The right of publicity is based in state common law or statutory laws and prevents the unauthorized use of an individual’s likeness, image, or name for commercial purposes. The term “right of publicity” was coined in 1953 when a federal court recognized a professional baseball player’s right to control the commercial use of his image (Haelen Laboratories v. Topps Chewing Gum, 1953). Since that time, numerous professional athletes have asserted publicity rights in a variety of cases (Stapleton & McMurphy, 1999; Grady, McKelvey, & Clement, 2005; Baranko, 2010). However, until recently, no amateur college athlete had pursued right of publicity claims, since NCAA rules expressly prohibit certain promotional and media activities that use a student-athlete’s name or picture for commercial purposes (NCAA Bylaws 12.5.1; 12.5.2; and 12.5.3).

The application of right of publicity laws to college athletes is currently experiencing a radical shift with the potential to dramatically impact student-athletes’ legal rights as well as the basic tenets of NCAA amateurism principles (Bearman, 2012; Dennie, 2009; Stippich & Otto, 2010). In 2009, Sam Keller, a former University of Nebraska football player, filed suit under California state law objecting to the use of his likeness by the NCAA and its licensees (Keller v. Electronic Arts, 2009). Later, Keller’s suit was consolidated with another action filed by former UCLA basketball player, Ed O’Bannon (O’Bannon v. NCAA, 2009) into what is referred to as the NCAA Student-Athlete Name & Likeness Licensing Litigation (2009). Also in 2009, another former student-athlete, Ryan Hart, sued Electronic Arts and the NCAA under New Jersey state law for its use of his image as a virtual avatar in the popular NCAA College Football video game (Hart v. Electronic Arts, 2009). These cases raised legal questions about how courts should balance the intellectual property rights of student-athletes with the rights to make creative works, including video games, which are protected by the First Amendment. Over the past year alone, multiple decisions have been entered in the consolidated cases which have further refined the legal issues remaining for trial. On September 26, 2013, EA and the Collegiate Licensing Company settled all the claims brought against them by the current and former athletes. Thus, the NCAA is now the only remaining defendant in the cases which are currently scheduled for trial in 2014 (Berkowitz, 2013).

The Hart case, together with the Keller and O’Bannon consolidated lawsuits have generated the most attention as they have the potential to “radically change college sports as we know it” (“Town hall,” 2013; and “Blow up the [NCAA’s] rigid stance on amateurism,” 2013). Two recent decisions resolving various motions to dismiss the cases in Hart (2013) and Keller (2013) confirmed that college athletes, who have historically been unable to enforce their publicity rights in similar ways as professional athletes (Grady, 2006), do have a protectable interest in their commercial identity. Given the rapidly evolving legal landscape, the need for additional research that explores the contours of this right for college athletes, specifically current athletes, is undeniable.

The developing body of case law for college athlete publicity rights, including the Hart, Keller, and O’Bannon cases which have been in various stages of litigation for the past four years, have finally begun to produce some valuable legal guidance as they move closer to resolution. First, in July, 2013, a three-judge panel sitting for the Ninth Circuit federal court of appeals in Keller adopted the California Supreme Court’s “transformative use” test to find that Electronic Arts had no First Amendment defense in using the Keller’s likenesses “because the game literally recreated Keller in the very setting in which he had achieved renown” (p. 6). In other words, Electronic Arts’ “objective was to recreate Keller as accurately as possible [in the video game]—the antithesis of a transformative use” (“Two New Rulings,” 2013). In Hart (2013), the Third Circuit federal court of appeals also adopted the “transformative use” test and held that even though video games are protected expressive speech, those First Amendment protections did not outweigh the publicity rights of the athletes which were virtually depicted in those games with insufficient transformative elements. These two cases mark an important and meaningful shift in our understanding of the legal analysis likely to be used to resolve right of publicity disputes going forward. Two federal Courts of Appeals have now held that the First Amendment protections available to video game producers do not
authorize the virtual depiction of college players without compensation under state right of publicity laws. The agreement between the two courts makes it considerably less likely that the Supreme Court will review either case even though the NCAA is seeking to intervene and file a petition for certiorari in Keller (NCAA v. Keller, 2013).

Despite these significant clarifying decisions, many legal issues continue to remain unresolved. regarding the use of college athletes in numerous commercial contexts. For example, given the advances in digital technology, a new version of video games may be able to sufficiently transform the image or likeness of a college athlete to satisfy the transformative use test. EA had argued in Hart that the interactivity of the games was sufficiently transformative to trump the athletes’ publicity rights. While the Third Circuit rejected that interactivity alone was sufficiently transformative, interactivity combined with other modifications of the athletes’ images may produce a different result.

A central issue underlying this litigation is the role of the student-athlete in the commercial landscape of college athletics. From a practical standpoint, litigation costs raise concerns about the propriety of continuing to use college athletes images in commercial ways. For example, in response to the current legal and business climate, EA announced they would not produce a NCAA Football video game in 2014 (Berkowitz, 2013) and the NCAA announced that it would no longer sell players jerseys in their online store (Chappell, 2013).

This presentation will provide a brief historical review of the right of publicity as applied to college athletes and then provide a detailed analysis and discussion of the recent decisions in this pending litigation as well as provide critique and analysis of the claims yet to be decided. Implications for future research in this rapidly developing area of sport law will also be proffered.