into Olympic Athletics

At the conclusion of the 2016 Summer Olympics held in Rio, it was clear the United States dominated. The U.S. finished with 46 gold, 37 silver, and 38 bronze totaling 121 medals. For comparison, the United Kingdom finished in second with a total of 67 medals.
During preparation for the games, the United States team utilized a variety of wearable devices, many involving sensors. The sensors would then transmit the information to the cloud.

Having the ability to access the gathered data through the cloud allowed the U.S. athletes to view the information in real time. Further, it allowed the athletes the ability to view it from the comfort of their own home after training in the evening. These new technologies have integrated in Olympic athlete training from nutrition to physiology. While this clearly helped the U.S. athletes on their quest for greatness in 2016, it does come with many of the same concerns discussed previously.

Another important concern is relevant due to the nature of the Olympic Games. Olympic athletes are competing for their countries and have information stored via the cloud. Due to this, Olympic athletes are increasingly susceptible to hacking and data mining on a global scale. Additional safeguards may be necessary to ensure safety and privacy. Finally, it cannot be understated the importance to also consider the legal significance that in some sports athletes who prepare and partake in the Olympics are minors. This may subject them to different privacies, or obtaining approval through guardians may commonly be necessary.

F. Privacy Rights May Impact Wearable Technology Integration

Federal and State laws generally give employers discretion as to how far they can monitor employees. Depending on jurisdiction, consent may or may not be required for monitoring. However, an employee’s expectation of privacy is minimized when on company premises or when using company equipment. The case of City of Ontario, Cal. v. Quon used precedent set in O’Connor v. Ortega to analyze how an employee may lack an expectation of privacy in provided technologies from their employer. The case stated that it was dependent on the realities of their workplace. How this can relate in the athletics context is important especially as they ascend the ranks from youth sports to the professional level. It has been proclaimed that athletes have lesser privacy compared to many other people, as this is merely a detriment of their chosen activity or career path.

Depending on the sport being played, high school athletes may be given equipment in order to compete from their school. Wearable devices may be included within parts of this equipment. For example, players who play high school football may have to obtain their own socks and cleats but are likely to be issued some gear along the lines of a helmet and shoulder pads. Therefore, when analyzing amateur athletes in the compared context of a school to a company, a high school player’s privacy interest will likely have a reduced expectation of privacy.
privacy firstly due to the nature of them being given equipment. Additionally, because they are playing sports altogether, their privacy expectations are reduced.131

However, comparing adolescent students to company employees is not quite a perfect comparison, rather just a starting point. Courts in the past have concluded that a student athlete’s expectation of privacy is reduced even further than one of a normal student’s and is subject to greater regulation.132 It is additionally important to note that courts will likely defer judgment to school districts regarding how to handle their students’ best interests as guardian.133 Therefore, if a school district deems that it is necessary to track a student's vitals and other information during their athletic involvement for health and other reasons, precedent indicates this is likely legal.134 However, analyzing precedent in this manner is alarming, and educated parental consent should be required before this privacy is potentially infringed upon in young athletes.

Furthermore, athletes at the collegiate level have a reduced expectation of privacy for a multitude of reasons. First, college athletes are recognized as public figures.135 In *Bilney v. The Evening Star News*, a group of Maryland basketball players sued a newspaper over the invasion of privacy when their academic records were reported.136 The court concluded that this was not an invasion of privacy because they were public figures on the basketball team.137 Accordingly, due to their public figure status, the players did not have the same privacy luxuries afforded to them as other students. In sum, the basketball players were not entitled to experience the same level of expectation of privacy as a common student would because they were public figures representing their team and university.138

An additional reason in which courts have expressed athletes have a diminished expectation of privacy is due to the frequency of sharing their personal information daily.139 Players interact with coaches, trainers, and other members of athletic staff frequently, and the level of interaction is quite intimate.140 Due to this regular interaction, players are not entitled to experience an expectation of privacy for certain types of shared information.141

However, whether this lowered expectation of privacy is ultimately fair for the college athlete is often overlooked. College athletes have a lack of bargaining power and means to stand up for their own interests. They are uniquely placed in between the youth and professional athletes. In the context of society, youth athletes commonly have fiduciary and guardian support, coupled with the societal reality of adults are aware they need to frequently look out for children. Professional athletes have player representation organizations and associations. The college athlete is ousted in between these two fending for themselves with only their coaches, Universities, and the NCAA looking out for them. However, the clear difference here is that

131 Id.
132 Id.
133 See Id.
136 Id.
137 Id.
138 Id.
140 Id.
141 Id.
coaches, Universities and oftentimes the NCAA have interests that are adverse to the individual athletes’ for an array of reasons due to their respective positions.

Due to the essence of their employment, professional athletes are also subject to different privacy expectations. This is illustrated with NFL players signing HIPAA waivers. HIPPA stands for Health Insurance Portability and Accountability Act and was signed into law in 1996 in order to provide security for the medical data and information of patients. HIPAA places the burden on covered entities, or employers, to protect information that is related to individually identifiable health. This Act ensures that, in general, people have control over who sees what of their health data and information.

There is an exception in HIPAA that is likely applicable to athletes. HIPAA has an exception that states that if employees are required to maintain a certain level of physical fitness in order to perform their job, or as a part of medical surveillance, exceptions can be made making the record sharing a condition upon their employment. This gets even further complex when taking into account that athletes’ healthcare professionals are commonly employed by their team or league.

However, professional athletes have the luxury of player associations looking out for their interests. These organizations were created to ensure professional athletes were fairly represented.

In summary, when analyzing athletes’ rights, it is important to recognize the individual athletes’ privacy rights doubled with First Amendment concerns that need to be weighed against any interest the public may have in that specific information.

Lastly, in a look at how other countries have dealt with this trending issue, in 2014, the United Kingdom announced that the collection and processing of personal information through wearable technology devices was required to comply with U.K. Data Protect Act’s standards. And even though the Act currently applies merely to a narrow exception of devices collecting information solely for personal purposes, the ICO, who is responsible for upholding information rights in the public interests, stated that all uses can be extended to be included within the Act’s scope.

**IV. PROTECTION OF INFORMATION**

**A. Ensuring Privacy Protection of Collected Data**

Teams and organizations may need to enhance their policies and security protocols. This would be in an effort to ensure compliance with data collection and limit their scope, protecting their vulnerabilities and decreasing liability. This may include frequent background checks in addition to extensive screening for anyone who works in areas that have access to confidential data.

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143 *Id.*
wearable devices and collected information. Teams will likely also have to ensure compliance with top-notch cyber-security devices, as the security risks that are associated with the collection of data through technology increases. These risks include the potential of hacking, manipulating data for personal use and gain, cloud storing, and processing. The information that can be gathered through wearable technology has significant value to marketers, as seen and explained previously in the 2016 agreement between Nike and The University of Michigan. This information being highly valuable makes it vulnerable to being hacked. In our society, data mining has become so incredibly invasive and it has become a necessity to protect against.

Recently the Federal Trade Commission has indicated their opinion to lawmakers that transparency and accountability among companies in the businesses of buying and selling personalized data is vital. It is reasonable for athletes to want their information protected with the highest safeguards possible. This was demonstrated in Nucci v. Target Corp. where the court distinguished the difference between the significant privacy interest a reasonable person has in their medical records and information, compared to a weak privacy interest a person has of their personal social media posts and photographs. It is completely understandable to draw the extension as to why an athlete may want to have the ability to own their personal information to ensure it is protected. Regardless if they can or cannot have the ability to own it, trusting someone else with their private information is a delicacy, and a thin line athletes should not be forced to walk without reasonable efforts to ensure their knowledge, acceptance, comfort, and security.

B. The Labeling of Collected Data

When analyzing the information gathered through wearable technology devices a debate can arise regarding what exactly this information is considered. On one hand, the metrics gathered from the individual athlete may be considered trade secrets. On the other hand, this information may simply be considered statistics. The difference between these two things, and the answer to this discrepancy, is important. Whether the information is considered a trade secret, or a statistic, translates into what capacity the information may be able to be used for. For example, while the NBA collective bargaining agreement has concluded that information obtained from wearable technology cannot be used in contract negotiations, other leagues, like the NFL, have allowed the data to be utilized. Statistics and metrics are the main bargaining chips in professional sports contract negotiations. However, by nature, trade secrets have an inability to be used in contract negotiations. Under the letter of privacy law, this information may be able to be recognized as trade secrets, therefore making it difficult, or even illegal, for organizations to use this information against athletes in any future negotiations unless player represented organizations like the NFLPA permit it. This exception is a necessity to protect other

147 Arnow, supra note 145.
148 Id.
149 Arnow, supra note 145 at 620.
athletes in a position with less bargaining power as the effects may trickle down to lower levels of sports.

The Uniform Trades Security Act defines a “trade secret” as information that: (1) “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 (2) “is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” 151 There is no doubt that this information gathered is not generally known. To begin, the whole reason wearable technology has been implemented into the sports world is to obtain information that is not generally known. Additionally, athletes have the potential to not only utilize their information to potentially have economic gain from their metrics, but undoubtedly have an economic interest in having this information being withheld from being utilized against them in contractual negotiations.

Comparatively, the word statistic is a number or piece of data that represents a piece of information. In the sports industry, statistics pertain to a specific athlete, player, or team, and it demonstrates their achievement or performance. To expand the same health information that is protected under HIPAA, to be labeled as a statistic, even if players in professional leagues sign waivers to have reduced HIPAA rights, seems like quite a stretch.

An additional reason why it would be beneficial for the information obtained from wearable technology to be labeled as a trade secret compared to a statistic is to benefit consumers. An example of this can be analyzed in the fantasy gaming and gambling markets. Wearable Technology can impact gambling and fantasy sports through accessibility to pertinent, and also real-time information. The collection of data in real-time may negatively or positively impact certain parties depending on who has access to the information. An imbalance of accessibility may create an unfair advantage. Information can become a premium in which the highest bidder may have the ability to acquire a significant edge. According to 5dimes.eu live bettors experience a 15-second time delay. 152 If casinos and authorities that offer live gambling have the ability to access this information and technology to analyze it quickly, they may have the ability to create a significant advantage over gamblers. In turn, gambling regulations may need to be updated to address this concern if this trend develops.

How this information is categorized is also vital to the legal protections it receives. This is because under the current federal framework biometric data is not regulated or considered personal health information. 153 While some states specifically regulate it, there is a lack of federal uniformity. 154 However, there are instances when HIPAA is applicable. Under some circumstances, HIPAA does regulate some biometric data when healthcare providers gather it. 155 However, in the sports context, once athletes data is considered a term of their employment, it is no longer health information that yields protection under the law. 156 This is because most

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151 Hall, supra note 146.
154 Id.
155 Stanger, supra note 144.
156 Id.
wearable devices are not solely medical devices, and are utilized for a multitude of things. Thus, not all devices are protected under HIPAA.\textsuperscript{157} For the same reasons, it is not protected under the Health Information Technology for Economic and Clinical Health (HITECH) Act which was created in 2009 as a way to encourage the implementation of electronic health records.\textsuperscript{158}

Lastly, we turn to the Federal Trade Commission Act to analyze whether its broad reach may regulate wearable technology to the extent necessary. Timothy Newman and Jennifer Kreick lay this out clearly in their SMU Science and Technology Law Review Article, \textit{The Impact of Hipaa (and Other Federal Law) on Wearable Technology}:

Under the FTC Act, the FTC is charged with preventing companies from engaging in unfair or deceptive acts or practices. The FTC has used this authority to take enforcement action against companies in the healthcare industry that represented to patients and customers that reasonable and appropriate measures to protect their personal information would be taken, but allegedly failed to do so. The FTC regulates data security and the protection of personal information in conjunction with OCR's regulation of protected health information under HIPAA. While the two regulators' authority can overlap, the FTC's authority is broader than OCR's because it is not limited to covered entities and business associates.\textsuperscript{159}

With this information, it is important to consider whether or not HIPAA may be outdated. Since HIPAA only applies if the information is transmitted to a covered entity, one may contemplate if the list of covered entities should be expanded. Or, would it be too much of a stretch to consider that an organization may fall within the scope of covered entities? Currently, covered entities include health plans, healthcare clearinghouses, and every health care provider who electronically transmits health information that is connected with transactions for which The U.S. Department of Health and Human Standards has adopted standards.\textsuperscript{160} This can include any person or organization that furnishes, bills, or is paid to provide healthcare.\textsuperscript{161} With this, it is likely that HIPAA would need to be expanded to include sports teams.

If HIPAA is expanded, should it be updated to cover and protect athletes who wear wearable technology? Or would another regulation be a better fit to govern this? Can the Federal Trade Commission Act cover what HIPAA cannot reach? The clarity surrounding this area is

\begin{itemize}
  \item \textsc{Compliancy Group}, \textit{What is the HITECH ACT?}, (last visited Feb. 15, 2020), https://compliancy-group.com/what-is-the-hitech-act/.
  \item Tier3MD, \textit{Are You a HIPAA Covered Entity?}, (last visited Feb. 15, 2020), https://www.tier3md.com/hipaa-covered-entity/.
\end{itemize}
quite uncertain. Ultimately it may be necessary for federal regulation to ultimately control this field and regulate it to the extent necessary.

V. SOLUTIONS TO PROTECT ATHLETES FROM WEARABLE TECHNOLOGY CONCERNS

A. National Legislation

Over time it has become clear that the law commonly fails to keep up with societies advancements. The legislative process frequently is behind in adapting to rapidly expanding technology. As of now, there are currently no federal laws that directly regulate biomedical data collection.\(^\text{162}\) In addition to the lack of regulations, there is minimal case law governing wearable technology regulations, privacy concerns, and other potential legal issues. Now is the time for Congress to regulate and get ahead before these issues regarding wearable technology rapidly arise. Congress has the ability and should take action to provide protection to athletes nationwide.

In March of 2014, Senator Al Franken re-introduced the Location Privacy Protection Act. If this act would have passed, it would have prohibited many entities from knowingly collecting or disclosing geolocation information from electronic devices without express consent, except under a court order or request by legal authorities in need of the location of a minor or to provide emergency services.\(^\text{163}\) The Location Privacy Protection Act is an indicator that some lawmakers are aware, concerned, and feel the need to address the collection of data. The tracking procedure and process of this similar type of information is quite similar to the wearable technologies utilized in athletics. However, while this bill did not make it past the senate judiciary hearing stage, it would not have sufficiently regulated the needs and concerns that the wearable technology industry presents. For the sake of sports, lawmakers need to step in soon to create a solution that will have a uniform implementation and impact. Lawmakers need to protect all athletes comprehensively. While the Location Privacy Protection Act may have begun to take this first step, ultimately it was overbroad. Legislation needs to be drafted that is tailored specifically to meet this daunting need of protecting athletes and their interests.

Legislation from Congress is especially important and at the highest priority to properly protect amateur athletes. Ultimately since professional athletes are employees, they can unionize and become members of their respective player organizations which serve their interests.\(^\text{164}\) Professional sports have extensive collective bargaining agreements as discussed previously. These collective bargaining agreements are where it would be most appropriate for these current wearable technology concerns to be addressed, and therefore Congress should shift their focus to the needs of amateur athletes.

There is a need for Congress to regulate regarding amateur athletes ranking from college athletics down to youth sports. This need is because they do not have the similar guardian type organizations, like professionals have in players unions looking out for their best interests.

\(^{163}\) The Location Privacy Protection Act, S. 2171, 113th Cong. (2014).
\(^{164}\) See NFL Mission Statement available at https://www.nflpa.com/about.
Amateur athletes do not have the ability to unionize.\textsuperscript{165} The constituency of amateur athletes needs the greatest level of protection. Furthermore, this protection may be warranted due to the age of these individuals. Amateurs, who are youths by nature, are the most in need of guardian support. Additionally, this information collected, without proper protection, may impair an amateur athlete's ability to play sports at the next level. Through technology, colleges may begin to gather new layers of information about amateurs, which could be used in their recruiting process. This could lead to a disparate impact on a group of inadequately protected athletes. Further, this same example is applicable for professional leagues and their scouting of collegiate athletes.

Forcing parents and school administrators to fulfill this role has not, and will not, suffice.\textsuperscript{166} Parents are not the best fit or properly commissioned for this legal duty. Many parents do not have the bargaining power, or potentially even the knowledge to understand the complexity of the future concerns wearable technology in amateur sports may bring. Dually, despite courts in the past deferring to school administrators and their judgments in similar situations, school administrators may have a conflict of interest regarding these types of wearable technologies and the privacy of their students. This leaves Congress as not only having the ability to take action, but also being best suited for the task. This group of publicly elected representatives need to continue to serve as amateur athletes advocates as we’ve seen them do throughout history.\textsuperscript{167}

In order for Congress to fulfill this void, legislation is the answer. A bill of this nature would likely be best fit for the Senate Committee on the Judiciary, Subcommittee on Privacy, Technology and the Law. The Jurisdiction of the Subcommittee on Privacy, Technology and the Law Includes:

1. Oversight of laws and policies governing the collection, protection, use and dissemination of commercial information by the private sector, including online behavioral advertising, privacy within social networking websites and other online privacy issues
2. Enforcement and implementation of commercial information privacy laws and policies
3. Use of Technology by the private sector to protect privacy, enhance transparency and encourage innovation
4. Privacy standards for the collection, retention, use and dissemination of personally identifiable commercial information

\textsuperscript{165} See Northwestern University, No. 13-RC-121359, 2014 NLRB LEXIS 221, 2014 WL 1246914 (denying the college athletes the ability to unionize explaining it would not promote labor relations to assert jurisdiction in this case) 2015 NLRB LEXIS 613 (N.L.R.B., Aug. 17, 2015).
\textsuperscript{167} See Sports Agents Responsibility and Trust Act 15 U.S.C. § 7801-7807 (2004). SPARTA was established to regulate the conduct of athlete agents in their attempts to sign student athletes, and provide student athletes protection from deceptive and misleading behavior.
5. Privacy implications of new or emerging technologies

This committee is headed by Chairman Thom Tillis, U.S. Senator from North Carolina. The other members of this committee currently include Lindsey Graham (South Carolina), John Cornyn (Texas), Ben Sasse (New England), Marsha Blackburn (Tennessee), Chuck Grassley (Iowa), Michael S. Lee (Utah), Mike Crapo (Idaho), Patrick Leahy (Vermont), Sheldon Whitehouse (Rhode Island), Mazie Hirono (Hawaii), Dick Durbin (Illinois), Richard Blumenthal (Connecticut), and Kalama Harris (California).

Legislation may be needed to establish necessary safeguards and processes for the collection of data in amateur sports. The extent and reach of the legislation is a determination for Congress. At the bare minimum, the regulation should require consent and minimal safeguards for companies collecting wearable data. A model legislation in which the Subcommittee on Privacy, Technology, and the Law, and Congress should consider as a baseline, modeled after S.2171 of the 113th Congress may look something similar to the following.

B. Summary of Proposed Model Legislation for Congress to Consider

If you would like to continue to the full portion of this proposed legislation continue to the appendix of this note on page 35. A summary of some key provisions proposed in the model legislation are listed here.

An entity may not knowingly collect or disclose to another entity or group the data metrics collected through wearable technology without the consent of the individual (or guardian when applicable) that is using the wearable technology device. Any entity partaking in the collection of data metrics through wearable technology must be held to an equal or higher standard of privacy rules and safeguarding regulations as set forth in the HIPAA Privacy Rules found at 45 CFR 160, 162, 164.

An entity may knowingly collect or disclose information to another entity or group the data metrics from a wearable technology device without consent if the collection or disclosure is for an array of listed emergencies.

An entity that collects data metrics through wearable technology of more than 2 devices in a year shall maintain a publicly accessible Internet website that includes a list of pertinent information including how an individual can revoke consent.

The total amount of civil penalties that may be imposed with respect to an entity that violates this section or its implementing regulations shall not exceed, for all violations resulting from the same or related acts or omissions, $1,000,000, unless the conduct is found to be willful or intentional.

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169 Id.
170 Id.
171 Location Privacy Protection Act of 2014, S.2171 113th Cong.
C. Alternative Ideas and Explanations of the Best Solutions

Alternatively, but far less effective than national legislation, yet nonetheless a start, to protect youths in sports one may look at the state. Rule implementation from athletic associations organizations in a state is one idea. An example of a state interscholastic organization is the Arizona Interscholastic Organization (AIA). The AIA is the largest in the state of Arizona and represents the majority of the schools. However, it does not represent all of the schools in Arizona. Many states like Arizona also have multiple smaller organizations tailored to specific unique schools who opt to join smaller organizations. Due to this, implementing rules from these organizations would not even lead to complete uniformity within one state. Therefore, state regulation would be the only way to ensure uniformity within a state's borders. Lobbying all sports organizations like the AIA, would be incredibly unfeasible, and likely lead to unequal results. It would require dozens of private membership-based organizations to agree and get on the similar terms of implementation. Furthermore, this may prove successful for high school age athletes, but it may leave a group of younger amateur athletes unprotected.

This idea of states protecting their athletes is a trend which has recently gained traction. Recently, states are now taking it upon themselves to protect the interest of college athletes. Starting in California with the Fair Pay to Play Act, an Act which allows student athletes to profit from their name, image, and likeness, multiple states have followed with similar legislation. States like California are recognizing the importance of safeguarding athletes’ rights as they become increasingly prominent figures in the public's eye.

However, state by state legislation is not as effective as national legislation because it does not provide uniform protection. When states simultaneously attempt to legislate around a current issue that athletes face, uniformity amongst legislations is utterly impractical. As recently illustrated with the Fair Pay to Play Act which was signed into law in California during September of 2019, Alabama, Arizona, Colorado, Florida, Georgia, Illinois, Kentucky, Minnesota, Nebraska, Nevada, New Jersey, New York, Pennsylvania, South Carolina and more states have all either introduced, or will be introducing their own versions of the Fair Pay to Play Act in 2020. Upon a review of the proposed bills of these states, and a comparison to California’s Fair Pay to Play Act, the following can be observed. Colorado imposed a specific 72-hour time limit in which student athletes need to inform their University of their contract entered, which California does not. The Georgia Bill as proposed would require schools to set aside one third of monies earned in a fund distributed to athletes upon graduation. New Jersey places limitations on what athletes are able to endorse from a product standpoint. New York includes the addition of an injury fund to benefit potentially injured student athletes. South Carolina includes paying students in good academic standing a fee. These are just a few of the easily identifiable differences that exist. In short, what is important to observe is the legislation proposed in these states are all different from California. All of these legislations will have vastly different impacts. Due to this, there is no true uniform impact for college athletes, and it will create unequal protection. This is just one example of how state by state legislation may address an issue, and be a positive solution, but not always the best solution. When an issue like this impacts athletes nationwide, as wearable technology has begun to, and will continue to, national

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legislation is undoubtedly the most effective answer. With nationwide uniformity, athletes will observe the most possible equal protection.

An alternative legislative effort may lie within the expansion and definition of “educational record” within the FERPA Act. While metrics recorded on the field may not translate directly to educational records, an extension of this law is not completely unforeseeable in the amateur athlete context. Expanding this to include information collected on the field in order to protect the privacy of athletes, just as the protection of educational records is already required, would not be outlandish. This solution is realistic and may provide an alternative way to implement a similar protection for amateur athletes.

Lobbying is commonly an effective way to get things of this nature done. However, the likelihood of lobbying may be unrealistic for many college athletes and parents due to the lack of funds, ability, and even awareness of the issues associated with wearable technology. College athletes may be faced with wearing these devices, yet not fully educated on what this undertaking entails. Additionally, many parents of amateur athletes may not comprehend the complexities of wearable technology, and issues may arise before there is systematic comprehension. An alternative way in which may be successful in raising awareness to this issue is through eliciting engagement from professionals. Professional athletes have the forum to be heard, and all professionals used to be amateur athletes.173 Appealing to professional athletes past as amateurs may be a way to increase support for amateurs interests’ and is not something unheard of.174

VI. CONCLUSION

Professional leagues and their respective collective bargaining agreements are ahead of the curve compared to the rest of the American sports world. When it comes to the realization of the privacy implications athletes face with wearable technology, professional leagues are leading the way. However, these agreements have not yet found the exact necessary medium. With many of the collective bargaining agreements ready to be renegotiated soon, professional sports have the unique ability to recreate and set the standard for the American sports world as a whole. It may be in the best interest of American professional sports to gather arguments that are persuasive to protect the athletes’ privacy more intensely. If the professional sports world can set the standard high to protect athletes, it may trickle down and impact the rest of the sports world including the collegiate and amateur athletic communities.

By 2024, all of the 5 major professional sports leagues will have new collective bargaining agreements. Each league, much like each sport, is unique and has varying circumstances that will come into play. However, they all have one thing in common. They need to ensure they represent the best interests of their athletes; otherwise, a larger issue for the future of their sports may arise with athletes’ concerns about their privacy just by preparing or stepping on the field of play. Former Commissioner of Major League Baseball, Allan “Bud” Selig

174 Id.
commonly refers to sports as a social institution.\textsuperscript{175} There is no better time in history than the present for sports to serve as a social institution and play a vital role in creating and standardizing the norm for privacy and the protection of individual athletes' interests. If the sports world is unable to accomplish this, Congress must step in and protect amateurs.

To address the usage of technology including wearable devices in athletic sports training and games at the amateur athletics level for tracking information and other purposes.

SECTION 1. SHORT TITLE.

This Act may be cited as the, “Wearable Technology in Amateur Sports Act of 2020”.

SECTION 2. DEFINITION.

In this Act, the term “wearable technology” has the meaning of technology and devices that have the ability of being attached, placed, and used in athletic clothing, gear, equipment, and on the human body.

SECTION 3. USAGE OF TECHNOLOGY INCLUDING WEARABLE DEVICES IN ATHLETIC SPORTS TRAINING AND GAMES AT THE AMATEUR ATHLETICS LEVEL.

(a) In General.—Chapter 121 of Title 18, United States Code, is amended by adding at the end the following:

§2XXX. Usage of technology including wearable devices in athletic sports training and games at the amateur athletics level

(a) Definitions.—In this section—

(1) the term “data metrics” refers to all information that is obtained through the usage of wearable technology devices including but not limited to, biometrics, health information data and vitals, and geographic data and locations.

(2) the term “entity” refers to any single business or company conducting operations in the wearable technology field collecting data metrics

(3) the term “consent” means affirmative express consent after being entitled to and unequivocally receiving clear and accurate information providing notice that —

(A) informs the amateur athlete (or legal guardian when applicable) that his or her data metrics will be collected by a specific entity

(B) what that specific entity has the ability to do with the collected data metrics

(C) whom that specific entity has the ability to share the collected data metrics with

(D) whom that specific entity has the legal duty to disclose the collected data metrics with in dire situations such as medical emergencies
(4) the term “group” refers to any other business, coaching staff member, school administrator, school staff member, parent, or any other person attempting or one that incidentally unintentionally receives data metrics collected

(5) the term “person” refers to any sole individual acting as a member of a group, as defined in this section above

(6) the term “information” refers to any other piece of data that a wearable technology device, or group collects not defined as data metrics

(b) Usage Of Technology Including Wearable Devices In Athletic Sports Training And Games At The Amateur Athletics Level.—

(1) IN GENERAL.—An entity may not knowingly collect or disclose to another entity or group the data metrics collected through wearable technology without the consent of the individual (or guardian when applicable) that is using the wearable technology device. Any entity partaking in the collection of data metrics through wearable technology must be held to an equal or higher standard of privacy rules and safeguarding regulations as set forth in the HIPAA Privacy Rules found at 45 CFR 160, 162, 164.

(2) EXCEPTIONS.—An entity may knowingly collect or disclose information to another entity or group the data metrics from a wearable technology device without consent if the collection or disclosure is—

   (A) to proper and necessary personnel solely for the use in an emergency medical situation;

   (B) for the provision of fire, public safety, or other emergency services;

   (C) requested by a law enforcement agency of the United States, a State, or a political subdivision of a State pursuant to any lawful authority or activity, including chapter 119, the Federal Rules of Criminal Procedure, or any other provision of Federal or State law, if the covered entity uses the data metrics collected in response to the request solely for law enforcement purposes;

   (D) necessary for network operation by a person that is subject to section 222 or 631 of the Communications Act of 1934 (47 U.S.C. 222 and 551), if the person uses the information solely for the purpose of network operation; and

   (E) necessary to protect property of significant value to the entity, or the entities customers from fraudulent, abusive, or unlawful conduct.

(3) PUBLICATION OF INFORMATION.—An entity that collects data metrics through wearable technology of more than 2 devices in a year shall maintain a publicly accessible Internet website that includes —

   (A) the nature of the wearable technology used, including what it entails, and how it collects data metrics
(B) the nature of the data metrics collected, and how it stores, processes, shares (when applicable) and safeguards the data metrics

(C) the purposes for which the entity collects, uses, and discloses all information including data metrics; and

(D) how an individual (or guardian when applicable) may electronically revoke consent for the collection and disclosure of wearable technology data, information, and data metrics, applied within 48 hours.

c) Rulemaking.—

(1) IN GENERAL.— The Attorney General shall, in consultation with the Federal Trade Commission, issue regulations to implement the requirements of this section. All regulations promulgated under this section shall be issued in accordance with section 553 of title 5.

(2) FLEXIBLE RULEMAKING.— In promulgating regulations under this section, the Attorney General shall—

   (A) avoid any regulatory requirement that would create redundant notifications or requests for consent, including in instances in which an individual has previously consented to the collection of his or her data metrics through wearable technology or its disclosure to a particular entity; and

   (B) ensure that such regulations address the specific operational requirements of shared and legacy wearable technology devices.

d) Civil Remedies.—

(1) ACTION BY ATTORNEY GENERAL OF THE UNITED STATES. — If the Attorney General of the United States has reasonable cause to believe that an individual or entity is violating this section or its implementing regulations, the Attorney General may bring a civil action in an appropriate United States district court.

(2) RIGHT OF ACTION. — Any individual aggrieved by any action of an individual or entity in violation of this section or its implementing regulations may bring a civil action in an appropriate United States district court.

(3) RIGHTS OF ATTORNEY GENERAL.—

   (A) NOTICE.—

      (i) IN GENERAL.—Except as provided in clause (iii), an aggrieved person bringing a civil action under paragraph (2) shall notify the Attorney
General in writing that the person intends to bring the action before initiating that action.

(ii) CONTENTS.—A notification provided under clause (i) with respect to a civil action shall include a copy of the complaint to be filed to initiate the civil action.

(iii) EXCEPTION.—If it is not feasible for the person to provide the notification required by clause (i) before initiating a civil action under paragraph (2), the person shall notify the Attorney General immediately upon instituting the civil action.

(B) INTERVENTION.—The Attorney General may—

(i) intervene in any civil action brought by an aggrieved person or guardian under paragraph (2); and

(ii) upon intervening—

(I) be heard on all matters arising in the civil action; and

(II) file petitions for appeal of a decision in the civil action.

(C) PREEMPTIVE ACTION.—If the Attorney General brings a civil action under paragraph (1), a person may not, during the pendency of such action, bring a civil action under paragraph (2) against any defendant named in the complaint of the Attorney General for any violation with respect to which the Attorney General instituted such action.

(4) RELIEF.—

(A) IN GENERAL.—In a civil action brought under this subsection, the court may award—

(i) damages of not more than $5,000 per violation per day while such a violation exists, with a maximum of $500,000 per violation;

(ii) punitive damages in an additional amount of not more than $5,000 per violation per day while such violation exists, with a maximum of an additional $500,000 per violation;

(iii) reasonable attorney’s fees and other litigation costs reasonably incurred; and

(iv) such other preliminary or equitable relief as the court determines to be appropriate.
(B) PENALTY LIMITS.—Notwithstanding any other provision of law, the total amount of civil penalties that may be imposed with respect to an entity that violates this section or its implementing regulations shall not exceed, for all violations resulting from the same or related acts or omissions, $1,000,000, unless the conduct is found to be willful or intentional. If a court determines that a violation was willful or intentional and imposes an additional penalty, the court may impose an additional penalty in accordance with subparagraph (A) in an amount that does not exceed $1,000,000.

(5) PERIOD OF LIMITATIONS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), a civil action may not be brought under this subsection unless the civil action is filed not later than 2 years after the later of—

(i) the date of the act complained of; or

(ii) the date of discovery of the act complained of.

(B) LIMITATION.—In no instance may a civil action be brought under this subsection after the date that is 10 years after the date of the act complained of.

(e) Effects On Other Law.—

(1) IN GENERAL.—This section shall supersede a provision of the law of a State or political subdivision of a State that requires or allows collection or disclosure of wearable technology information and/or data metrics prohibited by this section.

(2) STATE CONSUMER PROTECTION LAWS.—Nothing in this section shall be construed to preempt the law of a State that grants greater consumer protections relating to the collection, receipt, recording, obtaining, or disclosure of wearable technology information and/or data metrics.

(3) RIGHTS AND REMEDIES.—Nothing in this section shall be construed to effect the rights and remedies of any individual under any other State or Federal law.

(4) COMMON CARRIERS AND CABLE SERVICES.—This section shall not apply to the activities of an individual or entity to the extent the activities are subject to section 222 or 631 of the Communications Act of 1934 (47 U.S.C. 222 and 551).”.

(f) Technical And Conforming Amendments.—Chapter 121 of title 18, United States Code, is amended—

(1) in the table of sections, by adding at the end the following:
“2XXX. Usage of technology including wearable devices in athletic sports training and games at the amateur athletics level.”

(g) Effective Date; Applicability.—

(1) IN GENERAL.—The amendments made by this section—

(A) shall take effect on the date of enactment of this Act.