AMATEURISM AND THE RIGHT OF PUBLICITY: HOW O’BANNON v. NCAA STRIKES AN IMBALANCE BETWEEN AMATEURISM AND STUDENT-ATHLETES’ RIGHT OF PUBLICITY REGARDING USE OF THEIR NAME, IMAGE, AND LIKENESS

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I. INTRODUCTION

The National Collegiate Athletic Association (“NCAA”) accumulates approximately one billion dollars in revenue per year.\(^1\) Student-athletes assist in generating that revenue by participating in college sports.\(^2\) A person’s ability to authorize and control the use of their identity for commercial gain is called the right of publicity.\(^3\) In contrast to professional athletes, student-athletes are limited in their ability to monitor and protect the use of their image without their consent because of their status as an “amateur.”\(^4\)

This comment will review the Ninth Circuit’s decision in *O’Bannon v. NCAA* and the impact it has on the use of student-athletes’ name, image, and likeness (“NIL”).\(^5\) Section II provides an overview of the First Amendment and right of publicity.\(^6\) Section III is a brief narrative analysis of the *O’Bannon* decision.\(^7\) Section IV details why the *O’Bannon* struck an imbalance between


\(^2\) For further discussion about how student-athletes contribute to the NCAA’s revenue, see *infra* note 92 and accompanying text.

\(^3\) For further discussion about the right of publicity, see *infra* note 41 and accompanying text.

\(^4\) For further discussion about how student-athletes are limited in their ability to control their right of publicity, see *infra* notes 83-92 and accompanying text.

\(^5\) For further discussion about *O’Bannon* and its impact on student-athletes use of their NILs, see *infra* notes 74-96 and accompanying text.

\(^6\) For further discussion about the First Amendment and the right of publicity, see *infra* notes 10-48 and accompanying text.

\(^7\) For further discussion about the *O’Bannon* decision, see *infra* notes 49-73 and accompanying text.
amateurism and student-athletes’ right of publicity. Section V concludes that the NCAA currently holds the power to exploit student-athletes’ right of publicity.

II. THE WARM UP: THE FIRST AMENDMENT AND RIGHT OF PUBLICITY

When an individual’s NIL is used without their permission in video games, television shows, or newspapers, they potentially have a right of publicity claim. There are times when a defendant can use a First Amendment defense to substantiate why they did not infringe on an individual’s right of publicity. Section A outlines the First Amendment, what forms of speech are protected, and how much protection they receive. Section B explains what the Transformative Use Test is and why it is applied to expressive speech. Section C details the history of the right of publicity and how it is viewed today. Section D summarizes why the right of publicity and First Amendment are intertwined in right of publicity claims.

A. The First Amendment

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech or press.” It immunizes specific forms of speech from legal liability. There are three forms of speech that are protected under the First Amendment: political news, expressive speech, and advertising. Each category receives a certain level of immunity from legal liability.

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8 For further discussion about how O’Bannon caused an imbalance between amateurism and student-athletes’ right of publicity, see infra notes 74-92 and accompanying text.
9 For further discussion about how the O’Bannon decision is currently impacting student-athletes, see infra notes 93-96 and accompanying text.
10 For further discussion about the First Amendment and protected speech see infra notes 14-21 and accompanying text.
11 For further discussion about the First Amendment and protected speech see infra notes 22-31 and accompanying text.
12 For further discussion about the First Amendment and protected speech see infra notes 32-43 and accompanying text.
13 For further discussion about nexus between the First Amendment and right of publicity, see infra notes 44-48 and accompanying text.
14 U.S. Const. amend. I.
16 See Id. (outlining political news, expressive speech, and commercial speech).
17 See Martin H. Redish & Kelsey B. Shust, The Right of Publicity and the First Amendment in the Modern Age of Commercial Speech, 56 WM. & MARY L. REV. 1443, 1467 (2015)(“Speech deemed ‘newsworthy,’ or in some cases ‘expressive,’ is generally afforded broad constitutional protection in the face of right of
The First Amendment provides the most protection to political news because it promotes “liberty” by furnishing “information about the real world and is essential to clear thinking and public debate in a free society.”

Expressive speech receives a reduced level of protection compared to political news. The last category is advertising, which is now called commercial speech. The current opinion is that “commercial speech” is entitled to the protection of the First Amendment, albeit to protection somewhat less extensive afforded to ‘noncommercial speech.’

See Kelly Miller, By Any Other Name: Image Advertising and the Commercial Speech Doctrine in Jordan v. Jewel, 36 Loy. L.A. Ent. Rev. 1, 5 (2015) (noting that political news receives the highest protection because it is “fundamental principle of the American government”); see also Josh Waller, The Right of Publicity: Preventing the Exploitation of a Celebrity’s Identity or Promoting the Exploitation of the First Amendment?, 9 UCLA Ent. L. Rev. 59, 63 (2001) (outlining three goals of First Amendment and how those goals set the framework for the amount of protection afforded to each category of speech).

See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 637 (1985) (stating dominant view, based on recent court decisions is that commercial speech should receive constitutional protection).
B. Expressive Speech and the Transformative Use Test

Works categorized as expressive speech receive a higher form of protection compared to works deemed commercial speech. Video games are expressive works and receive the same degree of protection provided to elite literary works. The Transformative Use Test was created by the California Supreme Court to address the ongoing battle between right to publicity claims and First Amendment defenses. The Transformative Use Test is comprised of five factors; and, courts examine these factors to determine whether a defendant’s use of an individual’s likeness meet the threshold to be considered transformative to receive First Amendment protections.

Video game creators use the First Amendment as a defense to right of publicity claims and the transformative use test is applied to deduce whether video games protection. In Hart v. Elec. Arts, Inc., 717 F.3d. 141 (3rd Cir. 2013), former Rutgers quarterback, Ryan Hart, filed a suit under the right of publicity claim. Hart argued that EA misappropriated his likeness for commercial use in its NCAA Football video game without his consent, and EA argued that NCAA Football is an expressive work that is provided First Amendment protection. After applying the Transformative Use Test, the Third

22 For further discussion about the level of protection expressive speech receives under the First Amendment, see supra note 19 and accompanying text.
23 See Michael Feinberg, A Collision Course Between the Right of Publicity and the First Amendment: The Third and Ninth Circuit Find EA Sports’s NCAA Football Video Games Infringe Former Student Athletes Right of Publicity, 11 SETON HALL CIRCUIT REV. 175, 203 (2014)(stating video games are expressive works and are provided First Amendment protections).
24 See Id. at 198 (2014)(“The California Supreme Court constructed the Transformative Use Test after finding that elements of the copyright ‘fair use’ doctrine most appropriately balance the competing interest underlying the right of publicity and the First Amendment.”).
25 For further discussion about how courts apply the transformative use test factors, see infra notes 27-31 and accompanying text.
26 For further discussion about how video game developers use the First Amendment defense against right of publicity claims see infra notes 74-82 and accompanying text.
27 Hart, 717 F.3d. 141 (3rd Cir. 2013)(addressing Ryan Harts right of publicity claim alleging that EA used his biographical information and likeness for commercial use in their NCAA Football video game).
28 See Id. at 148-49 (“Here Appellee concedes, for purposes of the motion of appeal, that it violated Appellant’s right of publicity; in essence, misappropriating his identity for commercial exploitation. However, Appellee contends that the First Amendment shields it from liability for this violation because NCAA football is protected work.”).
Circuit ruled in favor of Hart’s right of publicity claim.\textsuperscript{29} *NCAA Football* did not meet the threshold to be considered transformative because it did not adequately transform Hart’s identity.\textsuperscript{30} *Hart* was not the last occurrence where EA asserted a First Amendment defense against a right of publicity claim against a student-athlete – EA asserted a similar defense against Keller in the *O’Bannon* litigation.\textsuperscript{31}

C. Right of Publicity

In 1953, in *Haelan Laboratories v. Topps Chewing Gum Inc.*, Judge Frank coined the phrase “the right to publicity.”\textsuperscript{32} In *Haelan Laboratories*, a company that distributed gum had the exclusive right to use a prominent baseball player’s picture for their product.\textsuperscript{33} Another company induced the baseball player to allow them to use his picture for their chewing gum too.\textsuperscript{34} In his analysis Jude Frank stated that a public figure has the right to privacy and what is included in their right to privacy is the right in the publicity value of their image.\textsuperscript{35}

\textsuperscript{29} See Id. at 170 (“The ability to make minor alterations – which substantially maintain the avatar’s resemblance of the Appellant (e.g., modifying only basic biographical information, playing statistics, or uniform accessories) – is likewise insufficient, for ‘an artist depicting a celebrity must contribute more than ‘merely trivial’ variations.’”).

\textsuperscript{30} See Id. (detailing why *NCAA Football* did not meet the standards under the Transformative Use Test).

\textsuperscript{31} For further discussion about EA using the First Amendment defense against a right of publicity claim, see infra notes 74-82 and accompanying text.

\textsuperscript{32} See *Haelan Laboratories v. Topps Chewing Gum Inc.*, 202 F.2d 866 (2nd Cir. 1953)(“We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made ‘in gross,’ i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a ‘property’ right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth. This right might be called a ‘right of publicity.’ For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways”).

\textsuperscript{33} See Id. at 868 (recounting fact of case).

\textsuperscript{34} See Id. (noting how defendant induced star baseball player to give them consent to use his image for their chewing gum).

\textsuperscript{35} For further discussion about why public figures should be permitted to give consent to use their image, see supra note 32 and accompanying text.
Following Judge Franks coining of “the right to publicity,” Professor Melville B. Nimmer predicted that public figures would soon focus less on their right to privacy. Nimmer stated “[A]lthough the well-known personality does not wish to hide his light under a bushel of privacy, neither does he wish to have his name, photograph and likeness reproduced and publicized without his consent or without remuneration to him.” Public figures would begin to want some form of protection from the use of their likeness without their permission. In sum, the “right to publicity” started off as a protection under the right to privacy. Then, it became less about public figures’ privacy and more about their right to protect their likeness or image.

To claim the right of publicity, the plaintiff must show: 1) their own identity is at issue, 2) defendant’s used plaintiff’s identity in way to make plaintiff identifiable, and 3) defendant’s use caused damage to the plaintiff’s commercial value. Professional athletes have the ability to assert a right of publicity claim if they feel that another person or entity used their celebrity status for commercial gain without their consent. After the Ninth Circuit’s decision in O’Bannon, undergraduate institutions are not permitted to compensate student-athletes with cash for the use of student-athletes’ name, image, and likeness because their status as an “amateur.”

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37 See Id. (analyzing why public figures harbor less on their right to privacy and more on their right to authorize use of their image).
38 See Id. at 951-52 (“Now, courts in most jurisdictions uniformly hold that the right of publicity should be considered as a free standing right independent from the right of privacy”).
39 For further discussion about the development of the right of publicity, see supra notes 32-38 and accompanying text.
40 For further discussion about the development of the right of publicity, see supra notes 32-38 and accompanying text.
41 See J. Thomas McCarthy, 5 McCarthy on Trademarks and Unfair Competition § 28:7 (stating the prima facie elements of a right to publicity claim).
42 For further discussion about athletes asserting their right of publicity see infra notes 54-62 and accompanying text.
43 For further discussion about the Ninth Circuit holding that student-athletes are not permitted to be compensated for their NILs, see infra notes 68-73 and accompanying text.
D. Nexus of Right to Publicity and First Amendment

The First Amendment’s purpose is to “secure the common good through the ‘free exchange of ideas.’” \(^{44}\) Topics such as politics and various matters of opinion are categorized as noncommercial speech and are given greater constitutional protection than commercial speech.\(^{45}\) If a person’s likeness is used for political topics or matter of opinion, the First Amendment would exclude that individual’s rights. However, courts have a difficult time when a persona is used for trade purposes.\(^{46}\)

The Transformative Use Test must be applied when an individual’s persona is used in an expressive work because of the higher degree of protection afforded to expressive works under the First Amendment. Therefore, when right of publicity claims are alleged against expressive works, it must be determined whether the work sufficiently transformed a person’s likeness to the point where it is substantially different from the person’s original likeness or persona.\(^{47}\) Balancing the interest of an individual’s right to control their image under the right of publicity claim and freedom of expression under the First Amendment is the true purpose of the Transformative Use Test.\(^{48}\)


\(^{45}\) See Id. (stating the difference between political expression and matters of opinion, and commercial speech).

\(^{46}\) For further discussion about courts balancing the First Amendment and right of publicity claims, see supra notes 27-31 and accompanying text.

\(^{47}\) For further discussion about the Transformative Use Test, see supra notes 27-31 and accompanying text.

\(^{48}\) See Michael Feinberg, A Collision Course Between the Right of Publicity and the First Amendment: The Third and Ninth Circuit Find EA Sports’s NCAA Football Video Games Infringe Former Student-Athletes Right of Publicity, 11 SETON HALL CIRCUIT REV. 175, 185-87(2014)(“One the one hand, the right of publicity is not a right of censorship, but rather a right to prevent others from misappropriating the economic value generated by an individual’s fame through merchandising his or her name, image, or likeness . . . There are several theories and policies supporting First Amendment protections, which include fostering a marketplace of ideas, encouraging human dignity and self-fulfillment . . .”).
III. THE GAME: O’BANNON V. NCAA

O’Bannon had a significant impact on student-athletes right of publicity and how they can be compensated for their NILs.\textsuperscript{49} The decision tipped the scales towards amateurism and away from student-athletes’ interest in exploiting their NILs and using their right of publicity.\textsuperscript{50} Section A recites the facts of the case.\textsuperscript{51} Section B reviews NCAA’s argument about why student-athletes’ right of publicity was harmed by preventing them from receiving compensation for use of their NILs.\textsuperscript{52} Section C assesses why the Ninth Circuit decided not to permit student-athletes to be compensated for their NILs because their status as an amateur.\textsuperscript{53}

A. Facts

In 2008, Ed O’Bannon, a former UCLA basketball player, viewed an avatar of himself in a college basketball video game created by Electronic Arts, Inc.\textsuperscript{54} O’Bannon sued the National Collegiate Athletic Association (“NCAA”) and Collegiate Licensing Company (“CLC”) in federal court.\textsuperscript{55} O’Bannon alleged that the NCCA’s amateurism rules violated the antitrust laws because they prohibited student-athletes from being compensated for their name, image, and likeness.\textsuperscript{56} In a separate suit, Sam Keller, a former collegiate athlete brought a suit against NCAA, EA, and CLC claiming that the NCAA’s wrongfully used student-athletes’ image, name and likeness (“NILs”), ignored EA’s misappropriation of student-athletes’ NILs, and brought a claim under Indiana and California’s right of publicity statutes.\textsuperscript{57}

\textsuperscript{49} For further discussion about how the O’Bannon decision impacted how student-athletes can use their NILs, see infra notes 74-96 and accompanying text.
\textsuperscript{50} For further discussion about how the O’Bannon decision tipped the scales towards amateurism, see infra notes 74-96 and accompanying text.
\textsuperscript{51} For further discussion about the background of O’Bannon, see infra notes 54-62 and accompanying text.
\textsuperscript{52} For further discussion about the NCAA’s argument about how student-athletes never suffered an injury-in-fact, see infra notes 63-67 and accompanying text.
\textsuperscript{53} For further discussion about why the Ninth Circuit decided not to allow student-athletes to be compensated for their NILs, see infra notes 68-73 and accompanying text.
\textsuperscript{54} See O’Bannon v. National Collegiate Athletic Ass’n, 802 F.3d 1049, 1055 (9th Cir. 2015) (detailing the facts of O’Bannon litigation).
\textsuperscript{55} See Id. (stating how O’Bannon sued the NCAA and CLC).
\textsuperscript{56} See Id. (outlining O’Bannon’s claims against the NCAA).
\textsuperscript{57} See O’Bannon, 802 F.3d at 1055 (providing facts surrounding Keller litigation).
The O’Bannon and Keller litigation were consolidated and they settled their claims against EA and CLC. O’Bannon’s suit against the NCCCA went to a bench trial before the district court. O’Bannon argued that the NCAA’s rules caused an unlawful restraint on Trade over Division I basketball and football student-athlete NILs in the college education market and group licensing market. The district court concluded that the NCAA’s rules prohibiting student-athletes from receiving compensation for use of their NILs violated antitrust laws. The NCAA appealed the decision arguing that the district court was prohibited from deciding whether O’Bannon’s claims failed or succeeded on the merits under the Sherman Act.

B. No Harm to Student-Athletes When Using Their NILs

The NCAA argued that its rules did not injure student-athletes and that O’Bannon failed to meet the heightened standard required to be met when

58 See Id. at 1056 (stating O’Bannon suit and Keller suit were consolidated and later settled).
59 See O’Bannon National Collegiate Athletic Ass’n, 7 F.Supp.3d 955 (N.D. Ca. 2014)(outlining the district court’s reasoning and decision).
60 See O’Bannon, 802 F.3d at 1055-57 (Stating that the following limited how much student-athletes are compensated for the use of their NIL: 1) the prohibition on receiving financial aid above the full grant-in-aid for athletic ability; 2) the prohibition on receiving financial aid in excess of the cost of attendance; 3) the prohibition on receiving compensation from third parties based on a student-athlete's athletic skill or ability; and 4) the prohibition on a student-athlete endorsing a product, whether he receives compensation or not).
61 See Id. at 1007-08 (“Consistent with the less restrictive alternatives found, the Court will enjoin the NCAA from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid. The injunction will not preclude the NCAA from implementing rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance, as the term is defined in its current bylaws. The injunction will also prohibit the NCAA from enforcing any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires.”).
62 See Id. (“... (1) The Supreme Court held in NCAA v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), that the NCAA's amateurism rules are “valid as a matter of law”; (2) the compensation rules at issue here are not covered by the Sherman Act at all because they do not regulate commercial activity; and (3) the plaintiffs have no standing to sue under the Sherman Act because they have not suffered “antitrust injury.”).
alleging an antitrust injury. 63 The Ninth Circuit agreed with the district court stating that if the NCAA’s compensation rules were not in place, video game creators would negotiate directly with student-athletes to receive authorization to use their NILs. 64 The NCAA argued that there was no injury in fact because the NCAA relinquished its relationship with EA and it’s not working with another video game maker. 65 The Ninth Circuit’s rebuttal was that the district court determined that there was a possibility that the NCAA would resume its relationship with EA; and, because college sports video games were profitable in the past, it was reasonable to conclude that student-athletes’ suffered a loss in compensation. 66 The Court went on to note that the NCAA allowed EA to make video games long after EA incorporated player avatars and that EA made efforts to cooperate with the NCAA and change the policy for using student-athletes’ NILs. 67

C. Amateurism and Student-Athlete Compensation

The Ninth Circuit determined that the district court erred when it concluded that another reasonable alternative would be cash payments not related

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63 See id. at 1067 (“To satisfy the antitrust-injury requirement, a plaintiff must show ‘injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.’”).
64 See id. (“As we have explained, the district court found that, if permitted to do so, video game makers such as EA would negotiate with college athletes for the right to use their NILs in video games because these companies want to make games that are as realistic as possible . . . The district court noted that EA currently negotiates with the NFL and NBA players’ unions for the right to use their members’ NILs in pro sports video games. The plaintiffs also put into evidence a copy of a 2005 presentation by EA representatives to the NCAA, which stated that EA’s inability to use college athletes NILs was the ‘number one factor holding back NCAA video game growth.’”).
65 See O’Bannon, 802 F.Supp.3d 1049, 1067 (9th Cir. 2015)(“The NCAA argues, however, that we cannot find that the plaintiffs have suffered an injury in fact based on lost compensation from video game companies because the NCAA has terminated its relationship with EA and is not currently working with any other video game maker.”).
66 See id. at 1068 (“Given the NCAA’s previous, lengthy relationship with EA and the other evidence presented, it was reasonable for the district court to conclude that the NCAA may well begin working with EA or another video game company in the future.”).
67 See id. (“The NCAA did, after all, permit EA to continue making NCAA video games for some time after EA began incorporating recognizable player avatars into games . . . a EA executive, testified at trial that EA ‘made long-sustained effort to work with the NCAA’ to change the policy against using student-athletes’ NILs, and that NCAA executives were ‘supportive’ of the idea.”).
to education expenses. The court stated “the question is whether the alternative of allowing students to be paid NIL compensation unrelated to their education expenses, is “virtually as effective” in preserving amateurism as not allowing compensation.” The court concluded that student-athletes not getting paid is what makes them amateurs and amateurism is one of the NCAA’s procompetitive purposes. If student-athletes received money for their NILs, their status as an “amateur” would be vitiated. Therefore, providing funds for NILs is not a reasonable alternative. The Ninth Circuit vacated the district court’s decision allowing NCAA’s member schools to hold student-athletes compensation in trust until they left their respective university.

IV. THE COOL DOWN: HOW O’BANNON TRIED TO BALANCE AMATEURISM AND STUDENT-ATHLETES’ RIGHT OF PUBLICITY

O’Bannon and Keller consolidated their cases during the pretrial proceedings. The defendants moved to dismiss Keller’s right-of-publicity claims under California’s right of publicity statutes on First Amendment grounds. Video games have First Amendment protections because it is considered expressive speech. However, the protections the First Amendment provides are not “. . . absolute, and states may recognize the right of publicity to a degree consistent with the First Amendment.”

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68 See Id. at 1076 (stating that the district court erred when deciding that cash payments for NILs were a viable alternative).
69 See Id. (outlining the test to determine whether a proposed reasonable alternative is acceptable).
70 See O’Bannon, 802 F.Supp.3d 1049, 1076 (9th Cir. 2015) (“But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is precisely what makes them amateurs.”)
71 See Id. (stating that if student-athletes were to be compensated for their NILs, they would no longer be considered “amateurs”).
72 See Id. (concluding that compensation for student-athletes’ NILs was not a reasonable alternative).
73 See O’Bannon, 802 F.Supp.3d at 1079 (stating the 9th Circuit’s decision to vacate the district court’s holding in part and affirm in part).
74 For further discussion about how O’Bannon and Keller consolidate their cases, see supra notes 54-58 and accompanying text.
75 See O’Bannon, 802 F.Supp.3d at 1055 (explaining why defendants moved to dismiss Keller’s right-of-publicity claims and on what grounds).
76 See In re NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268, 1270-71 (9th Cir. 2013) (stating why video games are afforded First Amendment protections).
77 See Id. at 1271 (detailing how even though expressive speech are afforded protections via First Amendment, those protections are not infallible against right of publicity claims).
“Under California’s transformative use defense, EA’s use of the likenesses of college athletes like Samuel Keller in its video games is not, as a matter of law, protected by the First Amendment.”78 The Court provided five factors to use when determining whether work is transformative.79 It concluded that EA’s video games did not contain a sufficient number of transformative elements to be permitted to use it as a First Amendment defense.80 EA’s game used Keller’s physical characteristics and used him in the same context his performance would be seen in reality.81 In sum, the Ninth Circuit concluded that under California’s transformative use test, EA’s use of student-athletes’ NILs are not protected under the First Amendment.82

There is tension between the Ninth Circuit’s decisions in O’Bannon and In re NCAA Student-Athlete Name & Likeness Licensing Litigation. In O’Bannon, the Ninth Circuit held that student-athletes should not be monetarily compensated for use of their NILs because receiving monies outside of educational purposes

78 See Id. 1284 (9th Cir. 2013) (stating the holding of the case).
79 See Id. at 1274 (“First, if “the celebrity likeness is one of the ‘raw materials' from which an original work is synthesized,” it is more likely to be transformative than if “the depiction or imitation of the celebrity is the very sum and substance of the work in question.” Second, the work is protected if it is “primarily the defendant's own expression”—as long as that expression is “something other than the likeness of the celebrity.” This factor requires an examination of whether a likely purchaser's primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist. Third, to avoid making judgments concerning “the quality of the artistic contribution,” a court should conduct an inquiry “more quantitative than qualitative” and ask “whether the literal and imitative or the creative elements predominate in the work. Fourth, the California Supreme Court indicated that “a subsidiary inquiry” would be useful in close cases: whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted.” Lastly, the court indicated that “when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame,” the work is not transformative.”).
80 See Id. at 1276 (“. . . we conclude that EA's use of Keller's likeness does not contain significant transformative elements such that EA is entitled to the defense as a matter of law.”).
81 See Id. at 1276 (“EA is alleged to have replicated Keller's physical characteristics in NCAA Football, just as the . . . manipulate the characters in the performance of the same activity for which they are known in real life—playing football in this case . . . The context in which the activity occurs is also similarly realistic—real venues in Band Hero and realistic depictions of actual football stadiums in NCAA Football.”).
82 See In re NCAA Student-Athlete Name & Likeness Licensing Litigation, 724 F.3d 1268, 1276 (9th Cir. 2013)(concluding that EA’s use of Keller’s image was not transformative).
cannot co-exist with the “amateur” status. However, in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, the Ninth Circuit held that EA’s use of student-athletes’ NILs are not protected by the First Amendment, inferring that EA would have to compensate student-athletes if EA wanted to use their NILs in the video game.

Student-athletes essentially give up their right of publicity protections when they agree to play collegiate sports. NCAA regulations prohibit student-athletes from receiving compensation for the commercial use of their name and likeness. Therefore, student-athletes are prohibited from exploiting their right of publicity like professional athletes. When student-athletes assign the rights of publicity to the NCAA, they receive a scholarship and the opportunity to play for their respective institutions. The maximum a student-athlete can receive for their NILs is a full-tuition scholarship. However, the NCAA is permitted to exploit the names, image, and likeness of student-athletes in their licensing agreements and broadcasting agreements.

The Ninth Circuit was clearly inhibited from permitting student-athletes from receiving compensation because of student-athletes’ status as an “amateur.” The “spirit of amateurism” is what makes the NCAA unique and

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83 For further discussion about how the Ninth Circuit decided that student-athletes should not be compensated for their NILs, see *supra* notes 68-73 and accompanying text.
84 See Michael Marrero, “A Primer On NCAA Athletes’ Right of Publicity,” Law360 (July 16, 2013, 12:49 PM), https://www.law360.com/articles/456776/a-primer-on-ncaa-athletes-right-of-publicity ("NCAA regulations prevent current NCAA athletes from receiving compensation for the commercial use of their names and likenesses. The NCAA constitution and bylaws create a contract between the NCAA and its member institutions. Although student athletes aren’t technically parties to the contract, they are considered third-party beneficiaries.").
85 See *Id.* (The NCAA’s bylaws restrict the commercial use of an athletes’ name or likeness by third parties, and thanks to this restriction, current college athletes can’t exploit their rights of publicity the way pro athletes do.").
86 See *Id.* (The NCAA contends that student-athletes assign their rights to publicity to the colleges or the NCAA, in exchange for a scholarship and the right to play for the school.").
87 See O’Bannon, 802 F.Supp.3d 1049, 1075 (9th Cir. 2015)(“A compensation cap set at student-athletes’ full cost of attendance is a substantially less restrictive alternative means of accomplishing the NCAA’s legitimate procompetitive purposes. And there is no evidence that this cap will significantly increase costs. . .").
88 For further discussion about how student-athletes’ status as an “amateur” influence the Ninth Circuit’s decision, see *supra* notes 68-73 and accompanying text.
distinguishable from professional leagues. However, limiting how student-athletes are able to exploit their personas has a notable impact on student-athletes because most do not move to professional sports. The NCAA states that they desire to protect student-athletes from “...exploitation by professional and commercial enterprises.” Yet, the NCAA made approximately $702 million off of television and marketing rights alone in 2012-2013.

V. Conclusion

O’Bannon established that student-athletes relinquish their right of publicity protections when they agree to play a collegiate sport for a university. If the NCAA did not have regulations and bylaws prohibiting student-athletes from being compensated for their image or likeness, video game developers such as...

89 See O’Bannon, 802 F.3d at 1076 (“But in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is precisely what makes them amateurs.”)

90 See Leslie E. Wong, Our Blood, Our Sweat, Their Profit: Ed O’Bannon Takes on the NCAA for Infringing on the Former Student-Athlete’s Right of Publicity, 42 Tex. Tech. L. Rev. 1069, 1105-06 (2010)(“The majority of student-athletes never pursue a career in professional sports, and even those that do, generally will not stay with professional leagues for an extended period of time. Repeatedly, because of the rigorous efforts players put into their athletic goals, they graduate, or simply leave the university, with a subpar academic foundation. The few athletes that reach the ranks of professionalism face short-term, insecure contracts, if any at all. Without a guaranteed contract, players run the risk of being automatically cut from their team due to injury or any other reason for non-performance.”).


92 See Revenue, NCAA, http://www.ncaa.org/about/resources/finances/revenue ("For 2012-13, NCAA revenue is at $797 million, with $702 million coming from the Association’s new rights agreement with CBS Sports and Turner Broadcasting.").

93 For further discussion about how Ninth Circuit held that student-athletes should not be compensated for NILs, see supra notes 68-73 and accompanying text.
as EA would have to pay them to use their NILs. As of today, the NCAA is permitted to exploit student-athletes NILs and in exchange student-athletes have the opportunity to compete for their university or college. In O’Bannon, amateurism prevailed over the right of publicity. Now the NCAA is permitted to engage in the acts they desire to prevent: the exploitation of amateurism.

94 For further discussion about how the Ninth Circuit ruled that EA’s games were not transformative and not protected by the First Amendment, see supra notes 74-82 and accompanying text.

95 See Michael Marrero, “A Primer On NCAA Athletes’ Right of Publicity,” Law360 (July 16, 2013, 12:49 PM), https://www.law360.com/articles/456776/a-primer-on-ncaa-athletes-right-of-publicity (“But the NCAA controls the rights to license the sale of college merchandise, and perhaps by extension the personas of NCAA athletes. A good example is jerseys with numerals. Because the numbers identify the athletes, the numerals and the jersey may become part of their persona. But when students agree to play for their schools, they consent to the bylaws of the NCAA and thus to the NCAA’s exploitation of their persona.”)

96 See Id. (noting how the NCAA is permitted to exploit student-athletes’ personas).