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“WHOSE” GAME IS IT? SPORTS-WAGERING AND INTELLECTUAL
PROPERTY

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IN 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA), a statute designed to prevent the further spread of state-sponsored sports-wagering.¹ The statute’s language has the effect of granting a property right to sports leagues, implicating the Constitution’s Intellectual Property Clause.² The Intellectual Property Clause grants Congress the authority: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³

In 2012, Major League Baseball (MLB), the National Football League (NFL), the National Basketball Association (NBA), the National Hockey League (NHL), and the National Collegiate Athletic Association (NCAA) (collectively “Sports Leagues”) brought suit against New Jersey Governor Chris Christie seeking an injunction under PASPA to prevent the state from offering regulated sports-wagering.⁴ The Department of Justice (DOJ) eventually joined the Sports Leagues as an intervenor.⁵ The matter was eventually appealed to the Third Circuit where a divided court ruled 2–1 in favor of the Sports Leagues.⁶

PASPA’s section 3703—labeled “Injunctions”—includes the word “whose,” which confers the ownership rights of “competitive game[s]” to the Sports Leagues for enforcement purposes under the statute:

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization *whose* competitive game is alleged to

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1. See 28 U.S.C. §§ 3701–04 (2012). In 1999, the Supreme Court discussed PASPA briefly in *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 527 U.S. 173, 179–80 (1999).

2. U.S. CONST. art. I, § 8, cl. 8; see also 28 U.S.C. §§ 3701–04.

3. U.S. CONST. art. I, § 8, cl. 8.

4. See Complaint for Declaratory and Injunctive Relief, *Nat’l Collegiate Athletic Ass’n v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2012) (No. 2:12-cv-04947), 2012 WL 3191255.

5. See David Purdum, *Feds to Step in on New Jersey’s Effort to Legalize Sports Betting*, THE SPORTING NEWS (Jan. 22, 2013), <http://linemakers.sportingnews.com/sport/2013-01-22/new-jersey-nj-sport-betting-law-dept-of-justice-doj-intervenes-chris-christie>.

6. See *Nat’l Collegiate Athletic Ass’n v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013).

be the basis of such violation.⁷

This semantic choice, with the determinant word “whose,” confers ownership rights of “competitive game[s]” to the Sports Leagues, as well as other professional or amateur sports organizations, deputizing them to enforce the law in the same manner as the DOJ.⁸ As a pronoun, the word “whose” is the possessive form of the word “who” and is used as an adjective. The word “whose” is defined as “a possessor” and “that which belongs to whom.”⁹

PASPA violates the Intellectual Property Clause for two distinct reasons. First, the express grant of perpetual ownership rights with characteristics mimicking both patents and copyrights runs counter to various prongs of the Intellectual Property Clause, including the “limited Times,” “Authors and Inventors,” and “Writings and Discoveries” requirements.¹⁰ Second, conferring perpetual property rights to states exempted under PASPA’s grandfathering provision violates the Intellectual Property Clause’s “limited Times” requirement.¹¹ The focus of this paper is on the former.

In a September 24, 1991 letter, the DOJ raised a number of concerns in connection with a then-Senate bill, S. 474, which would become PASPA.¹² Two concerns predominated. First, the DOJ flagged a number of provisions in S. 474 that raised “federalism issues.”¹³ Second, the DOJ found it “particularly troubling that S. 474 would permit enforcement of its provisions by sports leagues.”¹⁴ The DOJ’s concerns were ignored.

PASPA was enacted by Congress pursuant to the Commerce Clause.¹⁵ However, the conferral of property rights under the straightforward language in section 3703 implicates the Intellectual Property Clause.¹⁶ When Congress granted ownership of “competitive game[s]” to the Sports Leagues as a mechanism to deputize the Sports Leagues for purposes of PASPA enforcement, such conferral took the functional form of a patent with ancillary characteristics common to a copyright. This gave the Sports Leagues the right to exclude sports-wagering otherwise permissible under state law.¹⁷ By virtue

7. 28 U.S.C. § 3703 (emphasis added).

8. *See id.*

9. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1352 (10th ed. 1993), available at <http://www.merriam-webster.com/dictionary/whose>.

10. *See* U.S. CONST. art. I, § 8, cl. 8.

11. *See id.* *See generally* Eldred v. Ashcroft, 537 U.S. 186 (2003).

12. *See* Letter from W. Lee Rawls, Assistant Attorney Gen., Dep’t of Justice, to the Hon. Joseph R. Biden, Jr., Chairman, Comm. on the Judiciary (Sept. 24, 1991).

13. *See id.*

14. *Id.* The federalism issues were at the center of the petitions for writ of certiorari in *Christie*. The intellectual property implications were addressed in the amici curiae brief of the authors. *See* Brief for Amici Curiae Ryan M. Rodenberg, Anastasios Kaburakis, and John T. Holden in Support of Petitions for Writ of Certiorari at 4–22, *Christie v. Nat’l Collegiate Athletic Ass’n*, 134 S. Ct. 2866 (2014) (No. 13-967), 2014 WL 1246719 [hereinafter Brief for Amici Curiae Rodenberg, Kaburakis, & Holden].

15. *See* 28 U.S.C. §§ 3701–04 (2012).

16. *See id.*

17. The Supreme Court has provided an overview of the characteristics and remedies afforded to both patent and copyright holders. *See generally* Sony Corp. of Am. v. Universal

of the language used in PASPA’s property rights conferral, the statute is within the purview of the Intellectual Property Clause and therefore must comply with the Clause’s express limitations.

The Sports Leagues have cited the property rights granted by PASPA.¹⁸ The Sports Leagues posit that they have a proprietary interest in “the degree to which others derive economic benefits from their own games”¹⁹ The Sports Leagues also contend that they “have an essential interest in how their games are perceived and the degree to which their *sporting* events become *betting* events.”²⁰ The Sports Leagues further reference “legally protected interests of the organizations that produce the underlying games.”²¹ These recognitions of ownership by the Sports Leagues lend further support to a finding that PASPA implicates the Intellectual Property Clause.

The Sports Leagues’ legal position on this point has also been supported by the DOJ in this case.²² The DOJ claimed “PASPA does give the leagues a protected legal interest that has been invaded by New Jersey’s authorization of sports gambling”²³ The DOJ explained its argument by drawing an analogy to intellectual property law: “[T]he legal protection that PASPA accords to sports leagues is similar to the protections traditionally afforded in fields such as copyright and trademark law, where authors and companies are given the right not to have their creative works exploited by other parties.”²⁴

PASPA’s legislative history supports the arguments made by the Sports Leagues and the DOJ. PASPA was debated in the Senate by the Subcommittee on Patents, Copyrights, and Trademarks.²⁵ The title of the statute itself reveals PASPA’s intent and effect. PASPA stands for “Professional and Amateur Sports Protection Act.”²⁶ PASPA protects select professional and amateur sports leagues from the perceived ills of regulated sports-wagering through the allocation of ownership interests in “competitive game[s]” under section 3703.²⁷ Congress anointed the Sports Leagues to sue for injunctive relief under the statute in the same way patent holders and copyright holders can file suits to protect their property interests.

When NBA commissioner David Stern testified in front of the Senate

City Studios, Inc., 464 U.S. 417 (1984).

18. See Response Brief of Plaintiffs-Appellees at 18, *Nat’l Collegiate Athletic Ass’n v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2014) (No. 13-967), 2013 WL 2904907.

19. *Id.*

20. *Id.* at 13–14.

21. Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss the Complaint at 1, *Nat’l Collegiate Athletic Ass’n v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2012) (No. 3:12-cv-4947), 2012 WL 4804067.

22. See Brief for Appellee United States of America at 17, *Nat’l Collegiate Athletic Ass’n v. Christie*, 730 F.3d 208 (3d Cir. 2013) (Nos. 13-1713, 13-1714, 13-1715) 2013 WL 2904910.

23. *Id.*

24. *Id.* at 22 n.7.

25. See *Prohibiting State-Sanctioned Sports Gambling: Hearing Before the Subcomm. on Patents, Copyrights & Trademarks of the S. Comm. on the Judiciary*, 102d Cong. (1991) [hereinafter *Prohibiting State-Sanctioned Sports Gambling*].

26. See 28 U.S.C. § 3701–04 (2012).

27. See *id.* § 3703.

Subcommittee on Patents, Copyrights, and Trademarks on June 26, 1991, he expressed his view on PASPA's intended protection and on the overlap between sports-wagering and intellectual property: "Conducting a sports lottery or permitting sports gambling involves the use of professional sports leagues' games, scores, statistics and team logos, in order to take advantage of a particular league's popularity; such use violates, misappropriates and infringes upon numerous league property rights."²⁸

Congress enacted patent and copyright laws pursuant to the Intellectual Property Clause.²⁹ Patent law protection is granted for useful, novel, and non-obvious inventions.³⁰ The U.S. Patent and Trademark Office (USPTO) reviews and grants patents.³¹ If approved, a patent permits the holder to exclude others from claiming the invention for a period of usually twenty years.³² Patents operate as a duly authorized monopoly for a limited duration of time. The Sports Leagues did not obtain a formal patent from the USPTO in connection with individual sporting events. Congress unilaterally granted a quasi-patent for sports-wagering purposes via the language contained in section 3703 of PASPA.³³

Copyright law protects "original works of authorship fixed in any tangible medium of expression, now known or later developed . . ."³⁴ Copyright categories are specifically enumerated and include literary works, musical recordings, and movies.³⁵ Sporting events are not included in the inclusive list.³⁶

Congress's conferral of ownership interests over athletic events to Sports Leagues functions as a monopoly and runs counter to Supreme Court precedent.³⁷ In *Sony v. Universal City Studios, Inc.*,³⁸ the Court explained: "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. . . . It is intended to motivate the creative activity of authors and inventors . . ."³⁹ PASPA fails to meet this standard in two ways. First, PASPA's ownership privileges under section 3703 attach to only "a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation."⁴⁰ Second, PASPA's purpose is wholly unrelated to the creative activity of authors and inventors; instead, the statute seeks to control the spread

28. See *Prohibiting State-Sanctioned Sports Gambling*, *supra* note 25, at 51 (testimony of David J. Stern, Comm'r, Nat'l Basketball Ass'n).

29. U.S. CONST. art. I, § 8, cl. 8.

30. See 35 U.S.C. §§ 101–03 (2012).

31. See *id.*

32. See *id.*

33. See 28 U.S.C. §§ 3701–04 (2012).

34. See 17 U.S.C. § 102(a) (2012).

35. See *id.*

36. See *id.*

37. See, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

38. 464 U.S. 417 (1984).

39. *Id.* at 429.

40. 28 U.S.C. § 3703 (2012).

of an activity deemed by Congress to be undesirable.⁴¹

With PASPA’s grant of a proprietary right to the Sports Leagues operating as the functional equivalent of a patent, it is useful to gauge the scope of Congress’s authority to grant patents. In *Graham v. John Deere Co. of Kansas City*,⁴² the Court made clear:

Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must “promote the Progress of . . . useful Arts.” This is the standard expressed in the Constitution and it may not be ignored.⁴³

When juxtaposed with the Intellectual Property Clause’s requirements, PASPA’s grant of a patent-like property right to Sports Leagues fails on multiple counts. First, the power to exclude states from effectuating regulated sports-wagering programs is unrelated to, and in direct conflict with, the Intellectual Property Clause’s requirement that such grants “promote the Progress of Science and useful Arts.”⁴⁴ Scholars Paul Heald and Suzanna Sherry have noted, “[a] corollary principle [of the Intellectual Property Clause] demands that Congress initially direct exclusive grants to those who provide the public with the new creation. Monopolies are not rewards Congress may grant to favored special-interest groups.”⁴⁵

Second, PASPA’s grant of property rights is perpetual, putting it at odds with the “limited Times” requirement of the Intellectual Property Clause.⁴⁶ Third, as detailed in *National Basketball Ass’n v. Motorola, Inc.*,⁴⁷ the Sports Leagues do not qualify as “Authors” under the Intellectual Property Clause.⁴⁸ The Second Circuit in *Motorola* ruled against the NBA and found the league’s primary business was “producing basketball games with live attendance and licensing copyrighted broadcasts of those games”⁴⁹ Fourth, athletic events do not constitute “Writings [or] Discoveries” under the Intellectual Property Clause, given their purported spontaneous nature and accompanying uncertainty of outcome.⁵⁰

PASPA’s grant of copyright-like power to the Sports Leagues is equally

41. *See id.*

42. 383 U.S. 1 (1966).

43. *Id.* at 6 (alteration in original) (quoting U.S. CONST. art. I, § 8, cl. 8).

44. *See* U.S. CONST. art. I, § 8, cl. 8.

45. Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1164 (2000).

46. *See* U.S. CONST. art. I, § 8, cl. 8.

47. 105 F.3d 841 (2d Cir. 1997).

48. *See id.*

49. *Id.* at 853.

50. In contrast to scripted television shows or quasi-sporting events such as professional wrestling, the Sports Leagues supposedly do not participate in athletic events using pre-arranged scripts or a rehearsed sequencing of game-level events.

evident under section 3703's "whose competitive game" language.⁵¹ In their original complaint, the Sports Leagues posited that athletic contests are not scripted, implicating the "Writings" requirement of the Intellectual Property Clause and the "fixation" language in the Copyright Act of 1976.⁵² The Sports Leagues argued that "the outcomes of collegiate and professional athletic contests must be determined, and must be perceived by the public as being determined, solely on the basis of honest athletic competition."⁵³ Unlike live musicals, theatrical plays, and professional wrestling, honestly competitive sports are unscripted, making them incompatible with copyright law's constitutional and statutory requirements.

Unlike the games' telecasts and broadcasts, which have been found to be copyrightable content, the games *per se* have not been definitively deemed worthy of copyright protection.⁵⁴ Indeed, as the Solicitor General recently explained as amicus in *American Broadcasting Cos. v. Aereo, Inc.*⁵⁵: "In some circumstances, moreover, the initial 'performance' may be the act of transmission itself. For example, when a television network broadcasts a live sporting event, no underlying performance precedes the initial transmission—the telecast itself is the only copyrighted work."⁵⁶ Additionally, the "whose competitive game" wording of section 3703 creates the suspicion of a *sui generis* Intellectual Property Clause violation by basing a property right granted by PASPA to a concept that has no owner.⁵⁷

PASPA's conferral of property rights in section 3703 also highlights a conflict between the Commerce Clause and the Intellectual Property Clause.⁵⁸ According to professor Thomas Nachbar, "[t]he overwhelming view among commentators is that the Intellectual Property Clause's limits apply to all of Congress's powers and therefore that Congress may not look to other Article I, Section 8 powers in order to avoid those limits."⁵⁹ The implications for the Intellectual Property Clause's external limitations on PASPA are profound. Scholar Jeanne Fromer flags the issue generally as follows: "Since the late twentieth century, Congress has increasingly reached beyond the [Intellectual Property] Clause's means to promote the [Intellectual Property] Clause's ends,

51. See 28 U.S.C. §§ 3701–04 (2012).

52. See 17 U.S.C. §§ 101–810 (2012); Complaint for Declaratory and Injunctive Relief, *supra* note 4.

53. Complaint for Declaratory and Injunctive Relief, *supra* note 4, at ¶ 5.

54. This issue has emerged as both an inter-circuit split as well as an intra-circuit split within the Eighth Circuit. The Second Circuit and the Eleventh Circuit are largely at odds. Compare *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997), with *Morris Commc'ns. Corp. v. PGA Tour, Inc.*, 364 F.3d 1288 (11th Cir. 2004). The Eighth Circuit cases include *Nat'l Football League v. McBee & Bruno's, Inc.*, 792 F.2d 726 (8th Cir. 1986) and *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007).

55. 134 S. Ct. 2498 (2014).

56. Brief for the United States as Amicus Curiae Supporting Petitioners at 26, *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461), 2014 WL 828079.

57. See 28 U.S.C. § 3703 (2012).

58. See *id.*

59. Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 274 (2004).

often asserting its expansive—and less limited—commerce and treaty powers.”⁶⁰

PASPA’s invocation of the Intellectual Property Clause is a novel argument, one not addressed by the parties or other amici in the *Christie* litigation.⁶¹ The other parties have focused their attention on anti-commandeering principles contained within the Tenth Amendment and arguments related to equal sovereignty.⁶² PASPA’s deputization of Sports Leagues and embedded property rights to “competitive game[s]” under section 3703 have not been uniformly accepted in various federal courts.⁶³ In addition to the obvious First Amendment issues connected to the commodification of news from sporting events, the judicial divergence on this issue yields substantial doubt in regard to PASPA’s underpinnings and compatibility with the Constitution’s Intellectual Property Clause.

60. Jeanne C. Fromer, *The Intellectual Property Clause’s External Limitations*, 61 DUKE L.J. 1329, 1330 (2012) (emphasis omitted).

61. See *Nat’l Collegiate Athletic Ass’n v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014); Brief Amicus Curiae of Pacific Legal Foundation and Cato Institute in Support of Petitioners, *Christie v. Nat’l Collegiate Athletic Ass’n*, 134 S. Ct. 2866 (No. 13-967), 2014 WL 1089088; Brief for Amici Curiae Rodenberg, Kaburakis, & Holden, *supra* note 14; Brief of Amici Curiae States of West Virginia, Wisconsin, and Wyoming in Support of Petitioners, *Christie v. Nat’l Collegiate Athletic Ass’n*, 134 S. Ct. 2866 (2014) (No. 13-967), 2014 WL 1089089.

62. See *supra* note 61.

63. See Complaint for Declaratory and Injunctive Relief, *supra* note 4.