GOING FOR BROKE: \textit{Sui Generis} Copyright Protection for the NCAA Student-Athlete

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I. INTRODUCTION

In 2010, college football officially became a billion-dollar industry.\(^1\) The sport’s longtime exclusive video game producer, Electronic Arts, Inc., has successfully piggybacked on the emergence of this billion-dollar machine, reporting college football-related incomes in excess of $800 million.\(^2\) Despite these impressive revenue figures, student-athletes continue to receive no compensation for their input into this highly profitable business model.

Originally rooted in strong principles of amateurism, the relationship between student-athletes at major college football programs and the National Collegiate Athletic Association (“NCAA”) has strained as college football revenues skyrocket. After decades in which the spirit of amateurism has dominated discussions concerning paying student-athletes, enormous athletic department revenues have changed the landscape of the debate.\(^3\) Accordingly, the discussion over whether student-athletes should be compensated has been the subject of significant scholarly dialogue.\(^4\)

As the 2010 figure noted above highlights, the 68 teams that play in college football’s six major conferences collectively pocket a yearly figure in excess of $1 billion dollars.\(^5\) On average, each team nets an amount well above $1 million per game.\(^6\) Although these figures appear astronomical standing alone, the biggest names in college football generate revenues well in excess of this average. The University of Texas, The University of Michigan, and The University of Georgia reported profits of $103.8 million, $85.2 million, and $75

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\(^5\) Isidore, supra note 1.

\(^6\) Isidore, supra note 1.
These increasingly lucrative figures have contributed to big time college football programs emerging as the ultimate business model without having to pay athletes.

Major universities have not been the only party to benefit financially from this rise in revenues. As one of the leading video game producers in the United States, Electronic Arts, Inc. (“EA”) produces the “NCAA Football” series of video games, with the first installment of the series appearing in 1998, and the most recent release in 2013. Allowing users to revel in the pageantry, passion, and excitement of college football game days, “the NCAA Football franchise has generated over $868 million in revenue.” However, these revenues have not come without a number of legal battles. For example, EA successfully defended a lawsuit against NFL hall-of-fame and Cleveland Browns running back, Jim Brown, in 2010. More recently in 2012, EA agreed to a proposed settlement that forced the company to relinquish its exclusive rights to the NCAA Football series, as well as allocate $27 million in settlement funds to consumers. More specific to the financial plight of student-athletes is the recent rise in EA litigation in which current and former athletes have brought suit concerning the video game’s depiction of college football players.

The emergence of college football programs as major business machines has provided little to no dividend to current and former student-athletes. Student-athletes are awarded athletic scholarships that often cover full or partial tuition costs, although some critics continue to argue that an athletic scholarship may not be sufficient compensation for an athlete’s performance. The NCAA has also

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8 Id.
9 Gaudioso, supra note 2.
13 Miller, supra note 4, at 1156 (discussing the sufficiency of a scholarship as continued . . .
produced a proposal that would provide players with a $2,000 stipend to cover expenses outside the scope of the traditional scholarship. This initial proposal was passed by the NCAA’s board of directors; however, 161 schools combined to override the legislation in December of 2011. Nevertheless, student-athletes remain able to pursue more traditional avenues to financial aid, including the Free Application for Federal Student Aid (“FAFSA”), Federal Pell Grants, and academic merit awards.

Despite these avenues to financial aid, the typical student-athlete fails to cover the cost of living and continues to live below the poverty line. Major college football programs and licensees such as EA report multi-million dollar revenue streams, relying primarily on the names and faces of student-athletes as the main input to this highly profitable business model. Players seeking additional “pocket change” have solicited cash through illegal avenues resulting in major scandals at NCAA institutions including The University of Miami, The Ohio State University, and The University of North Carolina. Although these scandals appear frequently in the press, academia and the judiciary have taken a much more watchful eye over the recent outbreak of litigation between student-athletes and EA over the use of student-athlete likenesses in video games.

A number of legal scholars have proposed solutions aimed at solving the collision between the business and amateurism models of compensation for student-athletes).

Jeremy Fowler, *NCAA President Mark Emmert Hopes to Unveil New Stipend Plan in April*, CBS SPORTS (Jan. 1, 2013 1:26 PM), http://www.cbssports.com/collegefootball/blog/jeremy-fowler/21483211/ncaa-president-mark-emmert-hopes-to-unveil-new-stipend-plan-in-april (explaining that in January of 2013, NCAA President Mark Emmert revealed his plan to propose a new stipend plan to his board of directors by April 2013. This new stipend plan is likely to include a “need-based component”).

Id.

Miller, *supra* note 4, at 1143.

Wong, *supra* note 4, at 1070 (“[v]ery little of that revenue makes it to the pocket of the students whose names and faces actually drive those sales.”).

*A List of the Worst Scandals in College Sports*, ESPN.COM (July 22, 2010 2:58 PM), http://sports.espn.go.com/espn/wire?section=ncf&id=8189312. In 2011, 73 players of The University of Miami football program were implicated in NCAA violations including accepting money, prostitutes, cars, and vacations.

*Id.* In 2010, several notable players of The Ohio State University football program traded sports memorabilia for illegal NCAA benefits including cash and tattoos.

the NCAA. Michael P. Acain argues that “athletic scholarships do not adequately and fairly compensate student-athletes in light of the substantial revenue they generate for their schools.” Accordingly, Acain proposes an extensive revenue-sharing plan for major college football programs that would allow student-athletes to receive a share of the profits offered to teams for post-season tournaments, academic benchmark accomplishments, and athletic awards. Similarly, Michael A. Corgan proposes a number of solutions under which the NCAA may provide compensation for student-athletes within its amateurism model including: The Pay-for-Play Model; The Revenue-Sharing Plan; Laundry Money; and The Endorsement Deal Model. The above-mentioned solutions focus primarily on altering the internal structure of the NCAA to provide compensation for the efforts of student-athletes.

In juxtaposition with these internal modifications to the NCAA structure, legal scholars have discussed the applicability of legal remedies in solving the financial plight of student-athletes. A federal right of publicity statute has been offered as a solution that better protects the financial interests of student-athletes. Bearman states:

Celebrity has become an integral part of our culture. . . . Likewise, college athletics has also become a billion-dollar industry. Unfortunately, the law fails to protect college athletes the same way it protects other celebrities . . . Indeed, the current state-law system is inadequate and fails to represent the interests of student athletes. Therefore, student athletes need a federal system and an escrow fund to provide consistent, equitable protection.

Accordingly, such a federal standard governing the right of publicity would protect the financial interests of former student-athletes such as Samuel Keller and Ryan Hart, the subjects of Keller v. Electronic Arts, Inc., and Hart v. Electronic Arts, Inc. respectively. In both cases,

21 Acain, supra note 4, at 308.
22 Acain, supra note 4, at 336-39.
25 Id.
26 Id. at 115-16.
27 Id. at 96.
former players at major college football programs sued EA alleging that EA knowingly misappropriated the players’ identities and likenesses for commercial gain. However, as Bearman identifies, “these cases demonstrate how differences in the right-of-publicity laws, as well as differences in the way courts apply the laws, render the protection afforded student-athletes inadequate.” Accordingly, the likeness of student-athletes remains unprotected.

Contrary to the inadequacies of state statutes concerning the right of publicity, copyright law has emerged in the federal system as a comprehensive body of statutory protection for certain works. Where inadequacies in federal copyright law have emerged due to technological and social shifts, *sui generis* amendment to this comprehensive system has filled in the gaps for additional protected works. The growing litigation provided by cases such as Keller and Hart has provided the technological and social catalyst necessary to urge Congress to craft a *sui generis* amendment to current copyright law that specifically addresses the lack of legal and financial protection afforded student-athletes.

This comment examines the lack of legal protection afforded to student-athletes despite the emergence of college football as a billion-dollar industry. Specifically, this comment analyzes the inability of current copyright law to protect the use of student-athlete’s likeness in the *NCAA Football* series produced by Electronic Arts, Inc. Part II of this comment discusses pending student-athlete litigation over EA’s depiction of former college players in the *NCAA Football* series. Part III provides a brief history of copyright law in the United States, with particular emphasis placed on the emergence of the fair use doctrine and transformative use defense. Part IV provides a discussion of past *sui generis* amendments to copyright law, including the Semiconductor Chip Protection Act & The Vessel Hull Design Protection Act. Part V borrows the rationale from these *sui generis* amendments in discussing why copyright law might reform to afford protection to NCAA student-athletes. Part VI concludes by predicting the protections afforded under such *sui generis* law.

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29 Bearman, *supra* note 24, at 96.
II. Keller v. Electronic Arts, Inc. and Hart v. Electronic Arts, Inc.

Two recent cases litigated at the federal level provide examples of the lack of legal recourse afforded to NCAA student-athletes. In both instances, former college football players filed suit against video game publisher Electronic Arts, Inc., asserting right of publicity claims. However, the difference between the outcomes of the two cases illustrates the inability of state-based rights of publicity to universally protect NCAA student-athletes. By contrast, the federal grasp of sui generis copyright amendment provides a much more effective vehicle for protection.

A. Keller v. Electronic Arts, Inc.

Samuel Keller’s twenty-touchdown campaign in 2005 marked him as one of the top passers in Division 1-A football. After injuring his thumb and being released from his scholarship at Arizona State University, Keller finished his career at the University of Nebraska. Following his playing career, Keller became the focal point of a highly scrutinized judicial action in the U.S. District Court for the Northern District of California.

In 2010, Keller filed suit against Electronic Arts, Inc. (“EA”), the National Collegiate Athletics Association (“NCAA”), and the Collegiate Licensing Company (“CLC”). Amongst other claims, Keller alleged EA violated his California right of publicity. Specifically, Keller claimed EA designed virtual players to resemble real-life athletes. He further asserted that he and EA’s virtual players shared commonalities in their jersey numbers, physical characteristics, physical characteristics,
and home states.\textsuperscript{38} Adding fuel to the fire, Keller also charged the NCAA with a myriad of statutory and common law claims, including violation of Indiana’s right of publicity statute, breach of contract, and civil conspiracy.\textsuperscript{39}

Keller’s complaint against the NCAA was dismissed with leave to amend allegations that the NCAA misappropriated his likeness or violated his right of publicity.\textsuperscript{40} By contrast, EA did not contest the sufficiency of Keller’s claims.\textsuperscript{41} Instead, EA asserted that Keller’s right of publicity claims were wholly barred by the First Amendment’s transformative use defense.\textsuperscript{42}

In balancing the First Amendment against Keller’s right of publicity, the district court formulated the transformative use test as:

\begin{quote}
Whether the celebrity likeness is one of the “raw materials” from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity’s likeness is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness. And when we use the word “expression,” we mean expression of something other than the likeness of the celebrity.\textsuperscript{43}
\end{quote}

With this formulation in mind, the court analyzed Keller’s claim amongst the spectrum of California Supreme Court decisions utilized to gauge a work’s transformative nature.\textsuperscript{44} The infamous case of Comedy III v. Saderup provided one bookend of this spectrum, in finding a literal depiction of The Three Stooges devoid of sufficient transformative elements deserving of First Amendment protections.\textsuperscript{45}

\textsuperscript{38} Id.
\textsuperscript{39} Id. at *2.
\textsuperscript{40} Id. at *3.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Id. at *4 (citing Comedy III Prods., Inc., v. Saderup, 21 P.3d 797 (Cal. 2001)). The court also supplemented this formulation of the transformative use test with a number of California judiciary decisions. See, e.g., Winter v. DC Comics, 69 P.3d 473, 477 (Cal. 2003) (an artist depicting a celebrity must contribute something more than a merely trivial variation, but create something recognizably his own, in order to qualify for legal protection.).
\textsuperscript{44} Keller, 2010 WL 530108, at *4.
\textsuperscript{45} Id. See also Comedy III, 21 P.3d at 810. The Comedy III decision has also been famously interpreted by the Ninth Circuit along the lines of celebrity merchandising. In Hilton, the Ninth Circuit stated “it is clear that merely merchandising a celebrity’s image without that person’s consent [. . .] does not continued . . .
On the opposite end of the spectrum, the court found *Winter v. DC Comics* to be a paradigmatic example of images that were sufficiently transformative.46

Keller’s claim against EA was found to be closer in nature to *Comedy III.*47 Whereas Keller and EA’s virtual players shared the same jersey number, height, and weight, and the game’s setting was “identical to where the public found [Keller] during his collegiate career,” the District of California found EA’s depiction far from the transformative use of *Winter.*48 As such, the court rejected EA’s request for a broad view of the transformative use defense that would examine the transformative elements of the video game as a whole.49 Instead, the court focused on the actual depiction of Keller himself in the video game and subsequently rejected EA’s transformative use defense at the motion to dismiss stage.50

Keller appealed this decision to the Ninth Circuit Court of Appeals. This appeal is currently pending as of the date this article was written by the Author. However, the implications of the appeal have already been recognized by academia as potentially changing the landscape of intellectual property rights.51

**B. Hart v. Electronic Arts, Inc.**

In the *Hart* case, along substantially similar lines as the *Keller* case, former Rutgers University quarterback Ryan Hart filed suit against EA in the US District Court for the District of New Jersey alleging violations of his New Jersey right of publicity.52 Again

46 See *Winter*, 69 P.3d at 479 (“Although the fictional characters Johnny and Edgar Autumn are less-than-subtle evocations of Johnny and Edgar Winter, the books do not depict plaintiffs literally. Instead, plaintiffs are merely part of the raw materials from which the comic books were synthesized.”).


48 Id. In finding that EA’s transformative use defense failed, the court also found it necessary to distinguish Kirby’s application of the transformative use doctrine to the video game context. Compare *Kirby v. Sega of Am., Inc.*, 50 Cal. Rptr. 3d 607, 616 (Cal. Ct. App. 2006) (“[The character] contains sufficient expressive content to constitute a ‘transformative work’ under the test articulated by the [California] Supreme Court.”), with id. (“Further, unlike in *Kirby*, the game’s setting is identical to where the public found Plaintiff during his collegiate career: on the football field.”).


50 Id.

51 Bearman, *supra* note 24, at 98.

similar to the Keller litigation, EA conceded Hart’s complaint stated a prima facie right of publicity violation. As a result, the court focused solely on EA’s First Amendment defense. The court analyzed Hart’s claim between the competing interests of the right of publicity and the First Amendment, noting the existence of eight judicial balancing tests. However, the court was satisfied applying two key tests: 1) the transformative use test, as borrowed from the copyright fair use doctrine; and 2) the Rogers test, as borrowed from trademark actions.

After applying a number of instructive decisions and distinguishing Keller, the court found EA’s use sufficiently transformative. This finding was moderately surprising given the court’s explicit “appreciation of the plight of college football players who are prohibited by NCAA bylaws from entering into license agreements and other ‘commercial opportunities’ during their playing years.” Nevertheless, the court upheld EA’s use, relying primarily on the expressive effects added by the game’s designers, and EA’s “creation of a mechanism by which the virtual player’s height, weight,

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53 Id. at 766.
54 Id. at 768.
55 Id. at 775.
56 Id. at 776. See also Rogers v. Grimaldi, 875 F.2d 994, 1000 (2d Cir. 1989).
57 Hart, 808 F. Supp. 2d at 776.
58 See, e.g., Comedy III Prods., Inc. v. Gary Sanderup, Inc., 21 P.3d 797, 808 (Cal. 2001); Winter v. DC Comics, 69 P.3d 473 (Cal. 2003); Hilton v. Hallmark Cards, 580 F.3d 874, 891 (9th Cir. 2009); Kirby v. Sega of Am., Inc., 50 Cal. Rptr. 3d. 607 (Cal. Ct. App. 2006).
59 Hart, 808 F. Supp. 2d at 787 (“Finally, I disagree with Keller’s approach of focusing solely on the challenged image, as opposed to the work as a whole. Contrary to Keller’s reasoning, I read Kirby as looking at the video game in that case, as a whole. [. . .] Moreover, in my view, it is logically inconsistent to consider the setting in which the character sits, which Keller does in its analysis, yet ignore the remainder of the game.”).
60 Id.
61 Id. at 783 (“Placing present and former college athletes, including Hart, into the fittingly-titled NCAA Football game setting strongly suggests that the goal of the game is to capitalize upon the fame of the players. Indeed it seems ludicrous to question whether video game consumers enjoy and, as a result, purchase more EA-produced video games as a result of the heightened realism associated with actual players . . . Nevertheless, a game developer that bases its work on real players, may walk a fine line between using reality as a building block for the developer’s own creative work and exploiting the hard-earned reputations of college players for its own profit.”).
62 Id. at 784 (“[T]he NCAA Football game contains “virtual stadiums, athletes, coaches, fans, sound effects, music, and commentary, all of which are created or compiled by the games’ designers.”).
hair style, etc. may be altered.” Accordingly, the court upheld EA’s First Amendment defense.

Almost as a matter of form over substance, the court analyzed Hart’s claim under the Rogers test traditionally limited to trademark actions. In short, Judge Wolfson for the majority remained unconvinced by EA’s arguments for applying the Rogers test as opposed to the transformative use defense. After offering a brief discussion on the merits of the Rogers test, the court noted that it need not explicitly endorse either test where EA prevailed on its First Amendment defense.

Hart appealed this decision to the Third Circuit Court of Appeals. This appeal is currently pending as of the date this article was written by the Author. However, the indecisive balancing in the right of publicity arena, in conjunction with the discrepancies between state systems, will likely hinder the Third Circuit’s ability to create lasting jurisprudence. This hindrance could be solved by sui generis amendment in the copyright realm aimed at solving the unique plight of NCAA athletes.

### III. THE HISTORY OF COPYRIGHT LAW: THE FAIR USE DOCTRINE

The United States Constitution 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.” Commonly known as the Copyright Clause, this provision has allowed Congress to enact a series of comprehensive copyright laws. Most notable in terms of

63 Id. at 785.

64 Id. at 787-88. (“Like the transformative test, [the Rogers test] is created to balance the competing interests of intellectual property rights and First amendment freedom-of-expression rights. In contrast to the transformative test, it was developed in the context of trademark law rather than copyright.”).

65 Hart, 808 F. Supp. 2d at 793 (“Accordingly, although I am not convinced by EA’s arguments as to the applicability of the Rogers test, and, in my view, the transformative test better balances First Amendment and right of publicity interests, I will assume for the sake of argument that the test applies.”).

66 Id. at 794.

67 U.S. CONST. art. I, § 8, cl. 8.

68 See Craig W. Dallon, The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest, 44 SANTA CLARA L. REV. 365, 365 (2004) (“Although the term ‘copyright’ is never used, this provision of the Constitution is commonly known as the Copyright Clause.”).

69 See Copyright Act of May 31, 1790, ch. 15, 1 Stat. 124 (1848); Copyright Act of Feb. 3 1831, ch. 16, 4 Stat. 436 (1831); Copyright Act of July 8, 1870, ch. 230, 16 Stat. 198 (1871); Copyright Act of Mar. 1909, ch. 320, 35 Stat. 1075 (1909). See continued . . .
sweeping copyright reform is the Copyright Act of 1976 ("the 1976 Act").70

Prior to 1976, copyright laws in the United States had been amended71 numerous times throughout history in response to emerging social and technological trends.72 The first comprehensive act was enacted in 1790.73 Comprehensive revisions occurred in 1831, 1870, and 1909.74 A number of copyright revisions were introduced during the period between 1924 and 1940, all of which failed to reach enactment “because of controversy among private interests over differences between the Berne Convention and the U.S. Law.”75 Additionally, after World War II, “the United States participated in the development of the new Universal Copyright Convention, becoming a party in 1955.”76

Despite the above-mentioned occurrences, the 1909 legislation remained in effect until 1976, when the most recent comprehensive revisions occurred in reaction to the development of a number of technologies including motion picture, radio, television, and audio and

also id. at 366 (“Congress has exercised this power in a series of major copyright laws beginning with the Copyright Act of 1790, followed by the respective Acts of 1831, 1870, 1909, and 1976.”).


72 See, e.g., Mary L. Mills, New Technology and the Limitations of Copyright Law: An Argument for Finding Alternatives to Copyright Legislation in an Era of Rapid Technological Change, 65 CHI.-KENT L. REV. 307, 310 (1989) (“From its inception, copyright law has developed largely in response to technological change, and this factor has had a greater impact on copyright law than any other.”); Fred H. Cate, The Technological Transformation of Copyright Law, 81 IOWA L. REV. 1395, 1397 (1996) (“Digital technologies are rapidly changing the application of copyright law to prohibit access, protect ideas, and facts, and dramatically expand the monopoly granted to copyright holders”); Dallon, supra note 68, at 366 (“Through the centuries, copyright law has developed and adapted to changing conditions. In particular, new technology has driven changes and advancement in copyright law.”). See also Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430-31 (1984) (“From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment-the printing press-that gave rise to the original need for copyright protection.”).


74 Id.

75 Id.

76 Id.
video recording equipment.\textsuperscript{77} The legislative history of the 1976 Act reflects this role of technology in serving as an impetus for copyright reform. Primarily, the legislative history reflects:

Since that time significant changes in technology have affected the operation of the copyright law. Motion pictures and sound recordings had just made their appearance in 1909, and radio and television were still in the early stages of their development. During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.\textsuperscript{78}

A number of scholars continue to call on Congress to make further revisions of the copyright law;\textsuperscript{79} however, Congress has remained cautious in altering the balance between public and private incentives struck by the 1976 Act. Accordingly, the statutory framework of the 1976 Act remains as the main source of copyright protection in the United States.

A. Fair Use

In light of the recent hotbed of NCAA litigation,\textsuperscript{80} the most significant addition embodied in the 1976 Act is the formal codification of the fair use doctrine. Generally, fair use emerged in the 1976 Act as a legislative attempt at balancing “the exclusionary rights

\textsuperscript{77} Mills, supra note 72, at 313-14.
\textsuperscript{78} H.R Rep. No. 94-1476.
\textsuperscript{79} See, e.g., Mills, supra note 72, at 336 (recommending Congressional enactment of a voluntary licensing scheme to facilitate royalty arrangements); Kevin M. Lemley, The Innovative Medium Defense: A Doctrine to Promote the Multiple Goals of Copyright in the Wake of Advanced Digital Technologies, 110 Penn. St. L. Rev. 111, 157 (2005) (recommending an “innovative medium defense” to determine the legality of innovative mediums).
granted to authors and the social benefits provided to the public.”

However, the origins of the fair use doctrine first appeared in the judicial arena with the leading case of *Folsom v. Marsh,* and appeared more recently at the United States Supreme Court in *Campbell v. Acuff-Rose Music.*

In *Folsom,* the private papers of the nation’s first President, entitled “The Writings of George Washington,” provided the backdrop for the District of Massachusetts’ primitive account of the fair use doctrine. In finding that the defendant Folsom violated the copyright of author Jared Sparks, Justice Story enunciated a crude description of factors in determining if a use constitutes piracy or a “work entirely distinct from and independent” of a derivative work. According to Story,

\[
[t]he identity of the two works in substance, and the question of piracy, often depend upon a nice balance of the comparative use made in one of the materials of the other, the nature, extent, and value of the materials thus used; the objects of each work; and the degree to which each writer may be fairly presumed to have resorted to the same common sources of information, or to have exercised the same common diligence in the selection and arrangement of the materials.
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Story further engaged in a discussion of the economic rationale of copyright and fair use in recognizing “[i]f so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto.” This economic analysis not only became a codified factor in the 1976 Act, but it has also been the subject of heavy scholarly discussion. Thus, as gleaned from the penmanship of Story, “fair use

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81 Lemley, supra note 79, at 128.
84 *Folsom,* 9 F. Cas. at 342.
85 Id. at 349.
86 Id. at 342.
87 Id.
88 Id. at 348.
remained exclusively judge-made doctrine until the passage of the 1976 Act, in which Justice Story’s summary [remains] discernible. 91

Long after Folsom and slightly before the Supreme Court’s decision in Campbell, Congress codified the statutory underpinnings of the fair use doctrine at 17 U.S.C. § 107. Section 106 of the Copyright Act grants the owner of a copyright exclusive rights to his work. 92 These exclusive rights extend an owner’s ability to authorize a number of actions including: “to reproduce the copyrighted work,” 93 “to prepare derivative works based upon the copyrighted work,” 94 and “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 95 However, as section 106 explicitly notes, these exclusive rights are “subject to sections 107 through 122.” 96 For purposes of this Note, the most important of these limitations is the fair use doctrine, codified in section 107.

Section 107 of the Copyright Act provides in pertinent part: “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” 97 The section provides a list of factors for courts to consider in “determining whether the use made of a work in any particular case is a fair use.” 98 These factors include:

(1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; 99

(2) The nature of the copyrighted work; 100

(3) The amount and substantiality of the portion used in


93 Id. at § 106(1).
94 Id. at § 106(2).
95 Id. at § 106(3).
96 Id. at § 106.
98 Id.
99 Id. at § 107(1).
100 Id. at § 107(2).
relation to the copyrighted work as a whole;\textsuperscript{101} and

(4) The effect of the use upon the potential market for or value of the copyrighted work.\textsuperscript{102}

Despite the inclusion of these factors, legislative history and scholarly criticism demonstrate that the inquiry calls for a case-by-case analysis.\textsuperscript{103} Senate reports filed in conjunction with the codification of the fair use doctrine recognized:

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gage for balancing the equities.\textsuperscript{104}

Likewise, House Reports dictate that section 107 was intended “to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”\textsuperscript{105} This legislative intent to create a flexible standard has been the topic of legal criticism and scholarly discussion.\textsuperscript{106} Samuelson argues that the considerable flexibility provided by the fair use doctrine is of great value in “balancing the interests of copyright owners . . . as well as the interests of the public in having access to new works and making reasonable uses of them.”\textsuperscript{107} However, to the same extent, fair use is “often decried for the unpredictability said to attend the fact-intensive, case-by-case nature of fair use analysis and/or to result from the lack of judicial consensus on the fundamental principles that underlie fair use.”\textsuperscript{108}

In the judicial arena, the cases of Harper \& Row, Publishers, Inc. v. Nation Enterprises, and Campbell v. Acuff Rose Music, Inc. remain

\textsuperscript{101} Id. at § 107(3).
\textsuperscript{102} Id. at § 107(4).
\textsuperscript{105} Id.
\textsuperscript{107} Samuelson, supra note 106, at 2540.
\textsuperscript{108} Samuelson, supra note 106, at 2540.
leading authority on the fair use doctrine. In *Harper*, President Gerald Ford granted publisher Harper and Row exclusive rights as to the publishing of his memoirs. Harper and Row subsequently entered into a prepublication licensing agreement with *Time Magazine*, allowing *Time* to publish an advance excerpt of the memoir. Shortly before the excerpt was to be published in *Time*, a 2,250-word article appeared in *The Nation Magazine*, “at least 300 to 400 words of which consisted of verbatim quotes of copyrighted expression taken from the manuscript.” Writing for the majority, Justice O’Conner dismissed *The Nation’s* fair use defense after balancing the “unpublished nature of the work and the resulting impact on the potential market for first serial rights of permitting unauthorized prepublication excerpts under the rubric of fair use.”

Similarly, in *Campbell*, the Supreme Court analyzed Luther R. Campbell’s rendition of “Pretty Woman” under the fair use doctrine. According to Campbell, the work was “intended, through comical lyrics, to satirize the original work,” with the original work being a 1964 Roy Orbison and William Dees rock ballad entitled “Oh, Pretty Woman.” Acuff-Rose Music, Inc., the copyright holder of the song, denied Campbell permission to produce the song, explaining: “I am aware of the success enjoyed by ‘The 2 Live Crews,’ but I must inform you that we cannot permit the use of a parody of ‘Oh, Pretty Woman.’” Writing for the majority, Justice Souter ruled Campbell’s rendition could satisfy the fair use defense where the nature of the parody outweighed the degree of copying and the commercial nature of the work.

*Campbell* has traditionally been the subject of scholarly discussion concerning the protection of parodies under the fair use defense. However, far more impactful for the purposes of this Note and EA versus student-athlete litigation, is Souter’s discussion of

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110 *Id.*
111 *Id.*
112 *Id.* at 569.
114 *Id.* (citations omitted).
115 *Id.* at 572-73.
116 *Id.* at 572.
transformative use. According to Justice Souter, the first factor in the fair use analysis “draws on Justice Story’s formulation, the nature and objects of the selections made.” 118 Relying further on Justice Story’s quasi-precedent, Souter states:

[The central purpose of the investigation is to see . . . whether the new work merely supersedes the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is transformative.]

Souter further announced the proposition that transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.” 121

Campbell marked the first time in which the Supreme Court explicitly endorsed the transformative use analysis. 122 Souter’s above explanation, in combination with a highly influential Harvard Law Review Article written by Pierre N. Leval, 123 has generally been cited as the leading authority on transformative use. 124 As one author has found, since Campbell, lower courts have classified defendant’s transformative use into three different groups:

1. Secondary works that add no original expression;
2. Secondary works that add original expression, but not in the form of criticism, commentary or

118 Campbell, 510 U.S. at 578 (citations omitted).
120 Campbell, 510 U.S. at 579 (citations omitted). See also Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1111 (1990) (“A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test; in Justice Story’s words, it would merely supersedes the objects of the original.”) (citations omitted).
121 Campbell, 510 U.S. at 579.
123 Leval, supra note 120, at 1105.
124 Kudon, supra note 122, at 597 (discussing the impact of Campbell and Leval’s article on court’s subsequent fair use analysis); H. Brian Holland, Social Semiotics in the Fair Use Analysis, 24 Harv. J.L. & Tech. 335, 344-45 (2011) (labeling Campbell and Leval as a sharp departure from previous fair use trends); Matthew D. Bunker, Eroding Fair Use: The “Transformative” Use Doctrine After Campbell, 7 Comm. L. & Pol’y 1 (2002) (“After the United States Supreme Court’s 1994 decision in Campbell v. Acuff-Rose Music, Inc., fair use analysis in lower courts has become increasingly monistic, focusing to a great degree on whether the use in question was “transformative.”).
scholarship; and (3) secondary works that add original expression that clearly constitute criticism, commentary or scholarship. Of these three groups, only the third generally passes the transformative use test.\textsuperscript{125} Not surprisingly, video games such as those produced by EA in the NCAA Football Series would not fit smoothly into any of the above groups. Nevertheless, transformative use has appeared heavily in the most recent suits involving student-athletes pitted against EA, albeit in the context of common law right of publicity claims.\textsuperscript{126} However, the Supreme Court has found it useful in the past to analogize the goals of copyright law with those of the interests protected by a right of publicity.\textsuperscript{127} More notably, at least one federal court has explicitly discussed Leval’s work, as well as the contours of copyright’s fair use doctrine in discussing the protections afforded to NCAA student-athletes.\textsuperscript{128} This precedent has set the stage for the role of copyright in restoring the balance between the amateur status of student-athletes as against the college football business model.

IV. \textit{Sui Generis} Amendments: Semiconductor Chip Protection Act & The Vessel Hull Design Protection Act

Since the time of the Industrial Revolution, calls for additional protection of industrial designs have been a recurring theme amongst intellectual property scholars.\textsuperscript{129} Proponents argue that additional legislation will foster more innovation and allow America to return as a leading world industrial manufacturer.\textsuperscript{130} On the contrary, opponents argue that additional legislation will further the adverse economic effects common to the monopolistic nature of copyright protection.\textsuperscript{131} Despite this scholarly disagreement, Congress has responded with two \textit{sui generis} amendments to the comprehensive body of copyright law: The Semiconductor Chip Protection Act of 1984, and the Vessel Hull Design Protection Act.

\textsuperscript{125} Kudon, \textit{supra} note 122, at 583.
\textsuperscript{128} \textit{Hart}, 808 F. Supp. 2d at 778-79.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
A. Semiconductor Chip Protection Act of 1984

Prior to 1984, no per se rule barred competing innovation firms from duplicating the mask work integrated into a semiconductor chip. This lack of intellectual property protection left innovators with little to no effective protections against the emerging practice of “chip piracy.” As Kasch notes, the need for semiconductor chip protection took on an increasing sense of urgency as the costs involved in marketing and designing an industry-leading chip began to skyrocket. A chip whose design could cost anywhere in the neighborhood of $40 million could be copied at a much lower price, and required a much less time-intensive process. The stark contrast between these investment figures largely resulted in market share losses amongst U.S. firms to foreign market competition.

Congress responded to this economic threat with the Semiconductor Chip Protection Act (“SCPA”) of 1984. The SCPA’s protection of mask works, limited primarily by the defense of reverse engineering in section 906, has since sought to protect against the practice of “chip piracy.” However, as Kasch notes, a considerable lack of common law treatment and litigation of the statute has caused judicial interest to give way to academic interest. This academic interest is particularly reflected in the present litigation concerning NCAA student-athletes. This rise in litigation has provided the same unique socioeconomic pressures that have clearly urged Congresses of the past to formulate sui generis amendment.

B. The Vessel Hull Design Protection Act

The Vessel Hull Design Protection Act of 1998 (“VHDPA”) was passed as a subtle addition to the 1998 Digital Millennium Copyright Act. The Act provides that “[t]he designer or other owner of an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public may secure

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134 Id. at 79.
135 Id.
138 Kasch, supra note 133, at 72.
the protection”\textsuperscript{140} of such design. The statute limits the protections afforded by defining both the terms “design” and “useful article.” A design is “original,” and thus protected under the Act, “if it is the result of the designer’s creative endeavor that provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source.”\textsuperscript{141} A “useful article” is further narrowly delineated as “a vessel hull or deck, including a plug or mold, which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”\textsuperscript{142}

Legal scholars have commented that the Act’s \textit{sui generis} protections have been under-utilized since enactment.\textsuperscript{143} Nevertheless, one author has commented that the initial success of the VHDPA could potentially serve as the model for future attempts by legal scholars and lawmakers to “expand \textit{sui generis} design protection legislation to other industries if such an expansion is needed.”\textsuperscript{144} Notwithstanding this legal disagreement, the VHDPA remains particularly relevant to the present issue as another example in which socioeconomic pressures have caused Congress to enact \textit{sui generis} amendment to the 1976 Copyright Act.

In contrast to the SCPA, the spur for the VHDPA came in large part from within the judicial arena. Prior to the VHDPA, boat hull designers enjoyed protection under a minority of state regimes. However, in \textit{Bonito Boats, Inc. v. Thunder Craft Boats, Inc.}, the Supreme Court dealt a blow to such state legislation when faced with the issue of “what limits the operation of the federal patent system places on the States’ ability to offer substantial protection to utilitarian and design ideas which the patent laws leave otherwise

\textsuperscript{141} \textit{Id.} at § 1301(b)(1).
\textsuperscript{142} \textit{Id.} at § 1301(b)(2).
\textsuperscript{143} See, e.g., Bradley J. Olson, Esq., \textit{The Amendments to the Vessel Hull Design Protection Act of 1998: A New Tool for the Boating Industry}, 38 J. MAR. L. & COM. 177 (2007); \textit{see also} Keebaugh, \textit{supra} note 129, at 275. (In 2003, the United States Copyright Office and the USPTO released a joint report concerning the status of the Vessel Hull Design Protection Act (VHDPA). According to Keebaugh, “[a]lthough the results of the report do not provide any conclusive information regarding the success of the \textit{sui generis} protection offered by the VHDPA, the [joint] report does provide a positive early assessment of the viability of \textit{sui generis} protection for the design of individual categories of products.”)).
\textsuperscript{144} Keebaugh, \textit{supra} note 129, at 275 (“With time, legal scholars and lawmakers will have more information to work with and will be better equipped to expand \textit{sui generis} design protection legislation to other industries if such an expansion is needed.”).
unprotected.”

Affirming the decision of the Florida Supreme Court, the U.S. Supreme Court found the state law protections prohibiting “the use of the direct molding process to duplicate unpatented boat hulls” unconstitutional as conflicting with the federal scheme. In analyzing the prudential value of past intellectual property decisions, the Court noted: “state regulation of intellectual property must yield to the extent that it clashes with the balance struck by Congress in our patent laws.”

Legal scholars have commented that the subsequent political backlash created by the Bonito Boats decision spurred Congress to add the VHDPA as a means to “fill the void” between state and federal protection.

Much like the SCPA, the legislative history of the VHDPA reveals the presence of socioeconomic motivators in spurring the Act. As one House Committee explained:

> Boat manufacturers invest significant resources in the design and development of safe, structurally sound, and often high-performance designs. Including research and development costs, a boat manufacturer may invest as much as $500,000 to produce a design from which one line of vessels can be manufactured. . . “Hull splashing” is a problem for consumers, as well as manufacturers and boat design firms. Consumers who purchase copied boats are defrauded . . . [m]ost importantly for the purposes of promoting intellectual property rights, if manufacturers are not permitted to recoup at least some of their research and development costs, they may no longer invest in a new, innovative boat design that boaters eagerly await.

As a response to these socioeconomic pressures, Congress carved out *sui generis* protection for boat vessels that is much more narrow than the general protections afforded under the 1976 Copyright Act. Similar socioeconomic pressures have demanded center stage in recent debates concerning the balance between intellectual property rights and NCAA student-athletes. In light of these pressures, the case has been made for narrowly crafted *sui generis* amendment to the current

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146 See Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 515 So. 2d 220 (Fla. 1987).
147 *Bonito Boats, Inc.*, 489 U.S. at 144.
148 *Id.* at 152.
149 Olson, *supra* note 143, at 178.
federal scheme to protect student-athletes at the collegiate level.

V. THE ARGUMENT FOR SUI GENERIS AMENDMENT TO COPYRIGHT LAW IN PROTECTING STUDENT-ATHLETES

The primary rationale for the present proposal of *sui generis* protection of NCAA student-athletes stems from a lack of concrete protection at the federal level. However, past *sui generis* amendments illustrate that mere lack of protection alone will be insufficient to spur Congress to enact appropriate legislation. To justify the *sui generis* approach, this lack of protection must be coupled with the emergence of unique social and technological conditions. The present collision course between the emergence of college football’s business model and student-athlete initiated litigation has presented this necessary coupling. Accordingly, Congress should consider enacting *sui generis* protection to supplement the present system of intellectual property rights.

A. Inadequacy of Federal Protection

As a matter of form, it is first relevant to discuss the perceived lack of federal protection of NCAA student-athletes in the traditional bodies of intellectual property rights – copyright, patent, and trademark. First, patents provide the clearest example of a lack of protection. Although patent law in the United States enjoys the protections of a comprehensive federal system this Note seeks to promote, definitional limitations prevail in excluding student-athletes. United States patent law has primarily been reserved for useful articles meeting the standards of “invention.” 151 Specifically, patentable subject matter must be both novel 152 and non-obvious. 153 These requirements simply do not conform to the present issue and financial plight of NCAA student-athletes. Athletes presently seek compensation for the use of their likeness in video games. Although the finer intricacies of the video game may qualify as patentable subject matter, the athletes themselves do not. Furthermore, the procedural posture of the patent process provides an inefficient basis for the protection of student-athletes. Even assuming the likeness of an individual athlete could qualify as patentable subject matter in some abstract sense, the substantial filing and prosecution fees relevant to patents would certainly leave most athletes without protection.

152 Id. at § 101.
153 Id. at § 102(a).
Second, the application of trademark law within the NCAA structure has been discussed in a much more tangible sense. As reflected in the Hart opinion, the Rogers trademark test has limited applicability in the context of misappropriation claims. The majority states the test as: “(1) whether the challenged work has relevance to the underlying work; and (2) if the challenged work is relevant, whether the title misleads the public as to the source of the content of the work.”

Where the Rogers test has been applied to misappropriation claims, the inquiry adds another level, asking “whether the use of the plaintiff’s name is a disguised commercial advertisement.”

The precedential value of Hart is limited by the inherent fact that the majority refused to tentatively apply the elements of the Rogers test to the claim at issue. However, the application offered in dicta fails to take into account the realities of the present college football business model. For the sake of argument, this Note agrees that there is likely a small possibility that the use of Hart’s image in the game will lead consumers to believe he has endorsed the video game. However, this is only half of the proper Rogers analysis. It is simply a fallacy to further conclude that the NCAA’s use of Hart’s image is anything but a disguised commercial advertisement.

In analyzing Hart’s claim under the transformative use defense, the court found it useful to note, “[p]lacing present and former college athletes, including Hart, into the fittingly-titled NCAA Football game setting strongly suggests that the goal of the game is to capitalize upon the fame . . . [and] hard-earned reputations of college players for its own profit.” There is no tenable reason as to why the court failed to recognize the same commercial guise in terms of the Rogers test. EA’s depiction of Hart draws solely on the public’s familiarity with Hart’s collegiate football career as one of the nation’s top passers. EA clearly seeks to draw on this public familiarity to advertise and add value to the “pageantry, passion, and excitement” the game purports to create. For example, EA does not seek to increase the profitability of Rutgers University by including one of its players in the video game. Perhaps as an even clearer example, EA does not seek to increase the value of Ryan Hart himself by including his likeness in the game. If this were EA’s goal, Hart would surely be compensated for the use of his height, weight, jersey number, hometown etc. Instead, the only party to benefit from the use of Hart’s likeness is EA itself, blatantly

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155 Id. See also Rogers v. Grimaldi, 875 F.2d 994, 1004 (2d Cir. 1989).
156 Hart, 808 F. Supp. 2d at 793.
157 Id. at 783.
marking EA’s use as an advertisement in hiding. Under a conventional application of the Rogers test, such an incorporation of Hart’s likeness solely for the purpose of commercial advertisement would clearly be a violation of an extension of trademark law to misappropriation claims. 158

Despite this logical application, the District of New Jersey was seemingly satisfied with EA’s advertisement and further capitalization on the vulnerability of student-athletes similarly situated with Hart. This Note will assume that Hart has some degree of precedential value in implicitly foreclosing trademark protection of NCAA student-athletes.

Third, the limited application of copyright law precludes extension of the protections struck by the 1976 Act to NCAA student-athletes. This preclusion is accomplished not only in a definitional sense in section 102, but also in the fair use balance struck in section 107, which similarly fails to mesh with the interests of student-athletes.

From a definitional perspective, student-athletes are not likely candidates to qualify as “original works of authorship fixed in [a] tangible medium of expression.” 159 Along similar lines, the athlete persona, at least in its original form, is an intangible concept wholly distinct from the listed examples in section 107. In the context of the NCAA Football series, individual student-athletes are more akin to an integral “concept,” a term that has been expressly precluded from the scope of copyrightable material. 160 Moreover, Congresses of the past have expressed general disapproval of extending the scope of section 107 to commercial concepts intended to be an integral part of a larger process. 161

Where student-athletes are not viewed as copyrightable material, the fair use limitations struck in the present Act are also facially inapplicable. However, as reflected in Hart, recent federal courts have attempted to remove the fair use factors from their copyright underpinnings with extremely inequitable results, albeit in the context of right of publicity cases. For purposes of this Note, the application of fair use principles in the context of these misappropriation claims allows for an effective foreshadowing of copyright application.

158 See George M. Armstrong, The Reification of Celebrity: Persona as Property, 51 LA. L. REV. 443, 467 (1991) (“Otherwise put, ‘[c]ourts have long ago recognized that a celebrity’s right of publicity does not preclude others from incorporating a person’s name, features or biography in a literary work, motion picture, news or entertainment story. Only the use of an individual’s identity in advertising infringes on the persona.’”).


160 Id. at § 102(b).

Because student-athletes enjoy no per se protection under the present copyright scheme, the District of New Jersey took free reign in crafting an appropriate standard in *Hart*. The court’s characterization of the transformative use defense under the fair use analysis represents the extreme inequity of such an incomplete copyright application. Several aspects of the reasoning in *Hart* fail to completely account for the vulnerability experienced by student-athletes under the present NCAA amateurism model.

First, the court in *Hart* elected to consider the transformative nature of the game as a whole, instead of relying solely on the player’s image at issue.\(^{162}\) Second, focusing on Hart’s likeness alone, the court vastly understated a significant finding in reaching the conclusion that EA’s use was sufficiently transformative.\(^ {163}\) The court noted “[i]t is true that the virtual player bears resemblance to Hart and was designed with Hart’s physical attributes, sports statistics, and biographical information in mind.”\(^ {164}\) This finding is significantly understated and unfortunately served as the basis of the court’s unsubstantiated conclusions. EA did not merely design the game with Hart’s attributes *in mind*. By contrast, EA designed the virtual starting quarterback for Rutgers University as a carbon copy of the collegiate version of Hart. EA listed the virtual player as “hailing from Florida . . . standing six feet two inches tall . . . and weighing one hundred ninety pounds.”\(^ {165}\) EA even went so far as to accessorize the two players with the same equipment, including a helmet visor and a left wristband.\(^ {166}\) In light of these factual findings, EA’s use is a far stretch from the raw material approach to transformative use taken by *Folsom* and *Campbell*.

The mere fact that EA also created a “mechanism by which the virtual player may be altered, as well as the multiple permutations available for each virtual player image”\(^ {167}\) does not *post hoc* qualify EA’s use as transformative. An alteration established after EA fixed the original expression in a tangible medium does not seem to fit the traditional authorship requirements of the copyright scheme.\(^ {168}\) Moreover, although the creation and subsequent use of such permutations and mechanisms may in fact be deserving of some degree of transformative use protection, the court failed to address the


\(^{163}\) *Hart*, 808 F. Supp. 2d at 784.

\(^{164}\) *Id.*

\(^{165}\) *Id.* at 763.

\(^{166}\) *Id.*

\(^{167}\) *Id.* at 785.

likely scenario where a potential user neglects “to alter the virtual player’s physical characteristics, including the player’s height, weight, hairstyle, face shape, body size, [etc.]”

In this instance, Hart’s unaltered image would remain the sole expression of the athlete in the NCAA Football series. The use of this unaltered image is a literal depiction of Hart’s original image, failing to “add something new” as required by Justice Souter in Campbell. Further, such a literal depiction of a student-athlete for commercial gain is extremely likely to interfere with the economic interests protected by Justice Story’s early application of the transformative use test in Folsom. Despite the clear discrepancies between these instructive decisions, the District of New Jersey found that EA’s exploitation of student-athletes was protected under the transformative use analysis.

The Hart court was allowed to craft this disparaging fair use analysis due to the fact that student-athletes do not fit neatly within the definitional scope of copyrightable subject matter. In the absence of such federal protection, courts have borrowed from the principles of copyright to the disadvantage of student-athletes. Accordingly, student-athletes are left with little to no protection of their intellectual property interests.

B. Unique Social and Technological Circumstances

Having established a lack of protection at the federal level, the sui generis approach must be further supported by unique social and technological conditions. The amateurism model of college football most notably highlights the unique social condition of the NCAA student-athlete. The NCAA was founded in strong principles of amateurism and continues to adhere to these principles at present. However, the societal reality of college football has drastically changed since the body was formally named in 1906. For example, the NCAA was founded “to protect young people from the dangerous and exploitive athletic practices of the time.” At the time of its founding, college football was not a billion-dollar industry. Moreover, student-athlete scandals concerning illegal financial activity were not highlighted daily in the nation’s press. The emergence of college

\[169\] Hart, 808 F. Supp. 2d at 785.
\[171\] Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901) (“[i]f so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto.”).
\[172\] Miller, supra note 4, at 1141.
\[173\] Miller, supra note 4, at 1141.
football as a billion-dollar industry has strained the NCAA’s amateurism model to a breaking point. Student-athletes contribute the manual labor to this billion-dollar industry, yet they continue to see no compensation for their efforts. The current lack of intellectual property protection afforded to such student-athletes has perpetuated this cycle of financial exploitation.

Adding to the strain on the NCAA’s amateurism model is the technological emergence of EA as a leading video game developer. Over the lifetime of the product, the NCAA Football series has generated over $800 million in revenue for EA. The sole building block for this product is the individual reputations of student-athletes like Samuel Keller and Ryan Hart. At present, the NCAA amateurism model bars EA from attempting to compensate such student-athletes for the use of their likeness in the video game. Further, definitional limitations in present federal intellectual property schemes allow courts to parse out federal standards at will. This lack of limitation has subsequently allowed EA to cross the fine line of copyright protection typically offered at the federal level.\footnote{See Hart, 808 F. Supp. 2d at 783 (“Nevertheless, a game developer that bases its work on real players, in the context of the games that bring them notoriety, may walk a fine line between using reality as a building block for the developer’s own creative work and exploiting the hard-earned reputations of college players for its own profit.”).}

The above social and technological conditions are similar to those Congresses of the past have taken into account in drafting \textit{sui generis} amendment to copyright law. For example, where the practice of chip piracy posed an economic threat to the semiconductor chip industry, Congress responded by enacting the Semiconductor Chip Protection Act. The purpose of the act was to restrikethe balance between public and private incentives, so that innovating firms were incentivized to continue development, while the public remained able to benefit from the ultimate product produced. Congress responded to similar socioeconomic pressures in the instance of the Vessel Hull Design Protection Act. When courts stripped vessel hull designs of any intellectual property protection,\footnote{See Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 144 (1989).} Congress again responded to protect the vulnerable manufacturing industry. This immediate response was aimed at incentivizing developers to continue the socially beneficial process of development.

Here, similar social and technological pressures place an incredible strain on the infrastructure of the NCAA’s amateurism model. Student-athletes can hardly be expected to remain incentivized to
sacrifice their bodies on the playing fields while billions of dollars are being exchanged in the front office. Granted, student-athletes are not likely to make the decision to discontinue playing college football at major universities. However, student-athletes can, and will, continue to place pressure on the judiciary through incredibly large class action suits in the absence of federal protection.

The appropriate response to these shifting social and technological conditions is *sui generis* amendment to copyright law. It would be unwise for Congress or federal courts to attempt to incorporate student-athlete protection into the present copyright scheme. The likeness interest presently misappropriated simply does not fit neatly within the concept of “authorship” traditionally protected by copyright. Given Congress’ past hesitation to extend copyright protection to processes of an industrial nature, a *sui generis* amendment provides the most likely vehicle for protection.

**VI. Conclusion: Predicting the Protections Under a Sui Generis Approach**

A *sui generis* amendment to the current copyright scheme could effectively strike a balance between EA’s ability to create the NCAA Football series on one hand, and the intellectual property rights of student-athletes on the other. This can be accomplished by supplanting an appropriate fair use analysis into a concrete, stand-alone statute, as opposed to the present free reign granted to the federal judiciaries of *Hart* and *Keller*. In supplanting the fair use analysis, the principles from the instructive decisions of *Folsom* and *Campbell* should shine throughout the plain language and policy rationales of the statutory set.

Furthermore, a *sui generis* amendment sufficiently protects the NCAA amateurism model. A *sui generis* amendment would not per se compensate athletes in matters regarding the use of their likeness. On the contrary, it would solely seek to prevent game developers, such as EA, from exploiting the use of an athlete’s raw image solely for commercial gain. *Sui generis* amendment would require EA to incorporate the use of an athlete’s likeness into an expression that is

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176 H.R. REP. NO. 98-781, at 6 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5755. In advocating for the *sui generis* approach to the SCPA, two significant conclusions were noted. First, “[i]t would be unwise for Congress to provide copyright protection for semiconductor chips by amendment to the present statute. The basis for this conclusion is that the present copyright statute purports to provide for an author’s copyright.” Second, “[t]he appropriate solution to the problem of protection for semiconductor chips is the creation of an industrial copyright, separate and distinct from the author’s copyright.”
actually transformative, as opposed to a virtual mirror image of the athlete.

The first step in affording such protection is to carefully craft a definitional section specific to the genre of NCAA student-athletes. The SCPA successfully accomplishes this in section 901, with the VHDPA doing so in section 1301. This section should avoid the generic intellectual property language employed in other areas of federal copyright law to prevent confusion amongst the schemes. Narrowly crafting a definitional section places student-athletes into a comprehensive scheme that sufficiently protects the intellectual property rights ultimately afforded. Where NCAA student-athletes are expressly placed in a concrete federal scheme, athletes will be protected from the lack of uniformity appearing recently in Hart and Keller.

The next step, and the most important for purposes of the present *sui generis* approach, is to place limitations on the ability of student-athletes to control the use of their likeness in socially beneficial works. Such a limitation is consistent with the Constitutional grant of power to Congress in the Copyright Clause. This limitation should arise from the traditional fair use analysis. However, in narrowing the traditional analysis to the context of the NCAA’s amateurism model, the balance must take into account the background and practices of the industry. The primary guide for the fair use balance afforded in such a *sui generis* statute should be the origins of the original approach. Thus, Congress should focus on the emanations of *Folsom* and *Campbell*.

Although archaic in some aspects, the economic rationale applied to George Washington’s private papers in *Folsom* remains relevant to the present *sui generis* analysis. Where the reputation of a NCAA athlete is so substantially appropriated as to cause injury, there is little room for EA to claim transformative use as a defense. Additionally, to fall within the narrow breathing space of copyright, Justice Souter’s narration in *Campbell* requires EA add something new as opposed to merely superseding the object of the original creation. Somewhere in the midst of a billion-dollar NCAA industry, courts have dangerously strayed from this instructive “raw materials” approach. The

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177 See 17 U.S.C. § 901(1) (2006) (defining a “‘semiconductor chip product’ [as] the final or intermediate form of any product” and a “‘mask work’ [as] a series of related images, however fixed or encoded. . .”).


overbearing economic impact of inputting student-athletes into the collegiate business model, specifically EA’s NCAA Football series, has convinced courts to focus the fair use analysis instead on the transformative nature of the game as a whole, as opposed to the individual student-athlete’s image alone. Under such a broad scope, the student-athlete remains hopeless in seeking protection against the exploitation of their likeness. However, under a federally crafted *sui generis* approach that appropriately takes into account the amateurism and social vulnerability of the unique class protected, NCAA student-athletes may be sufficiently protected from reputational exploitation. A *sui generis* return to the principles of *Folsom* and *Campbell* provides an efficient mechanism for accomplishing this socially beneficial goal.