BROADCAST RIGHTS, UNJUST ENRICHMENT, AND THE STUDENT-ATHLETE

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ABSTRACT

The NCAA, conferences and universities license to networks the right to broadcast their live games in exchange for billions of dollars in annual rights fees without anyone questioning either the origin of this right or who constitutes all of the holders of this right. Historically courts recognized a quasi-property right of professional teams to sell the right to broadcast their games; however, team owners put personal funds at risk and are entitled to full ownership of the copyright to the broadcast under the work made for hire doctrine as they pay the players a proportionate share of the rights fees. The putative quasi-property right of NCAA member institutions has gone unchallenged despite the fact that (1) they are tax exempt public institutions lacking the same economic investment and incentive, (2) the rights fees continue to climb at astronomical rates while the grant-in-aid remains stagnant, and (3) the work made for hire doctrine does not protect the entitlement because the players are not employees. Viewed within the construct of common law unjust enrichment which is premised on the idea of distributive justice, this Article argues that universities obtain an unjust benefit at student-athletes' expense by retaining for themselves the portion of the increasing rights fees that would normally and equitably be paid to the players for their substantial contribution in creating the broadcast. The ill-gotten gains, which do nothing to preserve amateurism, can be disgorged in a fair manner that preserves the amateur sports model.

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INTRODUCTION

The billions in annual revenues generated by universities, conferences and the National Collegiate Athletic Association (NCAA) are in large part derived from rights fees paid by media conglomerates such as ESPN/ABC, CBS, and Fox for a license that affords the networks the right to broadcast live coverage of the sporting events over television, radio, the internet, and other technological platforms.[1] Many questions arise pertaining to these rights. For example, what is the nature and scope of the universities' right to license or sell to networks the right to broadcast the games and what is the origin of that right to broadcast? Who owns the copyright to the broadcast? Are the players legally entitled to a portion of the revenues generated from the licensing of the broadcast rights? College players (hereinafter "student-athletes" to be consistent with the term used by the NCAA and its members) have not claimed an interest in game broadcast rights and the lucrative fees those rights generate, which is not surprising given their lack of organization.[2]

In the professional sports league context, these questions were at the heart of numerous disputes involving clubs, broadcasters, and players over the ownership rights in live game broadcasts. Through years of litigation and many court battles, these three groups fought over the proper application and interpretation of federal copyright law and common law theories based on misappropriation, unfair competition,

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[1] In 2011, Turner Broadcasting and CBS signed a fourteen-year, $10.8 billion contract with the NCAA for the exclusive right to broadcast the men's basketball national championship tournament, generating $770 million in annual revenue for the NCAA. PAUL C. WEILER & GARY R. ROBERTS, SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS 746 (4th ed. 2011). The conferences have their own television contracts with the networks that, depending on the individual conference, distribute to each school in the conference on average anywhere from $13 million to $21 million annually. In May 2011, the Pac-12 Conference signed a $3 billion, twelve-year television deal with ESPN and Fox. The Big 12 Conference signed a $1.17 billion, thirteen-year television deal with Fox in March 2011; a $1.3 billion, thirteen-year deal with ESPN/ABC in March 2012; and a $78 million, four-year deal with FSN in April 2007. In May 2012, the Atlantic Coast Conference signed a $3.6 billion, fifteen-year television deal with ESPN/ABC. In August 2008, the Southeastern Conference signed a $2.25 billion, fifteen-year television deal with ESPN/ABC; and an $825 million, fifteen-year deal with CBS College Sports. The Big Ten signed a $1 billion, ten-year television deal with ESPN/ABC in June 2006; and a $72 million, six-year deal with CBS for basketball only in June 2011. The Big Ten even has its *own* network, which the conference jointly owns with News Corp., and the television contract signed in August 2006 was a $2.8 billion, twenty-five–year deal. Lastly, in August 2006, the Big East signed a $200 million, six-year television deal with ESPN/ABC. Michael Smith, *One Year Later, ACC Ups Its Rights Fees by a Third*, SPORTS BUS. J., May 14, 2012, at 1. In August 2012, the Pac-12 Conference launched its own network, the Pac-12 Networks, in which "[s]ome projections have suggested that each school will see $6 million to $10 million in new revenue in the coming years." Michael Smith & John Ourland, *One Year, 7 Networks: Pac-12 Completes a Media Company Crash Course*, SPORTS BUS. J., August 20, 2012, at 1.

[2] I am not proposing in this Article that student-athletes should be considered employees nor that they should have the legal right to certify as a labor union under the National Labor Relations Act. However, some scholars have considered such proposals. *See, e.g.*, Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006); C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081 (1997); Nathan McCoy & Kerry Knox, Comment, *Flexing Union Muscle—Is It the Right Game Plan for Revenue Generating Student-Athletes in Their Contest for Benefits Reform with the NCAA?*, 69 TENN. L. REV. 1051 (2002). Indeed, their lack of legal status as employees and inability to bargain over terms and conditions of their scholarships makes non-recognition of their property rights all the more egregious.

unjust enrichment, and right of publicity. As a result, it is now fairly well settled in the *professional* sports league context that (1) the network purchases a license from the teams (or league) for the right to broadcast the game, (2) the teams (or league) own the copyright to the broadcast via an assignment from the network contained in the broadcast licensing agreement, and (3) the players receive a substantial share of the broadcast licensing revenue garnered by the league via the players' individual contracts with the clubs and the collective bargaining agreement. Any rights of professional players in broadcast rights, copyright assignments, or their game performances are generally subsumed within the employment relationship and surrendered to the clubs by virtue of copyright law's "work made for hire" doctrine.

In contrast, college sports have remained virtually immune from litigation over ownership rights in game broadcasts. Thus, at the collegiate level, multi-billion dollar sports broadcasting agreements are negotiated and entered into based upon the following unchallenged *assumptions*: (1) that there exists a quasi-property interest in the live games which establishes a right to broadcast that can be licensed to networks; (2) that the NCAA, conferences and/or universities are the exclusive owners of this quasi-property right as well as the copyright to the broadcast via an assignment from the network contained in the broadcast licensing agreement; and (3) that student-athletes do not have any interest in these rights and therefore do not have a right to any share of the broadcast licensing revenues. I challenge the third assumption.

Student-athletes, through their extensive pre-game preparations and actual game performances, make more than a de minimis contribution to the creation and production of the live game and its broadcast. The game broadcast and its immense value to the networks and viewing public simply do not exist without the players' substantial contributions; their game performances are the sine qua non of the broadcast. In return for their athletic services, student-athletes receive "grants-in-aid" which cover tuition, fees, room and board, and books.[3] Even if principles of amateurism justifiably (and legally) deny student-athletes a right to profit from marketing their reputation as athletes, to earn wages as employees, to compete against each other in a market for their services, or to collectively bargain, amateurism principles do not give the NCAA and its members a corresponding right or justification to be enriched by the portion of the broadcast rights fees attributed to the players' expense and effort (beyond the value of the grant-in-aid) that would normally, equitably, and morally be paid to them.

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[3] "In theory, the 'full ride' grant-in-aid compensates a student-athlete for the cost of attendance at the university in which he is enrolled. However, a grant-in-aid, according to the NCAA, covers only tuition, fees, room and board, and course-related books (NCAA, Art. 15.02.5, 2010)." Thomas A. Baker III, Joel G. Maxcy & Cyntrice Thomas, White v. NCAA*: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 76 (2011).

This Article provides a theory for recognition of student-athletes' interest in broadcast rights fees received by the NCAA and its members based on common law unjust enrichment which arises when the defendant obtains a benefit at the plaintiff's expense that is recognized to be unjust. To be clear, this interest is not based on a constitutionally protected property interest,[4] or a state law right of publicity for the unauthorized use of their names or likenesses.[5] Nor is it derived from copyright authorship of the game broadcast,[6] the game itself,[7] sports-related moves,[8] or scripted plays and playbooks.[9] Part II addresses the historical development of game broadcast rights in professional sports, including the establishment of the teams' rights under various common law theories and federal copyright law as well as the claims asserted by performers of sporting events in broadcast rights. This Part also briefly addresses the antitrust battle over broadcast rights between the NCAA and its members. Part III provides a theory for recognition of student-athletes' interest in broadcast rights based on common law unjust enrichment as an independent basis of recovery, essentially supported by a similar rationale that supports the rights of professional teams and universities to sell and license the right to broadcast their games to the networks, and it also includes a discussion regarding the restitutionary

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4 *See, e.g.*, Brian L. Porto, Note, *Balancing Due Process and Academic Integrity in Intercollegiate Athletics: The Scholarship Athlete's Limited Property Interest in Eligibility*, 62 IND. L.J. 1151 (1987).

5 *See, e.g.*, James W. Quinn & Irwin H. Warren, *Professional Team Sports New Legal Arena: Television and the Player's Right of Publicity*, 16 IND. L. REV. 487 (1983) (advocating that players possess a right of publicity in the broadcasts of their games); David E. Shipley, *Three Strikes and They're Out at the Old Ball Game: Preemption of Performers' Rights of Publicity Under the Copyright Act of 1976*, 20 ARIZ. ST. L.J. 369 (1988) (explaining why the right of publicity players have in their performances is not preempted by federal copyright law); Shelley Ross Saxer, Note, Baltimore Orioles, Inc. v. Major League Baseball Players Association*: The Right of Publicity in Game Performances and Federal Copyright Preemption*, 36 UCLA L. REV. 861, 873 (1989) ("Because most states recognize the right of publicity, ballplayers should be allowed to assert their right of publicity against parties who capitalize on unauthorized videotapes of their game performances.").

6 *See, e.g.*, Shipley, *supra* note 5, at 391–93 (discussing why players are not authors or owners of the copyrightable telecasts).

7 *See, e.g.*, MELVILLE B. NIMMER & DAVID NIMMER, 1 NIMMER ON COPYRIGHT § 2.09[F], at 2-167 to -171 (rev. ed. 2011) (discussing why an athletic event and players' game performances are not subject to copyright protection).

8 *See, e.g.*, Carl A. Kukkonen, III, *Be a Good Sport and Refrain from Using My Patented Putt: Intellectual Property Protection for Sports Related Movements*, 80 J. PAT. & TRADEMARK OFF. SOC'Y 808 (1998); Loren J. Weber, *Something in the Way She Moves: The Case for Applying Copyright Protection to Sports Moves*, 23 COLUM.-VLA J.L. & ARTS 317 (2000); Jeffrey A. Smith, Comment, *It's Your Move—No It's Not! The Application of Patent Law to Sports Moves*, 70 U. COLO. L. REV. 1051 (1999).

9 *See, e.g.*, Proloy K. Das, Note, *Offensive Protection: The Potential Application of Intellectual Property Law to Scripted Sports Plays*, 75 IND. L.J. 1073 (2000); Rice Ferrelle, Note, *Combating the Lure of Impropriety in Professional Sports Industries: The Desirability of Treating a Playbook as a Legally Enforceable Trade Secret*, 11 J. INTELL. PROP. L. 149 (2003); Brent C. Moberg, Comment, *Football Play Scripts: A Potential Pitfall for Federal Copyright Law?*, 14 MARQ. SPORTS L. REV. 525 (2004).

measure. Part IV addresses statutory defenses under federal copyright law and explains why the statutory work made for hire doctrine does not preclude student-athletes' unjust enrichment claim because they are not employees of the university, a premise the NCAA and its member institutions do not dispute, and also why their claim would not be preempted by federal copyright law.

I. THE HISTORICAL DEVELOPMENT OF PROPERTY RIGHTS IN GAME BROADCASTS

The basis for recognition of student-athletes' interest in broadcast rights begins by tracing the historical development of property rights in game broadcasts held by professional teams and leagues over the past eighty years under common law and federal copyright law.[10] Professional clubs and broadcasters battled over ownership rights to game broadcasts in the courts and before the Federal Communications Commission (FCC) prior to Congress's amendment of the Copyright Act in 1976, which expressly accorded copyright protection to simultaneously recorded broadcasts of live performances such as sports events.[11] Subsequent to the amendment of the Copyright Act, professional clubs and broadcasters then fought over who *owned* the copyright and performers of sporting events asserted their own rights in game broadcasts based on common law theories of misappropriation, right of publicity, unjust enrichment, and unfair competition.[12] This Part will first address the establishment of the property right in game broadcasts held by professional leagues and their member clubs. It will then discuss the claims asserted by professional athletes and performers in the broadcast of their sporting events, followed by a discussion of the

10 *See* LAW OF PROFESSIONAL AND AMATEUR SPORTS § 20:1 (Gary A. Uberstine ed., 2002) ("[T]he relationship between sports and television has been, and will continue to be, defined in large measure by a multitude of judicial, legislative, and administrative pronouncements."); *see also* Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection of Intellectual Property*, 11 HARV. J.L. & TECH. 401 (1998) (discussing the historical reliance on state misappropriation law to protect intellectual property rights in broadcasts of sporting events).

11 The Copyright Act protects "original works of authorship fixed in any tangible medium," including "motion pictures and other audiovisual works." 17 U.S.C. § 102(a), (a)(6) (2006). Section 101 of the Act, containing definitions, was amended in 1976 to state that "[a] work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." *Id.* § 101. The House Report indicates that Congress intended for the amendment to cover live broadcasts of sporting events: "[T]he bill seeks to resolve, through the definition of "fixation" in section 101, the status of live broadcasts—sports, news coverage, live performances of music, etc.—that are reaching the public in unfixed form but that are simultaneously being recorded." H.R. REP. NO. 94–1476 at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5665.

12 While Major League Baseball players were unsuccessful on their claims, Part II.A. explains why the rationale for denying them a property interest is not applicable to student-athletes.

battle among the NCAA and its members over broadcast rights in the antitrust arena.

A. *Professional Teams' Property Right in Game Broadcasts*

In 1921, Major League Baseball (MLB) began entering into contracts with radio stations authorizing the stations to broadcast World Series games over the airwaves.[13] Thirteen years later, an individual by the name of A.E. Newton, who operated a radio station from the basement of his home in Jamestown, New York, broadcast the 1934 World Series between the Cardinals and Tigers without paying a license fee based upon information he gathered while listening to authorized radio broadcasts.[14] The renewal of Newton's broadcasting license was challenged before the FCC on the basis that his unauthorized broadcast of the World Series violated section 325(a) of the Communications Act of 1934, which provides that no broadcasting station shall "rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."[15] The FCC, noting that Newton's unauthorized rebroadcasting activities were limited to the 1934 World Series, determined that he did not violate section 325 and renewed his broadcasting license.[16] Nevertheless, the FCC, speaking in misappropriation, unjust enrichment, and unfair competition terms, found Newton's unauthorized rebroadcast to be "inconsistent with fair dealing," "an unfair utilization of the results of another's labor," and "deceptive to the public upon the whole, and contrary to the interests thereof."[17]

1. The *Pittsburgh Athletic* Property Right

Four years later, in 1938, the Western District of Pennsylvania decided the landmark case establishing professional clubs' property rights in the broadcasts of their games. In *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*,[18] the Pittsburgh Pirates sought an injunction to enjoin a radio station from conducting unauthorized broadcasts of the Pirates' home games.[19] The station was able to broadcast play-by-play accounts of the games by paying observers to stand at different vantage points

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13 *See* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 10, § 20:2.
14 *See In re* A.E. Newton, 2 F.C.C. 281 (1936).
15 47 U.S.C. § 325(a) (2006).
16 *Newton*, 2 F.C.C. at 284–85.
17 *Id.* at 284.
18 24 F. Supp. 490 (W.D. Pa. 1938).
19 *Id.* at 491. The owners of the Pirates licensed to General Mills, Inc. the exclusive right to broadcast the play-by-play and other accounts of the Pirates' games. *Id.* at 492.

outside the stadium, for example on top of tall buildings, who relayed the accounts of the game back to the studio for distribution of the game broadcast over the airwaves.[20] The district court noted that both the Pirates and the radio station are "using baseball news as material for profit" but at the primary expense of the Pirates, which "maintains a baseball park, *pays the players who participate in the game*, and have, as we view it, a legitimate right to capitalize on the news value of their games by selling exclusive broadcasting rights to companies which value them as affording advertising mediums for their merchandise."[21]

The district court considered the radio station's unauthorized broadcast to be an unlawful interference amounting to unfair competition and unjust enrichment of the radio station at the Pirates' expense.[22] In describing the *property right* held by clubs, the court opined that the Pirates, "by reason of its creation of the game, its control of the park, and its restriction of the dissemination of news therefrom, has a property right in such news, and the right to control the use thereof for a reasonable time following the games."[23] The court clarified even further that this property right in "disseminating or publishing or selling, or licensing the right to disseminate, news, reports, descriptions, or accounts of games played in such parks, during the playing thereof, is vested *exclusively* in" the member clubs of the league.[24] In other words, the teams have a property right in the broadcast rights.

The battles continued between professional clubs and unauthorized broadcasters who unsuccessfully argued before numerous courts that accounts of sporting events constituted news in the public domain that anyone has the right to disseminate.[25] In *National*

[20] *Id.* at 492.

[21] *Id.* (emphasis added).

[22] "The defendant's unauthorized broadcasts of information concerning games played by the Pittsburgh team constitute unfair competition with the plaintiffs and each of them." *Id.* at 494. "The actions and threatened actions of the defendant constitute a direct and irreparable interference with, and an appropriation of, the plaintiffs' normal and legitimate business; and said action is calculated to, and does, result in *the unjust enrichment of the defendant at the expense of the plaintiffs* and each of them." *Id.* (emphasis added).

[23] *Id.* at 492.

[24] *Id.* at 494 (emphasis added).

[25] *See, e.g.*, Johnson-Kennedy Radio Corp. v. Chi. Bears Football Club, 97 F.2d 223 (7th Cir. 1938) (enjoining radio station from broadcasting football games without authorization); Liberty Broad. Sys. v. Nat'l League Club, 1952 Trade Cas. (CCH) ¶ 67,278 (N.D. Ill. 1952) (concluding that each club has a property right in its games and the sole right to disseminate news, reports, descriptions, and accounts thereof); Madison Square Garden Corp. v. Univ. Pictures Co., 7 N.Y.S.2d 845 (App. Div. 1938) ([owner of New York Rangers] stating cause of action against defendants who incorporated film of a Rangers' hockey game in a motion picture without authorization); Nat'l Exhibition Co. v. Fass, 133 N.Y.S.2d 379 (Sup. Ct. 1954) (enjoining defendant from listening to authorized radio and television broadcasts of baseball games and simultaneously teletyping reports of the games to radio stations for immediate rebroadcast); Mut. Broad. Sys. v. Muzak Corp., 30 N.Y.S.2d 419 (Sup. Ct. 1941) (enjoining defendant from retransmitting plaintiff's broadcasts of the World Series); Twentieth Century Sporting Club v. Transradio Press Serv., Inc., 300 N.Y.S. 159 (Sup. Ct. 1937) (enjoining defendant from supplying radio station with "up to the minute" ringside accounts of a boxing match in Yankee

Exhibition Co. v. Fass,[26] a New York trial court noted that the clubs not only create games for the benefit of spectators in attendance but they also create "a drama consisting of the sequence of plays, which is valuable program material for radio and television stations and for which licensees have paid and are paying plaintiff substantial sums."[27] The Senate Commerce Committee made similar remarks in a 1953 report suggesting that the FCC should consider any unauthorized sports broadcasts of a station when determining whether to renew that station's license.[28] Referring to well-established legal doctrine of misappropriation and unfair competition, the Committee noted that "[t]he plays which make up baseball games and the sequence of those plays constitute original and unique performances which are of great interest to the public and of commercial value to the clubs as the creators and exhibitors of the games . . . ."[29] Both the *Fass* court and the Committee recognized the substantial contribution to the broadcast of the plays which make up the game and that the plays are of great interest to the public. Both also recognized the commercial value in the plays; the *Fass* court focusing on the value to the networks that are paying substantial licensing fees and the Committee focusing on the value to the clubs (presumably considering that the clubs are paying substantial sums to those who perform the plays). Neither, however, mentioned the interest of the individuals who actually perform the plays.

2. Federal Copyright Protection

During the mid-1960's, the professional leagues became concerned about the unauthorized rebroadcasts of their games by cable television systems and thus urged Congress to extend federal copyright protection to sports broadcasts.[30] In 1976, Congress granted their request by

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Stadium).

26 143 N.Y.S.2d 767 (Sup. Ct. 1955).

27 *Id.* at 770. There are two cases, however, in which the courts refused to protect a club's property rights in the accounts and descriptions of their games and it is highly unlikely that either of these cases would be followed today. LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 10, § 20:2 (citing Loeb v. Turner, 257 S.W.2d 800 (Tex. Civ. App. 1953); Nat'l Exhibition Co. v. Teleflash, 24 F. Supp. 488 (S.D.N.Y. 1936)).

28 S. REP. NO. 83-387, at 10–12 (1953).

29 *Id.* at 11.

> The clubs employ extensive capital, expense, and labor in exhibiting the games and are entitled to protection against misappropriation by others of the fruits of the clubs' efforts. Your committee understands that these property rights are supported by well-established principles of law, including principles of common law copyright and the principles of equitable protection against unfair competition.

Id.

30 *See Hearings on S. 1006 Before the Subcomm. on Patents, Trademarks, and Copyrights of the S. Comm. on the Judiciary*, 89th Cong. 162–63 (1965); *Hearings on H.R. 4347 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 89th Cong. 1825–26, 1842–43, 1848 (1965).

amending the Copyright Act to expressly accord copyright protection to simultaneously recorded broadcasts of live performances such as sports events.[31]

However, the Copyright Act of 1976 is silent as to who owns the copyright in sports broadcasts. To add to the confusion, federal copyright law confers upon the owner of the copyright the *exclusive* right to reproduce, publish, and sell the copyrighted work and the Copyright Act also recognizes that a work may be jointly authored and its copyright co-owned.[32] Ownership in the copyright to sports broadcasts lacks clarity because the broadcaster produces and creates the broadcast and is therefore the "author" of the copyrighted work, that being the broadcast of the game.[33] Although the clubs and players produce the game, the game itself is not copyrightable because a live sporting event is not authored and has no underlying script.[34] Nevertheless, testimony provided during the Congressional hearings leading up to the enactment of the Copyright Act of 1976 evidences that the professional leagues and the NCAA *assumed* they would be the rightful owners of the copyright in game broadcasts that they were hoping Congress would create.[35]

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31 *See supra* note 11; *see also, e.g.*, Phila. Eagles Football Club, Inc. v. City of Phila., 823 A.2d 108, 122 (Pa. 2003) ("[T]he networks' live telecasts of the NFL football games at issue here, which were simultaneously recorded with transmission, were clearly copyrightable.").

32 17 U.S.C. § 201(a) (2006). The United States Constitution grants Congress authority "[t]o 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." U.S. CONST. art. I, § 8, cl. 8.

33 The U.S. House of Representatives has stated:

> When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic images are sent out to the public and in what order, there is little doubt that what the cameramen and the director are doing constitutes "authorship."

H.R. REP. NO. 94-1476, at 52 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5665; *see also* Balt. Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 668–69 (7th Cir. 1986) (citing H.R. REP. NO. 94-1476, at 52 (1976)); Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 377–79 (D.C. Cir. 1982).

34 *See, e.g.*, Nat'l Basketball Ass'n. v. Motorola, Inc., 105 F.3d 841, 847 (2d Cir. 1997) (holding that the broadcasts of NBA games, as opposed to the actual games themselves, are entitled to copyright protection under the Act); *see also* NIMMER & NIMMER, *supra* note 7, § 2.09[F], at 2-167 to -171 (discussing why an athletic event and players' game performances are not subject to copyright protection). Judge Winter explained in the *Motorola* case: "Sports events are not 'authored' in any common sense of the word. . . . Unlike movies, plays, television programs, or operas, athletic events are competitive and have no underlying script." *Motorola*, 105 F.3d at 846.

35 *See*, *e.g.*, *Hearing on S. 1361 Before the Subcomm. on Patents, Trademarks and Copyrights of the S. Comm. on the Judiciary*, 93d Cong. 526–32 (1973) (testimony of James B. Higgins, Chairman, Cable Television Subcommittee, National Collegiate Athletic Association); *Id.* at 533–36, 539–47 (testimony and statement of Bowie K. Kuhn, Comm'r, Major League Baseball); *Id.* at 550–51 (statement of Pete Rozelle, Comm'r, National Football League); *Id.* at 551–52 (statement of J. Walter Kennedy, Comm'r, National Basketball Association); *see also Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice*

Not surprisingly, soon after the enactment of the Copyright Act of 1976, disputes arose between the leagues and broadcasters regarding ownership of the copyright. In the first royalty distribution proceeding under the Copyright Act of 1976, the Copyright Royalty Tribunal (the federal agency responsible for allocating cable royalties among copyright owners) denied a claim by the National Association of Broadcasters (NAB) that broadcasters are entitled to a share of the royalties.[36] The Tribunal rejected the idea that broadcasters have an ownership interest in the copyright to the game telecasts they produce and distribute, unless the broadcaster and club expressly agree to the contrary.[37] The Tribunal's decision in the 1978 royalty distribution was ultimately affirmed by the U.S. Court of Appeals for the District of Columbia Circuit in *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*.[38] Although noting "some confusion in the legislative history"[39] and that "Congress clearly seemed to contemplate Tribunal recognition of the copyrightable interests claimed by NAB,"[40] the D.C. Circuit concluded that "[t]he Tribunal still must address the value of these interests" and found that "the theories advanced by NAB concern interests that are quantitatively de minimis."[41] The D.C. Circuit agreed with the Tribunal that "the work of television stations in broadcasting sports events and compiling broadcast days has minimal market value because 'the public tunes in sports broadcasts mainly to see *the sports performance*, not the activities of the director and the cameramen.'"[42]

of the H. Comm. on the Judiciary, 94th Cong. 785–810 (1975) (testimony and statement of Bowie K. Kuhn, Comm'r, Major League Baseball); *Id.* at 810–17 (testimony and statement of Philip R. Hochberg, representing the National Hockey League); *Id.* at 817–25 (testimony and statement of John O. Coppedge, Chairman, Cable Television Association Subcommittee, National Collegiate Athletic Association).

36 1978 Cable Royalty Determination, 45 Fed. Reg. 63,026, 63,034–35 (Sept. 23, 1980).

37 *Id.*

38 675 F.2d 367 (D.C. Cir. 1982).

39 *Id.* at 378.

> This confusion may be attributable to the fact that neither the broadcasters nor sports interests initially sought a cable royalty scheme when legislation governing cable retransmission was first proposed more than a decade ago. The broadcasters focused on the unfair competition said to result from the ability of cable systems to transmit at no cost programs that broadcasters could obtain only by paying license fees.

Id. at 378 n.18.

40 *Id.* at 378.

41 *Id.* at 379. *But see* Christian Broad. Network, Inc. v. Copyright Royalty Tribunal, 720 F.2d 1295, 1315–16 (D.C. Cir. 1983) (remanding case to the Tribunal because the NAB had introduced new evidence in the 1979 proceeding which attempted to demonstrate the value of NAB's contributions to sports telecasts, and the Tribunal had not evaluated such evidence in the 1979 proceeding).

42 Nat'l Ass'n Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 379 (quoting Brief for Respondent Copyright Royalty Tribunal at 24) (emphasis added); *see also* 1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9565–66 ("[T]he contribution of the broadcaster as compared with that of the teams is minimal . . . . We do not find it creditable that a cable subscriber would pass up viewing a game involving teams competing for the

Once again, there was no mention of the interest of the people who actually do the performances.

Under the Copyright Act, copyright ownership "vests initially in the author or authors of the work"[43] and an author may transfer all or any part of his or her ownership at any time.[44] For example, "if an author assigns all rights in a novel to the publisher, or even assigns all rights to the publisher and takes back a license to dramatize the novel, it is the publisher, as assignee, that is the owner of the copyright."[45] Similarly, the networks, through their creative involvement in broadcasting games, author the copyrighted work.[46] However, such authorship does not establish that the broadcasters have any rights of copyright ownership once the copyright is assigned to the league and/or its member clubs under the terms of their network contracts.[47] The property right held by the clubs is best characterized as an exclusive "right to broadcast" their games.[48]

In the National Football League (NFL), these intellectual property rights are pooled by the league and sold or licensed as a package to the networks.[49] Federal and state courts have universally recognized that the broadcast contracts between the NFL and the networks involve the sale

pennant to watch a Chicago Cubs game because of the quality of the production of the Cubs telecast."). For a discussion of broadcasters' claims to cable royalties before the Tribunal, see LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 10, § 20:4.

43 17 U.S.C. § 201(a) (2006).

44 *Id.* §§ 201(d), 204; *see also In re* Napster, Inc. Copyright Litig., 191 F. Supp. 2d 1087, 1096 (N.D. Cal. 2002) (explaining that copyright ownership arises either through assignment or authorship); NIMMER & NIMMER, *supra* note 7, § 5.01[A], at 5-5 ("[T]he person claiming copyright must either himself be the author, or he must have succeeded to the rights of the author.").

45 Phila. Eagles Football Club, Inc. v. City of Phila., 823 A.2d 108, 124 (Pa. 2003) (citing GOLDSTEIN ON COPYRIGHT § 4.4.1 (2d ed. 2000 & 2002 Supp.)); *see also Napster,* 191 F. Supp. 2d at 1097 (discussing contracts wherein a music record label, rather than the musical artist, is specifically deemed the *author* of the work).

46 *See* Shipley, *supra* note 5, at 391 ("In view of the creative contributions made by a broadcaster's employees in the production of a copyrighted telecast of a sporting event, it is reasonable to assume that the broadcaster should be regarded as the author and owner of copyright in the resulting audiovisual work.").

47 *See id.* at 392 ("A broadcast entity that directs, produces, and thus creates a protectible [sic] game broadcast, however, might be required by contract to transfer all or part of its copyright in the telecast to the sports team as an initial condition of being authorized by the team to do the broadcast.").

48 "[T]he right to broadcast a live event is one of the bundle of rights that comes with copyright ownership." *Phila. Eagles Football Club*, 823 A.2d at 126.

49 *See, e.g.*, Symposium, *Panel III: Restructuring Professional Sports Leagues*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 413, 427 (2002) ("NFL has the ability to take the intellectual property associated with it and all of its clubs and package that for . . . its television partners.") (comments of Tandy O'Donoghue, Associate, Proskauer Rose LLP); Gary R. Roberts, *The Legality of the Exclusive Collective Sale of Intellectual Property Rights by Sports Leagues*, 3 VA. J. SPORTS & L. 52, 52–59 (2001) (explaining that NFL teams collectively selling the right to televise games live involves the transfer of an intellectual property right); Stephen F. Ross, *Antitrust Options to Redress Anticompetitive Restraints and Monopolistic Practices by Professional Sports Leagues*, 52 CASE W. RES. L. REV. 133, 141–45 (2001) (discussing how NFL's contracts with networks involve collective sale of valuable intellectual property rights).

of exclusive rights to televise games.[50] Pursuant to the terms of these contracts, the network in return transfers to the league all of its rights as owner in the copyright to the broadcast.[51] For example, the Supreme Court of Pennsylvania referenced provisions in a network contract between the NFL and NBC which provided that the "League on behalf of member clubs is deemed owner of copyright on live telecasts made under this agreement" and further that the network was required to announce to viewers during its football game telecasts that the NFL and its member teams owned the copyright on the telecast.[52] The NFL has been fairly aggressive in protecting its rights against unauthorized broadcasters.[53] In the other professional leagues, the broadcast rights to most of the games are sold by individual member clubs and the clubs retain the revenues subject to league revenue sharing rules.[54]

3. Broadcast Rights Fees

As a result of these property rights held by the teams, professional sports broadcast licensing revenue has grown exponentially over the years. In 1962, the NFL's first television contract with CBS paid the league a total of $4.65 million annually ($320,000 distributed annually to each of the fourteen clubs).[55] By the early 2000s, the NFL's multiple network and cable contracts paid the league a total of $2.25 billion annually, $18 billion over eight years, which amounted to more than two-thirds of the NFL's total revenues.[56] In 2010, the NFL was paid over $20 billion in broadcast rights fees.[57]

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[50] "Federal courts examining broadcasting contracts between the NFL and the networks have also consistently concluded that such contracts involve the sale or transfer of exclusive rights to televise games." *Phila. Eagles Football Club*, 823 A.2d. at 119 (citations omitted).

[51] *See, e.g.*, *Phila. Eagles Football Club*, 823 A.2d at 124 ("[T]he copyrights were assigned to the NFL and its member clubs at the time the parties entered into the Network Contracts."); Nat'l Football League v. Insight Telecomm. Corp., 158 F. Supp. 2d 124, 128 (D. Mass. 2001) ("The NFL owns the copyright in all regular season and post-season NFL game telecasts, as confirmed by the League's contracts with the networks."); *see also* Roberts, *supra* note 49, at 52–53.

[52] *Phila. Eagles Football Club*, 823 A.2d at 125 (quoting NFL/NBC Contract) (internal quotation marks omitted).

[53] *See* WEILER & ROBERTS, *supra* note 1, at 463 ("The National Football League continues to file a host of lawsuits against bars that use a dish to pick up satellite TV feeds of distant broadcasts of games being played in the local area and to show these home games to their customers in what is supposed to be the home team's blackout territory (at least if the game has not been sold out).").

[54] *Id.* at 663. "[O]nly in the NFL have the teams elected to have all of their regular season games (and even some of their pre-season games) sold by the league through pooled-rights contracts." *Id.*

[55] *Id.*

[56] *Id.* at 434, 663. In 2004, each team received $75 million in broadcast licensing revenue. *Id.* at 663.

[57] *Id.* at 434.

In baseball, television deals in the late 1960s paid a little more than $3 million annually to twenty teams and by the early 2000s Fox and ESPN paid a combined $558 million annually (which was in addition to the $660 million per year the teams cumulatively received in sale of local broadcast rights).[58] In recent years, some MLB teams have been able to cash in on the value of local cable broadcast rights. In 2010, the Rangers entered a twenty-year television deal with Fox Sports Southwest that is valued at $3 billion and includes an equity interest in the network, escalator clauses and profit participation, and the Angels entered a similar twenty-year deal with Fox Sports West that is valued to be slightly higher than the Rangers' deal.[59] In 2012, the Padres, who play in the twenty-sixth largest market in baseball, signed a twenty-year deal with Fox Sports that guarantees $30 million in the first year and increases by about 4% each year.[60] The Astros partnered with the NBA Houston Rockets and Comcast SportsNet Houston in the creation of a regional sports network whereby the Astros and Rockets will share approximately 77.5% of the network with Comcast controlling the balance, which will pay the Astros $80 million annually beginning in 2013.[61] According to a Columbia University professor, Vince Gennaro, local rights fees have risen to the point that some large-market teams can generate as much revenue from those fees as they do from ticket sales.[62] During the early 2000s, broadcast rights fees made up (1) more than two-thirds of football's overall revenues, (2) close to half of baseball's and basketball's overall revenues, and (3) more than one-fifth of hockey's overall revenues.[63]

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58 *Id.* at 663.

59 Bob Nightengale, *TV Deals for Angels, Rangers Open Door for Other Teams*, USA TODAY, Feb. 6, 2012, http://www.usatoday.com/sports/baseball/story/2012-02-06/MLB-teams-using-lucrative-TV-deals-to-sign-talent/53032284/1. Currently, the Yankees own approximately 30% of the YES Network and the Red Sox own 80% of NESN (New England Sports Network), two lucrative networks that are more valuable than the franchises themselves, and the White Sox have a 30% equity interest in Comcast SportsNet in Chicago. *Id.*

60 Jay Posner, *Padres' TV Haul in 2012 Could Reach $40 Million*, SAN DIEGO UNION-TRIBUNE, Feb. 15, 2012, at D2, *available at* http://www.utsandiego.com/news/2012/feb/14/padres-tv-haul-2012-could-reach-40m/.

61 Maury Brown, *TV Deals in MLB Bringing in Bigger Money, Just Some More Than Others*, THE BIZ OF BASEBALL, Feb. 15, 2012, http://bizofbaseball.com/index.php?option=com_content&view=article&id=5602:tv-deals-in-mlb-bringing-in-bigger-money-just-some-more-than-others&catid=26:editorials&Itemid=39.

62 Jorge L. Ortiz, *TV Bounty a Boon to Future Free-Agent Classes*, USA TODAY'S DAILY PITCH BLOG (Feb. 9, 2012 11:02 PM), http://content.usatoday.com/communities/dailypitch/post/2012/02/tv-bounty-a-boon-to-future-free-agent-classes/1.

> The explosion in local TV rights fees in baseball—with the Texas Rangers and Los Angeles Angels recently getting deals valued at $3 billion and the L.A. Dodgers in line for perhaps $5 billion after they're sold in the spring—directly correlates with the spiraling salaries for the game's top players.

Id.

63 WEILER & ROBERTS, *supra* note 1, at 434.

B. *Claims of Professional Athletes and Performers in Sporting Event Broadcasts*

The recognition of the athlete's property right in the broadcast of a sporting event commenced in 1956 with the Third Circuit's decision in *Ettore v. Philco Television Broadcasting Corp.*[64] In *Ettore,* a professional boxer signed a contract prior to a fight he lost to Joe Louis in 1936 whereby he sold the motion picture rights to the film of the fight to be shown in movie theatres.[65] Thirteen years later, around the advent of television, excerpts from the film of the fight were broadcast in a television series called "Greatest Fights of the Century."[66] The Third Circuit held that Ettore was entitled to damages under the laws of the several states where the unauthorized broadcasts were distributed on the basis of misappropriation and unfair competition principles.[67] Just as the *Pittsburgh Athletic* court recognized a property right of professional clubs to control the broadcasts of their games,[68] Chief Judge Biggs wrote that the athlete has a similar property right:

> Where a professional performer is involved, there seems to be a recognition of a kind of *property right* in the performer to the product of his services. . . . The fact is that, if a performer performs for hire, a curtailment, without consideration, of his *right to control his performance* is a wrong to him.[69]

The Third Circuit in large part based its decision on contract principles, noting that a motion picture employed for some use other than that for which it was intended by the performer and entrepreneur deprives the performer of his right to compensation for the new use of the product.[70]

But what is most intriguing about Judge Biggs' lengthy opinion is the following remarks:

> It is usual today to provide specifically by contract between the performer and the entrepreneur as to what uses the product may be put; so, as to services performed and products made in the future, the issues presented by the case at bar will become largely academic. Today also, for example, if there be telecasts of an intercollegiate football game, the players, knowing or having reasonable grounds to know that the contest was being telecast, would be presumed to have

64 229 F.2d 481 (3d Cir. 1956).
65 *Id.* at 483.
66 *Id.*
67 *Id.* at 489–93.
68 *See supra* notes 18–24 and accompanying text.
69 *Ettore*, 229 F.2d at 487, 490 (emphasis added).
70 *Id.*; *see also* Sharkey v. Nat'l Broad. Co., 93 F. Supp. 986 (S.D.N.Y. 1950) (holding that a professional boxer's right of publicity was violated by defendant's unauthorized use of his name and pictures in a sponsored television program called "Greatest Fights of the Century").

> waived any right to compensation for their performances by participating in the contest.[71]

It is anyone's guess what may have prompted Judge Biggs to throw in this off-base, generic, and ambiguous remark about college football players presumably "waiving" any right to compensation because they participate knowing their games are being broadcast on television. Nevertheless, the question of whether student-athletes' grant-in-aid precludes their right to prevent unjust enrichment in regards to exponentially increasing broadcast rights revenue will be addressed later in this Article.

In 1977, only one year after the Copyright Act was amended, the performer's property right in sporting event broadcasts was sanctioned by the Supreme Court in *Zacchini v. Scripps-Howard Broadcasting Co.*[72] In *Zacchini*, a television station videotaped and broadcast Zacchini's entire human cannonball act on a news program without his permission. In rejecting the television station's First Amendment argument that his performance constituted news in the public domain, the Supreme Court made clear:

> The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television than it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner, or to film and broadcast a prize fight, or a baseball game, where the promoters or the participants had other plans for publicizing the event.[73]

The decision of the Supreme Court, which cited with approval the holding in *Ettore*,[74] is particularly noteworthy for purposes of this Article for two reasons: (1) it was the *performer* asserting a right (a right of publicity) in the broadcast of a sporting event that has no underlying script for purposes of copyright law and (2) the basis for the Court's recognition of the performer's property right in the event and the right to control the broadcast is the same basis that supported a professional team's property right on unfair competition and misappropriation grounds pre-Copyright Act of 1976, that being "preventing unjust enrichment by the theft of good will."[75] The Supreme Court further noted:

> Ohio's decision to protect petitioner's right of publicity here rests on more than a desire to compensate the performer for the time and effort invested in his act; the *protection provides an economic*

[71] *Ettore*, 229 F.2d at 487.
[72] 433 U.S. 562 (1977).
[73] *Zacchini*, 433 U.S. at 575 (citations omitted).
[74] *See id.* at 572 n.9.
[75] *Id.* at 576.

> *incentive for him to make the investment required to produce a performance of interest to the public.*[76]

Notably absent from the discussion of the *teams'* property rights in broadcasting in the professional sports leagues were the very people who actually perform the plays that make up the valuable content of the broadcast. Just two years following the Supreme Court's decision in *Zacchini*, the first lawsuit involving players' rights in the broadcasts of games in the professional team sports was filed by three National Basketball Association (NBA) players against several cable television companies.[77] Ultimately the NBA and the National Basketball Players Association agreed that the league and the clubs would possess all the broadcast rights and the players voluntarily dismissed the lawsuit against the cable companies.[78]

Shortly thereafter in May of 1982, the Major League Baseball Players Association (MLBPA) began its own campaign by sending letters to the clubs, as well as the television and cable networks with which the clubs had contracted, asserting that (1) the players possess a property right in the televised performances of the games, (2) the networks were broadcasting the games without the consent of the players, and (3) the league and its member clubs lacked the authority to consent on behalf of the players.[79] One month later the clubs sought a declaratory judgment in federal court that they possess an exclusive right to broadcast the games and own exclusive rights to the telecasts based upon multiple theories, including copyright law and in particular the work made for hire doctrine under 17 U.S.C. § 201(b), state master-servant law, the collective bargaining agreement between the clubs and the players (including the Uniform Player Contract entered between individual players and clubs), and the parties' customs and dealings.[80]

In response, three MLB players brought their own federal court action against the clubs seeking a declaration that the game telecasts misappropriated their property rights in their names, pictures, and performances and constituted unjust enrichment.[81] The district court granted summary judgment in favor of the clubs on their copyright claim finding that the clubs, not the players, owned a copyright in the

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76 *Id.* (emphasis added). The Court observed that "the State's interest is closely analogous to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors." *Id.* at 573.

77 *See* Robert A. Garrett & Philip R. Hochberg, *Sports Broadcasting and the Law*, 59 IND. L.J. 155, 165 n.38 (1984) (citing Silas v. Manhattan Cable Television, Inc., No. 79 Civ. 3025 (S.D.N.Y. filed June 8, 1979)).

78 LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 10, § 20:5 n.1.

79 *See* Balt. Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 665 (7th Cir. 1986); *see also* LAW OF PROFESSIONAL AND AMATEUR SPORTS, *supra* note 10, § 20:5.

80 *Balt. Orioles*, 805 F.2d at 665–66.

81 *Id.* at 666. The parties stipulated to a transfer of the players' lawsuit from the United States District Court for the Southern District of New York to the United States District Court for the Northern District of Illinois, and to consolidation of the two cases. *Id.*

telecasts as works made for hire and that the players' right of publicity claim in the telecasts was preempted by the clubs' copyright.[82] The statutory work made for hire doctrine expressly provides that "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author . . . and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."[83]

In affirming the district court's ruling on the clubs' copyright claim in the telecasts, the Seventh Circuit found that (1) game telecasts are copyrightable works,[84] (2) the players are employees of the clubs and the scope of their employment encompasses performances before broadcast audiences,[85] and (3) the clubs own the copyright in the game telecasts because the players and the clubs did not expressly agree to rebut the statutory presumption that the employer owns the copyright in a work made for hire, i.e. the parties did not expressly agree that the players own the copyright.[86] The applicability of the statutory work made for hire doctrine to student-athletes is addressed below in Part IV.A. The Seventh Circuit also affirmed the district court's ruling that the clubs' copyright preempts the players' rights of publicity in their performances.[87] Preemption of student-athletes' unjust enrichment claim is analyzed in Part IV.B. below.

The Seventh Circuit did not address whether the players could establish the elements for a cause of action for violation of their right of publicity in their performances. Before moving on to the discussion of broadcast rights in college sports, it is worth briefly mentioning at this point why the right of publicity is probably not an appealing avenue of recovery for professional and college athletes against clubs and universities in the context of rights in game broadcasts. The right of publicity protects against an unauthorized third party's appropriation of "the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade . . . ."[88] The debatable question regarding right of publicity in the

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82 *Id.* at 667. On appeal, the Seventh Circuit noted that, although the players were claiming general "property rights" in their performances, the players specifically asserted only the right of publicity and therefore it considered the players' mention of property rights to refer only to their right of publicity. *Id.* at 667 n.2.

83 17 U.S.C. § 201(b) (2006). A work made for hire is defined in pertinent part as "a work prepared by an employee within the scope of his or her employment." *Id.* § 101.

84 *Balt. Orioles*, 805 F.2d at 668–69.

85 *Id.* at 669–70.

86 *Id.* at 670–73. The Seventh Circuit reviewed various provisions contained in the Uniform Player Contract, the Benefit Plan, and the collective bargaining agreement. *Id.*

87 *Id.* at 674–79. Numerous commentators have sharply criticized the rulings of the district court and the court of appeals that the players' right of publicity claim is preempted under the Copyright Act. *See, e.g.*, NIMMER & NIMMER, *supra* note 7, § 1.01[B][1][c], at 1-31; Shipley, *supra* note 5; Saxer, *supra* note 5.

88 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

broadcasting context would be whether clubs and universities are *using* players' identities *for purposes of trade*.[89] The use for purposes of trade criteria typically refers to a situation in which the identity is (1) "used in advertising the user's goods or services," (2) "placed on merchandise marketed by the user," or (3) "used in connection with services rendered by the user."[90] Clubs and universities likely do not violate players' right of publicity in the broadcasting context because, although the broadcast contains the players' identities, the clubs and universities arguably are not the ones producing or selling the broadcast itself and thus are not using their identities in the sale of any merchandise or service. In other words, clubs and universities produce and sell live sporting events which includes selling the *right to* broadcast them[91] but the product in which players' identities are being used is the broadcast which is produced and sold by third-party networks. Right of publicity might be a viable cause of action against an unauthorized broadcasting company that produces and sells a game broadcast, as it was in *Ettore* and *Zacchini* (although such a claim could present a federal preemption problem), or against any other unauthorized maker of products and services that uses the players' identities without authorization. But vis-à-vis clubs and universities, the players are the laborers who develop and make their product.

C. *The Antitrust Battle Between the NCAA and Its Members*

While the battle lines were being drawn over ownership of broadcasts in the professional sports leagues, the college sports industry was sitting back as a passenger along for the ride. Given the lack of case precedent concerning property rights in college sports broadcasting, assessing the respective rights of universities, student-athletes and third-party broadcasters in some respects requires a reinvention of the wheel to determine whether these three groups are relationally similar such that their respective property rights should be treated the same as the professional teams, professional players and third-party broadcasters. The underlying basis for recognition of professional teams' property rights in the game broadcasts traces back to *Pittsburgh Athletic*, and in essence their *Pittsburgh Athletic* property right was codified in the Copyright Act of 1976 which clothed the broadcasts with copyright

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89 *See, e.g.*, Richard T. Karcher, *The Use of Players' Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims*, 111 PENN. ST. L. REV. 557, 558–61 (2007) (discussing the "use for purposes of trade" element to establish a right of publicity cause of action).

90 RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47.

91 *See* Nat'l Basketball Ass'n. v. Motorola, Inc., 105 F.3d 841, 853 (2d Cir. 1997) (recognizing the National Basketball Association's primary products to be "producing basketball games for live attendance and licensing copyrighted broadcasts of those games").

protection.[92] Vis-à-vis the broadcasters, an abundance of case precedent establishes that the teams and professional leagues (through the pooling of the member clubs' rights) own the copyright by virtue of an assignment from the broadcaster pursuant to the terms of the licensing agreement.[93]

The college sports broadcasting industry follows a similar licensing model, i.e. the NCAA, conferences, and universities license to networks the right to broadcast the games and as part of the licensing agreement the network assigns to them ownership rights in the copyright.[94] Thus, the college sports broadcasting market essentially operates on an *assumption* that the NCAA, conferences, and universities hold an exclusive property right that can be sold to third party broadcasters, despite the fact that there are no published state or federal court decisions addressing that question because their rights have not been challenged in a property rights context, as we have seen in the professional sports. Instead, the battle over control of broadcasting rights occurred exclusively in the antitrust arena among the NCAA and its own members.[95] But as noted by one scholar, "the key common feature of professional and college sports that has helped fuel litigation in both arenas is the vast sum of money generated from fans intensely interested in watching the games, whether live or on television."[96]

In the U.S. Supreme Court case of *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*,[97] two universities that were part of the group of major football programs composing the College Football Association (CFA)[98] brought an antitrust challenge to the NCAA's plan for televising football games for the 1982 through 1985 seasons. The origin of the NCAA's television plan goes back to 1951 when a three-person committee of the NCAA concluded in a report that "television does have an adverse effect on college football attendance and unless brought under some control threatens to seriously harm the nation's overall athletic and physical system," and further "emphasized that the television problem is truly a

92 *See supra* note 11.

93 *See supra* notes 50–52 and accompanying text.

94 For a description of the current television deals entered between the networks and the NCAA as well as each conference, *see infra* Part II.C.1.

95 *See, e.g.*, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984) (concerning a case in which members of the NCAA brought antitrust challenge to the association's restraints on the sale of television broadcast rights); Regents of Univ. of Cal. v. Amer. Broad. Cos., 747 F.2d 511 (9th Cir. 1984) (affirming grant of preliminary injunction in antitrust suit against television broadcasting network, association of large number of college conferences and independent football powers, and two members of such association).

96 WEILER & ROBERTS, *supra* note 1, at 745.

97 468 U.S. 85.

98 The CFA included all Division I-A football schools except for the schools in the Big Ten and Pac 10 conferences which had their own television contracts. WEILER & ROBERTS, *supra* note 1, at 872.

national one and requires collective action by the colleges."[99] The committee's 1951 plan, which was virtually unanimously approved by the NCAA members, provided that only one game a week could be telecast in each area, with a total blackout on three of the ten Saturdays during the season, and that a team could appear on television only twice during a season.[100] From 1952 through 1977 the NCAA television committee formulated its television plan for the ensuing season based on responses to a questionnaire circulated to the membership, and then once the plan was formally approved by the membership it formed the basis for the NCAA's negotiations with the networks.[101]

In 1977, the NCAA discontinued the practice of submitting each plan for membership approval and also entered into a four-year contract granting exclusive rights to ABC for the 1978–1981 seasons.[102] The plan adopted in 1981 for the 1982 through 1985 seasons, which was the plan at issue in the case, awarded rights to negotiate and contract for the broadcasting of college football games to two networks, ABC and CBS, each of which entered into a separate agreement to pay a specified minimum aggregate compensation to the participating NCAA member institutions during the four-year period in an amount that totaled $131,750,000.[103] The 1981 plan (as did each of the television plans preceding it) effectively placed limitations on both the total amount of televised football and the number of games that any member may televise, and each member was prohibited from making any sale of television rights except in accordance with the terms of the plan.[104]

After a lengthy antitrust analysis the Supreme Court ultimately concluded "that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life."[105] In the case, the NCAA member institutions obviously were not challenging or disputing whether they hold a legally

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99 *Bd. of Regents*, 468 U.S. at 89–90 (internal quotation marks omitted).

100 *Id.* at 90.

101 *Id.* at 90–91.

102 *Id.* at 91. ABC held the exclusive rights to broadcast NCAA football games since 1965. *Id.*

103 *Id.* at 92–93. The agreements authorized each network to negotiate directly with member institutions for the right to televise their games in accordance with the terms of the television plan. *Id.* at 93. The Supreme Court noted:

> [T]he amount that any team receives does not change with the size of the viewing audience, the number of markets in which the game is telecast, or the particular characteristic of the game or the participating teams. Instead, the 'ground rules' provide that the carrying networks make alternate selections of those games they wish to televise, and thereby obtain the exclusive right to submit a bid at an essentially fixed price to the institutions involved.

Id.

104 *Id.* at 94.

105 *Id.* at 120.

recognized property right that can be sold to networks.[106] The Supreme Court noted that the district court found that "if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights."[107] This statement is the closest the Supreme Court came to addressing the property rights issue and perhaps the high court's opinion implies or assumes, without analysis because the issue was not raised in the case, that the NCAA member institutions possess a quasi-property right that can be sold or licensed to broadcasters. The Supreme Court's ruling in *Board of Regents* does not answer the questions raised in this Article; those being, what is the nature and scope of rights to game broadcasts in college sports, who owns or shares these rights, and what is the basis and justification for those rights?

II. STUDENT-ATHLETES' CLAIMS OF UNJUST ENRICHMENT

A. *The Basis for Student-Athletes' Claims Under the Principles of* Pittsburgh Athletic

Pittsburgh Athletic addresses a dispute over the right to control the broadcast of live games between, on the one hand, the team owners and their assignees authorized to broadcast the games and, on the other hand, unauthorized third parties who made no expense, investment or contribution in creating and producing the games. Unauthorized third parties who are permitted to profit by free riding from the efforts and expense of authorized parties are unjustly enriched which, according to the court, constitutes unfair competition with team owners and their assignees.[108] Unjust enrichment uncontestably results from free riding. Although the court in *Pittsburgh Athletic* held that the "property right" to sell or license broadcast rights is vested exclusively in the teams,[109] the court was not addressing the rights of the teams vis-à-vis the players but only the teams' rights vis-à-vis unauthorized broadcasters.

It is difficult to view the holding in *Pittsburgh Athletic*, and particularly its rationale, as precluding players from asserting the same right as teams based on unjust enrichment and the prevention of free riding. Players are not at all similarly situated with unauthorized free-

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106 Immediately following the Supreme Court's decision, the CFA, the Big Ten and the Pac 10 entered into television deals that granted the networks exclusive broadcast rights which prevented individual schools from entering their own deals. *See* WEILER & ROBERTS, *supra* note 1, at 887.

107 *Bd. of Regents*, 468 U.S. at 105.

108 *See supra* note 22.

109 *See supra* note 24.

riding third parties who have no involvement in the creation of the game. Rather, players are similarly situated with team owners vis-à-vis third-party broadcasters who desire to profit and exploit the games the players and owners create; the only difference being that the players do not secure the stadium doors to let in the fee-paying authorized broadcasters and keep out the non-paying unauthorized ones. But if team owners have the benefit of added security of the courts to enforce a property right to prevent unjust enrichment of unauthorized third parties, then in theory players should have the same right proportionate to the extent of any unjust enrichment. *Pittsburgh Athletic* does not at all address unjust enrichment from the standpoint of the players and in college sports the universities are the ones enriched, not the networks that pay market rates for the broadcast rights.

The team owners' *Pittsburgh Athletic* property right was essentially codified in the Copyright Act of 1976. The Act also did not address the unjust enrichment issue from the vantage of the players because it merely clarified that a simultaneously recorded broadcast of a live game is copyrightable.[110] Although the Act accorded protection for simultaneously recorded game broadcasts, teams and universities do not author the copyrightable work (broadcast).[111] Thus, their property right does not derive from federal copyright law (except for the fact that they are assignees of the broadcaster's ownership interest in the copyright) but rather from unjust enrichment principles under *Pittsburgh Athletic*.[112] To induce individuals to undertake the personal sacrifices necessary to create works in which the public is interested, federal copyright law extends to the authors of such works a limited monopoly to reap the rewards of their endeavors.[113] The work is authored by the broadcaster[114] and it shares a monopoly with the teams and universities but not the players. The only reason players are not recognized as co-owners of the copyright is due to the fact that they are not invited to the

110 *See supra* note 11.

111 *See* Shipley, *supra* note 5, at 391–92 ("[I]f it is erroneous to regard baseball players as authors or to treat a baseball game as a writing, then neither the clubs nor the players should be regarded as the authors of a telecast.").

112 *See, e.g.*, Morris Commc'ns Corp. v. PGA Tour, Inc., 235 F. Supp. 2d 1269, 1281 (M.D. Fla. 2002) ("[T]he PGA Tour does have a property right in the scores compiled by the use of [its Real-Time Scoring System], but that property right vanishes when the scores are in the public domain. The PGA Tour's property right does not come from copyright law, as copyright law does not protect factual information, like golf scores. However, the PGA Tour controls the right of access to that information and can place restrictions on those attending the private event, giving the PGA Tour a property right that the Court will protect.").

113 *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); Mazer v. Stein, 347 U.S. 201, 219 (1954); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932). In *Zacchini*, the Supreme Court recognized that the interest behind federal copyright protection is the advancement of the public welfare through the encouragement of individual effort by personal gain. Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977).

114 *See supra* note 33 and accompanying text.

table when the broadcast licensing agreement is executed whereby the broadcaster agrees that the teams and universities (or their respective league and conference) will own the copyright.[115] Recognition of the players' interest revolves around the extent of unjust enrichment of either party sitting at the monopoly table.

Student-athletes have just as much interest in preventing unjust enrichment as professional teams, professional players, and universities. The professional teams and universities have the ability to protect *themselves* from unjust enrichment through their negotiation and receipt of lucrative broadcast licensing fees. And professional players have the ability to protect *themselves* from unjust enrichment through their negotiation and receipt of compensation from the teams, which in essence gives them the value equivalent and proportionate to a co-ownership interest in the copyright assigned to the teams from the broadcaster. Student-athletes are incapable of protecting themselves from unjust enrichment because universities have unilaterally decided that enriching themselves (and their athletic department personnel) with 100% of the broadcast licensing revenue, which continues to grow year after year, is *just*. However, the percentage of broadcast rights fees received by professional players is compelling evidence that the windfall universities receive at the student-athletes' expense is inequitable because they are receiving a benefit that normally, equitably, and morally would be paid to student-athletes, which is the essence of common law unjust enrichment.

B. *Unjust Enrichment as an Independent Basis of Recovery*

Before discussing unjust enrichment in the context of the sale of broadcast rights, the substantive requirements under a common law claim for unjust enrichment will be addressed. Unjust enrichment generally permits recovery in situations where the defendant benefits at the plaintiff's expense without sufficient justification. While scholars continue to debate the precise contours of unjust enrichment, "the general consensus today appears to be that at the very least, it presents the common law with a basis for identifying an independent set of normative principles revolving around the idea of gain-based liability."[116] Some scholars have referred to unjust enrichment as common law's "fourth wheel"; the other three being contract, tort, and

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115 *See supra* notes 51–52 and accompanying text.

116 Shyamkrishna Balganesh, *"Hot News": The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 456 (2011) ("Most notably, the American Law Institute's adoption of the Restatement (Third) of Restitution and Unjust Enrichment seems to indicate the growing legitimacy of unjust enrichment as a viable and independent common law framework for certain entitlements.").

property.[117] Restitution is the designated remedy and restitution based upon unjust enrichment takes at least two forms: a "parasitic" form (which arises from contracts, torts or other predicate wrongs) and a "freestanding" form (which serves as an independent basis for restitution in the absence of mistake, wrongdoing, or breach of contract).[118]

Along these lines, there is a scholarly debate over the availability of restitution dependent upon a characterization as either "unjust" enrichment or "wrongful" enrichment. Under the wrongful enrichment view, restitution is only available when it advances the goal of the tort, misappropriation, fraud, contract breach, etc. that was committed by the defendant.[119] In order for recovery, then, a wrong must exist independent of the enrichment.[120] In contrast, unjust enrichment does not require the existence of an independent wrong and thus constitutes an independent basis of recovery;[121] i.e. it creates a primary obligation of restitution, to restore the benefit obtained in a certain context, based on the defendant's actions.[122] The prevailing trend in the courts appears to be that "[i]t is not necessary to show the party unjustly enriched committed any wrongdoing—even an innocent party 'may be compelled to surrender the fruits to a more deserving party.'"[123] This conception of unjust enrichment as an independent basis of recovery is carried forward in the Restatement (Third) of Restitution and Unjust Enrichment.[124] And privity of contract is not a prerequisite to recovery

117 *Id.* at 428; *see also* Richard A. Epstein, *The Ubiquity of the Benefit Principle*, 67 S. CAL. L. REV. 1369, 1371 (1994) ("[T]he common law coach runs not on three substantive wheels, but on four.").

118 *In re* New Motor Vehicles Canadian Exp. Antitrust Litig., 350 F. Supp. 2d 160, 207–08 (D. Me. 2004); *see also* Balganesh, *supra* note 116, at 428 ("The law of unjust enrichment is premised on the idea that there exist circumstances where a plaintiff can recover from a defendant when the latter is enriched at the expense of the former, without there having to be any wrongdoing, loss, or bargain between the parties.").

119 *See, e.g.*, Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1767, 1783 (2001) (arguing that "wrongfulness" rather than "unjustness" determines whether restitution is available); Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 TEX. L. REV. 1927, 1933–38 (2001) (arguing that recovery of restitution for tortious wrongdoing satisfies both normative and utilitarian criteria).

120 *See* Balganesh, *supra* note 116, at 457 ("Wrongful enrichment, as the phrase indicates, refers to an enrichment that a defendant obtains from an act that constitutes a wrong independent of the enrichment.").

121 *See id.* (arguing that unjust enrichment "is never triggered by a wrong but arises independent of it. In other words, the very enrichment of the defendant, as opposed to a wrongful action resulting in such enrichment, triggers recovery"); *see also* Birks, *supra* note 119, at 1789 ("Liability in unjust enrichment has in principle nothing whatsoever to do with fault.").

122 *See* Balganesh, *supra* note 116, at 480–81; *see also id.* at 482 ("In other words, unjust enrichment does not just create a primary right, but instead imposes liability for the nonperformance of an obligation that the circumstances created.").

123 Day v. Case Credit Corp., 427 F.3d 1148, 1154 (8th Cir. 2005) (quoting Smith v. Whitener, 856 S.W.2d 328, 330 (Ark. Ct. App. 1993)).

124 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a. (2011).

under an unjust enrichment theory.[125]

Thus, unjust enrichment can exist as an independent basis of civil liability where the plaintiff's interests have been appropriated, regardless of whether the appropriation was tortious or a breach of contract.[126] Liability under the common law for unjust enrichment is established when (1) the defendant obtains a benefit (2) at the plaintiff's expense that is (3) recognized to be unjust.[127] Determining whether the benefit obtained by the defendant is "unjust" under common law unjust enrichment creates a normative dilemma for courts.[128] The Sixth Circuit once explained that "[d]efining a given situation as either just or unjust is subjective and not necessarily open to a clear and decisive answer" and further that "[t]he notion of what is or is not 'unjust' is an inherently malleable and unpredictable standard."[129] While it is difficult to draw a bright line between what is just and unjust, it appears that most restitution cases fit within concrete doctrinal categories but there are some cases in which courts have resisted the doctrinal classification in favor of what might simply be best understood as equitable decision-making.[130]

One example of equitable decision-making would be a situation in which the defendant would be granted a "windfall" if the plaintiff is not granted restitution. The Fifth Circuit's decision in *United States v. Allstate Insurance Co.*[131] demonstrates this principle. Allstate was committed under automobile insurance policies to pay personal injury

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125 *See Day*, 427 F.3d at 1154 ("[I]f one has money belonging to another, which, in equity and good conscience, he ought not to retain, it can be recovered although there is no privity between the parties.").

126 Daniel Friedmann, *Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong*, 80 COLUM. L. REV. 504, 504 (1980) ("[R]estitutionary claims should be recognized in a wide variety of cases in which one person's interests have been 'appropriated' by another, whether or not the appropriation was tortious.").

127 PETER BIRKS, UNJUST ENRICHMENT 3 (2d ed. 2005); *see also* HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES 1–3 (1997) (listing the components of unjust enrichment as: "(i) a benefit (or enrichment); (ii) which has been received by the defendant at the plaintiff's expense; and (iii) the retention of which is unjust").

128 *See* BIRKS, *supra* note 127, at 39; *see also* Balganesh, *supra* note 116, at 428 (stating the principle of unjust enrichment "operates entirely as a principle of distributive justice that derives its normative basis in the incompatibility of the resulting situation with certain ideals of social morality.").

129 Reisenfeld & Co. v. Network Grp., Inc., 277 F.3d 856, 860 (6th Cir. 2002) (quoting DCB Constr. Co. v. Central City Dev. Co., 965 P.2d 115, 120 (Colo. 1998)) (internal quotation marks omitted).

130 *See* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2089 (2001) ("[M]ost restitution cases can be fit without much difficulty into the comparatively concrete doctrinal categories described in the body of the first Restatement: payments induced by fraud, mistake, or coercion; contribution among tortfeasors; unsolicited benefits; unwinding of failed contracts; disgorgement of tortious profits; and fiduciary misconduct. At the same time, there are restitution cases that resist doctrinal classification and can be understood as instances of equitable decision making in various senses of the term.").

131 910 F.2d 1281 (5th Cir. 1990).

protection benefits, including medical expenses, to its insureds resulting from bodily injury sustained in motor vehicle accidents.[132] Medical services were provided by the United States at military installations because the injured persons covered under the Allstate policies were either members of the military or dependents thereof.[133] As such, no charge was assessed to the patients because the medical services were part of the fringe benefits made available by Congress to active and retired members of the military and their dependents.[134] However, these services were not free to the provider, the United States, and thus if it was not granted restitution against Allstate for the value of medical benefits provided to military personnel, Allstate would be granted a windfall since it would have collected premiums from military service personnel and their dependents for which it assumed no insuring risk because they were entitled to "free" medical treatment.[135] The Fifth Circuit said "[w]e are not prepared to assign to Allstate such an inequitable position."[136]

Even if one were to accept the notion that student-athletes perform without expectation of payment for their services, that should not impact their entitlement based on unjust enrichment.[137] This is because a claim for unjust enrichment does not require that the benefit be conferred under circumstances that raise an expectation or anticipation of payment or compensation on the part of the provider of the benefit. In this regard unjust enrichment is not the equivalent of a claim for quantum meruit based on quasi-contract,[138] which generally requires an expectation of payment or compensation on the part of the plaintiff who confers the benefit.[139] Unjust enrichment is a broader concept. For example, quantum meruit is warranted when goods or services have been provided by the plaintiff to the defendant coupled with an expectation of payment.[140] But "compensation on a quasi-contract

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[132] *Id.* at 1282.

[133] *Id.* at 1283.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 1283–84.

[137] The notion that student-athletes perform without expectation of payment for their services is conceptually flawed because the only reason they perform without payment is that NCAA rules prohibit it, which is not to suggest they lack an *expectation* of payment.

[138] "A quasi-contract is not a contract at all, but a legal concept rationalizing a sanction to prevent unjust enrichment based upon the equitable principle that whatsoever it is certain that a man ought to do, the law supposes him to have promised to do." Kozlowski v. Kozlowski, 395 A.2d 913, 918 (N.J. Super. Ct. Ch. Div. 1978).

[139] *See, e.g.*, Yoh v. Daniel, 497 S.E.2d 392, 394 (Ga. Ct. App. 1998) ("[U]nlike quantum meruit, a claim for unjust enrichment does not require a showing of the anticipation of compensation."); D.A. Collins Constr. Co. v. ICOS/NCCA, A Joint Venture, No. 91-CV-933, 1994 WL 328626, at *7 n.17 (N.D.N.Y. June 28, 1994) (stating that "there is a difference between the elements of a quantum meruit claim and those of a claim for unjust enrichment" and noting that under New York law an expectation of payment is required for quantum meruit but not unjust enrichment).

[140] *See, e.g.*, Heller v. Fortis Benefits Ins. Co., 142 F.3d 487, 495 (D.C. Cir. 1998).

theory is not mandated where the services were rendered simply to gain a business advantage or where the plaintiff did not contemplate a personal fee."[141]

Nevertheless, the underlying justification for recovery of restitution under both quasi-contract and the broader concept of unjust enrichment is essentially the same.[142] A quasi-contract is based on duties imposed by law, not by the parties' agreement,[143] and these duties rest on moral obligations to do what is right.[144] Similarly, no unjust enrichment occurs when the plaintiff provides benefits for charitable, religious or humane motives, even if the services were requested.[145] In situations that entail altruistic or donative intent on the part of the provider, restitution is usually inappropriate because the benefit obtained by the defendant under such circumstances cannot be judged as an enrichment that is unjust.[146]

Applying these principles to the grant-in-aid, if the grant-in-aid does not equitably distribute the benefit received by universities from broadcast rights fees and is grossly disproportionate to the student-athletes' expense, and if this is in fact recognized as unjust, then the grant-in-aid should not preclude a claim for unjust enrichment under the freestanding form because unjust enrichment exists as an independent basis of recovery where the plaintiff's interests have been appropriated irrespective of whether the appropriation was a breach. Because unjust enrichment operates ex post, student-athletes do not waive the right to assert unjust enrichment ex ante through their

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141 Salamon v. Terra, 477 N.E.2d 1029, 1033 (Mass. 1985).

142 While the underlying justification that supports recovery of restitution is the same for both unjust enrichment and quantum meruit, the damages measurement is not the same. *See* Paffhausen v. Balano, 708 A.2d 269, 271 (Me. 1998) ("Damages in unjust enrichment are measured by the value of what was inequitably retained. In quantum meruit, by contrast, the damages are not measured by the benefit realized and retained by the defendant, but rather are based on the value of the services provided by the plaintiff." (citations omitted)).

143 *See* Callano v. Oakwood Park Homes Corp., 219 A.2d 332, 334 (N.J. Super. Ct. App. Div. 1966) ("In the case of actual contracts the agreement defines the duty, while in the case of quasi-contracts the duty defines the contract.").

144 *See* W. Nat'l Bank of Casper v. Harrison, 577 P.2d 635, 641–42 (Wyo. 1978) (addressing the rule that "[i]f a benefit is derived by the wrongdoers, recovery may be had on the basis of a promise implied in law and the benefit recovered," and noting that "[t]he touchstone of the rule is the moral obligation arising out of unjust enrichment to the tortfeasor"); Parsa v. State, 474 N.E.2d 235, 237 (N.Y. 1984) ("Although the action is recognized as an action in implied contract, the name is something of a misnomer because it is not an action founded on contract at all; it is an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another . . . . The action depends upon equitable principles in the sense that broad considerations of right, justice and morality apply to it, but it has long been considered an action at law." (citations omitted)).

145 *See* Thomas v. Kearney Little League Baseball Ass'n, 558 N.W.2d 842 (Neb. Ct. App. 1997) (involving services provided by Little League coach).

146 *See, e.g.*, Goldstick v. ICM Realty, 788 F.2d 456, 467 (7th Cir. 1986) ("[R]estitution does not make altruism a paying proposition.").

participation in games knowing that they are being broadcast.[147] The grant-in-aid is undisputedly a contract between the student-athlete and university, but the scope of the rights and duties of the parties under the grant-in-aid does not expressly, and nor should it implicitly, permit a misappropriation of student-athletes' rights or interests that is deemed under the law as unjust. Although a party to an arm's length contract is generally precluded from claiming unjust enrichment as a remedy for breach,[148] a party can plead in the *alternative* a claim for unjust enrichment.[149]

1. The *O'Bannon/Keller* Litigation

An illustrative case applying California unjust enrichment law is the pending consolidated class action lawsuit brought by former student-athletes in *O'Bannon v. National Collegiate Athletic Ass'n*[150] and *Keller v. Electronic Arts, Inc.*[151] The class claims that a form that student-athletes are required to sign (Form 08-3a)[152] as well as certain NCAA bylaw provisions enable the NCAA to enter into licensing agreements with companies that distribute products containing student-athletes' images in video games, pictures and other media.[153] Because student-athletes do not consent to these licensing agreements and they are not compensated for the use of their images, the class claims that the NCAA and Collegiate Licensing Company (CLC) violated antitrust law by agreeing to fix prices and to engage in a group boycott and it also claims unjust enrichment seeking disgorgement of profits from the wrongful use of putative class members' images.[154] In the district court's ruling

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147 *See* Balganesh, *supra* note 116, at 429 (explaining that the principle of unjust enrichment "is almost always backward looking, and operates ex post").

148 *See, e.g.*, Kuroda v. SPJS Holdings, L.L.C., 971 A.2d 872, 891 (Del. Ch. 2009) ("A claim for unjust enrichment is not available if there is a contract that governs the relationship between parties *that gives rise to the unjust enrichment claim*." (emphasis added)).

149 *See* FED. R. CIV. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency."); *see also* Capitaliza-T Sociedad De Responsabilidad Limitada De Capital, No. 10-CV-520, 2011 WL 6650329, at *13 (D. Del. Dec. 21, 2011) (noting that "[p]laintiff's contract claim as a third-party beneficiary may not be meritorious in the end, and therefore the possibility for pleading unjust enrichment as an alternative should not be ruled out"); Ramos v. SimplexGrinnell LP, 796 F. Supp. 2d 346, 370 (E.D.N.Y. 2011) (noting the principle that "[w]here a matter is governed by contract . . . plaintiffs cannot recover in quasi-contract, including claims for quantum meruit and unjust enrichment" but "[p]laintiffs make clear that these claims are asserted as alternatives to their contract claims").

150 Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010).

151 No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

152 Form 08-03a provided: "You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs." *O'Bannon*, 2010 WL 445190, at *1.

153 *Id.* at *2.

154 *Id.* "O'Bannon claims that the form requires student athletes to 'relinquish all rights in

denying the defendants' motion to dismiss, the court mentioned two distinct "views" of unjust enrichment.[155] One view is that it is "not a cause of action, or even a remedy, but rather a general principle, underlying various legal doctrines and remedies,"[156] and the other view is that it *is* an independent cause of action and "its elements are receipt of a benefit and unjust retention of the benefit at the expense of another."[157] Under the first view, unjust enrichment operates as "an alternative to breach of contract damages when the parties had a contract which was procured by fraud or is unenforceable for some reason" or "where the defendant obtained a benefit from the plaintiff by fraud, duress, conversion, or similar conduct and the plaintiff chooses not to sue in tort but to seek restitution on a quasi-contract theory."[158]

The district court ruled that the class sufficiently pled a cause of action against CLC for unjust enrichment even under the more restrictive first view because O'Bannon alleges CLC "profited from brokering licensing agreements for products that contain his image" which arose from "anti-competitive conduct" and that student-athletes sign the form "under duress and without informed consent."[159] The district court provided little analysis on the unjust enrichment issue and it is not entirely clear from the court's ruling why O'Bannon sufficiently pled a cause of action against CLC under the more restrictive view which appears to be based on quasi-contract. The claim appears to be a cleaner fit under the independent cause of action view of unjust enrichment. However, if the court was convinced the claim met the more restrictive view, presumably it would be sufficient at the pleading stage to satisfy the broader view of unjust enrichment as well.

In addressing the NCAA's motion to dismiss the breach of contract claim (Form 08-3a),[160] the district court found that the complaint

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perpetuity to the commercial use of their images, including after they graduate and are no longer subject to NCAA regulations'" and further that "student athletes' participation in intercollegiate athletics events is conditioned on signing this form." *Id.* at *1 (quoting O'Bannon Complaint ¶ 9).

155 *Id.* at *7 (citing Baggett v. Hewlett-Packard Co., 582 F. Supp. 2d 1261, 1270–71 (C.D. Cal. 2007) (applying California law)). The district court noted that "California courts appear to be split on whether there is an independent cause of action for unjust enrichment." *Id.*

156 *Id.* (citing McBride v. Boughton, 20 Cal. Rptr. 3d 115, 121 (Ct. App. 2004)).

157 *Id.* at *8 (citing Lectrodryer v. SeoulBank, 91 Cal. Rptr. 2d 881, 883 (Ct. App. 2000); First Nationwide Savings v. Perry, 15 Cal. Rptr. 2d 173, 176 (Ct. App. 1992)).

158 *Id.* at *7 (citing *McBride*, 20 Cal. Rptr. 3d at 121).

159 *Id.* at *8.

160 *In re* NCAA Student-Athlete Name & Likeness Litig., No. C 09-1967 CW, 2011 WL 1642256, at *8 (N.D. Cal. May 2, 2011). Keller alleges that, among other things, they offered as consideration to the NCAA a license to use their names or pictures "to generally promote NCAA championships or other NCAA events, activities or programs" and contend that this license did not permit the NCAA to use student-athletes' names, pictures and likenesses for commercial purposes. *Id.* And in exchange, it is alleged the NCAA agreed "to grant players eligibility to participate in Division I athletics." *Id.* According to the NCAA, the alleged contract does not contain a promise that it will not use putative class members' names for commercial purposes. *Id.*

sufficiently plead the existence of a contract because it is reasonable to infer that the class "understood that they granted a limited license to NCAA to use their names and likenesses to promote NCAA events and that the license did not permit the use of their names and likenesses for other purposes."[161] The district court then addressed whether this "limited license" to the NCAA could effectively bar a claim of unjust enrichment against CLC and Electronic Arts (EA). Although acknowledging the principle that a quasi-contract for unjust enrichment does not lie where an express contract exists defining the rights and duties of the parties,[162] the district court questioned whether Keller's contract with the NCAA defined, or even could define, any of his rights vis-à-vis CLC and EA.[163] The district court's reasoning is sound because the NCAA is liable for damages in contract law if it breached the limited license but the limited license does not address the benefit obtained by CLC and EA at Keller's expense.[164] In other words, *someone* is obtaining a windfall at Keller's expense—the NCAA and CLC are receiving the windfall if a portion of the licensing fees received from EA constitute payment for a license to use Keller's identity, and EA is receiving the windfall if the licensing fees it pays to the NCAA and CLC do *not* include payment for a license to use his identity.

In *Hart v. Electronic Arts, Inc.*,[165] a federal court came to the opposite conclusion in a lawsuit filed on the opposite coast by a putative class of former student-athletes involving identical facts. EA argued that Hart's unjust enrichment claim should be barred because he had "no direct relationship" with EA such that "he reasonably expected to be compensated" for EA's use of his likeness.[166] Hart countered that had he known EA intended to use his likeness he would have had a right to be compensated for such use and further that his filing of the lawsuit reveals an expectation of compensation.[167] The district court dismissed with prejudice Hart's unjust enrichment claim on the basis that, because he alleged that EA "did not seek his permission before using his likeness or photograph," he "clearly did not confer any benefit upon [EA]."[168]

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161 *Id.* ("Although discovery may reveal no such understanding, at this stage, Publicity Plaintiffs have plead [sic] the existence of a contract.").

162 Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108, at *10 (N.D. Cal. Feb. 8, 2010) (citing Cal. Med. Ass'n v. Aetna U.S. Healthcare of Cal., 114 Cal. Rptr. 2d 109, 126 (Ct. App. 2001) (holding that "as a matter of law, a quasi-contract action for unjust enrichment does not lie where, as here, express binding agreements exist and define the parties' rights")).

163 *Id.* ("Although EA and CLC correctly note that the existence of such a contract could bar a restitutionary claim against a contracting party, it is not clear that his alleged contract with NCAA defined any rights between him and EA and CLC.").

164 The issue as to whether Form 08-3a operates as consent or a waiver in the broadcast rights context is addressed in Part III.A.

165 740 F. Supp. 2d 658 (D.N.J. 2010).

166 *Id.* at 670.

167 *Id.*

168 *Id.*

The district court relied on a case that rejected an unjust enrichment claim by survivors of a murder victim who alleged that the defendant author and publisher of a book about the victim profited from the victim's story without first seeking their permission, on the basis that (1) the survivors did not confer any benefit on the defendants and (2) the survivors did not expect any remuneration at the time the victim's story was misappropriated.[169]

The district court's ruling in *Hart* on the unjust enrichment issue is in error on multiple levels.[170] First, the court only focused on the more restrictive view of unjust enrichment based on quasi-contract and neglected to consider unjust enrichment as an independent basis of recovery which does not require an ex ante expectation of compensation on the plaintiff's part. Second, even if quasi-contract is recognized as the sole avenue of recovery, if recovery is dependent upon the defendant first seeking permission from the plaintiff before enriching himself at the plaintiff's expense it would gut the very purpose of quasi-contract which is to impose a compensation duty by law when the parties did not actually have a prior understanding but it is just to do so under the circumstances. Third, there is a spurious connection between EA's not seeking permission before using Hart's likeness and the conferral of benefit upon EA. Surely it is possible for one to actually confer a benefit on another without the other seeking permission for it beforehand. Finally, the survivors' unjust enrichment claim against the author and publisher of the book is inapposite because there is nothing in that situation to suggest that the equities should weigh in favor of the survivors rather than the author and publisher. In that case we would say that the murder victim (and possibly the murder itself) was the benefit obtained by the author and publisher, which can neither be "conferred" by the survivors nor is it something for which an author or publisher would be expected to pay for, and it is also unclear what exactly it is that makes the defendants' enrichment *unjust*.

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169 *Id.* (discussing Fasching v. Kallinger, 510 A.2d 694 (N.J. Super. Ct. App. Div. 1986)). The *Hart* court noted that the survivors, similar to Hart, argued that had they known the defendants were publishing a book they would have expected remuneration and that the court still rejected the survivors' unjust enrichment claim because "this fact lacks legal significance in the absence of any benefit conferred by plaintiffs." *Id.* (quoting *Fasching*, 510 A.2d at 700).

170 An appeal was filed on October 17, 2011 in the United States Court of Appeals for the Third Circuit. *See* Notice of Appeal, *Hart*, No. 11-3750 (3d Cir. Oct. 17, 2011) (Doc. Entry No. 1).

C. *Universities' Unjust Enrichment in the Licensing of Broadcast Rights*

1. The Benefits Obtained by Universities: Conference Realignment and Broadcast Rights Fees

College football and basketball, like their professional league counterparts, have profited substantially from the exploitation of the quasi-property right that is sold or licensed to networks. In the college sports arena the ability to exploit that right is the driving force behind the flurry of conference realignment activity that has been occurring over the past decade or so. Towards the end of the 1990s and into the early part of the twenty-first century, institutions began changing conference affiliation in large numbers, leading to conference instability.[171] Then around 2004, Virginia Tech, Miami and Boston College departed the Big East to join the Atlantic Coast Conference (ACC).[172] Another round of hefty conference realignment began in 2010 and is still continuing.

In 2010, Nebraska moved from the Big 12 to the Big Ten, Colorado and Utah moved to the Pac 12 (which used to be the Pac 10), and Fresno State and Nevada-Reno moved to the Mountain West from the Western Athletic Conference.[173] In 2011, Missouri left the Big 12 to join the Southeastern Conference, Pitt and Syracuse moved from the Big East to the ACC, and West Virginia left the Big East for the Big 12. After West Virginia accepted an invitation to join the Big 12, it sued the Big East in an attempt to avoid a provision in the conference bylaws requiring a school to give twenty-seven months prior notice to the conference before officially leaving. The Big East counter-sued seeking to hold West Virginia to the waiting period. The parties settled the lawsuits with the Big East receiving $20 million; West Virginia contributing $11 million (in addition to half of the $5 million exit fee they had previously paid) and the Big 12 covering the remainder.[174] The price for West Virginia to depart is high but apparently well worth it because West Virginia

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171 *See* RAYMOND L. YASSER, SPORTS LAW: CASES AND MATERIALS 51 (7th ed. 2011) ("The most prevalent reason for this shift was economics, largely driven by the opportunity for lucrative television contracts for football and men's basketball.").

172 *See* Gregg L. Katz, Note, *Conflicting Fiduciary Duties Within Collegiate Athletic Conferences: A Prescription for Leniency*, 47 B.C. L. REV. 345 (2006) (discussing migration of these three universities from the Big East to the ACC and the potential breach of fiduciary duty claims in the context of athletic conference migration, as well as the conflicts of interest that can arise in such situations because university representatives owe fiduciary duties both to their own universities and to the conference).

173 YASSER, *supra* note 171, at 51.

174 Andrea Adelson, *WVU Settles Suit, to Join Big 12 in July*, ESPN.COM (Feb. 15, 2012), http://espn.go.com/college-sports/story/_/id/7574104/west-virginia-mountaineers-join-big-12-july-big-east-lawsuit-settlement.

athletic director Oliver Luck said it should receive about $18 million to $19 million annually in broadcast rights fees, roughly double what it received from the Big East. According to Luck, "[i]t's a very healthy television payout, and it's important we maintain our self-sufficient status [and] [w]ith this move, we'll be in an excellent position to do so."[175]

Also in 2011, UCF, Houston, and SMU decided to leave Conference USA for the Big East and the Big East also brought in Boise State, San Diego State, and Navy. In early 2012, Memphis decided it was leaving C-USA to join the Big East in all sports, making it the seventh program to join the conference in less than a year.[176] Upon the announcement that Memphis was leaving for the Big East, C-USA commissioner Britton Banowsky quipped:

> Based upon my conversations with [Big East] commissioner Marinatto, the Big East has now completed its future membership plan. If this is true, it is very helpful as we can now move forward with our plans in a more stable national environment. We hope that the other conferences appreciate the value of stability in intercollegiate athletics and higher education.[177]

Following the raiding of C-USA, the conference and the Mountain West Conference merged by which each conference dissolved and the schools formed a brand new conference consisting of eighteen to twenty-four members to begin playing in the 2013–2014 academic year.[178]

Conference realignment and broadcast rights fees go hand in hand. One scholar connects the recent conference moves to lucrative television deals:

> All of these moves . . . are clearly motivated by economics. The ability to obtain control of large television markets for both regular season games and conference championship games (which under NCAA rules are available only for conferences with 12 or more members) is

175 *Id.*

176 "Conference members make money from their affiliations largely by sharing the revenue the leagues receive from their television contracts and NCAA postseason events." Kyle Veazey, *University of Memphis to Join Big East Conference in All Sports Starting in 2013*, MEMPHIS COMMERCIAL APPEAL (Feb. 7, 2012), http://www.commercialappeal.com/news/2012/feb/07/university-memphis-join-big-east-conference-all-sp/. "Big East football-playing schools received an average of $5.5 million more annually than C-USA schools—about 13% of Memphis' $41.7 million in athletic spending in 2010–11." *Id.*

177 Brad Wolverton, *Conference USA Loses Another, and Its Commissioner Makes a Plea*, THE CHRONICLE OF HIGHER EDUCATION PLAYERS BLOG (Feb. 8, 2012, 5:36 PM), http://chronicle.com/blogs/players/conference-usa-loses-another-and-its-commissioner-makes-a-plea/29564.

178 *See* Ed Graney, *Merger's About TV Deal, Not Football*, LAS VEGAS REV.-J. (Feb. 14, 2012), http://www.lvrj.com/sports/merger-s-about-tv-deal-not-football-139271903.html ("[I]f it leads to a better television contract for those Mountain West Conference teams about to merge with others from Conference USA . . . change is both good and necessary.").

> highly desirable. The other key to this expansion is access to slots in the Bowl Championship Series postseason games. Only the super conferences are guaranteed these bids . . . . Television contracts support the bowl games and provide substantial financial payouts for the schools involved.[179]

The broadcast rights fees received by the NCAA, conferences, and universities have grown substantially over the years. Slightly more than thirty years ago, the right to broadcast the men's basketball national championship tournament paid the NCAA only $190,000 annually,[180] but the rights fees paid to broadcast that tournament alone have mushroomed since then. By 1981 the NCAA was receiving $9 million in rights fees annually, and the amount rose to $215 million in 1997.[181] By 2003 CBS was paying $360 million per year for the broadcast rights to this one tournament.[182] That amount more than doubled in 2011 when Turner Broadcasting and CBS signed a fourteen year, $10.8 billion contract with the NCAA for the exclusive broadcast rights,[183] generating $770 million in annual revenue for the NCAA

In football, television deals paid annual rights fees of $1.1 million in 1952, $5 million by the early 1960s, and $75 million by the early 1980s.[184] As a result of the *Board of Regents* decision in 1984, the price per game was reduced from approximately $1 million to $250,000 but at the same time there were nearly three times as many games on television as the previous year under a whole host of network contracts.[185] From 1998 through 2005, the sixty-three participating schools in the Bowl Championship Series (BCS) alliance shared $900 million in television rights fees, approximating $1.8 million annually per school, from four bowl games (the Fiesta, Rose, Sugar, and Orange Bowls).[186] By 2010, the BCS bowl system paid a total of $140 million to the participating schools and conferences.[187]

At the conference level, each has its own television deals with the networks that, depending on the particular conference, distributes to

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179 YASSER, *supra* note 171, at 51, 224.
180 WEILER & ROBERTS, *supra* note 1, at 845.
181 *Id.* at 845, 888.
182 *Id.*
183 *Id.* at 746.
184 *Id.* at 887.
185 *Id.* at 887–88.

> Not until 1990 was the CFA able to negotiate a $70 million per year deal with ABC and ESPN, to go along with the Big Ten/Pac Ten package (which by then had been awarded to ABC). Toward the end of those negotiations, Notre Dame broke away and signed a separate 5-year, $35 million deal with NBC for the rights to telecast its home games, to the great displeasure of its fellow CFA members (though the CFA did not retaliate against Notre Dame by boycotting their NBC games).

Id. at 888.
186 *Id.* at 890.
187 *Id.* at 746. It is estimated that total bowl revenues in 2008 exceeded $225 million. *Id.*

each member school on average anywhere from $13 million to $21 million annually. As of May 2012, the television broadcast rights fees received by the "Big Six" conferences were as follows:

Pac-12 Conference: $3 billion, 12-year deal with ESPN and Fox.
Big 12 Conference: Combined $2.5 billion, 13-year deal with Fox and ESPN/ABC; and $78 million, 4-year deal with FSN.
Atlantic Coast Conference: $3.6 billion, 15-year deal with ESPN/ABC.[188]
Southeastern Conference: $2.25 billion, 15-year deal with ESPN/ABC; and $825 million, 15-year deal with CBS College Sports.
Big Ten: $1 billion, 10-year deal with ESPN/ABC; $72 million, 6-year deal with CBS for basketball only. The Big Ten also has its *own* network, jointly owned with News Corp., under a $2.8 million, 25-year deal.
Big East: $200 million, 6-year deal with ESPN/ABC. [189]

2. Comparing the Economic Investment and Incentive of Universities and Professional Teams

Universities' right to sell and license broadcast rights is based upon the underlying rationale of *Pittsburgh Athletic*. The rationale for protection of the right to exploit game broadcast rights, as indicated by *Pittsburgh Athletic* as well as *Zacchini*, is that protection provides an economic incentive to make the investment required to produce a performance of interest to the public.[190] This is the underlying rationale for copyright protection as well.[191] In addition to the incentive to invest, the extent of the actual investment made to produce the game underlies the *Pittsburgh Athletic* property right, which is based on principles of misappropriation, unjust enrichment, and unfair competition.[192] Like professional teams, universities produce live games and exploit the value

188 The ACC's expansion from twelve to fourteen teams with the addition of Syracuse and Pittsburgh prompted ESPN and the ACC in May 2012 to renegotiate their previous deal signed in May 2010. *Id*. The new deal resulted in a 32.9% increase in revenue over the 2010 deal. Smith, *supra* note 1.

189 *See* Smith, *supra* note 1; *see also* RAMOGI HUMA & ELLEN J. STAUROWSKY, TV MONEY WINDFALL IN BIG TIME COLLEGE SPORTS: $784 MILLION REASONS FOR REFORM 1 (2011), *available at* http://assets.usw.org/ncpa/pdfs/TV-Money-Windfall-in-Big-Time-College-Sports.pdf (describing a 2011 study concluding that when compared with the final year in each of their previous television contracts, current television deals for the major conferences (not including the Big East) brought $784 million in new revenue per year).

190 *See supra* notes 22, 76 and accompanying text.

191 *See* WEILER & ROBERTS, *supra* note 1, at 452 ("The operating premise . . . is that only if one gives authors and inventors the exclusive right to control and license use of their works will there be sufficient incentive to invest the time, effort, and resources in production of those works for the benefit of the ultimate consumer.").

192 *See supra* note 22 and accompanying text.

of the games through the sale of tickets to attendees. *If* universities are similarly situated to professional teams in terms of the extent of the investment made as well as the incentive to make that investment, then universities presumably have a *Pittsburgh Athletic* property interest vis-à-vis broadcasters in the further exploitation of the live games through the sale or license of the broadcast rights. Although universities maintain and control the stadiums, the extent of their investment and the incentive to make it is dissimilar to that of professional team owners in two significant respects, and these substantive distinctions have a direct bearing on the unjust enrichment issue.

First, the extent of the investment made by universities in producing the games is not nearly as extensive because they do not have to compensate the players who make the game possible. The court in *Pittsburgh Athletic* recognized a substantial expense of professional team owners in paying the players who perform the game.[193] The players' performances are what drive consumer interest and demand and thereby contribute substantially to the monetary value in the broadcast for which networks are willing to pay substantial rights fees.[194] This significant expense of professional team owners is absent in college sports, making the universities' *Pittsburgh Athletic* property interest less compelling. To put the amount of this expense in perspective, roughly 50% of the *total* revenue generated by professional teams from all sources is paid in salaries to the players. The cost to the university in extending a tuition waiver through the grant-in-aid pales in comparison to the professional teams' player salaries expense.[195]

As a result, the universities' overall expense in creating and producing games is proportionately less compared to that of professional teams, and therefore the resulting unjust enrichment of unauthorized third parties at the universities' expense would be proportionately less than professional teams.[196] Universities thus receive a windfall at the *student-athletes'* expense because the authorized broadcaster is not giving them a discounted rights fee in proportion to their saved player salaries expense. Assuming that universities and networks are rational economic actors when they negotiate broadcast

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193 *See supra* note 21.

194 *See* Nat'l Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 379 (D.C. Cir. 1982) ("[T]he public tunes in sports broadcasts mainly to see the sports performance, not the activities of the director and the cameramen.").

195 *See* Alfred D. Mathewson, *The Eligibility Paradox*, 7 VILL. SPORTS & ENT. L.J. 83, 84 n.5 (2000) (noting that the real cost to the university of extending a tuition waiver for an athlete is substantially less than tuition and only amounts to the cost to the university of another seat in the classroom).

196 *See* Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490, 494 (W.D. Pa. 1938) ("The actions and threatened actions of the defendant constitute a direct and irreparable interference with, and an appropriation of, the plaintiff's normal and legitimate business; and said action is calculated to, and does, result in the unjust enrichment of the defendant at the expense of the plaintiffs and each of them.").

rights fees, as we must, then the rights fee represents a market rate for the exclusive right to broadcast that is set according to what a buyer is willing to pay, which is not based upon the seller's (university's) expense but rather the value to the buyer (the network).[197] Giving the NCAA and its member institutions this huge windfall does absolutely nothing to help preserve amateurism.

Second, the for-profit/not-for-profit distinction between professional clubs and universities is a significant factor in regards to the economic incentive of universities to make the investment. Professional team owners put their personal funds at risk if their monetary investment in players and other assets does not produce a profit, whereas personal funds are not at risk when a university's athletic program does not profit. Professional team owners also make a substantial investment in the purchase price paid for their ownership interest, which encompasses many franchise rights, one of which includes the sole right of selling or licensing the broadcast rights to their games. Much of the justification for giving professional team owners the exclusive right, title, and interest in the exploitation of the games they produce is that the prospect of earning a profit and a return on their investment provides the necessary incentive to make such a large investment.[198]

In college sports there is no expectation of return on investment in an ownership sense. Although most NCAA members are state institutions operating in a proprietary as opposed to a regulatory capacity when they sell broadcast rights to their sporting events, all universities are nevertheless non-profit, tax exempt institutions and the Internal Revenue Service treats their revenues derived therefrom as

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197 "The limited amount of in-depth scholarly investigation on the internal accounting reports finds that schools tend to understate significantly the revenues and correspondingly overstate the expenses from sports." WEILER & ROBERTS, *supra* note 1, at 846 n.b (citing ARTHUR A. FLEISHER III, BRIAN L. GOFF & ROBERT D. TOLLISON, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR (1992)).

198 *See* Richard Sandomir, *A Team's Huge Price Tag Is Tied to a TV Windfall*, N.Y. TIMES, March 29, 2012, at B12 (noting that "at some point, sports team owners do want a return on their money," and the $2.15 billion sale price for the Dodgers in 2012 "is enormous because the buyers anticipate a huge windfall from a new cable TV deal that would go into effect after the 2013 season"); *see also* Sean Gregory, *$2 Billion for the Dodgers? Sizing Up the Magic Johnson-L.A. Dodgers Deal*, TIME MAG. KEEPING SCORE BLOG (March 28, 2012, 5:40 PM), http://keepingscore.blogs.time.com/2012/03/28/2-billion-for-the-dodgers-sizing-up-the-magic-johnson-l-a-dodgers-deal/ ("The incoming Dodgers owners are betting that revenues generated by a new television rights deal—the team's current deal, with FOX, expires after the 2013 season—or a regional sports network, like the lucrative YES Network owned by the New York Yankees, will increase returns."). David Carter, director of the Sports Business Institute at the University of Southern California, said "if you realize it's not a baseball deal first but rather a television and entertainment deal that also comes with a real-estate opportunity, then you can begin to scratch your way back toward justifying the price." Matthew Futterman, *Behind Dodgers Deal: TV Riches*, WALL ST. J., Mar. 29, 2012, http://online.wsj.com/article/SB10001424052702304177104577309860750637758.html.

non-taxable income.[199] The individuals who support and make monetary investments in a university's athletic program are taxpayers, students, and private donors but unlike professional team owners, the monetary investment of these individuals is certainly not based or dependent upon the university's ability to exploit game broadcast rights. Not only do these individuals not expect or receive any economic return on their investment but the investment made in college sports by most taxpayers and students is non-voluntary.[200] Moreover, universities, unlike for-profit professional teams, do not need an economic incentive to produce a game of interest to the public. Indeed, according to the NCAA and its member institutions themselves, athletics is an integral part of the university's educational mission and the purpose of intercollegiate athletics is not to profit but to enhance the educational experience of the student body.[201] Yet, as demonstrated in *Board of Regents*, the NCAA, conferences, and universities are clearly motivated by profit when they exploit game broadcast rights, and "conference realignment" through the years evidences such motivation. However, profit motive and incentive are not synonymous.

A comparison of the economic investments and incentives suggests that the universities' quasi-property interest in broadcast rights under the rationale of *Pittsburgh Athletic* is not as compelling as that of professional teams, which, from an unjust enrichment standpoint, is an argument that the exponentially increasing rights fees the NCAA, conferences, and universities (and their personnel) continue to engorge at student-athletes' expense is increasingly becoming more unjust.

3. Student-Athletes' Expense

The expense element of student-athletes' unjust enrichment claim can be demonstrated by two primary components: (1) the substantial work and effort of the players in creating the games in proportion to the failure to reap the rewards of their effort (the "Effort-Reward

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199 For an analysis of tax issues in regards to college athletics, see John D. Colombo, *The NCAA, Tax Exemption and College Athletics*, 2010 U. ILL. L. REV. 109.

200 One scholar poses the question, "Why should all federal taxpayers, whether or not they are college football fans, subsidize big-time college football entertainment?" WEILER & ROBERTS, *supra* note 1, at 895.

201 The NCAA's Constitution and Bylaws expressly state the "Fundamental Policy" and "Basic Purpose" of the NCAA as follows:

> The competitive athletics programs of member institutions are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports.

NCAA, 2011–12 NCAA DIVISION I MANUAL art. 1.3.1 (2011) [hereinafter NCAA MANUAL], *available at* http://www.ncaapublications.com/productdownloads/D112.pdf.

Component”) and (2) the substantial contribution of the players in making a game broadcast and its share in creating audience appeal (the “Value Added Component”). I use these two components for the purpose of describing the players’ unjust enrichment on a collective basis solely in the context of game broadcasts, not for the purpose of measuring restitutionary recovery, which is addressed in Part II.D.

a. The Effort-Reward Component

The effort portion of the Effort-Reward Component is essentially “sweat equity” and is functionally equivalent to the expense and investment component that forms the basis for the team owners’ *Pittsburgh Athletic* property right under an unjust enrichment theory. In order to produce a quality game that the viewing public will tune into and that companies will pay lucrative fees to broadcasters for advertising space, the players must and do work and prepare all year long. As part of a qualitative research project, Professors Robert and Amy McCormick interviewed four anonymous college football and basketball players (a current football player, a former football player, and two former basketball players) and chronicled the following data in regards to the amount of time college football players devote to football throughout the year.

During the week of a home game a conservative estimate of the amount of time a player devotes solely to football is approximately fifty-three hours, and the time commitment is even greater during the week of an away game.[202] When their team does not attend a post-season bowl game, demands are placed upon them for approximately 240 days per year and as many as 262 days if the team participates in a bowl game.[203]

During the off-season, for six weeks prior to the NCAA-sanctioned spring practice period, football players are required to attend rigorous conditioning workouts; three conditioning workouts are required each week beginning promptly at 5:30 a.m. and on three or four additional days per week during this period players must also report for weightlifting for at least sixty to ninety minutes each session.[204]

In the summer months football players are “strongly encouraged” to attend voluntary weightlifting and running workout sessions each day during the week.[205]

In early August football players participate in mandatory pre-

202 McCormick & McCormick, *supra* note 2, at 99, 101.

203 *Id.* at 103. The professors note that “this time commitment approximates or exceeds the 250 days an average American works each year.” *Id.* at 104.

204 *Id.* at 101. Football players also must attend team meetings for forty-five minutes each day during the week. *Id.* at 101–02.

205 *Id.* at 102.

season "boot camp" which consists of three full-contact practices every two days and includes weightlifting, running, meetings, and group meals.[206]

Based on information gathered from the interviews, the professors also described the amount of time that a college basketball player devotes to basketball throughout the year.

From mid-October until the end of the season in March, players are required to spend four to five hours per day, six days a week, devoted solely to basketball which includes early morning "boot camp" workouts consisting of running, weight training, and cardiovascular conditioning, as well as afternoon team practices and film meetings.[207]

Basketball time often conflicts with class time. As one player indicated, it is "impossible not to miss class," estimating that he is typically absent from 15–20% of his classes, and although he is not "forgiven from any of the academic requirements" professors are "extremely accommodating" and excuse his absences due to basketball-related activities.[208]

Basketball players have virtually no time off during the holidays, as they are playing in tournaments (often traveling long distances) and when they are not competing they are required to participate in weight-lifting workouts in the mornings and, in the afternoons, attend two-hour practices followed by film sessions and meetings.[209]

During the off-season, one of the interviewees noted that it is "understood" that players will practice on their own, lift weights and stay in cardiovascular shape, and a failure to do so may result in being "replaced."[210] This player reported practicing and exercising on his own during the off-season for a minimum of three hours per day, seven days a week.[211]

I make the assumption that the *effort* portion of the Effort-Reward

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206 *Id.* at 102–03. Attendance is mandatory and recorded during the football season beginning with pre-season practice, and each week players are required to sign a statement, which is prepared by team personnel and maintained to comply with NCAA rules limiting total practice time, describing the number of hours practiced. *Id.* at 103. According to the professors, these statements "often falsely understate the amount of time the players actually spend." *Id.*

207 *Id.* at 106. In an interview one player mentioned that on Saturdays, "some kind of meeting or practice" takes place "especially if we lost the previous game," and that although there is no obligation on Sundays "most of us are there on Sunday for [treatment of our] aches and pains." *Id.* After Kansas came back from a thirteen point deficit in the second half to beat Ohio State in the semi-finals of the 2012 NCAA men's basketball tournament, Kansas coaches and players attributed much of their success to the physical and mental toughness the players acquired during Boot Camp or, as referred to by some players, "Hell Camp." Les Carpenter, *Tempered by "Hell Camp," Kansas Clamps Down to Oust Ohio State and Reach Championship Game*, YAHOO! SPORTS (April 1, 2012, 2:34 AM), http://rivals.yahoo.com/ncaa/basketball/news;_ylt=ApS4oIqdEn9CDfrPO_wXFsU5nYcB?slug=lc-carpenter_kansas_tough_tops_ohio_state_final_four_033112.

208 McCormick & McCormick, *supra* note 2, at 107.

209 *Id.*

210 *Id.* at 108.

211 *Id.*

Component of student-athletes is substantially similar to that of professional players. I also make the assumption that professional players obtain the rewards of their effort through a combination of arms-length negotiations in collective bargaining with the league and on an individual basis with the teams. Student-athletes, on the other hand, in return for their athletic services receive "grants-in-aid" to cover tuition, housing, books, and a meal plan for only a one-year term which is renewable for additional terms at the option of the university.[212] Looking solely at broadcast rights fees, as addressed earlier, the value in broadcast rights has exponentially appreciated in both professional sports and big-time college athletics over the course of the past forty to fifty years.[213] While professional players have kept pace with the appreciation by receiving a proportionate share of the increasing rights fees equal to the value of their contribution in creating the broadcast, student-athletes have not because the grant-in-aid has remained constant. This proportionate difference magnifies the benefit that universities are receiving at student-athletes' expense. Universities are getting for free the portion of broadcast licensing revenue that they would otherwise normally pay the players. The Restatement recognizes such a situation whereby the "enrichment at the claimant's expense results from the defendant's receipt of a benefit from someone else" and, in effect, the claimant complains that "the defendant has received something that should rightfully be mine."[214]

Universities are continuing to increase their enrichment by conference realignment decisions that are simultaneously creating a corresponding increase in student-athlete expense.[215] Contributing to the unjustness is the fact that amounts which universities would otherwise normally pay the players are instead fueling the increasing enrichment of coaches, athletic department personnel and conference commissioners.[216] College football and basketball coaches are being paid as much, and in some cases even more, than professional coaches.[217] A

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212 *See* Baker III et al., *supra* note 3, at 76.

213 *See supra* notes 55–63, 180–189 and accompanying text.

214 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT, ch. 6, intro. n. (2011).

215 Over two decades ago, before conference realignment had reached the magnitude that it has today, the Knight Commission had already noted its detrimental impact on student-athletes. *See* KNIGHT FOUND. ON INTERCOLLEGIATE ATHLETICS, KEEPING FAITH WITH THE STUDENT-ATHLETE: A NEW MODEL FOR INTERCOLLEGIATE ATHLETICS 5 (1991) ("In the search for television revenues, traditional rivalries have been tossed aside in conference realignments, games have been rescheduled to satisfy broadcast preferences, the number of games has multiplied, student-athletes have been put on the field at all hours of the day and night, and university administrators have fallen to quarreling among themselves over the division of revenue from national broadcasting contracts.").

216 *See* Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2009) (discussing the economics of the college coaching industry).

217 "Top college coaches in football and basketball now make sums that are comparable to

2011 study by *USA Today* revealed that the average compensation for college head football coaches in the eleven major conferences that make up the Football Bowl Subdivision (FBS) consisting of 120 schools was $950,000 in 2006 and $1.47 million in 2011, an increase of nearly 55 % in just six seasons.[218] And in the six conferences with automatic BCS bids, the average compensation rose from $1.4 million in 2006 to $2.125 million in 2011, an increase of approximately 52% which means that head coaches' compensation at schools in the other five major conferences are keeping pace with coaches' compensation at the highest revenue producing schools.[219] In the 2011 season the average compensation for FBS assistant coaches was more than $182,000, an 18% increase from the average pay in 2009.[220] In basketball, the average compensation of the head men's basketball coaches in the 2011 NCAA Division I tournament was $1.4 million[221] and in women's basketball at least five N.C.A.A. Division I head coaches were making more than $1 million in 2011.[222]

Athletic directors and conference commissioners are also participating in the enrichment. In 2011, the average compensation of athletic directors at the top-tier schools was about $450,000, which is more than the compensation of many university presidents.[223] At least

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those paid to most professional coaches, because there is competition between, as well as within, these two branches of the respective sports for the most-talented and visible coaching personalities." WEILER & ROBERTS, *supra* note 1, at 896.

218 Erik Brady, Jodi Upton & Steve Berkowitz, *Salaries for College Football Coaches Back on Rise*, USA TODAY, Nov. 17, 2011, http://www.usatoday.com/sports/college/football/story/2011-11-17/cover-college-football-coaches-salaries-rise/51242232/1. The study was based on contracts and other documents showing compensation from 110 of the 120 schools in the FBS. *Id.*

219 *Id.* In the 2011 football season, sixty-four coaches were making more than $1 million and of those, thirty-two were making more than $2 million, nine were making more than $3 million, three were making more than $4 million and one made more than $5 million. *Id.*

220 Steve Berkowitz & Jodi Upton, *Auburn, LSU, Alabama, Texas Among Highest-Paid Staffs*, USA TODAY, Dec. 21, 2011, http://www.usatoday.com/sports/college/football/story/2011-12-19/college-assistant-salaries-package/52123650/1. In 2011, there were twenty-three assistant football coaches making at least $500,000 and forty-eight making at least $400,000. *Id.*

221 Jodi Upton, *Salary Analysis: NCAA Tournament Coaches Cashing In*, USA TODAY, May 19, 2011, http://www.usatoday.com/sports/college/mensbasketball/2011-03-30-ncaa-coaches-salary-analysis_N.htm. The average compensation of the head men's basketball coaches in the 2012 NCAA Division I tournament was a little more than $1.4 million. Erik Brady, Jodi Upton & Steve Berkowitz, *Even Small Schools Pay Big for Hot NCAA Coaches*, USA TODAY, Mar. 29, 2012, http://www.usatoday.com/sports/college/mensbasketball/story/2012-03-29/salaries-continue-rise-shaka-smart-vcu/53828414/1. For thirty-one of the thirty-four schools appearing in both the 2011 and 2012 tournaments, the average compensation for coaches at those schools in 2012 increased by 8.6% from the previous year. *Id.* According to Colonial Athletic Association commissioner Tom Yeager, "It seems like the salary packages at the Big Six leagues are almost limitless." *Id.*

222 Steve Berkowitz & Jodi Upton, *Salaries Dramatically Rise for Top Women's Basketball Coaches*, USA TODAY, July 18, 2011, http://www.usatoday.com/sports/college/womens basketball/2011-04-04-coaches-salaries-increase_N.htm.

223 Jodi Upton & Steve Berkowitz, *Athletics Directors Seeing Major Increase in Salaries*, USA TODAY CAMPUS RIVALRY BLOG (Oct. 6, 2011, 5:06 PM), http://content.usatoday.com/

five athletic directors were making more than $1 million, and since August 2010 at least ten public schools had given their athletic directors pay raises of at least $75,000.[224] Regarding the annual compensation of conference commissioners, based on a review of 2009 IRS returns, the Associated Press (AP) reported that (1) the Big Ten commissioner received total compensation of $1.6 million, (2) the Atlantic Coast Conference commissioner $1.1 million, (3) the Southeastern Conference commissioner $1 million, and (4) the Big 12 commissioner $997,000.[225] The two commissioners in the Pac 10 and Big East conferences started in July 2009, and their compensation figures reported for the last six months of 2009 were $735,000 and $366,000, respectively.[226] The AP's report also revealed that the SEC commissioner Mike Slive received a $1 million bonus in 2008, which nearly doubled his pay that year to $2.1 million, because, according to an SEC spokesman, the bonus was for two television deals the SEC negotiated with ESPN and CBS that year.[227] University of California-Berkley visiting professor Murray Sperber noted, "Mike Slive got more money for TV contracts, but nobody turns on their TV set to see Mike Slive, who may be interviewed at halftime. They want to see Alabama and Auburn play at their very best, which means players have to be in 12-month training and (put in) very intensive work weeks."[228]

The economic incentive rationale does not favor universities over student-athletes. As discussed above, universities are not similar to professional team owners in that they do not need an economic incentive to make the investment required to exploit broadcast rights.[229] The same cannot be said of student-athletes. The fact that universities have successfully convinced the courts that their product requires not compensating the people who are instrumental in producing it does not mean that those people do not need an economic incentive to put forth the effort to do so; it merely compounds the unjust enrichment.[230] It is intellectually dishonest to suggest that student-athletes do not *need* an economic incentive to make the necessary effort to produce college sports because they choose to play even though they are uncompensated

communities/campusrivalry/post/2011/10/athletics-directors-increase-salaries-school-presidents/1.

224 *Id.*

225 Associated Press, *Four BCS Commissioners made $1 Million*, ESPN.COM (June 21, 2011), http://sports.espn.go.com/ncaa/news/story?id=6682234.

226 *Id.*

227 *Id.* The Big 12 commissioner received the largest increase in pay from 2008 to 2009, more than a 50% raise; his 2008 compensation was $661,000. *Id.*

228 *Id.*

229 *See supra* Part II.C.2.

230 *See* Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 576 (1977) (explaining that broadcast was not simply an "appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place").

for their efforts or because college sports is a "privilege." Student-athletes lack any available alternative to college sports because an overwhelming majority of them do not have the necessary skills to play professional sports and the very small percentage that do are prevented from playing due to professional league draft eligibility rules.[231]

The fact that student-athletes are not employees of their universities or cannot be paid wages under NCAA principles of amateurism does not make the increasing enrichment just. Although courts have rejected antitrust claims by players asserting that the NCAA's amateurism rules constitute an illegal restraint on trade,[232] no state or federal court has ever expressly held that amateurism rules redefine common law rules. Whatever justification, legal or otherwise, exists for permitting the NCAA and its members to deny student-athletes the right to earn market wages or endorse products and services in order to effectively produce its product of amateur sports,[233] does not grant them a corresponding right to be unjustly enriched. Just as amateurism has no relevance to a student-athlete's (1) intellectual property rights in a book or computer program they write, (2) right of publicity if a third party uses their identity to promote a product or service without authorization, or (3) possession of legal title to their wallet, amateurism also has no relevance to their right to prevent unjust enrichment. Preventing unjust enrichment in broadcast rights licensing does not alter student-athletes' amateurism status and treat them like professionals because disgorgement of the ill-gotten gain would not grant them the right to profit from their reputation as athletes, to earn wages as employees, to compete against each other in a market for their services, or to collectively bargain.

b. The Value Added Component

The Value Added Component is conceptually based on the same rationale that underlies the theory of a joint work and joint authorship under copyright law.[234] The universities and players cannot possibly be

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231 *See* Clarett v. Nat'l Football League, 369 F.3d 124 (2d Cir. 2004) (holding that NFL's draft eligibility rule requiring plaintiff to wait at least three full football seasons after his high school graduation before entering the draft was immune from antitrust scrutiny under the non-statutory labor exemption).

232 *See* Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081 (7th Cir. 1992); Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 738 (M.D. Tenn. 1990).

233 *See* Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621 (Colo. App. 2004) (holding that the NCAA rule prohibiting student-athletes from accepting commercial endorsements, as well as the rule's application to plaintiff, is not "manifestly arbitrary, unreasonable, or unfair").

234 For purposes of this discussion, I am merely drawing an analogy to joint authorship principles and do not mean to suggest or imply that the underlying game itself is or should be copyrightable or that the players should be recognized as co-authors of the copyrightable broadcast of the game.

considered joint authors of the game broadcast because neither makes a "creative" contribution in the production of the broadcast.[235] They also cannot possibly be considered joint authors of the game itself because a game is not a copyrightable work.[236] However, joint authorship principles can be applied in evaluating the substantiality of their respective contributions for purposes of the Value Added Component.[237] Because the universities' *Pittsburgh Athletic* property right and copyright assignment from the network is based on the creation of the game itself and not the broadcast, the game can be viewed as a joint work through the lens of joint authorship principles.

The Copyright Act provides that "authors of a joint work are co-owners of copyright in the work."[238] A joint work is defined under the Act as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[239] Professor Nimmer notes that this more accurately defines joint authorship and that a joint work is a broader concept that "may more properly be defined as one in which the copyright is owned in undivided shares by two or more persons."[240] The principle of joint authorship is justified where the respective contributions of each author are more than de minimis[241] and are either (1) not separately identifiable, as in the case of a collaboration of two playwrights whose respective contribution to the final play are inextricably intertwined, or (2) interdependent such that the contributions are separately identifiable and there is an implied agreement that the product of the several contributions will be collectively regarded as an indivisible

235 *See supra* note 33 and accompanying text; *see also* Big Fights, Inc. v. Ficara, No. 93 Civ. 5682 (TPG), 1996 WL 492988 (S.D.N.Y. Aug. 28, 1996) (holding that filmmakers, not boxers, own the copyright to movies of fights).

236 *See supra* note 34 and accompanying text.

237 Because I am not suggesting that the game itself or the players' performances is or should be copyrightable, the concern raised by the Second Circuit in *Motorola* that copyright protection of sporting events would impair the underlying competition in the future and prevent others from performing similar feats is obviously not an issue. *See* Nat'l Basketball Ass'n v. Motorola, 105 F.3d 841, 846 (2d Cir. 1997) ("What 'authorship' there is in a sports event, moreover, must be open to copying by competitors if fans are to be attracted. . . . [A] performer who conceives and executes a particularly graceful and difficult—or, in the case of wrestling, seemingly painful—acrobatic feat cannot copyright it without impairing the underlying competition in the future.").

238 17 U.S.C. § 201(a) (2006).

239 *Id.* § 101.

240 NIMMER & NIMMER, *supra* note 7, § 6.01, at 6-3. A joint work is a broader concept in that, while it includes a work that is the product of joint authorship, it is possible for a joint work to result without joint authorship, for example, if the author or copyright proprietor (1) transfers 2such copyright to more than one person or (2) transfers an undivided interest in such copyright to one or more persons, reserving to himself an undivided interest. *Id.*

241 *See id.* § 6.07[A], at 6-20 ("It is not necessary that the respective contributions of several authors to a single work be equal, either quantitatively or qualitatively, in order to constitute them as joint authors. However, each such contribution must, in any event, be more than *de minimis*.").

whole.[242] An example of the second situation would be the words and music of a song which are separately identifiable contributions of the lyricist and composer, and, in the absence of an express agreement to the contrary, it can be presumed that they intended that each shall own an undivided interest in the resulting jointly produced work.[243] According to Nimmer, "[t]he essence of joint authorship is a joint laboring in furtherance of a preconcerted common design."[244]

The game is akin to a joint work in the sense that it is the product of separately identifiable contributions of the universities and the players which are more than de minimis and collectively make an indivisible whole. It is akin to a song produced by the separately identifiable contributions of the lyricist and composer, a book in which the text and illustrations are contributed by different authors, or a motion picture in which the performing actors are considered authors of a joint work.[245] The universities provide the stadiums, employ the coaching staff and people who maintain the fields and work the stadiums during games, set the game schedules, and provide the necessary equipment and facilities for the players. The players prepare all year long for the games, practice and keep themselves in proper condition, make the plays and perform the game together as a team, and provide the individual talent and skill necessary to produce a game that has audience appeal. Both sets of contributions are substantial because the game (and obviously its broadcast) would not exist in the absence of either contribution. The same cannot be said of the people who maintain the fields and work the stadiums because their contributions, although important, are de minimis.[246] While coaches may provide more than a de minimis contribution, their compensation precludes them from claiming unjust enrichment.

Turning to the value added in the broadcast itself, the substantial contribution of the players in making a successful broadcast possible cannot be disputed. Indeed, the audience appeal of the game broadcast turns on the contributions of the players much more so than the

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[242] *See id.* § 6.02, at 6-4.

[243] *See id.* Another example would be a book in which the text and illustrations are contributed by different authors. *Id.* at n.3.

[244] *Id.* § 6.03, at 6-5.

[245] "A motion picture is a joint work consisting of a number of contributions by different 'authors,' including the writer of the screenplay, the director, the photographer, the actors, and, arguably, other contributors such as the set and costume designers, etc." *Id.* § 6.05, at 6-14.

[246] *See, e.g.*, Aalmuhammed v. Lee, 202 F.3d 1227, 1231 (9th Cir. 2000) (rejecting plaintiff's claim of co-authorship of the motion picture *Malcolm X* regarding his "substantial and valuable contributions to the movie, including technical help, such as speaking Arabic to the persons in charge of the mosque in Egypt, scholarly and creative help, such as teaching the actors how to pray properly as Muslims, and script changes to add verisimilitude to the religious aspects of the movie;" plaintiff also "submitted evidence that he rewrote several specific passages of dialogue that appeared in Malcolm X, and that he wrote scenes relating to Malcolm X's Hajj pilgrimage that were enacted in the movie").

contributions of the NCAA, conferences, and universities who are assigned ownership in the copyright. The players and their performances are paramount to a game broadcast.[247] While the same cannot be said for university logoed apparel and other merchandised products, with respect to a game broadcast the players and their performances *are* the product. The viewing audience does not watch their television for three hours straight to see the university's stadium and trademarked logos, team names, and team colors.[248] Before the game, the audience tunes into ESPN's morning "College GameDay" program solely to hear the commentators discuss the individual players and how their individual skills and talents will impact the outcome of the game. The universities, conferences, and NCAA simply cannot produce a game that has such high audience appeal without the players and their performances. The players are like actors in a motion picture film; they are the sine qua non of the broadcast.

By the same token, the players' contribution in making a successful broadcast, as substantial as it is, does not undermine the contribution of the universities, conferences, and the NCAA nor dissolve them of their property rights. It cannot be disputed that the players' performances would have little value or use if it were not for the universities, conferences, and NCAA organizing, scheduling, and administering competitive games, tournaments, and championship events. Indeed, the success of the broadcast depends upon two teams competing against each other; clearly the networks would not pay such lucrative licensing fees for the right to broadcast the players performing tackling drills or practicing their pass routes. But student-athletes are similar to professional athletes in the sense that they are not fungible or easily replaceable because the viewing audience is only interested in the broadcast if the best amateur talent is actually playing the game. The nonfungible nature of the players and their performances is evidenced by the aggressive competition among universities in recruiting the top players in the country in order to give the university the greatest competitive advantage possible and thereby create the greatest consumer demand for its on-field product. Recruits are even segregated

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247 *See* Morrill v. Smashing Pumpkins, 157 F. Supp. 2d 1120, 1123 (C.D. Cal. 2001) (concluding that musicians filmed in a music video used as a promotional tool for their band qualified as joint authors along with the videographer after applying three factors to determine whether a contributor, in the absence of a contract, should be considered a joint author, one of which was whether "the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised").

248 *See* David Goetzl, *Cablers Cite ESPN, Disney as Key to Selling Services*, MEDIA DAILY NEWS, Feb. 23, 2012, http://www.mediapost.com/publications/article/168321/cablers-cite-espn-disney-as-key-to-selling-servic.html#ixzz1nE2wxZrZ ("A Beta Research survey of 110 cable operators of all sizes found that the average 'perceived value' to them is ninety-six cents per customer a month, compared to fifty cents for the Disney Channel. Perhaps showing the power of sports programming, ESPN2 (sixty cents) and the NFL Network (fifty-five cents) also topped the kids/tween network.").

into groups and labeled "five star," "four star," or "three star" according to their individual talent levels. Throughout the recruiting season, a ranking system is maintained that numerically ranks the programs according to the number of commitments from the highest star recruits and consumers follow with great interest which programs had the most successful recruiting season.[249]

D. *Restitutionary Measure*

The function and purpose of restitution is to restore the benefit unjustly taken from the plaintiff by the defendant. When the benefit taken is a tangible item, the remedy is to return the item to the plaintiff. But when the benefit taken is intangible such as the plaintiff's services or intellectual property rights, restitution presents a valuation problem.[250] The measure of recovery for unjust enrichment is typically based on either the cost of providing the benefit or the market value of the benefit conferred. Depending on the nature and extent of the defendant's wrongdoing, the measure of recovery may be limited to the benefit the plaintiff would likely have obtained as opposed to the greater benefit the defendant actually obtained.[251] These general principles make sense in theory, but may be difficult in application.

The essential question in measuring the defendant's benefit is what did the defendant gain or save by not purchasing it from the plaintiff. As discussed in this paper, the nature of universities' benefit is that they are getting for free the *portion* of broadcast licensing revenue that they would otherwise normally pay the players for their contribution in making the broadcast a valuable commodity. More specifically, then, this windfall is equivalent to a cost savings or expense avoided measure, sometimes referred to as "negative unjust enrichment" and the restitutionary measure commonly used is the standard of comparison approach.[252] The cost savings or expense avoided measure of unjust enrichment is supported by the Restatement which recognizes that an indirect benefit obtained by the defendant through a saved or reduced expenditure is the equivalent of the receipt of a direct benefit that yields

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249 *See 2012 Team Football Recruiting Rankings,* RIVALS.COM FROM YAHOO! SPORTS http://rivals.yahoo.com/ncaa/football/recruiting/teamrank/2012/all/all (last visited Sept. 15, 2012).

250 *See, e.g.*, Campbell v. Tenn. Valley Auth., 421 F.2d 293 (5th Cir. 1969) (recognizing difficulty of quantifying intangible benefit of reproduction of thirteen sets of technical trade journals on microfilm and allowing use of measure based on market value of the microfilm which court found to be equal to plaintiff's cost of production).

251 *See* Daniel Friedmann, *Restitution for Wrongs: The Measure of Recovery*, 79 TEX. L. REV. 1879 (2001) (discussing measure of recovery for unjust enrichment).

252 *See, e.g.*, Branch v. Mobil Oil Corp., 778 F. Supp. 35 (W.D. Okla. 1991); Ablah v. Eyman, 365 P.2d 181 (Kan. 1961) (referring to this principle as the "resulting benefit rule"); Olwell v. Nye & Nissen Co., 173 P.2d 652 (Wash. 1946).

a measurable increase in the defendant's wealth.[253] The standard of comparison approach is often used in cases involving misappropriation of trade secrets and the defendant's gain is determined by comparing the defendant's actual costs with what it would have cost had the defendant not engaged in the misappropriation.[254] In other words, the profits earned by the defendant by its actions are measured by the cost savings determined.[255]

The standard of comparison measure would thus focus on a valuation of the universities' cost savings rather than their profitability which is based on a whole host of factors.[256] Such factors relating to profitability may include, among other things, contributions to the end product made by the defendant's lawful activity, including making capital investment and expenditures in producing the end product such as the purchase of raw materials as well as costs associated with distribution. Although market value of the plaintiff's services can oftentimes serve as a valid measure of cost savings in unjust enrichment cases,[257] this is not a viable option with student-athletes as there is no operative market for their services and the wages set in the market for professional player services is an inadequate comparison model because we are not trying to assess the supply and demand value of players to

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253 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1, cmt. d. (2011) ("A saved expenditure or a discharged obligation is no less beneficial to the recipient than a direct transfer. There are prominent topics within the law of restitution in which the defendant's unjust enrichment typically or invariably consists of a reduction in necessary expenditures or a reduced obligation to a third party.").

254 *See* GEORGE E. PALMER, THE LAW OF RESTITUTION § 2.8, 111–12 (1978) (suggesting that the goal of the standard of comparison approach is to "deprive the defendant of the expense saved by the wrongful use of the trade secret"); *see also* Salsbury Labs., Inc. v. Merieux Labs., Inc., 908 F.2d 706, 714–15 (11th Cir. 1990) (approving use of measure based on only costs saved by defendant); Telex Corp. v. Int'l Bus. Machs. Corp., 510 F.2d 894, 930–32 (10th Cir. 1975) (approving use of standard of comparison measure); Int'l Indus. v. Warren Petroleum Corp., 248 F.2d 696, 699 (3d Cir. 1957) (stating that the standard of comparison measure is "the comparison of the cost . . . by means of the use of the trade secret with a method of accomplishing the same result which would have been open to defendant had he not appropriated the trade secret").

255 *Int'l Indus.*, 248 F.2d at 702 (explaining that in this process "the profits are simply measured by the savings determined").

256 *See* Balganesh, *supra* note 116, at 486 (noting in the context of hot news misappropriation "the gain is not simply the defendant's profitability, which may have come about owing to other factors, but rather its enhanced profitability due to its unfair cost savings. The ideal solution is therefore one that focuses on annulling this cost savings and its effects on the defendant.").

257 *See, e.g.*, Chodos v. West Publ'g Co., Inc., 92 F. App'x 471, 474 (9th Cir. 2004) (measuring damages in quantum meruit based on value of author's services in open market and finding "[i]t was within the competence of the jury to determine the value of Chodos's services based on West's testimony on the hourly or per unit compensation that West would have offered to have the treatise written and Chodos's testimony on what a practicing attorney would have accepted to produce the treatise"); Malonis v. Harrington, 442 Mass. 692, 696–97 (2004) (holding that attorney was entitled to fair and reasonable value of services to prevent unjust enrichment of one party (the windfall of free legal services to the client) at the expense of another (the discharged attorney who expended time and resources for the client's benefit)).

individual schools and the wages they might be able to obtain if there was an open competitive free market for their services.[258]

I will limit this discussion of restitutionary measure to the context of broadcast licensing revenue in college football and men's basketball. Data in professional football and basketball in regards to total revenues, broadcast licensing revenues, and salary data can be used as a basis for determining universities' cost savings—the portion of football and basketball broadcast rights fees that would normally be paid to the players (Cost Savings). A valuation of Cost Savings on an *aggregate* basis can be assessed by calculating the difference between (x) the value of the player salaries expense avoided (Value-PSEA) multiplied by the percentage of the player salaries expense avoided that is attributed to the players' contribution in creating the game broadcasts (Contribution-PSEA) and (y) the value of the grant-in-aid. The Value-PSEA can be calculated by first determining the percentage of total gross revenue in professional football and basketball that is paid in player salaries, and then multiplying that percentage by the total gross revenue in college football (FBS schools) and basketball (D-I schools). The Contribution-PSEA can be determined by first calculating the dollar amount of total broadcast licensing revenue received by professional football and basketball players, and then determining the percentage that this amount bears in relation to their combined salaries.

The purpose of the foregoing discussion is to show the feasibility of determining a restitutionary measure that disgorges the ill-gotten gains under unjust enrichment principles; it is not intended to validate any particular position or view in the widespread heated debate over how the money should be *allocated* to student-athletes, how *much* student-athletes (individually and in the aggregate) should receive and *when* they should receive it, or *who* are the appropriate ones to make such determinations. For example, one remedial option would be for the NCAA, conferences, and universities to establish a method of allocating a reasonable portion of their broadcast licensing revenues to student-athletes, and distribute it in a form and manner that the NCAA and its members deem appropriate and consistent with the preservation of amateurism.

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[258] It is possible to appraise a hypothetical labor market in big-time college sports based upon individual players' contributions to team victories and the impact of victories on team revenues. *See, e.g.*, Robert W. Brown, *An Estimate of the Rent Generated by a Premium College Football Player*, 31 ECON. INQUIRY 671 (1993); Robert W. Brown, *Measuring Cartel Rents in the College Basketball Recruitment Market*, 26 APPLIED ECON. 27 (1994).

III. Statutory Defenses Under the Copyright Act

A. *The Work Made for Hire Doctrine*

In weighing the professional baseball players' claim that the game telecasts misappropriated their property rights in their names, pictures, and performances against the club owners' assertion that they owned the copyright to the game telecasts under the statutory works for hire doctrine, the Seventh Circuit in *Baltimore Orioles* first reached the uncontestable conclusion that the telecast of a game is protectable under copyright law.[259] The Seventh Circuit then concluded that, because the players are employees of the clubs and the scope of their employment encompasses performances before broadcast audiences, the clubs own the copyright in the game telecasts because the players and the clubs did not expressly agree to rebut the statutory presumption that the employer owns the copyright in a work made for hire.[260]

The Copyright Act of 1976 defines a "work made for hire" as:

> (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.[261]

The 1976 Act was the product of extensive negotiations by representatives of the entertainment industry and of authors, and their negotiations with respect to work made for hire resulted in narrowing the definition to exclude most commissioned works, to the advantage of authors.[262] However, the text of the Copyright Act and the Committee Reports do not define "employee" and "scope of employment."[263] From 1978 to 1989, four different interpretations of the term "employee" emerged among the federal circuits: (1) when the hiring party retains the right to control the product; (2) when the hiring party actually wields the right to control the product; (3) when the person is an

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259 *See* Balt. Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 668–69 (7th Cir. 1986); *see also* NIMMER & NIMMER, *supra* note 7, § 2.09[F], at 2-167 ("[T]he court was clearly correct in according copyright protection to the *motion picture* of the game.").

260 *See supra* notes 85–86.

261 17 U.S.C. § 101 (2006).

262 *See, e.g.*, Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 859, 888–91 (1987).

263 NIMMER & NIMMER, *supra* note 7, § 5.03[B][1], at 5-14.

employee within the meaning of agency law; and (iv) when the person is a "formal, salaried employee".[264]

In *Community for Creative Non-Violence v. Reid*,[265] the Supreme Court resolved the confusion among the circuits. The Court summarized the inquiry in one sentence: "In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished."[266] The Supreme Court also noted:

> Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits, and the tax treatment of the hired party.[267]

The Supreme Court in *Reid* then applied all of the factors to the facts before it.[268]

No court has ever had to address whether the copyright ownership rights universities receive via an assignment from the broadcasters in their licensing agreements trump the student-athletes' rights under the work made for hire doctrine. Although a court confronted with the issue could take pains to apply, analyze, and weigh the *Reid* factors in the context of the university-player relationship, there are three fundamental reasons why the work made for hire doctrine falls flat on its face: (1) universities, conferences and the NCAA themselves vehemently maintain the position that student-athletes are not employees or agents of the university;[269] (2) courts that have analyzed the university-player relationship in a variety of contexts have overwhelmingly concluded that college athletes are not employees of the university, including for purposes of recovering workers' compensation benefits,[270] bringing suit under a state fair employment and housing

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264 For a discussion of the four interpretations and annotation of the cases in which courts have used each of the interpretations, see *id.* § 5.03[B][1][a][ii], at 5-14 to -20.

265 490 U.S. 730 (1989).

266 *Id.* at 751.

267 *Id.* at 751–52 (citing RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958)).

268 The Supreme Court "took pains not only to list every one of the factors but to analyze the facts before it in terms of the totality of the factors." NIMMER & NIMMER, *supra* note 7, § 5.03[B][1][a][iv], at 5-28.

269 As noted by one scholar, "[i]f scholarship athletes really are university employees, they are not 'amateurs' as that term is commonly defined." YASSER, *supra* note 171, at 27.

270 *See* MATTHEW MITTEN ET. AL, SPORTS LAW AND REGULATION: CASES, MATERIALS, AND PROBLEMS 150 (2d ed. 2009) ("Although historically courts were divided over the question of whether scholarship student-athletes are covered by workers' compensation statutes, the

statute,[271] respondeat superior,[272] entitlement to governmental immunity,[273] and antitrust law;[274] and (3) a copyright marketplace whereby the universities and players negotiate over ownership of the copyright to the broadcasts is non-existent.

The policy behind the work made for hire doctrine does not support its application to the university/student-athlete relationship because there is no negotiation, agreement or consent concerning ownership rights to the copyright in game broadcasts. In addressing "Congress' goal of ensuring predictability through advance planning," the Supreme Court in *Reid* noted that "[i]n a 'copyright marketplace,' the parties negotiate with an expectation that one of them will own the copyright in the completed work [and] [w]ith that expectation, the parties at the outset can settle on relevant contractual terms, such as the price for the work and the ownership of reproduction rights."[275] With this backdrop, the Supreme Court rejected an actual control test.[276] An actual control test, according to the Court,

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modern trend is not to afford employee status to student-athletes."); *see also, e.g.*, Rensing v. Ind. State Univ., 444 N.E.2d 1170, 1175 (Ind. 1983) (holding that college athletes are not employees under state workers' compensation laws); Coleman v. W. Mich. Univ., 336 N.W.2d 224, 228 (Mich. Ct. App. 1983) (holding that college athletes are not employees under state workers' compensation laws); Waldrep v. Tex. Emp'rs Ins. Ass'n, 21 S.W.3d 692, 702 (Tex. Ct. App. 2000) (affirming jury's finding that scholarship athlete was not a university employee when he suffered a permanently disabling injury during a game). However, two early cases held that a college athlete could recover workers' compensation benefits if he held a university job unrelated to athletics. *See* Van Horn v. Indus. Accident Comm'n, 33 Cal. Rptr. 169 (Ct. App. 1963), *superseded by statute*, 1965 Cal. Stat. ch. 1791, § 1, 4127–28, *as recognized in* Shephard v. Loyola Marymount Univ., 125 Cal. Rptr. 2d 829, 834 (Ct. App. 2002); Univ. of Denver v. Nemeth, 257 P.2d 423 (Colo. 1953).

271 *See* Shephard v. Loyola Marymount Univ., 125 Cal. Rptr. 2d 829 (Ct. App. 2002) (holding that college athlete was not an employee for purposes of bringing suit pursuant to the California Fair Employment and Housing Act).

272 *See* Kavanagh v. Trustees of Bos. Univ., 795 N.E.2d 1170 (Mass. 2003) (holding that scholarship or other financial aid to college athletes does not create an employment relationship for purposes of respondeat superior); Hanson v. Kynast, 494 N.E.2d 1091, 1096 (Ohio 1986) (holding that a student "is not the agent of the university at the time he is playing the game of lacrosse").

273 *See* Korellas v. Ohio State Univ., 779 N.E.2d 1112 (Ct. Claims 2002) (holding that football player on scholarship is not an employee of the university and therefore not entitled to governmental immunity in civil actions).

274 *See* Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1090–91 (7th Cir. 1992) ("We consider college football players as student-athletes simultaneously pursuing academic degrees that will prepare them to enter the employment market in non-athletic occupations, and hold that the regulations of the NCAA are designed to preserve the honesty and integrity of intercollegiate athletics and foster fair competition among the participating amateur college athletes . . . . We fail to understand how the dissent can allege that NCAA colleges purchase labor through the grant-in-aid athletic scholarships offered to student-athletes when the value of the scholarship is based upon the school's tuition and room and board, not by the supply and demand for players.").

275 Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 749–50 (1989) (citation omitted).

276 *Id.* at 750 ("To the extent that petitioners endorse an actual control test, CCNV's construction of the work for hire provisions prevents such planning . . . . Under petitioners' approach, therefore, parties would have to predict in advance whether the hiring party will sufficiently control a given work to make it the author.").

> leaves the door open for hiring parties, who have failed to get a full assignment of copyright rights from independent contractors falling outside the subdivision (2) guidelines, to unilaterally obtain work-made-for-hire rights years after the work has been completed as long as they directed or supervised the work, a standard that is hard not to meet when one is a hiring party.[277]

The work made for hire doctrine contemplates a "hiring" process in which the hiring party and the hired party, whether an employee or independent contractor falling inside the subdivision (2) guidelines, have an understanding that the copyright in the work belongs to the hiring party (and that understanding is presumed if the hired party is an employee but if an independent contractor the understanding must be expressly agreed to by the parties in a signed writing).[278]

Because professional baseball players are undisputedly employees of the clubs, the players in *Baltimore Orioles* would have had to expressly agree with the clubs that they possess co-ownership rights in the copyright in order to rebut the statutory presumption that the copyright belongs solely with the clubs. The Seventh Circuit substantially relied on the fact that professional players have the ability to negotiate for those rights:

> In this litigation, the Players have attempted to obtain *ex post* what they did not negotiate *ex ante*. That is to say, they seek a judicial declaration that they possess a right—the right to control the telecasts of major league baseball games—that they could not procure in bargaining with the Clubs . . . . Contrary to the Players' contention, the effect of this decision is not to grant the Clubs perpetual rights to the Players' performances. The Players remain free to attain their objective by bargaining with the Clubs for a contractual declaration that the Players own a joint or an exclusive interest in the copyright of the telecasts.[279]

The Seventh Circuit's decision is consistent with Congress's goal of ensuring predictability through advance planning as articulated by the Supreme Court. The copyright marketplace exists with professional players but not with student-athletes. The application of the work made for hire doctrine to professional players is also consistent with the principles of *Pittsburgh Athletic* in which the clubs' property right in the sale or license of broadcast rights is based in part on the fact that the

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[277] *Id.* (quoting Marci A. Hamilton, Comment, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1304 (1987)).

[278] *See* Martha Graham Sch. & Dance Found., Inc. v. Martha Graham, 380 F.3d 624, 636 (2d Cir. 2004) ("[U]nder both the 1909 and 1976 Acts, a person's status as an employee renders a work created within the scope of employment as a work for hire, as to which the copyright belongs to the employer (in the absence of a contract providing otherwise).").

[279] Balt. Orioles, Inc. v. Major League Baseball Players Ass'n, 805 F.2d 663, 679 (7th Cir. 1986).

clubs *pay the players to participate in the games.*[280] Player salaries include the value of the players' contribution to the broadcast, and one stick of the bundle of sticks representing the clubs' *Pittsburgh Athletic* property right is the recoupment of that value from the network in broadcast rights fees. *Pittsburgh Athletic* also assumes that players have an interest in broadcasts that clubs must purchase from the players as consideration for *full* ownership rights in broadcasts under the work made for hire doctrine. If the value of the grant-in-aid does not represent the value of that interest, then student-athletes are being denied a legal right to the extent of the amount of the deficiency and the universities are being unjustly enriched by receiving one of the sticks in the bundle for free. Because student-athletes are not employees or hired like professional players, and thus the work made for hire doctrine does not apply, preventing the unjust enrichment would not create a "parade of horribles" because it would not grant student-athletes employment status or the right to bargain with universities for wages and other benefits, or the right to compete in a free market for their services.

The Seventh Circuit, in addressing whether the clubs and players expressly agreed to rebut the statutory presumption that the employer owns the copyright in a work made for hire, looked at the language of paragraph 3(c) of the Uniform Player Contract that every player signs, which provides:

> The Player agrees that his picture may be taken for still photographs, motion pictures or television at such times as the Club may designate and that all rights in such pictures shall belong to the Club and may be used by the Club for publicity purposes in any manner it desires.[281]

The Seventh Circuit concluded, and rightfully so, that paragraph 3(c) "does not declare that the copyright in the telecasts is owned by the Players, rather than by the Clubs. Instead, it merely grants the Clubs the rights to take the Players' pictures for still photographs, motion pictures, and television and to use the pictures for publicity purposes."[282] Nevertheless, paragraph 3(c) did not expressly state that the clubs do *not* own the copyright and thus the writing was insufficient to rebut the presumption, as the players needed to be able to do because they are employees of the clubs.[283]

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280 *See supra* note 21.

281 *Balt. Orioles*, 805 F.2d at 671.

282 *Id.* at 672.

283 The Seventh Circuit stated that:

> A limitation on the Clubs' rights to televise the Players' performances perhaps might be implied by the grant of these particular rights; however, even if such an implied limitation were plausible, paragraph 3(c) nowhere contains an express statement that the Clubs do not own the copyright in the telecasts of the Players' performances.

Id.

The Seventh Circuit's interpretation and analysis of paragraph 3(c) is not pertinent to student-athletes for purposes of rebutting the presumption under the work made for hire doctrine (because they are not employees), but it does shed some light on the question of whether student-athletes agree or consent to give up, or perhaps waive, any of their rights in game broadcasts pursuant to the terms of the grant-in-aid or other documents. The NCAA Division I Student-Athlete Statement (Form 11-3a for the Academic Year 2011-12) that all student-athletes must sign contains seven parts, one of which is "Part IV: Promotion of NCAA Championships, Events, Activities or Programs" and it provides: "You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture in accordance with NCAA Bylaw 12.5, including to promote NCAA championships or other NCAA events, activities or programs."[284] A reasonable interpretation of this provision is that it relates solely to the NCAA's authorization to use a player's name and photo in connection with an advertisement or promotion of an event, for example, a brochure or commercial promoting the March Madness tournament; it does not at all speak to licensing broadcast rights.

The Division I Manual states that the NCAA owns the television rights to its championships: "The Association owns all rights to each and all of its championships as listed in Bylaw 18.3. These rights include, in addition to the rights with respect to participation and admission, rights to television (live and delayed), radio broadcasting, filming and commercial photography."[285] However, this provision is not contained within the Student-Athlete Statement that is signed by the players and the Student-Athlete Statement does not incorporate the Division I Manual, only select provisions of the Manual concerning eligibility, recruitment, financial aid, amateur status, involvement in gambling activities and use of banned drugs.[286] Nevertheless, it is difficult to fathom the possibility that a private association's bylaws could strip non-members of their rights to property, intellectual property or otherwise, or operate as a license to breach the common law's prohibition against unjust enrichment. At best, this bylaw provision

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284 NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA STUDENT-ATHLETE STATEMENT—NCAA DIVISION I, FORM 11-3A, at 4 (2011) [hereinafter STUDENT-ATHLETE STATEMENT], *available at* http://fs.ncaa.org/Docs/AMA/compliance_forms/DI/DI%20Form%2011-3a.pdf. Bylaw 12.5.1.1.1 tracks the language of Form 11-3a and provides, "The NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of an enrolled student-athlete to generally promote NCAA championships or other NCAA events, activities or programs." NCAA MANUAL, *supra* note 201, art. 12.5.1.1.1. The same provision is found in Bylaw 12.5.1.8: "The NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of a student-athlete to generally promote NCAA championships." *Id.* art. 12.5.1.8.

285 NCAA MANUAL, *supra* note 201, art. 31.6.4.

286 *See* STUDENT-ATHLETE STATEMENT, *supra* note 284, at 1–7.

contractually allocates broadcast ownership rights among the parties to the agreement (the NCAA and its members).[287]

Granted, even though student-athletes do not expressly consent, one could take the position that players implicitly waive their rights to claim unjust enrichment because they sign the grant-in-aid with full knowledge they will be performing in games that will be broadcast nationally on television—and the players do not have to play if they are not willing to do so.[288] Presumably the players could collectively refuse to play, although logistically it would be very difficult to organize the players and effectuate a group boycott. But the question is why should student-athletes be required to boycott the universities—the equivalent of a union strike—in order to prevent universities and their coaches and athletic directors from continuing to unjustly enrich themselves? In 2011, the National Student-Athletes Association, a California-based athlete advocacy group, in a short ten-day period gathered more than 300 signatures on a petition from student-athletes at five different schools—Arizona, Georgia Tech, Kentucky, Purdue, and UCLA—asking the NCAA to set aside some of the additional $784 million in new television deals to further benefit players by helping cover educational expenses in the event a scholarship ends before a player has earned a degree or the money could be distributed to the players once they exhausted their eligibility.[289] The petition prompted *Yahoo! Sports* columnist Dan Wetzel to call for players to get together and boycott a minor bowl game.[290]

There are reports of student-athletes having discussed boycotting at various times in the past but they never acted on it. When Syracuse first agreed to participate in the 1961 Liberty Bowl against Miami during December in Philadelphia, the Syracuse players held a special meeting without coaches before the game.[291] The disgruntled players had more questions than answers such as, "Why are we even playing in this game? What is it about? Who is ultimately benefiting?"[292] The seniors talked

287 *See* Richard G. Johnson, *Submarining Due Process: How the NCAA Uses Its Restitution Rule to Deprive College Athletes of Their Right to Access to the Courts . . . Until* Oliver v. NCAA, 11 FLA. COASTAL L. REV. 459, 596–97 (2010) (discussing how the NCAA dances around the issue of whether it has a contractual relationship with student-athletes and noting that "the NCAA simply cannot admit to any relationship with college athletes, because once it admits to this it will actually provide college athletes with rights").

288 *But see* Ventura v. Titan Sport, Inc., 65 F.3d 725 (8th Cir. 1995) (holding that Jesse "The Body" Ventura's agreement with the defendant to serve as color commentator for the broadcast of live wrestling matches did not give consent for the defendant to sell videotapes of the broadcast using his name, likeness or performance).

289 Dan Wetzel, *Bowl Boycott Would Shock Unfair System*, RIVALS.COM FROM YAHOO! SPORTS (Oct. 24, 2011), http://rivals.yahoo.com/ncaa/football/news?slug=dw-wetzel_bowl_boycott_would_shock_system102411.

290 *Id.*

291 Patrick Hruby, *Time to Strike Against the NCAA*, THE POST GAME (Jan. 10, 2012), http://www.thepostgame.com/blog/hruby-tuesday/201201/time-strike-against-ncaa.

292 *Id.*

about a boycott and then met with coach Ben Schwartzwalder and told him in so many words that if the team had to play—and "in a second-rate icebox bowl nobody had ever heard of"—the players should at least get something in return such as nice wristwatches similar to the ones handed out at the major bowls, or else the team would not play.[293]

In the 1980s, Dick DeVenzio, a former basketball player and 1971 academic All-American at Duke, formed the Revenue Producing Major College Players Association and sent weekly pamphlets and newsletters to hundreds of college athletes.[294] In 1987, DeVenzio talked to Oklahoma football star players Brian Bosworth and Spencer Tillman about the prospect of delaying the start of a game against Nebraska but the players instead kneeled for a pregame prayer intended to draw attention to athletes' rights.[295]

Taylor Branch recently wrote about a basketball team's plan one time to boycott the NCAA championship game.[296] According to Branch, former North Carolina president William Friday recalls being informed about what might happen if a certain team made the championship game.[297] Friday told Branch, "They were going to dress and go out on the floor but refuse to play," however the suspect team lost before the finals.[298] Similarly, during an interview on HBO's "Real Sports" former UMass player Rigo Nunez revealed that prior to the start of the opening games of the 1995 NCAA men's basketball tournament, a large number of players on multiple teams "intended to walk to the middle of the court, sit down and let the ball bounce."[299]

B. *Federal Preemption*

The universities presumably own the copyright to the broadcasts by virtue of an assignment from the network in the broadcast licensing agreement. As such, a federal preemption issue arises with a separate and distinct right granted under state law pursuant to a cause of action for unjust enrichment.[300] Two conditions must be met in order to

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293 *Id.*

294 *Id.* DeVenzio also authored a book, *Rip-off U*, indicting amateurism. *Id.*

295 *Id.*

296 Taylor Branch, *The Shame of College Sports*, ATLANTIC, Oct. 2011, http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/8643/7/.

297 *Id.*

298 *Id.* Patrick Hruby wrote that "[t]he team in question is widely suspected to be UNLV in 1991; the players were the defending national champions and coach Jerry Tarkanian had a longtime running feud with the NCAA." Hruby, *supra* note 291.

299 Hruby, *supra* note 291.

300 It should be noted that the Seventh Circuit's ruling in *Baltimore Orioles* that professional players' right of publicity claim was preempted is of limited value in this preemption analysis. First, the players in that case were claiming a right of publicity for the use of their identities in game telecasts, not common law unjust enrichment based on the rationale of *Pittsburgh Athletic*. Second, the Seventh Circuit's preemption analysis has been heavily criticized by

effectuate preemption: "[t]he first element relates to the nature of the rights granted under state law, the second to the nature of the work in which such rights may be claimed."[301] Thus, the work for which the state right is being asserted must come within the *subject matter* of copyright and the state right must be equivalent to any of the exclusive rights encompassed within the *general scope* of copyright.[302]

1. Subject Matter Requirement

State-created rights meet the subject matter requirement for preemption if they inhere in "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by section 102 and 103 . . . ."[303] Section 102 includes "motion pictures and other audiovisual works."[304] The simultaneously recorded broadcast of a live sporting event constitutes a work of authorship fixed in a tangible medium of expression; the performance of the game does not.[305] The performance of the game could thus be viewed as a work that falls outside the subject matter of copyright.[306] Live performances, improvisations, and speeches are works "not fixed in any tangible medium of expression" and therefore "state laws protecting unfixed works are fully viable" whether labeled the "misappropriation" variety of unfair competition or by any other name.[307] Thus, if student-athletes' unjust enrichment claim in the context of broadcast rights licensing were viewed as asserting rights in live game performances then the subject matter requirement for preemption would not be met.

However, if the claim is viewed as asserting rights in the broadcasts

numerous courts and commentators. *See, e.g.*, Fleet v. CBS, Inc., 58 Cal. Rptr. 2d 645, 652 (Ct. App. 1996); NIMMER & NIMMER, *supra* note 7, § 1.01[B][1][c], at 1-31; Shipley, *supra* note 5; Saxer, *supra* note 5.

301 NIMMER & NIMMER, *supra* note 7, § 1.01[B][1], at 1-10. Section 301 of the Copyright Act subjects any state law to federal preemption under the following conditions:

> (1) such law creates 'legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106,' and if, in addition, (2) such rights under such state law may be claimed in 'works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by Sections 102 and 103, whether created before or after [January 1, 1978] and whether published or unpublished . . . .'

Id. §1.01[B], at 1-9 (quoting 17 U.S.C. § 301(a) (2006)).

302 *See, e.g.*, Nat'l Basketball Ass'n v. Motorola, Inc., 105 F.3d 841, 848 (2d Cir. 1997).

303 17 U.S.C. § 301(a)(5).

304 *Id.* § 102(a)(6).

305 *See supra* notes 11, 34 and accompanying text.

306 *See* Saxer, *supra* note 5, at 877 ("The telecast of the performance is copyrightable as an 'audiovisual work,' but the performance itself does not fall within any of the section 102 subject matter categories.").

307 *See* NIMMER & NIMMER, *supra* note 7, § 1.01[B][2][a], at 1-68 to -69.

and not in their live game performances, the claim would arguably meet the subject matter requirement. In this respect, the players could be viewed analogous to actors asserting a right of publicity claim to their performances that are being used in a copyrighted motion picture film.[308] But this is not entirely accurate because a technical distinction can be drawn between a game broadcast and a motion picture as relates to the copyrightability of the underlying subject matter. Professor Nimmer notes that the focus of the inquiry as to whether the subject activity captured on film or videotape (and, presumably, a copyrightable broadcast) can itself be the subject of copyright protection "necessarily divides the creative aspects of the motion picture from the creative aspects of the *underlying subject matter* portrayed therein."[309] The distinction between motion pictures and game broadcasts is that the underlying subject matter in films (the actors' performances) has creative aspects that are copyrightable works of authorship,[310] whereas the underlying subject matter in sporting events (the athletes' performances) does not. Under this analysis, because the underlying subject matter of sports broadcasts is not copyrightable, presumably the claim would not meet the subject matter requirement for preemption.

In describing the Seventh Circuit's flawed preemption analysis in *Baltimore Orioles*, Nimmer points out that if a baseball game were in fact a copyrightable work analogous to a modern dance or dramatic performance (which it is not), then the Seventh Circuit's ruling would be correct that a player could not defeat a game broadcast via his state law right of publicity claim:

> For a dancer or actor who performs in a televised copyrighted dance or play and *who has assigned away any copyright interest in the work* would be pre-empted from asserting the right of publicity; the baseball player is in the same situation, presuming that the baseball game is a copyrightable work.[311]

But because the game is not a copyrightable work, the baseball player is not in the same position as the dancer or actor and thus would not be preempted. Putting aside the Seventh Circuit's preemption analysis, student-athletes are distinguishable from professional players who have "assigned away any copyright interest in the work" and for that reason alone the unjust enrichment claim might not be justifiably preempted.

The unjust enrichment claim discussed in this Article is not an assertion of a right in either game performances or game broadcasts, but

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308 *See, e.g.*, Fleet v. CBS, Inc., 58 Cal. Rptr. 2d 645, 652 (Ct. App. 1996) (holding that actors preempted from asserting right of publicity cause of action as to performance of copyrighted film).

309 NIMMER & NIMMER, *supra* note 7, § 2.09[F], at 2-166 (emphasis added).

310 The statute defines "works of authorship" to include "dramatic works." 17 U.S.C. § 102(a)(3) (2006).

311 NIMMER & NIMMER, *supra* note 7, § 2.09[F], at 2-170 n.85 (emphasis added).

can be more accurately described as an assertion of a right in "the right to license the broadcast rights" as well as the rights fees paid for that license because a portion of the rights fees are claimed to be an unjust benefit that must be disgorged. Clearly, broadcast rights fees as well as the right to license broadcast rights do not constitute works of authorship and for this reason alone the more appropriate subject matter requirement analysis would suggest that the requirement for preemption would not be met. But even assuming for sake of argument that the subject matter requirement could be met, preemption is tripped up by the general scope requirement.

2. General Scope Requirement

Section 301 preempts state laws if they create "legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright."[312] A right "equivalent to copyright" is "one that is infringed by the mere act of reproduction, performance, distribution, or display."[313] Thus, if the act of reproduction, performance, distribution, or display "will *in itself* infringe the state-created right," then the state right is preempted.[314] However, there is no preemption if the state-created right contains elements instead of, or in addition to, the act of reproduction, performance, distribution, or display such that the nature of the cause of action is *qualitatively* different from a copyright infringement claim.[315]

An unjust enrichment claim in regards to the right to license or sell broadcast rights and the broadcast rights fees paid in conjunction therewith is qualitatively different from a copyright infringement claim. The nature of the claim is that universities are being unjustly enriched by the windfall they receive from the portion of the broadcast rights fees that student-athletes are entitled; the nature of the claim is not that universities are *infringing* the players' rights by an act of reproduction, performance, distribution, or display. Nimmer concludes that a state law claim for unjust enrichment or quasi-contract should be regarded as an equivalent right insofar as the claim applies to copyright subject matter, noting that:

> Examples can be as diverse as a tabloid's allegedly unjust enrichment through publishing Elvis photographs inspired by plaintiff's collection, to a studio's allegedly unjust enrichment through building a replica of plaintiff's home, used in the movie *Terms of Endearment*, for purposes of filming the sequel without arousing the neighbor's

312 17 U.S.C. § 301(a).
313 NIMMER & NIMMER, *supra* note 7, § 1.01[B][1], at 1-11.
314 *Id.* at 1-12.
315 *Id.* at 1-12 to -13; *see also* Saxer, *supra* note 5, at 880.

objections.[316]

But unlike the players' claim of unjust enrichment, these examples involve claims of infringement by an act of reproduction, performance, distribution, or display.

In certain respects the nature of the unjust enrichment claim resembles a state-created right based on misappropriation if the players are viewed as possessing a property right (as the *Pittsburgh Athletic* court referred to it) in the right to broadcast their games and universities are being unjustly enriched by taking their property without payment. Nimmer uses a two-part analysis to answer the question whether a state-created right based on misappropriation is "equivalent" to copyright: "First, does the law, by its terms, or as applied, involve 'misappropriation' of a work of authorship? If so, does the conduct that constitutes 'misappropriation' require any element other than the mere act of reproduction, distribution, performance or display?"[317] The nature of student-athletes' claim does not involve the taking of any creative (or otherwise copyrightable) work of authorship of the players, so even if the claim is labeled as misappropriation the equivalency test fails at the first question.

An unjust enrichment claim might be preempted, however, if the players' claim was being asserted against a third party who makes an unauthorized copy of the copyrighted game broadcast. In this situation, presumably the state claim would be the equivalent of copyright protection available to the universities and their authorized broadcasters for the infringement. For this reason older cases recognizing protection of athletic events on theories of unfair competition and misappropriation are generally disapproved of now, to the extent they accorded protection to broadcasts, because such claims would fall inside the subject matter of copyright itself.[318] The Second Circuit in *National Basketball Ass'n v. Motorola, Inc.*,[319] for example, held that "where the challenged copying or misappropriation relates in part to the copyrighted broadcasts of the games, the subject matter requirement is met as to both the broadcasts and the games."[320] The holding in *Motorola* would not preempt student-athletes' unjust enrichment claim

316 NIMMER & NIMMER, *supra* note 7, § 1.01[B][1][g], at 1-51 to -52 (citations omitted).

317 *Id.* § 1.01[B][1][f][ii], at 1-43. Thus, "legions of cases have held pre-empted claims for misappropriation ranging from designs to computer 'input format' to catalog descriptions to unauthorized secondary transmission of broadcasts . . . regardless of whether the state law in question labels the claim 'misappropriation,' 'unfair competition' or 'palming off.'" *Id.* at 1-48 (citations omitted).

318 *See id.* § 2.09[F], at 2-171.

319 105 F.3d 841, 848 (2d Cir. 1997).

320 *Id.* The Second Circuit, however, recognized a narrow "hot news" claim that survives preemption based on "extra elements" of "(i) the time sensitive value of factual information, (ii) the free-riding by a defendant, and (iii) the threat to the very existence of the product or service provided by the plaintiff." *Id.* at 853.

against universities because the claim is not challenging a copying or misappropriation, in whole or in part, of the copyrighted game broadcasts.

CONCLUSION

The NCAA, conferences, and universities have been licensing broadcast rights, without challenge, under the guise of the professional league teams' quasi-property right established seventy-five years ago under *Pittsburgh Athletic*. Yet, their economic investment pales in comparison to professional teams because they have the luxury of avoiding paying the players who make the rights fees so lucrative, or for that matter even possible. Further, as tax-exempt public educational institutions without owners risking personal funds in exchange for a return on investment, universities do not need the economic incentive to exploit broadcast rights and thus the justification for protection of a property right based on principles of unfair competition and unjust enrichment is not as compelling. While they may own the copyright to the game broadcasts by contract via an assignment from the networks pursuant to lucrative television deals, unlike their professional league counterparts they cannot rely on *Baltimore Orioles* because the work made for hire doctrine is not a legal device that sanctions unjust enrichment at the expense of unemployed people who make substantial contributions to the production of the broadcast and the value of the copyright.

The university/network/student-athlete tripartite relationship viewed through the lens of common law unjust enrichment sheds light on the distributive equities in relation to (1) the unjustness of (2) the exponentially increasing broadcast rights fees that provide a windfall equal to the portion of the rights fees that would normally, equitably and morally be paid to the players but instead are providing annual increases in the wealth of coaches, athletic directors, conference commissioners and other personnel in college sports who make no economic investment (3) at the increasing expense of student-athletes whose efforts create the value and whose grant-in-aid continues to remain stagnant. To be clear, this unjust enrichment in the context of broadcast rights has absolutely nothing to do with converting amateurs into professionals or the preservation of otherwise legitimate and noble principles of amateurism. A restitutionary measure can be fashioned in a court of law. However, the preferable remedial option would be for the NCAA, conferences, and universities to take the initiative in achieving equitable justice and determine a reasonable and fair method of disgorging their enrichment in a form and manner that they deem appropriate and consistent with the preservation of amateurism.