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CWRU's Athlete Data Lab

HOW COLLEGIATE-ATHLETES CAN TAKE CONTROL OVER THEIR PERSONAL DATA IN COLLEGE ATHLETICS

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I. Abstract

Advancements in wearable technology and other data capturing systems have opened doors to collect more information about collegiate athletes both on and off the field. Such information, while enhancing student-athletes' ability to optimize their athletic performance and mitigate future injuries, is being exploited for a variety of other opportunities led by universities, conferences, third-party data collectors, and other users without input from the student-athlete. In light of the continued discussions around NIL, and with more universities having their student-athletes leverage technologies to record information and capture various forms of personal data, the focus has now shifted to how collegiate athletes can retain full or partial ownership of their personal data, and therefore, profit from the data like their universities and third-party data collectors and holders.

This paper aims to educate college athletes on the potential value of the data collected about them and the considerations and legal landscape concerning ownership, rights, and use of their personal data. In exploring ownership, rights, and use of these data, current case law, state and federal statutes and regulations, as well as regulations implemented by other governing organizations are addressed. Current methods used by professional athletes during negotiations with their prospective professional associations are also analyzed.

II. Introduction

Collegiate athletics in the United States is a big business. With a global footprint, Division 1 collegiate athletics,[1] which are estimated to generate over $15 billion dollars annually,[2] and the National Collegiate Athletic Association (hereafter, "NCAA"), its governing body which itself brings in nearly $1.3 billion dollars annually,[3] have leveraged amateur collegiate athletes to create products that generate tremendous value for a variety of stakeholders. Traditional commercialization efforts that include media rights, sponsorship, and jersey sales are now intertwined with the licensing of NIL rights to video game companies, creation of predictive analytics for health-focused companies, and usage of information for fantasy sports that present a diverse and uncharted landscape of data collection, usage, and commercialization in the field of college athletics. For college athletes, many of whom are renowned and socially influential, the

[1] *Notre Dame vs Navy*, College Football Ireland (Aug. 26, 2023), https://collegefootballireland.com/games/notre-dame-vs-navy/.
[2] Andrew Zimbalist, *Analysis: Who is winning in the high-revenue world of college sports?*, PBS (May 18, 2023, 7:14:00 PM), https://www.pbs.org/newshour/economy/analysis-who-is-winning-in-the-high-revenue-world-of-college-sports.
[3] Associated Press, *NCAA generates nearly $1.3 billion in revenue for 2022-23*, ESPN (Feb. 1, 2024, 9:35 PM), https://www.espn.com/college-sports/story/_/id/39439274/ncaa-generates-nearly-13-billion-revenue-2022-23.

opportunities to leverage their Name, Image, and Likeness (hereafter, "NIL") to create revenue streams for themselves has been a first step in grabbing a larger slice of the revenue pie. However, advancements in technologies are creating even more opportunities for information to be collected about these student athletes, which can further power areas with significant revenue potential including sports betting and healthcare. With very few protections in place for student-athletes related to collection and use of their personal data, organizations should be focused on developing new data-based frameworks based on the learnings from the NIL landscape, current case law, state and federal statutes and regulations, and regulations implemented by other governing organizations to further protect the student-athletes and enable broader use cases for personal data that benefit all stakeholders.

III. Personal Data and the Use of Data Capturing Technologies

Personal data is information, or pieces of information, that individually or collectively identify an individual.[4] Even data that has been de-identified, encrypted or pseudonymized may be considered personal data if it can be used or reversed to identify an individual.[5] Personal data being collected from athletes worldwide includes various forms of their NIL, as well as physiological data, biomechanical data, location-based data, medical information, and other data points that can provide more context related to the biological state of that individual.

Recently, the use of wearable technology in collegiate athletics, which can be integrated within "gadgets, accessories or clothes",[6] as well as optical trackers and other devices have gained broader acceptance in the aftermath of COVID-19. As collegiate athletes retreated from their respective schools, coaches sought to recapture some semblance of oversight over the players to monitor their off-campus performance and regimen. Thus, such changes in processes spawned a more widespread use of wearable technologies and other data capturing systems to collect and track vital personal information from these collegiate athletes, including a player's physical progress and recovery during the days away from their team. Since COVID, use of wearable and other technologies to measure collegiate athlete performance has continued to grow. A wider acceptance of using wearable technologies to mitigate injuries, determine whether a player has recovered enough to return to competition,[7] knowing how "hard to push an athlete to reach new ability levels," and determine how to help athletes recover faster from injuries has reached new heights.[8] Companies like Zephyr, Catapult, Zebra, and STATSports receive billions of dollars collectively from the growing demand of wearable devices for athletes.[9] Catapult in

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[4] *What is personal data?*, European Commission (Feb. 9, 2024), https://commission.europa.eu/law/law-topic/data-protection/reform/what-personal-data_en.
[5] *Id.*
[6] Aleksandr Ometov et al., *A Survey on Wearable Technology: History, State-of-the-Art and Current Challenges*, 193 Comput. Network 1,1 (2021).
[7] *Id.*
[8] *Id.*
[9] Tony Luczak et al., *State-of-the-Art Review of Athletic Wearable Technology: What 113 Strength and Conditioning Coaches and Athletic Trainers From the USA Said About Technology in Sports*, 15(1) Int'l Journal of Sports Science & Coaching, 26, 27 (2020).

particular has 372 NCAA Universities as clients, including the University of Virginia and the University of Louisville.[10] Universities are also funding and implementing their own initiatives that focus on wearable technologies. For example, The Seshadri Laboratory at Lehigh University, which focuses on digital health and bioelectronics, partnered with Beyond Pulse to help monitor the performance of its collegiate athletes.[11] Such widespread use of wearables and other systems has prompted lucrative corporate agreements between universities and data capturing companies interested in leveraging an athlete's personal data in product development, marketing, and performance enhancement.

IV. Rights for Collegiate Athletes

In addition to the use of new data capturing systems collecting more information about student-athletes than ever before, collegiate athletics have undergone significant changes in other areas in recent years. In 2021, the Supreme Court of the United States took up its pen on the issue of NIL in its groundbreaking decision in *NCAA v. Alston.*[12] In *Alston,* the Supreme Court held that the prohibition on an athlete's ability to commercialize and monetize their NIL violated antitrust law.[13] Specifically, the Supreme Court decided that the restrictions the NCAA had put in place on education-related compensation from universities violated the Sherman Antitrust Act, allowing universities to offer bonuses known colloquially as "Alston money" to their student athletes.[14] Although the Supreme Court did not address the possible existence of an employer-employee relationship between student-athletes and universities, it did address the monetary NIL concerns that have plagued discussions around college athletics for decades.[15] In this case, the Supreme Court affirmed the district court's decision to conduct a full "rule of reason" analysis to address and invalidate universities education-related compensation policies.[16] The Court ruled that universities could still promote the competitive spirit of athletics while using less restrictive means regarding the compensation of student-athletes than those previously in use.[17] With this, the Court says, student athletes will be entitled to more just compensation in proportion to the value that they bring to the universities.[18]

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[10] *Catapult Reaches Major Milestone Passing 1,000 Teams in North America*, Catapult (Aug. 16, 2019), https://www.catapult.com/blog/catapult-reaches-major-milestone-passing-1000-teams-in-north-america.
[11] *Lehigh University Uses Beyond Pulse Wearable Technology to Redefine health and Performance Monitoring*, Beyond Pulse (Mar. 27, 2024), https://news.beyondpulse.com/en/blog/2024-03-27-lehigh-university-uses-beyond-pulse-wearable-technology-to-redefine-health-and-performance-monitoring/.
[12] Tony Luczak et al., *State-of-the-Art Review of Athletic Wearable Technology: What 113 Strength and Conditioning Coaches and Athletic Trainers From the USA Said About Technology in Sports*, 15(1) Int'l Journal of Sports Science & Coaching, 26, 27 (2020).
[13] *NCAA v. Alston*, 141 S. Ct. 2141, 2157 (2021).
[14] Paul Greene, *The State of the College Athletics NIL Revolution*, Law 360 (Sep. 12, 2022, 4:42 PM) https://www.law360.com/articles/1529115/the-state-of-the-college-athletics-nil-revolution.
[15] *See generally NCAA v. Alston*, 141 S. Ct. 2141, (2021).
[16] *Id.* at 2163 (explaining that the "rule of reason" requires a fact-specific assessment of market power and market structure to assess a restraint's affect on competition).
[17] *Id.* at 2162.
[18] *Id.* at 2166.

The decision in *Alston* reflects the Supreme Court's resolute commitment to steering college athletics away from antiquated compensation paradigms and toward a more equitable system[19] and in particular, a system that aligns with the contemporary landscape shaped by technological and economic advancements.[20] In recognizing the transformative impact of these changes, the Court's ruling not only addresses the monetary concerns surrounding NIL, but also serves as a beacon signaling a departure from traditional norms.[21] By affirming the need for a comprehensive rule of reason analysis, the Court acknowledges the evolving nature of collegiate sports, where technological innovations and economic shifts have reshaped the dynamics between universities and student-athletes.[22] As made clear in Justice Kavanaugh's concurrence, this decision marks a pivotal moment in the pursuit of fairness, positioning college athletes to receive compensation that more accurately reflects their value in today's dynamic and competitive collegiate sports environment.[23]

Since *Alston*, the landscape for collegiate athletes has shifted dramatically.[24] Collegiate athletes at major institutions have capitalized on the burgeoning collegiate NIL industry through paid partnerships with local, regional, and national organizations. In 2022, the first full year after the *Alston* decision, collegiate athletes secured $917 million in partnership deals.[25] Although the change in NIL policy occurred rapidly leading to some collegiate athletes having added financial security from their NIL compensation, the collegiate model still recognizes collegiate athletes as amateurs – or, in this case, student-athletes of the university.

The concept of the "student-athlete" arose in 1955 when the widow of Ray Dennison, a college football player, sued for workmen's compensation after Dennison died from head trauma during a game.[26] Dennison, who played for the Fort Lewis A&M Aggies, suffered a fractured skull from which he later died.[27] In response, Billie Dennison, his widow, filed a claim for workmen's compensation in the Colorado Industrial Commission under the Workmen's Compensation Act of 1957.[28] Ultimately, the Supreme Court of Colorado ruled that Billie Dennison was not entitled to death benefits because Ray was not an employee of the school, but

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[19] *See generally* NLRB MEMORANDUM GC 21-08.
[20] *Id.*
[21] *See generally* NLRB MEMORANDUM GC 21-08.
[22] *NCAA v. Alston*, 141 S. Ct. 2141 (2021).
[23] *Id.* at 2166.
[24] Victoria Larned, *The Ultimate College and High School NIL Timeline*, Ecckersports (Mar. 29, 2022), https://ecckersports.com/industry-insights/the-ultimate-college-and-high-school-nil-timeline/.
[25] *See* Josh Schafer, *NIL: Here's How Much Athletes Earned in the First Year of New NCAA Rules*, Yahoo Fin. (July 1, 2022), https://finance.yahoo.com/news/nil-heres-how-much-ncaa-athletes-earned-185901941.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAAMNA7PokrKaeR0J9gzpIAGL1QEUmj4q-kVqsToqej97urs9Havf19ZDzM3UhJCAXCRJuE-EBS2PppBfKAhGCTCHC8hJoTzpzhXe4_qStomy1nW4v84KOwtaIB7yMT7_HhG0ZrGPkwgeBjHaLjqhn32r4DxpSO13Vd6yqkDLLfxj1.
[26] *State Comp. Ins. Fund v. Indus. Com.*, 135 Colo. 570, 571 (1957).
[27] Chuck Slothower, *Ray Dennison, Killed Playing Football, Echoes Through NCAA History,* The Durango Herald (Sep. 25, 2014, 2:58 PM), https://www.durangoherald.com/articles/fort-lewis-first-student-athlete/.
[28] *Id*.

a "student-athlete."[29] By grounding its decision on the concept of a student-athlete, the Colorado Supreme Court erected the barrier that has since been the impediment to athlete's obtaining employment benefits, capitalizing on revenue earned at their programs, and limiting their use of their NIL.[30] While the *Alston* ruling enabled athletes to capitalize on their NIL, the decision far from resolves the myriad of issues surrounding collegiate athletes.[31] Of particular concern are the unresolved issues concerning the use of an athlete's personal data by universities, conferences, media companies, and other businesses interested in utilizing an athlete's data for a variety of purposes – including monetization – without the athlete's authorization and financial participation. The current amateurism model precludes athletes from becoming employees of the university, forming a union, or collectively bargaining with the university to secure specific rights.[32] However, with the recent settlement agreement in *House v. NCAA*, where the NCAA and the Power 5 conferences agreed to pay out $2.8 billion dollars to current and former players, that model of amateurism is fading fast now that universities can pay collegiate athletes directly for their services.[33] As such, these athletes do not have the bargaining tools to protect their data absent specific state or federal statutory protection.

V. Current Status of Personal Data and the Challenges

An overarching challenge in the US is the lack of guidance and information from sporting organizations, courts, and federal and state legislation regarding the ownership of collected personal data from athletes. The lack of clarity has caused athletes to fear that their personal data may be used to determine playing time and terms of player contracts.[34] To analyze the athletes' rights to their personal data in the collegiate context, it is important to consider those who might also claim rights to the data collected, such as universities, conferences, government entities, and other users of such information.

Issues involving athlete personal data are focused on the debate of NIL laws and agreements. Generally, an NIL agreement "means a contract or other written or oral arrangement between a student-athlete and third party licensee regarding the use of the name, image, likeness,

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[29] *See Id.* (holding that "Since the evidence does not disclose any contractual obligation to play football, then the employer-employee relationship does not exist,").
[30] Liz Clarke, *The NCAA Coined the Term 'Student-Athlete' in the 1950s. Its Time Might Be Up.,* The Washington Post (Oct. 28, 2021, 9:00 AM), https://www.washingtonpost.com/sports/2021/10/27/ncaa-student-athlete-1950s/.
[31] *See generally NCAA v. Alston*, 141 S. Ct. 2141, 2157 (2021).
[32] Katie Hawkinson, *Can College Sports Teams Unionize? We're About to Find Out*, Business Insider (Sep. 23, 2023),
https://www.businessinsider.com/can-college-sports-teams-student-athletes-form-union-dartmouth-basketball-2023-9.
[33] Ranjan Jindal, *Breaking Down the House v. NCAA Settlement and the Possible Future of Revenue Sharing in College Athletics,* The Chronicle (May 27, 2024),
https://www.dukechronicle.com/article/2024/05/duke-athletics-ncaa-house-settlement-nil-revenue-sharing-college-sports-hubbard-carter. (Collegiate athlete plaintiffs brought a suit against the NCAA and Power 5 conferences, claiming that they missed out on NIL and other monetary opportunities because of the NCAA and conference amateurism rules prohibiting athletes to profit from their name, image and likeness or accept benefits).
[34] Aleksandr Ometov et al., *A Survey on Wearable Technology: History, State-of-the-Art and Current Challenges,* Computer Networks 1, 32 (2021).

or voice of the student-athlete."[35] As an example, under the Illinois Student-Athlete Endorsement Rights Act, an NIL student-athlete's 'name' is considered to be part or all of the athlete's name, their nickname, or any name that reasonably makes a person connect a name to the specific athlete.[36] The Illinois law further considers 'image' to be any visual depiction of the athlete and specifically includes a rendering under this definition.[37] Lastly, the law defines 'likeness' to mean "a physical, digital, rendering, or other depiction or representation of a student-athlete, including a student-athlete's uniform number or signature, that reasonably identifies the student-athlete with particularity."[38] In some cases, personal data can be used to create such digital representations, including within video games that utilize volumetric data (i.e., x,y,z coordinates in a three-dimensional space representing the positioning an athlete's bodily extremities in relation to each other at any given time) captured on-field, among other data, to depict the precise in-game movements of a student athlete which can make the digital representation of the student-athlete "identifiable." In 2023, Electronic Arts came out with EA Sports FC™ 24.[39] This cutting-edge HyperMotionV technology uses volumetric data captured by a number of cameras in a stadium; the data is collected and used in a machine learning algorithm to "recreate true-to-football motion."[40] If more companies capitalize on the capture and usage of an athlete's personal data, it will create further challenges and motivation to find equitable solutions at the intersection of NIL and personal data rights.

A. Lack of Framework for Control Over Personal Data and NIL

The integration of biometric and other personal data into various industries, including sports, has highlighted a significant challenge in the harmonization of legal frameworks at the federal and state levels.[41] While there have been bills proposed, there is currently no legal framework at the federal level that can provide any guidance. At the state level, the current patchwork of laws provides vastly different gradations of personal data protections. Unfortunately, for the athletes, this means that their ability to dictate the use of their personal data is highly state dependent. In a few states, such as California, the personal data protections are robust; however, in most others, they are at best inadequate and at worst entirely absent.[42]

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[35] Michael H. LeRoy, *Do College Athletes Get Nil? Unreasonable Restraints on Player Access to Sports Branding Markets*, 2023 U. ILL. L. REV. 53, 97 (2023) (citing S.B. 2338, 102nd Gen. Assemb. (Ill. 2021)).
[36] 110 Ill. Comp. Stat. Ann. 190/5 (2021).
[37] *Id.*
[38] *Id.*
[39] *EA Sports FC™ 24 | Pitch Notes- Gameplay Deep Dive*, EA, https://www.ea.com/games/ea-sports-fc/news/fc-24-gameplay-deepdive (June 9, 2024).
[40] *Id.*
[41] *See generally* John T. Holden & Kimberly A. Houser, *Article: Taboo Transactions Selling Athlete Biometric Data*, 49 FLA. ST. U. L. REV. 103, 149 (2021) (giving an overview of the various state and federal rules and regulations that may apply to the collection and use of athlete data).
[42] Cal Civ Code §§ 1798.100 — 1798.199.100.

Currently, there have been proposals from the NCAA Division I Council to help bolster NIL protections for players.[43] The NCAA makes rules and regulations to govern university athletics in America in order to ensure fairness and competitiveness, and the Division I Council can be thought of as the board of directors, managing day-to-day operations for Division I of the NCAA.[44] Among these proposals is the desire for standardized contract terms and education for the student athlete.[45] Standardized terms such as exclusivity obligations and recommended term lengths included in form contracts provided to athletes could provide athletes with a more transparent understanding of their rights and could therefore mitigate the risk of exploitation or unfair treatment from sponsors or other entities.[46] The proposals include provisions that address the education of student athletes not only in the applicable law, but also in navigating the NIL deals that are available to them.[47] These proposals show that the NCAA is open to a more fair, standardized, and consistent system that protects the athletes from exploitation by their respective universities.[48]

Multiple states have data privacy laws that may directly interfere with the NCAA proposals in one way or another. In such cases, these state laws supersede any NCAA rules or guidelines.[49] To further illustrate this lack of uniformity and its irreconcilable effects, laws such as the Illinois Student Athlete Endorsement Rights Act categorically prohibits student athletes from obtaining sponsorship deals from entities in certain areas of business including gambling.[50] This may seem well intentioned, but examples like Michigan State University contracting with Caesar's Sportsbook to advertise on campus seem to contradict such mandates.[51]

Professional athletes in various sports in the United States and other countries can collectively bargain for rights that go beyond what the law can provide for the use of their

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[43] *DI Council Introduces Proposals to Boost Student-Athlete NIL Protections,* NCAA (Oct. 3, 2023, 6:43:00 PM), https://www.ncaa.org/news/2023/10/3/media-center-di-council-introduces-proposals-to-boost-student-athlete-nil-protections.aspx.

[44] Megan Durham Wright, *DI Council Approves NIL Disclosure and Transparency Rules,* NCAA (Jan. 10, 2024, 7:56:00 PM), https://www.ncaa.org/news/2024/1/10/media-center-division-i-council-approves-nil-disclosure-and-transparency-rules.aspx.

[45] *DI Council Introduces Proposals to Boost Student-Athlete NIL Protections,* NCAA (Oct. 3, 2023, 6:43 PM) https://www.ncaa.org/news/2023/10/3/media-center-di-council-introduces-proposals-to-boost-student-athlete-nil-protections.aspx.

[46] *Id*.

[47] *NIL Round-Up: New NCAA DI Student Athlete Protections, Policy Proposals, Enforcement Actions, and the Current State of NIL*, Ropes & Gray (Feb. 14, 2024), https://www.ropesgray.com/en/insights/alerts/2024/02/nil-round-up-new-ncaa-di-student-athlete-protections-policy-proposals-enforcement-actions.

[48] *See generally Id.* (stating that the purpose for the DI Council proposals was to reduce exploitation of athletes and bad actors).

[49] Michael H. LeRoy, *Do College Athletes Get NIL? Unreasonable Restraints on Player Access to Sports Branding Markets,* 2023 U. Ill. L. Rev. 53, 70–71 (2023) (illustrating the various restrictions and regulations in different states that may conflict with NCAA proposals and guidelines).

[50] 110 Ill. Comp. Stat. Ann. 190/20 (2021).

[51] Synnott, C. Kevin, *Gambling Companies' Contracts in Higher Education Raise Concerns,* SSRN (Mar. 20, 2023), https://ssrn.com/abstract=4394642 ("in 2021 Caesars Sportsbook agreed to pay Michigan State University $8.4 million over five years to promote gambling on campus").

personal data or NIL.[52] Collegiate athletes, however, cannot collectively bargain for personal data protections based on their status as student-athletes.[53] Currently, college athletes are not considered employees of the universities for which they play,[54] and the uncertain status of the employer-employee relationship between universities and the student athletes creates more questions about the rights of individual athletes related to their NIL and personal data.[55] Previously, courts have looked at the issue and, although they have not reached a dispositive conclusion about the employer-employee relationship of universities and college athletes, have also looked at the schedules and obligations of collegiate athletes associated with their respective sports and believe it plausibly suggests that such a relationship exists.[56] If it were established that an employer-employee relationship existed between college student athletes and the respective universities that they play for, collectively bargaining in a unionized capacity then becomes an option for the athletes.[57] However, this question as to the employment status of college athletes has largely been left untouched due to its potential ramifications, including a lack of competitiveness in collegiate sports competitions that could result from addressing the issue due to potential inequalities in university budgets tied to athlete compensation.[58] Additionally, the Supreme Court has added that amateurism in college athletics needs to be protected.[59] However, with the way the college athletic world is evolving and with the highly visible, massive revenue generated from college sports, experts find it hard to see much amateurism in college athletics anymore.[60]

Looking to major professional sports leagues and respective players unions does not provide a template for college conferences as they have remained relatively inactive on

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[52] Daniel Greene, *The Visible Body and the Invisible Organization: Information Asymmetry and College Athletics Data*, 10 Big Data and Society 1, 10 (2023).
[53] John T. Holden & Kimberly A. Houser, *Article: Taboo Transactions Selling Athlete Biometric Data*, 49 Fla. St. U. L. Rev. 103, 149 (2021).
[54] *See generally* Tim Robinson, Outkicking the Coverage: The Unionization of College Athletes, 77 La. L. Rev. 585 (2016).
[55] Steve Berkowitz, *NCAA, Pac-12, USC Trial Begins With NLRB Over Athletes' Employment Status*, USA Today (Nov. 8, 2023, 2:43 PM), https://www.usatoday.com/story/sports/college/2023/11/07/ncaa-pac-12-usc-student-athlete-misclassification-trial/71483085007/.
[56] *See generally* Johnson v. NCAA, 556 F. Supp. 3d 491 (E.D. Pa. 2021). The lower court in *Johnson* established that it was plausible, given their schedules and obligations, that student-athletes should be considered employees of their respective universities without going as far as saying that they actually were employees; *see also Id.*
[57] *See generally* Tim Robinson*, Outkicking the Coverage: The Unionization of College Athletes,* 77 La. L. Rev. 585 (2016).
[58] *See generally* Jeffrey L. Kessler & David L. Greenspan, *The NIL in Amateurism's Coffin: How the NCAA's Policy Reversal Shows Once Again That Compensating Student-Athletes Won't Hurt College Sports*, Harv. J. Sports & Ent. L. (2020) (explaining how shifting the landscape in college football towards athletes being compensated by universities directly will destroy amateurism in the sport).
[59] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 120 (1984); *see also NCAA v. Alston*, 141 S. Ct. 2141 (2021) (maintaining that amateurism in college athletics is still part of an important debate even with the changing NIL landscape).
[60] *See* Dawson v. NCAA, 250 F. Supp. 3d 401, 408 (N.D. Cal. 2017) ("there is simply no legal basis for finding them to be 'employees' under the FLSA").

bargaining for these individual rights to personal data on a larger uniform scale.[61] Thus, one problem that could foreseeably arise out of college athletes' current inability to unionize is a rise in forced consent to rights agreements.[62] Complicating matters further, the courts' inconsistent stance on data ownership, including ownership of derivative data, adds another layer of complexity to the regulatory landscape.[63]

Intellectual property concerns, particularly copyright concerns, are not hard to imagine for collegiate athletes attempting to brand and market themselves. As the landscape of collegiate sports evolves, the intersection of their athletic prowess and personal branding has created a complex legal environment.[64] With the newfound opportunity to profit from their own images and identities, athletes often grapple with navigating the intricacies of licensing agreements, potential conflicts with their university's branding, and the broader web of copyright protection.[65]

B. Entities Involved in the Data Collection Process

There are common roles that may be addressed by different entities from state to state. Athletes will likely be concerned about their rights in the context of who (or what) entities are collecting their personal data, processing their personal data, and using their personal data given the exorbitant revenue generated from and invested in the collection of their data.[66] Outside the US, European laws like the General Data Protection Regulation (hereafter, "GDPR") may apply if the athlete is participating in an event in a European Union (hereafter, "EU") country or if their data is being processed in an EU country.[67] The GDPR and its structure have likely influenced, and may continue to influence, data privacy and protection legislation passed around the world including in the United States.[68]

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[61] *See generally Id.* at 120 (Discussing the various but few instances in professional sports where collective bargaining has addressed the issue of data collected from players).
[62] Sarah M. Brown & Katie M. Brown, *Should Your Wearables Be Shareable? The Ethics of Wearable Technology in Collegiate Athletics*, 32 Marq. Sports L. Rev. 97, 114 (2021).
[63] *See generally* John T. Holden & Kimberly A. Houser, *Article: Taboo Transactions Selling Athlete Biometric Data*, 49 Fla. St. U. L. Rev. 103, 149 (2021) (illustrating the different approach taken when assessing the rights to raw data and derivative data).
[64] Charles R. Johnson & Richard Pianoforte, *What Student Athletes Need to Know About Their NIL Income*, Kiplinger Personal Finance (Dec. 13, 2023), https://www.kiplinger.com/personal-finance/nil-income-what-student-athletes-need-to-know.
[65] Joseph Crotty, *Mitigating The Risks Of Introducing Name, Image, And Likeness Rights In College Athletics*, JD Supra (Nov. 21, 2023), https://www.jdsupra.com/legalnews/mitigating-the-risks-of-introducing-7350406/.
[66] Ray Walia, *The Untapped Potential Of Athletes' Data*, Forbes (Sep. 22, 2023, 7:15 AM), https://www.forbes.com/sites/forbesbusinesscouncil/2023/09/22/the-untapped-potential-of-athletes-data/?sh=198a77125719.
[67] *Who does the data protection law apply to?*, European Commission, https://commission.europa.eu/law/law-topic/data-protection/reform/rules-business-and-organisations/application-regulation/who-does-data-protection-law-apply_en#:~:text=The%20GDPR%20applies%20to%3A%201%20a%20company%20or,monitoring%20the%20behaviour%20of%20individuals%20in%20the%20EU (Dec. 14, 2023).
[68] Stephany C. Amdahl, The European Union's GDPR and Data Protection Law in the U.S. and China 16-19 (May 2023) (Bachelor's Thesis, Norwegian University of Science and Technology) (on file with the Faculty of Humanities Department of Historical and Classical Studies).

There are numerous differences between the GDPR and US data privacy law, and while they are similar in some instances, they should not be treated as such. For example, the standard mandated by the California Consumer Privacy Act (hereafter, "CCPA") is that individuals can opt out of data collection or sharing while the GDPR standard is that the individual has to opt into the collection and sharing of their data.[69]

In California, data controllers bear the brunt of the responsibility under data privacy laws including disclosing what the data is being used for and who is using it.[70] Generally, data controllers are defined as "a person [or organization] that, alone or jointly with others, determines that the purposes for and means of processing personal data."[71] In college athletics, examples of a data controllers could the individual athlete or the university themselves.[72] Some universities collect data in many categories such as competition data, training data, physical health data and more specific medical identifiers and metrics.[73] These entities are tasked with overseeing the processing of personal data, ensuring compliance with relevant data protection regulations, and upholding the privacy rights of individuals.[74] By attempting to maintain transparent data handling procedures and promoting a culture of accountability, data privacy law makers are trying to instill confidence among participants in the sports data ecosystem by making the data controller accountable.[75]

Differences arise in the responsibilities of data controllers and data processors from jurisdiction to jurisdiction. Data processors are individuals or entities that, under the authority of the data controller, process data.[76] Data processors are responsible for handling personal information in accordance with the stipulated obligations contractually established by the data controller.[77] For example, under the European GDPR, data collectors can only process data collected from individuals under specific circumstances, such as to fulfill a legal or contractual obligation or to serve a public interest.[78] California's CCPA contains no such restrictions or limitations and only says that a sale or distribution of data to a third party must be for a specified and limited purpose.[79] The CCPA requires that the use, sale, and retention of data by the processor must be proportionate to achieve the purposes for which it was collected.[80] Likewise,

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[69] John T. Holden & Kimberly A. Houser, *Article: Taboo Transactions: Selling Athlete Biometric Data*, 49 Fla. St. U.L. Rev. 103, 129 (2021).
[70] California Consumer Privacy Act of 2018, Cal Civ Code § 1798.100 (2018).
[71] Colo. Rev. Stat. Ann. § 6-1-1303(7)(West).
[72] *See generally* Daniel Greene et al., *The Visible Body and the Invisible Organization: Information Asymmetry and College Athletics Data* 10 Big Data & Society 1 (2023) (discussing the imbalance in both control and power between universities and athletes regarding the collection and use of their personal data).
[73] *Id.*
[74] Cal Civ Code § 1798.100.
[75] *Id.*
[76] Sam Noss, *The Difference Between Data Controllers and Data Processors*, Data Grail (Jul. 25, 2023), https://www.datagrail.io/blog/data-privacy/the-difference-between-data-controllers-and-data-processors/.
[77] Cal Civ Code § 1798.100.
[78] Council Regulation 2016/679, art. 6 of Apr. 27, 2016, General Data Protection Regulation, 2016 O.J. (L 119) 1, 36 [hereinafter *GDPR*].
[79] Cal Civ Code § 1798.100.
[80] *Id.*

in the Colorado Privacy Act, there is no limitation on the data controller's motive for processing data.[81] The majority of the current United States' data privacy laws focus more on the responsibility to the individual from whom the data is collected and, subsequently, enabling the free market to regulate the kinds of activities that data controllers engage in.[82]

In line with the CCPA's guidelines, data processors in the sports data industry are required to implement appropriate technical and organizational measures to ensure the security and confidentiality of athlete's personal data they handle.[83] They must also facilitate the rights of consumers, including the right to access, delete, and opt-out of the sale of their personal information.[84] In collegiate athletics, one example of a data controller-data processor relationship in college football is Rutgers football's relationship with Oura Health, a leading health technology company which, as a data processor, provides information such as temperature, heart rate, heart rate variability, and respiratory rate for the Rutgers football medical staff to evaluate and quantify individual recovery, thereby informing tailored training activities.[85]

It is generally uniformly established that the role of the data processors is required to be specified by a contract (although the GDPR uses the specific language "contract" and the CCPA uses the term "agreement", both acts require data collectors and data processors to have a formal agreement or contract stipulating the terms of the relationship, the data to be processed, and how privacy concerns are to be addressed).[86]

VI. Governing Authorities over NIL and Data

Aside from statutes, there are rules and regulations that govern the collegiate athlete's use of their personal data and NIL. However, laws governing NIL are not clear, and the NCAA provides vague guidance for the member institutions to follow.[87] The NCAA categorizes its guidance into separate issue buckets.[88] First, the NCAA provides that member institutions must provide education and monitoring to student-athletes about NIL-related issues.[89] Specifically, the

[81] C.R.S. Title 6, Art. 1.
[82] *See generally* Cal Civ Code § 1798.100.
[83] *Id*.
[84] *Id.*
[85] *Football Partners With Oura Ring*, Rutgers University Athletics (Dec. 10, 2020), https://scarletknights.com/news/2020/12/10/football-partners-with-oura-ring.aspx; see also Joe Lemire, *Real Madrid Partners with Oura Health, All Players Will Receive Oura Rings to Track Sleep and Recovery*, Sports Business Journal (Dec. 14, 2022), https://www.sportsbusinessjournal.com/Daily/Issues/2022/12/14/Technology/real-madrid-oura-health-oura-rings-performance-sleep-recovery.aspx; see also *Wearable Integrations*, Own It, https://ownitapp.com/sports/ (June 15, 2024).
[86] *See* Cal Civ Code § 1798.100; *GDPR*.
[87] *See generally* NCAA Division 1, Institutional Involvement in a Student-Athlete's Name, Image, and Likeness Activities, Oct. 26, 2022.
[88] *Id.*
[89] *Id.* at 3.

institution must provide athletes with financial literacy, tax, social media, and entrepreneurship training.[90] Additionally, the institution must report the specific NIL activities of athletes.[91]

Second, institutions must provide satisfactory support to inform athletes of specific NIL activities, which the NCAA separates by permissible and impermissible activity.[92] Permissible activities include, but are not limited to, providing athletes with information about NIL opportunities of which the school is aware, promoting an athlete's NIL activity, providing athlete relevant contact information for NIL entities, such as collectives, and engaging NIL entities to provide a marketplace for the athlete that does not involve interference by the institution.[93] In essence, an NIL entity is any group whose primary function is to represent the athletic department's interest by cultivating relationships with donors – individuals, large corporations, small businesses, non-profits, and others alike – who desire to support collegiate athletes through NIL.[94] NIL entities quite often take the form of NIL collectives.[95] NIL collectives are groups, usually comprised of prominent alumni, that pool together funds from donors to make them.[96] These collectives are subject to restrictions articulated by the NCAA.[97]

Third, the NCAA outlines permissible and impermissible activities concerning institutional support for the NIL collective.[98] Namely, permissible activities include a staff member assisting the NIL entity to raise funds for the NIL entity through appearances at fundraisers or donated memorabilia, orchestrating meetings between donors and the NIL entity.[99] Impermissible activities include donating cash directly to the NIL entity or indirectly to a specific person to solicit their donation and allowing an athletics staff member to be employed by the NIL entity.[100]

Fourth, the institution may not negotiate, revenue share, or compensate the NIL entity for its services to the university.[101] The NCAA lists examples such as the institution entering into a joint contract with the athlete concerning the sale of a product for the athlete's NIL, or the athlete receiving compensation for promoting a competition in which the athlete is participating.[102]

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[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] Name, Image, and Likeness, Tax Payer Advocate Gov (Mar. 7, 2023), https://www.taxpayeradvocate.irs.gov/get-help/general/nil/.
[95] Bill Carter, *Seven data points that will tell the story of NIL in 2023,* Sports Business Journal (Jan. 17, 2023), https://www.sportsbusinessjournal.com/SB-Blogs/OpEds/2023/01/17-Carter.aspx.
[96] Pete Nakos, *What Are NIL Collectives and How Do They Operate*, On3 (Jul. 6, 2022), https://www.on3.com/nil/news/what-are-nil-collectives-and-how-do-they-operate/.
[97] Meghan D. Wright, *Division I Council Approves NIL Disclosure and Transparency Rules,* NCAA (Jan. 10, 2024, 7:56 PM) https://www.ncaa.org/news/2024/1/10/media-center-division-i-council-approves-nil-disclosure-and-transparency-rules.aspx.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*

Each area of guidance is noticeably vague and fails to provide a clear enforcement mechanism. Although the conferences have a substantial role to play, they mostly reiterate the NCAA's unclear guidance. The NCAA clarifies its enforcement guidance through memoranda sent to its member institutions.[103] To date, the NCAA has only enforced the guidelines one time when it placed University of Miami on probation for NIL recruiting violations.[104] Nevertheless, the NCAA's recent guidance indicates that it intends to assume a more prominent role in the ongoing debate about athlete NIL.[105] First, the NCAA, on June 26, 2023, sent a memorandum to its member institutions asserting that its guidance supersedes that of more lenient NIL laws passed by other states.[106] Currently, 32 states have adopted legislation concerning NIL and some states have even included express language that bars the NCAA from enforcing its own NIL policy.[107]

The burgeoning conflict between states and the NCAA is no more apparent than in Texas where the state legislature passed Texas House Bill 2804 which, in effect, prevents the NCAA from levying sanctions or punishments against universities in Texas who violate NCAA guidelines concerning NIL.[108] At Texas A&M, the 12th Man+ Fund, an NIL collective, uses the university's fundraising arm to further its fundraising efforts.[109] Such an arrangement is in direct conflict with the aforementioned NCAA Guidance that forbids universities from fundraising for NIL.[110] Nevertheless, the NCAA has taken no action on the matter.[111]

As it relates to personal data, and in particular a determination of who owns the personal data collected from a college athlete, the relevant statutes in the United States, as well as the common law need to be analyzed. Some States have statutes that touch on personal data of NIL while others have proposed bills. There are a very few cases on this topic that have made it to

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[103] Ross Delinger, *NCAA Sends Letter to Remind Schools They Cannot Compensate Athletes*, Sports Illustrated (Mar. 1, 2023), https://www.si.com/college/2023/03/01/texas-am-letter-ncaa-warns-nil-collectives-money-school.
[104] Dan Murphy, *NCAA Sanctions Miami Women's Hoops For NIL-Related Infraction*, ESPN (Feb. 24, 2023), https://www.espn.com/womens-college-basketball/story/_/id/35727606/ncaa-sanctions-miami-women-hoop-nil-related-infraction.
[105] Madison Willaims, *NCAA Releases NIL Memo, Warns Schools That Rules Supercede State Laws,* Sports Illustrated (Jun. 27, 2023), https://www.si.com/college/2023/06/27/ncaa-releases-nil-memo-warns-schools-rules-supercede-state-laws.
[106] Nicole Auerbach, *NCAA Says Schools Must Comply With its NIL Rules in States With Conflicting Laws*, The Athletic (Jun. 27, 2023), https://theathletic.com/4644949/2023/06/27/ncaa-nil-rules-state-laws/?redirected=1&access_token=14728221&isNewUser=1.
[107] Cate Charon, *The State-by-State NIL Legislation Guide*, Student Press Law Center (Feb. 22, 2023), https://splc.org/2023/02/the-state-by-state-nil-legislation-guide/; OK S.B. 840, Student Athletes Name, Image, and Likeness Act, § 6 (May 25, 2023) ("A collegiate athlete association shall not and shall not authorize its member institutions to…").
[108] Shenan Jeyarajah, *NCAA Clarifies NIL Policy to Member Schools, Explains Why It Must Be Prioritized Over State Laws Per Reports*, CBS Sports (June 27, 2023, 2:53 PM), https://www.cbssports.com/college-football/news/ncaa-clarifies-nil-policy-to-member-schools-explains-why-it-must-be-prioritized-over-state-laws-per-reports/.
[109] *Id.*
[110] *Id.*
[111] *Id.*

court; those that have made it have dealt with copyright law, privacy law, constitutional law, contract law, and antitrust law.

VII. Legal Precedent

A. Washington and Illinois Consumer Data Privacy Laws

As a federal law in the U.S., the Health Insurance Portability and Accountability Act (hereafter, "HIPAA") established national standards to protect against the disclosure of an individual's Protected Health Information ("PHI").[112] PHI is any information in the medical record or designated record set that can be used to identify an individual and that was created, used, or disclosed in the course of providing a health care service such as diagnosis or treatment.[113] With respect to wearable technology, personal data is not categorized as PHI and not protected by HIPPA if the wearer is using the device and data for personal use. However, if a healthcare provider becomes involved and receives data from the wearable device, such personal data would become PHI.[114] Notably, HIPAA, the predominant health-confidentiality law, aims to protect the confidentiality of interactions between patients and their doctors.[115] Thus, HIPAA does not cover the numerous scenarios where health data and other related sensitive personal data is collected and stored by wearable device companies for personal and other non-medical uses, unless the data were requested by an individual's medical provider.[116] Covered entities under HIPAA include healthcare providers and related businesses associates.[117] Educational institutions, professional sports teams, and employers are exempt from HIPAA, although teams may be subject to HIPPA when they act as health care providers.[118]

Washington, Illinois, and California are three States that have relevant information on this topic. As previously noted, California's CCPA has similar principles to the GDPR.[119] Many other states have followed California in the implementation of their consumer data privacy acts. While some of the enacted privacy laws are extensive, there is a lack of guidance in the collection of an athlete's personal data. On April 17, 2023, Washington State passed the Washington My Health My Data Act (hereafter, "WA Act"), with the purpose to protect individuals' personal health data

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[112] *See generally* Health Insurance Portability and Accountability Act of 1996 (*HIPAA*).
[113] *Protected Health Information (HIPAA) Regulations and Research*, University of Virginia (Jun. 19, 2024) https://research.virginia.edu/irb-hsr/protected-health-information-hipaa-regulations-and-research.
[114] *The HIPPA Compliance of Wearable Technology*, Healthcare Tech Outlook (Oct. 20, 2020) https://www.healthcaretechoutlook.com/news/the-hipaa-compliance-of-wearable-technology-nid-2020.html.
[115] HIPAA COMPLIANCE ASSISTANCE, SUMMARY OF THE HIPAA PRIVACY RULE, UNITED STATES DEPT. OF HEALTH AND HUM. SERV., at 3 (Oct 19, 2022), https://www.hhs.gov/sites/default/files/privacysummary.pdf.
[116] Kim Theodos & Scott Sittig, *Health Information Privacy Laws in the Digital Age: HIPAA Doesn't Apply,* 18 PERSPECTIVES IN HEALTH INF. MGMT., at 2 (Dec. 7, 2020).
[117] Maureen A. Weston, *Foreword: The Anxious Athlete: Mental Health and Sports' Duty and Advantage to Protect*, 13 Harv. J. of Sports & Ent. Law 3, 42 (2022).
[118] *Id.* at 43 (An example of an exception when teams our subject to HIPAA is when a team outside-doctor bills, charges, or transmits PHI to an insurance plan).
[119] *See generally* Cal. Civ. Code Ann. § 1798.100 (West).

that is not covered under HIPAA.[120] Under the WA Act, if data is collected from non-covered HIPAA entities, it is not provided the same protection as if it was collected by a healthcare provider.[121] The WA Act is a very broad application of data privacy rights that took effect on March 31, 2024.[122] The WA Act states that a regulated entity "may not collect, use, or share" consumer health data without obtaining the consumer's affirmative consent prior to collection, use, or sharing for that specific use of collection.[123] It defines consumer health data as "personal information that is linked or reasonably linkable to a consumer and that identifies the consumer's past, present, or future physical or mental health status."[124] Consumer health data includes, but is not limited to, vital signs, biometric data (including physiological data), genetic data, and precise location information.[125] It is important to note that the WA Act defines biometric data to include measurement of physiological data.[126] The inclusion of physiological data and vital information is notable for college athletes as it excludes applicable universities from collecting, using, and selling physiological data collected from them.

The WA Act does state that "individuals acting in an employment context" are not included in the definition of a consumer.[127] Given that college athletes are students and not employees in the school context, universities would not be able to collect, use, or sell data without obtaining prior consent. Unless the student-athlete is classified as an employee for a company collecting such health data, it seems the student-athlete would have the ability to control data collection regarding their health data.

Washington does not have a private cause of action for consumers. Instead, it offers a joint committee to review enforcement actions from the attorney general.[128] Violations of the WA Act are considered a violation of the Washington Consumer Protection Act, in which a $7,500 fine is applied for each violation.[129] These damages can be up to $25,000 if there was malicious intent.[130] It is unclear whether each data point or data type collected from a student-athlete would be a violation or whether the data would be viewed in its totality; if the former, there could be a plethora of violations from capturing multiple types of data from a single student athlete in a single competition without consent. The WA Act has extreme breath as it not only covers a Washington resident, but also a "natural person whose consumer health data is collected in

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[120] *See generally* Wash. Rev. Code Ann. § 19.373.005-900 (West).
[121] *Id.*
[122] *Id.* at § 5(1)(a).
[123] *Id.* at § 5(2).
[124] *Id.* at § 3(8)(a).
[125] *Id.* at § 3(8)(v-xi).
[126] *Id.* at § 3(4).
[127] Wash. Rev. Code Ann. § 19.373.010(7) (West).
[128] Wash. Rev. Code Ann. § 19.373.010(13) (West).
[129] *See generally* Elizabeth Johnson, *My Health, My Data, My Class Action Lawsuit: Why the Washington My Health My Data Act Deserves EVERY Company's Attention*, Wyrick Robbins Yates & Ponton LLP (April 25, 2023), https://www.jdsupra.com/legalnews/my-health-my-data-my-class-action-1717399/; *see also,* Wash. Rev. Code Ann. § 19.373.090 (West).
[130] *Id.*

Washington."[131] This may include any college athlete, from any state, playing or training in Washington.

Washington's new law is broad and seems to provide student athletes rights and protection over various forms of their personal data. The WA Act's opt-in requirement is different from the well-known CCPA, which provides the consumer the right to opt-out, also known as ability to withdraw consent.[132] The CCPA was amended on December 16, 2020 and took effect on January 1, 2023.[133] California was the first state to enact a comprehensive data privacy act, following the GDPR footsteps.[134] The CCPA makes it clear that a business must provide notice that it is collecting personal information from a consumer; in this context, personal information includes biometric information.[135] The CCPA specifies that biometric information includes physiological information as well as health or exercise data that contains identifying information.[136] Various forms of student-athlete personal data collected from wearables or non-wearable devices today would likely be classified as biometric data or sensitive personal information. Under the latter, "personal information collected and analyzed concerning a consumer's health" qualifies and requires notice to be provided and ability to opt-out.[137] Notably, Washington does not specifically provide direction to data being transferred in and out of the state; however, it does cover the collection of the data.[138] Many states have utilized California's data privacy act as a framework for its own laws.

The Illinois Personal Information Protection Act ("Illinois Act") is another seminal statute for data protection. The Illinois Act applies to data collectors such as organizations, businesses, or other entities that collect, handle, or store non-public personal information. The Illinois Act's important elements include breach notification, data disposal, and security requirements. The breach notification provision requires that covered organizations notify Illinois residents when any of their personal data has been compromised. The data disposal provision requires organizations to dispose of information that is not necessary for the organization's services or operations. Finally, the security requirements provision requires data collectors to formulate and preserve "reasonable security measures" to protect an individual's record from a potential breach. Unlike other state statutes, the Illinois Act includes a private right of action for violations of the law.[139] A private right of action means that a private citizen can sue to enforce the Illinois Act. In contrast, other states maintain enforcement through public officials such as state agency representatives or attorneys general.

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[131] Wash. Rev. Code Ann. § 19.373.010(7) (West).
[132] Wash. Rev. Code Ann. § 19.373.005(3) (West); Cal. Civ. Code Ann. § 1798.100(d) (West).
[133] Cal. Civ. Code Ann. § 1798.100 (West).
[134] Donna Calia, *Schrems II: The Eu's Influence on U.S. Data Protection and Privacy Laws*, 21 WASH. U. GLOBAL STUD. L. REV. 247 (2022).
[135] Cal. Civ. Code Ann. §§ 1798.100 (a), 1798.140 (v)(1)(West).
[136] Cal. Civ. Code Ann. § 1798.140(c) (West).
[137] Cal. Civ. Code Ann. § 1798.140(ae)(2)(b) (West).
[138] *See generally* Wash. Rev. Code Ann. § 19.373.005-900 (West).
[139] *Data Privacy and the Private Right of Action*, CLARIP, https://www.clarip.com/data-privacy/data-privacy-and-the-private-right-of-action/#:~:text=The%20BIPA%20is%20a%20law,a%20private%20right%20of%20action.

Currently, California has the most extensive consumer data privacy right act in the United States, while Washington has the most extensive data privacy rights for health data. While California and Washington both specifically cover protection of physiological data, states like Illinois do not specifically mention physiological data in its biometric data section, which includes "other unique physical representation or digital representation of biometric data."[140] However, the digital representation of biometric data may be physiological data itself. The vague nature of these definitions will likely be interpreted by courts in years to come.[141]

Washington was not the only state in 2023 to pass a strict health data privacy law; Nevada and Connecticut also followed.[142] Nevada's Act relating to data privacy, effective March 31, 2024, is very similar to Washington's Act; however, a main difference is that Nevada does not create a private right of action.[143] Connecticut amended the Connecticut Data Privacy Act on June 2, 2023 to address health data based on Senate Bill 3 ("SB 3"), which contained consumer health data provisions that would, among other things, prohibit entities from selling or processing consumer health data without obtaining consumer consent.[144] However, the amendment focuses on reproductive or sexual health care data.[145] These new acts and amendments are a step in the right direction for athletes to obtain more rights and control over their own personal data.

Most of the consumer data privacy right acts that have been passed focus on the right to information, right to access, right to delete, and right to modify personal information that has been collected by collectors and processors. However, most of the acts do not include or focus on the collection of health data not covered by HIPAA. Generally, HIPAA rules do not protect health information that isn't created, received, maintained, or transmitted by covered entities, such as hospitals.[146] Further, in some instances, athletes sign away their protected health information rights covered under HIPAA when they sign an informed consent form.[147]

B. Who Does the General Data Privacy Regulation Apply to, and Why is it Relevant?

Outside the U.S., while the GDPR does not directly address ownership rights in personal data per se, it significantly empowers individuals by providing them with greater control over

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[140] Cal. Civ. Code Ann. § 1798.140(c) (West); Wash. Rev. Code Ann. § 19.373.010(4) (West).
[141] 815 Ill. Comp. Stat. Ann. 530/5.
[142] David Stauss & Keir Lamont, *The Year That Was in State Data Privacy*, IAPP (Oct. 23, 2023), https://iapp.org/news/a/the-year-that-was-in-state-data-privacy/.
[143] Nev. SB 370 § 34.
[144]Kirk J. Nahra et al., *Connecticut Legislature Passes Privacy Bill Addressing Health Data and Child Online Safety,* WILMER HALE (Jun. 9, 2023), https://www.wilmerhale.com/en/insights/blogs/wilmerhale-privacy-and-cybersecurity-law/20230609-connecticut-legislature-passes-privacy-bill-addressing-health-data-and-child-online-safety.
[145] *See generally* Conn. Gen. Stat. Ann. § 42-515-530 (West).
[146] *What Health Information is Protected by the Privacy Rule?*, NIH, https://privacyruleandresearch.nih.gov/pr_07.asp (June 15, 2024).
[147] Kirsten Peremore, *Professional athletes' health information and HIPAA*, PAUBOX (Aug. 18, 2023), https://www.paubox.com/blog/professional-athletes-health-information-and-hipaa.

their personal information.[148] The GDPR applies to all individuals within the EU, regardless of citizenship, meaning it covers non-citizens residing in the EU.[149] For a US college athlete, this regulation would apply if they participate in activities involving the EU, such as international competitions, training, or activities in EU territories. In light of these, athletes need to be aware of how their personal data is collected, processed, and stored under GDPR rules. Compliance may require additional measures for data protection, impacting how they share their information with organizations, sponsors, and other entities operating within the EU.

Through mechanisms like the right to access, rectify, and erase personal data, as well as the right to data portability and the right to object to processing, the GDPR enables individuals to exert a substantial influence over how their information is handled.[150] The GDPR also necessitates explicit consent for data processing activities, fostering transparency and accountability.[151] While not framed explicitly as ownership rights, the GDPR establishes a sturdy framework that enhances individuals' autonomy and control over their personal data.[152]

One argument for individual ownership of personal data rests on the premise that fundamental aspects of ownership align more closely with the rights and controls granted to individuals under regulations like the GDPR than with those held by companies. According to the Oxford Journal of Law and Biosciences, key elements of ownership include the right to exclude others, the ability to transfer ownership, divisibility of interest, and absolute enforceability of these rights. GDPR empowers individuals with the right to access and port their personal data, meaning companies cannot legally exclude them from their own data.[153] This exclusion right is critical to the concept of ownership, implying that individuals are the sole entities capable of truly 'owning' their data.[154] Thus, if personal data ownership were to be acknowledged, it logically follows that this ownership would belong to individuals rather than companies, as only individuals possess the full suite of rights necessary to meet the legal criteria for ownership.

The GDPR applies to the processing of personal data in situations involving the activities of a controller or processor within the EU, irrespective of whether the actual processing occurs within the EU.[155] It also extends its applicability to the processing of personal data of individuals within the EU by controllers or processors located outside the Union, provided that the processing is connected to either offering goods or services to those individuals or monitoring their behavior within the EU.[156] Additionally, the GDPR covers the processing of personal data by a controller not established in the Union but subject to Member State law due to public

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[148] *See GDPR.*
[149] *Id.* at 32-33.
[150] *Id.* at 43.
[151] *Id.* at 39-40.
[152] *See Id*.
[153] *See*
[154] Kathleen Liddell, *Patient Data Ownership: Who Owns Your Health?*, 8 J.Law. Biosci. 2 (2021) (discussing whether or not health information is or should property given how it is treated by the law).
[155] *GDPR* AT 32-33.
[156] *Id.*

international law obligations.[157] In essence, the GDPR has a broad reach, affecting all people in the EU whether or not they are citizens and providing a framework for similar laws around the world.[158]

C. Relevant Definitions in the General Data Privacy Regulation

The enactment of the GDPR has had ripple effects globally as a model legal framework for collection processing, and use of personal data.[159] While the GDPR is not the governing law in the United States and likely only affects a marginal number of collegiate athletes because most college athletes are American citizens and most events do not take place in Europe, familiarity with the law can be useful in navigating currently enacted and upcoming data privacy laws.[160]

Under GDPR, "personal data" is defined as "any information relating to an identified or identifiable natural person…an identifiable natural person is anyone who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person[.]"[161] Underneath this broad definition of "personal data" are subsections of data specifically mentioned including "genetic data," "biometric data" and "data concerning health."[162] These data are notable under GDPR as they have different requirements for data controllers and processors related to consent and other relevant areas. The GDPR's sweeping definition of personal data[163] illuminates the European Union's goal of standardized data protections.[164]

The GDPR further goes on to define what "processing" means, encompassing a comprehensive range of activities, reflecting the multifaceted nature of data handling in the context of the GDPR.[165] "Processing" includes not only fundamental actions such as collection, recording, and storage but also extends to more intricate operations like organization, structuring, and adaptation.[166] The definition incorporates the various ways in which processed data can be utilized or shared, including "collection, recording, organization, structuring, storage, adaption or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise

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[157] *Id.*
[158] *See Id.*
[159] Stephany C. Amdahl, The European Union's GDPR and Data Protection Law in the U.S. and China 16-19 (May 2023) (Bachelor's Thesis, Norwegian University of Science and Technology) (on file with the Faculty of Humanities Department of Historical and Classical Studies).
[160] *See generally Id.* (showing how other countries around the world including the United States have already been affected by the GDPR and will likely continue to be influenced by it in drafting legislation).
[161] *See GDPR* at 33.
[162] *Id.* at 34.
[163] *Id.* at 33.
[164] *See generally* Hope Anderson et al., *The Data Act – the EU's Bid To "Ensure Fairness in the Digital Environment and a Competitive Data Market" – Has Been Adopted,* WHITE & CASE (Nov. 30, 2023), https://www.whitecase.com/insight-alert/data-act-eus-bid-ensure-fairness-digital-environment-and-competitive-data-market-has.
[165] *See GDPR* at 33.
[166] *Id.*

making available, alignment or combination, restriction, erasure or destruction."[167] Additionally, the regulatory scope covers actions like alignment or combination of data, imposition of restrictions, as well as the critical aspects of erasure or destruction.[168] This exhaustive delineation underscores the GDPR's intent to comprehensively regulate and safeguard the diverse processes involved in handling personal data.[169]

Although there are more definitions that are relevant, an additional definition to focus on is how "pseudonymization" is defined.[170] This term refers to the methodical processing of personal data in a manner that severs its direct link to a specific data subject without obliterating its utility.[171] Through "pseudonymization", the personal data remains functional for intended purposes but becomes detached from immediate identification.[172] However, to uphold the integrity of this privacy safeguard, the supplementary data must be subject to rigorous technical and organizational measures.[173]

D. Current Bills

Many important actors, including the NCAA President, Charlie Baker, have called for Congress to pass comprehensive NIL legislation to solve the patchwork of state laws on the issue.[174] However, little progress has been made, and prospects of material change are unknown until there is more political appetite or consensus on the issue of NIL.[175] Nevertheless, several draft bills from the House of Representatives and the Senate provide insight into Congress's thinking on the subject. First, Senator Chris Murphy and Congresswoman Lori Trahan have advocated for a bill that would essentially create an unimpeded market for endorsement deals in college athletics.[176] Senator Cory Booker proposed a bill that would create the College Athletics Corporation, an independent body that would have investigative and supervisory powers over matters concerning collegiate athletics – particularly, NIL.[177] Conversely, members of the Senate

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[167] *Id.*
[168] *Id*.
[169] *See generally* Anderson, *supra* note 164.
[170] *See GDPR* at 33.
[171] *Id.*
[172] *Personal Data Pseudonymization: GDPR Pseudonymization What and How*, I-SCOOP, https://www.i-scoop.eu/gdpr/pseudonymization/ (Dec. 14, 2023).
[173] *See GDPR* at 33.
[174] Ross Delinger, *NCAA President Charlie Baker Continues to Push for NIL Legislation With Lawmakers*, SPORTS ILLUSTRATED (MAY 9, 2023), https://www.si.com/college/2023/05/09/ncaa-president-charlie-baker-continues-to-push-for-nil-legislation-with-lawmakers.
[175] *Id.*
[176] *Trahan, Murphy Reintroduce Legislation to Codify College Athletes' Unrestricted Right to Their Name, Image, Likeness*, LORI TRAHAN (Jul. 26, 2023), https://trahan.house.gov/news/documentsingle.aspx?DocumentID=2957.
[177] Ralph D. Russo, *Booker, Democratic Lawmakers Introduce NCAA Reform Bill,* ASSOCIATED PRESS NEWS (Dec. 17, 2020, 6:59 PM), https://apnews.com/article/college-football-basketball-football-kirsten-gillibrand-courts-f44ca30fe9c5eb923102bb4fd3a53a34.

Commerce Committee, Tommy Tuberville and Joe Manchin, proposed the Protecting Athletes, Schools, and Sports (PASS) Act which included the following changes: reallocating federal funds, such as pell grants, away from college athletics, requiring the NCAA to maintain a uniform standard to properly enforce NIL, requiring NIL entities and boosters to be affiliated with college or university, creating a "Uniform Standard Contract" for student-athlete use in NIL deals, and prohibiting NIL agreements associated with alcohol and drugs, or in conflict with "existing school or conference licenses."[178] Additionally, the PASS Act would require anonymized NIL data to be published on a publicly accessible website.[179]

However, another pending bill is far more expansive as it addresses a systemic issue in collegiate sports: the employment status of a collegiate athlete. Senators Bernie Sanders of Vermont and Chris Murphy of Connecticut introduced the *College Athlete Right to Organize Act* ("Athlete Act").[180] The Athlete Act would amend the *National Labor Relations Act* to expand the definition of employee to include, "any individual who participates in an intercollegiate sports for an institution of higher education and is a student enrolled in the institution of higher education."[181] To satisfy this definition, the Athlete Act demands the athlete meet several requirements: (1) the athlete receives direct compensation in any form such as scholarships, financial assistance, or other grants; and (2) participation in a collegiate sport at the university.[182] Similar to the professional athlete model, collegiate athletes, with their newfound status as "employees", could collectively bargain for specific pay, working conditions, practice hours, and other benefits.[183] This proposed model begs the question as to what the NCAA's specific role - if any - would be in policing such a model.[184]

In the health data space, Senators Amy Klobuchar, Elizabeth Warren, and Mazie Hirono introduced the *Upholding Protections for Health and Online Location Data Privacy Act* that would expand statutory protections on health and location data stored on wearable devices and other data capturing systems.[185] Currently, there are few restrictions on entities that collect consumer personal data from selling, sharing, transferring, or providing access to such information—regardless of whether such information is identifiable or not.[186] This bill seeks to

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[178] *Tuberville Introduce Legislation to Address Name, Image and Likeness in College Sports*, Joe Manchin (Jul. 25, 2023), https://www.manchin.senate.gov/newsroom/press-releases/manchin-tuberville-introduce-legislation-to-address-name-image-and-likeness-in-college-sports.

[179] *Id.*

[180] *College Athlete Right to Organize Act*, Senate Gov, https://www.murphy.senate.gov/download/caro-fact-sheet (June 22, 2023) (cargo fact sheet for Chris Murphy).

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] News Releases, *Klobuchar, Warren, Hirono Introduce Legislation to Expand Personal Health Data Privacy Protections* (Mar. 3, 2023), https://www.klobuchar.senate.gov/public/index.cfm/2023/3/klobuchar-warren-hirono-introduce-legislation-to-expand-personal-health-data-privacy-protections#:~:text=The%20Upholding%20Protections%20for%20Health,health%20data%20for%20advertising%20purposes.

[186] Fedric D. Bellamy, *U.S. Data Privacy Laws to Enter New Era in 2023,* REUTERS (Jan. 12, 2023), https://www.reuters.com/legal/legalindustry/us-data-privacy-laws-enter-new-era-2023-2023-01-12/.

prevent companies from monetizing personally identifiable health and location data.[187] Additionally, it provides consumers with increased ownership and control of their health and location data while restricting companies from using and collecting information without the individual's consent.[188]

In addition to proposed legislation, administrative agencies have stepped in to further define the boundaries of data protection for personal data.[189] Currently, the Federal Trade Commission has a "Health Breach Notification Rule" that covers specific businesses such as "vendors of personal health records, personal health related entities, and third party service providers."[190] In case of any security breach to any of these businesses, the rule requires the listed companies to notify affected consumers.[191] The FTC defines a breach as "unauthorized acquisition of identifiable health information that occurs as a result of a data security breach or an unauthorized disclosure by the company itself."[192] An amended rule, which completed notice and comment on August 8, 2023, would expand the rules scope to health-based applications and clarify the concerns surrounding vendors that "draw [personal health records] data from multiple sources."[193]

E. <u>One Previously Proposed Bill</u>

Previous legislation has also aimed to tackle some of these issues. In August 2020, United States Senators Jeff Merkley and Bernie Sanders introduced the *National Biometric Information Privacy Act of 2020* (hereafter, "Privacy Act"), the first comprehensive federal biometric data privacy law.[194] The Privacy Act was modeled after the Illinois Act, and contained several key provisions: (1) data collectors must obtain consent before collecting and transmitting an individual's biometric information and identifiers; (2) a private right of action against organizations in violation of the act; (3) a duty to safeguard biometric data to prevent unauthorized use; (4) the organizations in possession of the biometric data were required to formulate a retention policy to dispose of data that the organization no longer uses for any business or other purpose; and (5) employers cannot condition employment on consent from the

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[187] John Wilkerson, *Senators Launch Inquiry Into Telehealth Companies for Tracking and Monetizing Personal Data,* THEMARKUP (Feb. 7, 2023), https://themarkup.org/pixel-hunt/2023/02/07/senators-launch-inquiry-into-telehealth-companies-for-tracking-and-monetizing-personal-data.
[188] Klobuchar, *supra* note 185.
[189] *See generally* Health Breach Notification Rule, 16 CFR Part 318 (2009), https://www.ecfr.gov/current/title-16/chapter-I/subchapter-C/part-318.
[190] *Id.* at § 318.2(a).
[191] *Id.* at § 318.3(a)(1)-(2) & (b).
[192] *Collecting, Using, or Sharing Condumer Health Information?* HHS (Sep. 14, 2023), https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-ftc-act/index.html.
[193] Health Breach Notification Rule, 88 F.R. 37819, 37819 (June 9, 2023).
[194] S. 4400 (IS) - National Biometric Information Privacy Act of 2020, https://www.govinfo.gov/app/details/BILLS-116s4400is.

employee to collect personal or biometric data.[195] This Privacy Act has since stalled and has not yet been enacted.[196]

The Security Industry Association (hereafter, "SIA"), a security solutions trade organization, was one of the leading organizations that opposed the Privacy Act.[197] The SIA opposed the Privacy Act's potential harm to effective law enforcement operations – namely, the impact on the use of facial recognition technology.[198] The SIA asserted that the law imposed a "blanket ban" on biometric and image analytics technologies, which could stymie U.S. innovation in these crucial emerging technological arenas.[199]

F. Effectiveness of Legal Damages

Currently, most states do not allow for a private right of action regarding data privacy violations, limiting an athlete's ability to bring a lawsuit and obtain damages. The CCPA allows for a private right of action only for leakage of consumer personal information; otherwise, it is up to a created agency to bring up a violation.[200] Additionally, the California Agency created by the CCPA to handle violations may allow for a 30-day cure period.[201] The punishment ranges per violation as it can be a cease and desist violation and/or a $2,500 fine.[202] The fine may even reach $7,500 if the violation was intentional.[203] While a state like Colorado does not allow a private right of action, possible damages for violations in the state are far greater than California's fines and other states with data privacy rights.[204] Under Colorado law, a violation is said to constitute a deceptive trade practice and a violation under the deceptive trade practice, which can be up to $20,000 per violation.[205]

VIII. Case Law

A. General Overview

The evolving landscape of college athletics encompasses critical issues such as the employer-employee relationship between institutions and athletes, the concept of amateurism, and the implications of monetary compensation for Name, Image, and Likeness (NIL) rights.

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[195] *Id.*
[196] S. 4400 (IS) - National Biometric Information Privacy Act of 2020, https://www.govinfo.gov/app/details/BILLS-116s4400is.
[197] SIA, *Security Industry Association Opposes Reintroduction of Facial Recognition & Biometric Technology Moratorium Act*, Security Industry Association (Jun.16, 2021), https://www.securityindustry.org/2021/06/16/security-industry-association-opposes-reintroduction-of-facial-recognition-biometric-technology-moratorium-act/.
[198] *Id.*
[199] *Id.*
[200] Cal. Civ. Code Ann. § 1798.199.10 (West).
[201] Cal. Civ. Code Ann. § 1798.199.45 (West).
[202] Cal. Civ. Code Ann. § 1798.199.55 (West).
[203] *Id.*
[204] Colo. Rev. Stat. Ann. § 6-1-1311 (West).
[205] *Id.*

This discussion delves into how these factors intersect and shape the experiences and opportunities for college athletes today.

The world of college athletics and monetary compensation has come a long way since 2015. In *O'Bannon v. NCAA*, a former UCLA college basketball player and an Arizona State football player were unaware that they had been depicted in an NCAA video game, and upon finding out, they sued the NCAA and the Collegiate Licensing Company ("CLC"), the entity that licenses the trademarks of the NCAA and some schools.[206] The district court entered judgment for the plaintiffs and ruled that "prohibiting student-athletes from receiving compensation for their NILs violate[s] section 1 of the Sherman Act."[207] The Ninth Circuit Court of Appeals affirmed in part and vacated in part, concluding that student-athletes could receive scholarships up to the entire amount of tuition but could not receive the suggested $5,000 per year in "deferred compensation."[208]

The legal battle, initiated by former college athletes who discovered their likeness was being exploited in an NCAA video game, marked a turning point in control of individual rights.[209] Their lawsuit against the NCAA and the CLC underscored the issue of student-athletes being depicted without their knowledge or compensation.[210] The *O'Bannon* court relied on the Court's clarification in *Board of Regents* that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."[211] With this ruling, the courts began to remove the restrictions in place that stopped athletes from benefiting from their NIL, but not without some limitations.[212] The circuit court borrowed the Supreme Court's analogy, saying "the market for college football is distinct from other sports markets and must be 'differentiate[d]' from professional sports."[213] Although this ruling showed the court's intention to maintain amateurism in college athletics, it also showed the beginning of the demise of the argument of amateurism alone in defense of rules and regulations by the NCAA.[214]

A few years later in 2021, the United States District Court for the Eastern District of Pennsylvania advanced the discussion further. In *Johnson v. NCAA*, the court considered the employee status of various college athletes from multiple different sports and universities.[215] Although not a dispositive answer, the court laid out some factors, including the time spent doing

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[206] *O'Bannon v. NCAA*, 802 F.3d 1049, 1055 (9th Cir. 2015).
[207] *Id.* at 1056.
[208] *Id.* at 1079.
[209] *See generally* O'Bannon 802 F.3d 1049.
[210] *Id.*
[211] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 117 (1984).
[212] Ken Belson, *What the O'Bannon Ruling Means For Colleges and Players,* The New York Times (Aug. 8, 2014), https://www.nytimes.com/2014/08/09/sports/what-the-obannon-ruling-means-for-colleges-and-players.html.
[213] *O'Bannon* 802 F.3d at 1076.
[214] *See generally* Michael Steele*, O'Bannon v. NCAA: The Beginning of the End of the Amateurism Justification for the NCAA in Antitrust Litigation,* 99 Marq. L. Rev. 511 (2015) (illustrating how the idea of amateurism has been fading and will continue to do so in the realm of college athletics).
[215] Johnson v. NCAA, 556 F. Supp. 3d 491, 512 (E.D. Pa. 2021).

athletic related activities and class scheduling policies, that indicated it was plausible that there might be an employer-employee relationship between the universities and the student-athletes.[216] Similarly, the court used the primary beneficiary test in *Glatt v. Fox Searchlight* to determine whether the athlete or the university is the primary beneficiary of the relationship.[217] Specifically, the court in *Johnson v. NCAA* emphasized the significance of the control exercised by universities over their student-athletes, delving into areas such as training regimens, team rules, and the extent of supervision during athletic activities.[218] By scrutinizing the nuances of class scheduling policies, the court hinted at a potential nexus between academic obligations and the athletes' status as employees.[219] While the ruling did not conclusively establish a precedent, it underscored the evolving nature of the debate surrounding the employment status of college athletes.[220] The decision's exploration of these factors opens the door to further legal deliberations on the intricate dynamics between universities and their student-athletes, paving the way for potential shifts in the broader landscape of collegiate sports labor law.[221] *Johnson v. NCAA* is now pending in the Third Circuit where its resolution could have reverberating effects on the employment status of collegiate football players.

Since the *Johnson* case, however, there has been a noticeable shift in student-athletes-as-employees debate. Following the *Johnson* holding, the National Labor Relations Board (hereafter, "NLRB") issued updated guidance on collegiate football players as employees.[222] Specifically, the NLRB's General Counsel, Jennifer Abruzzo, stated that the "student-athlete" label for Division 1 Football Bowl Subdivision (hereafter, "FBS") players is a misclassification such that it violates § 8(a)(1) of the National Labor Relations Act.[223] To reach such a conclusion, the NLRB referenced the common law definition of "employee": a person 'who performs services for another and is subject to another's right of control."[224] Here, as the Abruzzo explains, athletes provide a service by playing football and generating millions of dollars in return for a full-cost-of-attendance scholarship and a stipend for such performance.[225]

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[216] *Id.* at 496.
[217] *Id.* at 509 (holding that "[t]he extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit…[t]he extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar… [and] [t]he extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern" weighed in favor of student athletes being employees of their respective universities).
[218] *Id.* at 497.
[219] *Id.*
[220] *See generally* Johnson v. NCAA, 556 F. Supp. 3d 491, 512 (E.D. Pa. 2021).
[221] Richard Johnson, *Explaining Johnson v. NCAA and What's at Stake in Wednesday's Court Hearing*, Sports Illustrated (Feb. 15, 2023), https://www.si.com/college/2023/02/15/johnson-v-ncaa-court-hearing-employment-status.
[222] Jennifer A. Abruzzo, NLRB MEMORANDUM GC 21-08, STATUTORY RIGHTS OF PLAYERS AT ACADEMIC INSTITUTIONS (STUDENT-ATHLETES) UNDER THE NATIONAL LABOR RELATIONS ACT, NLRB (Sept. 21, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of.
[223] *Id.*
[224] *Id.* at 3.
[225] *Id.* at 4.

Moreover, the NCAA exercises control through its terms and conditions affecting player's performance on the field.[226] Additionally, the university exercises the "manner and means" of control concerning the players daily routines on the field and in their daily activities.[227] Effectively, granting such employment status to athletes would enable them to "speak out about their terms and conditions of employment or to self-organization.[228] The NLRB also referenced the employee-employer issues that Justice Kavanaugh addressed in his concurring opinion in *Alston,* which Kavanaugh believed could be addressed through the collective bargaining process.[229] Furthermore, the guidance made reference to the changing economic reality of players who are now permitted to monetize their NIL.[230]

Previously, the NLRB's guidance reflected the conservative, hands-off approach that many entities took regarding this topic. In 2015, the NLRB rejected the Northwestern University football team's attempt to unionize to be able to collectively bargain for secure extended rights and safer working conditions as collegiate football players.[231] Nevertheless, the NLRB issued a narrow rejection of this well-publicized unionization attempt.[232] The NLRB declined to exercise jurisdiction over the matter because of the NCAA and Big Ten's substantial control over the affairs of its member institutions.[233] The NLRB explained that any piecemeal attempts to change the status of student athletes would disrupt labor stability amongst the schools.[234] However, the NLRB stated affirmatively that its decision did not preclude future determinations regarding collegiate athletes' employment status since this issue went undecided in that case.[235]

Thus, Abruzzo and the NLRB rejected the notion that its earlier Northwestern University decision precluded a future determination that collegiate football players are not employees.[236] Namely, the NLRB explained that its previous decision merely declined to assume jurisdiction over the issue concerning Northwestern football players.[237] It did not, however, rule on the status of collegiate football players as employees.[238] Nevertheless, any policy changes to the NLRB's stance on this issue would be analyzed under the "arbitrary and capricious" standard of review - a deferential agency standard which requires only that an executive agency, independent or otherwise, supply reasons for any changes to its previous policy.[239] As such, the NLRB has wide latitude to issue new findings that support football player's status as employees of their respective university.

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[226] *Id.* at 3.
[227] *Id.*
[228] *Id.* at 4.
[229] *Id. See e.g., NCAA v. Alston*, 141 S. Ct. 2141 (2021).
[230] *NCAA v. Alston*, 141 S. Ct. 2141 (2021).
[231] *Northwestern University and College Athletes Players Association* (CAPA), Petitioner. Case 13–RC– 121359 (2015).
[232] *Id.*
[233] *Id.* at 1351.
[234] *Id.* at 1354.
[235] *Id.*
[236] NLRB MEMORANDUM GC 21-08.
[237] *Id.* at 2.
[238] *Id.*
[239] *Id.*

Since Abruzzo's memo, the NLRB has been regionally active on the issue of collegiate athletes as employees but has not issued any authoritative decisions. As of now, the NLRB has not established whether student-athletes are employees. Instead, regional offices have issued decisions on the employment topic. In one example, Laura Sacks, the regional director of NLRB's Region 1, issued a decision deeming Dartmouth basketball players as employees given the work performed by the student-athletes on behalf of Dartmouth.[240]

B. Copyright Law

Copyright law is designed to protect the original works of authors, creators, and artists, providing them with exclusive rights to control the use and distribution of their creations in order to promote creativity and innovation.[241] This body of law encompasses a broad spectrum of creative expressions, including literary works, music, visual arts, and software. By granting creators the exclusive rights to reproduce, distribute, perform, and display their works, copyright law incentivizes the production of original content while ensuring that creators can benefit economically from their intellectual endeavors. While copyright law is essential for safeguarding creative expressions, it may also apply to athletes and their NIL and personal data.

Data is commonly perceived as factual information within the realm of copyright. In accordance with copyright law, the distinction is clear - facts themselves are not eligible for copyright protection. This principle reflects the legal understanding that while the organization and presentation of data may be subject to copyright, the raw data itself is considered part of the public domain. Up to this point, the court has required some sort of creation rather than merely a discovery.[242] Copyright protection is a likely avenue for athletes trying to gain control over their personal data. Case law has furthered our understanding of where the line is to be drawn concerning what is and is not a copyrightable compilation of facts.

The prevailing authority on what is a copyrightable compilation of facts has been and still is the Supreme Court's decision in *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*[243] Here, the Court addressed the issue of differentiating between facts and compilations of facts saying that the issue was "one between creation and discovery."[244] According to the Court, "all facts -- scientific, historical, biographical, and news of the day…'may not be copyrighted and are part of the public domain available to every person.'"[245] The Court went on to say that while facts themselves are not eligible for copyright protection, compilations of facts may be subject to

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[240] Priscilla Fasoro et al., *Men's Basketball Team Scores With NLRB Ruling*, Inside Global Tech (Apr. 1, 2024), https://www.insideglobaltech.com/2024/04/01/mens-basketball-team-scores-with-nlrb-ruling/.
[241] *What Is The Purpose of Copyright Law,* Copyright Alliance https://copyrightalliance.org/education/copyright-law-explained/copyright-basics/purpose-of-copyright/ (Dec. 14, 2023).
[242] *Id.*
[243] *See generally* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (differentiating between compilations of facts that do and do not satisfy the creativity that is required by copyright law).
[244] *Id.* at 347.
[245] *Id.* at 348.

copyright protection. [246] However, not every compilation of facts is copyrightable.[247] The Court goes on to explain how there must be some minimal degree of creativity and originality in the arrangement of the facts.[248] The company failed to meet the creativity requirement because it was simply an arrangement of names and addresses of individuals.[249]

The decision in *Feist* offered three elements that must be met when determining the copyrightability of a compilation of otherwise uncopyrightable facts.[250] These three requirements are "(1) the collection and assembly of pre-existing material, facts or data; (2) the selection, coordination, or arrangement of those materials; and (3) the creation, by virtue of the particular selection, coordination, or arrangement, of an 'original' work of authorship."[251] These three requirements ensure that copyright protections are limited to works of authorship and not mere facts.

The *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.* decision continues to stand as the definitive authority on the copyrightability of compilations of facts.[252] The Supreme Court's decision in *Feist* is still cited often in cases involving the copyrightability of any kind and clarified the nuanced distinction between facts and compilations.[253] This landmark decision provides essential guidance in navigating the delicate balance between protecting intellectual property and preserving the free flow of factual information in the public domain.[254]

While there are no intellectual property rights in plain facts, a database will be protected by copyright law in markets like the United Kingdom (hereafter, "UK") if the selection or arrangement of its contents constitute the creator's own intellectual creation (section 3A(2) of the Copyright, Designs and Patents Act 1988).[255] This means that if an individual selects, assembles, and arranges data in an original way, the individual could claim database rights under copyright law related to the arrangement of information, but not ownership rights via copyright law to the underlying information itself. For example, according to the publication "*Research and Commercial Use of Healthcare Data in the UK*" by UK law firm Anthony Collins Solicitors, "an alphabetical list of traders within a particular area would in itself be unlikely to attract copyright protection."[256] However, if the traders were also graded for several other criteria by means of research carried out by the compiler of the database, including, for example, by reference to

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[246] *Id.* at 347.
[247] *Id.* at 357.
[248] *Id.* at 358.
[249] *Id.* at. 362.
[250] *Id*. at. 1293.
[251] *Id.*
[252] *See generally id.*
[253] *See* N.Y. Times Co. v. Tasini*,* 533 U.S. 483, 121 S. Ct. 2381 (2001)(An electronic publisher infringed copyrighted articles from a newspaper when they put them in an online database). *see also;* Harney v. Sony Pictures TV, Inc., 704 F.3d 173 (1st Cir. 2013)(Sony's adaptation of a photo was found not to be an infringement of a copyrighted photo).
[254] *See generally* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).
[255] Emma Watt, Research and Commercial Use of Healthcare Data in the UK 40 (2020), https://futurecarecapital.org.uk/wp-content/uploads/2020/05/Legal-Review-Research-and-Commercial-Use-of-Healthcare-Data-in-the-UK.pdf.
[256] *Id.*

customer satisfaction (i.e., the author's own intellectual creation), then it may attract copyright protection. In another example, expressions and compilations of facts about patients by doctors (e.g., medical notes related to a condition) may be copyrightable under English copyright law if it shows sufficient selection and arrangement to constitute the author's intellectual creation.[257] By contrast, a patient who records their health information using an app is not selecting or arranging the information they record through their own initiative; they are, in many cases, following prompts from the app, which organize the information for the patient. Therefore, these inputs would likely not be protected by copyright law.[258]

In sports, issues related to data and copyright law have intersected in cases such as *NBA v. Motorola, Inc*. In *Motorola,* the company sold a paging device (i.e., a beeper) that would provide the purchasers with a "data feed" from NBA games.[259] The "data feed" was supplied by sports data company STATS, which employed people to watch and/or listen to the games in order to collect real-time information (e.g., score changes, which team was in possession, the time of the game), then transmitting such information to those who purchased the paging device.[260] The NBA sued saying the game was a copyrighted broadcast.[261] However, the court held that "basketball games do not fall within the subject matter of federal copyright protection," saying that sports events are not "authored" by any typical meaning of the word.[262] If the company had used parts of the broadcast instead of facts from the games, they may well have been infringing, but because they only used facts that could be easily obtained by anyone in the arena, there was neither a free rider nor an infringement problem.[263] The company was therefore allowed to use the stats from the game in their service without infringing on a copyright, because it was impossible for the NBA to own the facts from their games.[264]

This case is important because while not extremely explicit in assessing the athletes' ownership rights in certain data from sporting events they are participating in, it does show that without some sort of creativity and input (e.g. a broadcast), the NBA or some other league cannot assert ownership over data from their events.[265] *NBA v. Motorola* lays out one potential pathway for players to gain exclusionary and monetary rights over their personal data.[266] Like the NBA and other broadcast networks do by compiling the stats into a broadcast for television viewing, the athlete could create a package of information that is copyrightable as a compilation of facts.[267]

The question as to whether certain forms of personal data could be considered "facts" becomes nuanced as more techniques are applied to derive such facts. For example, in the case of

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[257] *Id.*
[258] Most health professionals offer online screening services using data collection applications.
[259] NBA v. Motorola, Inc., 105 F.3d 841, 843 (2d Cir. 1997).
[260] *Id.*
[261] *Id.* at 846.
[262] *Id.*
[263] *Id.* at 854.
[264] *Id.* at 847.
[265] *Id.*
[266] *See generally id.*
[267] *Id.* at 847.

leveraging a sensor to generate an athlete's heart rate beat per minute (hereafter, "BPM") value, one could argue that the underlying raw data used to generate such a measurement could be considered a fact, even though the raw information itself is likely a signal derived from an array of selected technologies and processes combined together in a unique way to extract such a signal. However, the question becomes: is the derivative of that raw data – the heart rate value – also considered a fact? One viewpoint is that data generated from sensors that provide a derived output (e.g., a heart rate BPM value or other reading related to the body derived from raw information) would also likely be considered a fact with the methods or processes to create the heart rate calculation being protected by other IP law (e.g., patent law). But the idea that the heart rate BPM value is a derived value based upon calculations that may be considered original expression of works – thereby affording it copyright protection – is not out of the question. In such scenarios, determining ownership of the copyright may be a further challenge. Is the original expression of work derived from the athlete whose body is functioning physiologically and providing a unique biological signal that enables the BPM to be calculated, or is it derived from the individual who creates the algorithm that allows the interpretation and unique expression of the signal to occur and manifest itself in a form that represents a BPM value?

Another case explicitly addressing intellectual property rights of leagues was the *National Football League v. Governor of Delaware* where the court held, among other things, that use by a third party of the National Football League's ("NFL") schedules, scores, and public popularity in the Delaware State lottery did not amount to a misappropriation of the league's intellectual property.[268] Importantly, this case was one of the initial cases concerning sports betting in the United States.[269] Here, the twenty-eight member clubs filed a lawsuit against the Governor and the Director of the State Lottery seeking permanent injunctive relief to bar the Delaware State Lottery from using the NFL's schedules, scores, and popularity.[270] The core NFL argument was that the Lottery's use of the NFL's data for commercial purposes related to gambling effectively created a "forced association with gambling," which constituted an unlawful interference with their property rights on federal, state, and common law grounds.[271] The NFL further argued that the plaintiffs interfered with the use of their intellectual property rights by misappropriating the plaintiff's efforts and resulting product by "endeavoring to reap where it has not sown." Nevertheless, the court determined that the popularity, schedule, and scores of NFL games had already been broadly distributed to the public by the NFL. The court reasoned that once these items had been broadly distributed, they no longer have "any expectation of obtaining revenue from further dissemination."[272]

[268] Nat'l Football League v. Governor of Delaware, 435 F. Supp. 1372 (D. Del. 1977).
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.*

C. *Where Sports Betting Meets Constitutional Law*

Related to the issues surrounding copyright law are the cases that concern sports betting. Since the Supreme Court struck down the federal ban on sports gambling in *Murphy v. NCAA* in 2018, states have swiftly legalized sports gambling in a myriad of forms.[273] In *Murphy v. NCAA*, the Supreme Court decided the issue of whether Congress could directly order state legislatures to refrain from passing legislation that legalized sports betting.[274] Congress had prohibited states from legalizing gambling on sports through the Professional and Amateur Sports Protection Act of 1992 ("PASPA").[275] The Supreme Court held that the law was unconstitutional under the anti-commandeering doctrine, which prohibits the federal government from commandeering a state to comply with specific legislative requirements.[276] The Court decision solidified state control over sports betting and opened the industry of sports betting to previously reluctant states.[277]

Since the *Murphy* decision, the significant growth of sports betting has spawned the increased use of league and player data by sports betting companies.[278] As betting companies have increased the amount and sophistication of the data used, several states have countered by passing laws which require betting companies to purchase their sports gambling data directly from the leagues from which they obtain the sports information.[279]

While in some cases the data used by sports betting operators must be official league data, such a mandate is subject to the data being available at a "commercially reasonable" acquisition cost from the league. For example, in Michigan, if official league data is not provided on commercially reasonable teams, sports betting operators can use other approved data sources. Michigan lists multiple factors when determining whether official league data is offered on commercially reasonable terms including: (1) whether the data is available from more than one authorized source under materially different terms; (2) the availability and cost of comparable data from other sources; (3) the market information about the data available to sports betting operators; (3) characteristics of official league data and alternate data sources regarding the nature, quantity, quality, integrity, completeness, accuracy, reliability, availability, and timeliness of the data; and (4) the extent to which sport governing bodies have made such data available to settle such bets.[280] Similarly, Illinois requires that companies purchase official league data for any play-in wager or bet, except for data that concerns the final score of the game. In both states, the data must be available on "commercially reasonable terms."[281] Commercially reasonable terms

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[273] Murphy v. NCAA, 138 S. Ct. 1461 (2018).
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.*
[278] *Official League Data, Legal Sports Report*, LSR https://www.legalsportsreport.com/official-league-data/ (Dec. 14, 2023).
[279] *Id.*
[280] Matthew Kredell, *Michigan Sports Betting Draft Rules Show Path to Challenge Official League Data,* LEGAL SPORTS REPORT (Apr. 30, 2020), https://www.legalsportsreport.com/40454/michigan-sports-betting-draft-rules/.
[281] *Id.*

are those that are "fair or done in good faith."[282] To act in good faith, courts typically look to industry norms to determine whether pricing of the data fits the definition of commercially reasonable. Currently, 30 states offer some form of legal sports betting, while 26 states allow online sports betting.[283] The pushing for greater access to an athlete's personal data by betting companies is a significant driver for laws and regulations being created and adjusted.

D. Privacy Law and the1st Amendment of the Constitution

Collegiate athletes have seen their right to privacy diminished through the collection of their health data by universities to measure performance and test for banned substances. For example, in *Hill v. National collegiate athletic association,* the court held that the NCAA drug testing program does not violate a student-athlete's right to privacy.[284] The court reasoned that the student-athlete's expectation of privacy is outweighed by the NCAA's "legitimate regulatory objectives in conducting testing" to ensure that its sports are drug-free competition.[285] The court further explained that the student-athletes forgo some of their privacy for the privilege of engaging in extracurricular activities with the university and that the right to privacy in one's personal information is heavily dependent on the relevant state statute.[286]

Recent innovations in the wearable technology space have presented difficult privacy issues for collegiate athletes that transcend the performance benefits that these devices provide.[287] At many universities, athletes are forced by the school to wear the school-provided wearable devices in order to track their performance data.[288] In contrast to professional sports leagues, which provide thorough restrictions on collection, use, and processing of athlete data in the league's collective bargaining agreement(s) (hereafter "CBA), the NCAA does not provide any guidance on the privacy interests of collegiate athletes' personal data.[289]

Nevertheless, the Fourth Amendment of the United States Constitution protects an individual's right to privacy against unreasonable searches and seizures by public officials.[290] U.S. courts have adopted two primary tests to determine the occurrence of a search or seizure: the reasonable expectation of privacy test and the trespass test.[291] The seminal case of *Katz v. United States* provided the test for a trespass: whether "there is a reasonable expectation of privacy upon which one may justifiably rely."[292] Whether the Fourth Amendment protects an

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[282] *Id.*
[283] *Id.*
[284] Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1, 57, 26 Cal. Rptr. 2d 834, 871, 865 P.2d 633, 669 (1994).
[285] *Id.* at 669.
[286] *Id. at 658.*
[287] *See generally* Alicia Jessop, *Article: Examining the Fourth Amendment and Biometric Data Privacy Law Implications of NCAA Athletes' Mandated Use of Athlete Biometric Data Tracking Devices*, 40 Cardozo Arts & Ent L.J. 81 (2022) (addressing privacy implications arising from athletes' biometric data being collected).
[288] *Id.*
[289] Updated NCAA Guidance, Institutional Involvement in a College Athletes Name, Image, and likeness, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/D1NIL_InstitutionalInvolvementNILActivities.pdf
[290] U.S. Const. Amend. 4.
[291] Jessop, *supra* note 287.
[292] Katz v. United States, 476 U.S. 1159 (U.S., 1986).

individual from such privacy intrusions depends on "whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion."[293] Later, the *United States v. Jones* case revised the analysis in *Katz* when it held that the installation of a GPS surveillance device to monitor a vehicle's movements constitutes a search.[294] Central to the Court's analysis was that the placement of GPS devices on a vehicle constitutes an actual physical trespass in violation of the Fourth Amendment.[295] Thus, the court explained that physical trespasses are protected by *Jones* and transmission of "electronic signals without trespass would remain subject to the *Katz* analysis" involving the reasonable expectation of privacy.[296] In a later case, *Grady v. North Carolina,* the Supreme Court further illustrated this principle when considering a requirement that an individual wear a tracking device without their consent "to track an individual's movement."[297]

To determine a person's reasonable expectation of privacy, courts use the following test: 1. "[the person] has a subjective expectation of privacy; and 2. "That expectation of privacy is viewed by society as legitimate."[298] Courts then balance the "intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interest."[299] Nevertheless, consent that is "freely and voluntarily given" by an individual can negate any Fourth Amendment Privacy claims. When courts determine whether consent was voluntarily given, the courts look to the nature of the consent.[300] Specifically, the court examined whether consent was "the product of an essentially free and unconstrained choice."[301] Voluntariness is then determined under the totality of circumstances test where the court evaluates the entire factual basis of the intrusion. Importantly, the court will look at whether the consent was obtained by coercion through an "implied threat or covert force."[302]

Forced consent remains a difficult issue for collegiate athletes—even in an era in which they have significantly more financial leverage. Presently, collegiate athletes at all levels are being asked to allow for collection an ever-increasing array of personal data by the schools. Pursuant to such collection, schools will analyze a player's sweat, blood, body temperature, and other health indicators through a variety of wearable and other sensing systems. The reasons schools have increased their surveillance of their players is quite transparent: for performance analysis and optimization, injury prevention, and monetization. By investing in new technologies that carefully analyze a player's personal data, schools can evaluate and predict player performance under different conditions. Furthermore, the use of such technologies for collection can occur round the clock—that is, during practices, games, and non-sports related activity.

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[293] *Id.*
[294] United States v. Jones, 565 U.S. 400 (2012).
[295] *Id.*
[296] *Id.*
[297] *Grady v. North Carolina*, 575 U.S. 306 (2015).
[298] *Id.*
[299] *Id.*
[300] *Id.*
[301] *Id.*
[302] *Id.*

Consequently, the use of such data for performance analysis has become increasingly lucrative for sportswear and gambling.[303] Therefore, an athlete's decision to allow carte blanche collection of his or her personal data has both privacy and monetary implications for that player.

Importantly, some collegiate athletes at the largest schools have increasingly obtained representation prior to their enrollment in school. Complicating the concerns about the right to privacy is that the First Amendment likewise implicates the rights of collegiate athletes ownership and use of their data. Entities in the industry have asserted in previous litigation that "[c]ourts broadly construe matters of public concern to encompass news reports about all manner of subjects of interest to substantial portions of the public, including news about sports and entertainment."[304] The Supreme Court in *Snyder* established a two-prong test for determining when speech constitutes a matter of public concern: 1. "When it can be fairly considered as relating to any matter of political, social, or other concern to the community," or 2. "When the speech is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[305] The question here is whether and how either of these prongs implicate the use of sports data.[306] First, there must be a governmental actor infringing on an individual's free speech. Second, one must determine whether the location of the infringement was in the public domain or at a taxpayer-funded stadium. Furthermore, one must determine whether an attempt to limit or regulate speech was "content-neutral," or did not show favoritism for a particular viewpoint. Additionally, further protections for copyrightable items prevent the unauthorized use of such items. However, as already mentioned, facts are not copyrightable since they merely exist in the public domain. Nevertheless, intellectual property and First Amendment concerns underscore the concern about free-riding that occurs in misappropriation - namely, that one gains a commercial advantage from using another's work. In the sports context, companies who use sports data for news, betting, and analytics service an unequivocal pecuniary benefit by using such data to enhance their product. This proposition has been recognized in several court cases concerning sports data and their commercial use.

In *Morris v. PGA Tour,* the Eleventh Circuit of the United States Court of Appeals held that a newspaper could not report real-time golf scores since the newspaper misappropriated the golf-tour's in house real-time scoring system.[307] The Eleventh Circuit agreed with the PGA Tour's "free-riding" justification as supporting the Tour's "legitimate pro-competitive reason for imposing a restriction on Morris."[308] Furthermore, the PGA Tour has control over access to its events and, by extension, "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

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[303] Sophia Jaiswal, *The Role of Data Analytics in Sports Betting*, MEDIUM (Aug. 6, 2023) https://medium.com/@mycricketbet758/the-role-of-data-analytics-in-sports-betting-61c0fef3ed82.
[304] Ryan M. Rodenberg et al., *Article: Real-Time Sports Data and the First Amendment*, 11 WASH. J.L. TECH. & ARTS 63, 70 (Fox Broadcasting and the Big Ten Network made this statement in amici for *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*).
[305] *Id.*
[306] *Id.*
[307] Morris Commun. Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1298 (11th Cir. 2004).
[308] *Id.* at 1285.

Court will protect."[309] The Court added that the point at which the information is no longer protected is when it has been publicly disseminated.[310]

E. Quasi-Property Rights

International News Service v. Associated Press established the principle that a quasi-property right exists, which protects the investment of resources in gathering and disseminating timely news against direct competition that seeks to free-ride on those efforts.[311] This principle could potentially apply to the personal data and NIL rights of collegiate athletes, as these rights involve the control and commercial use of one's identity and associated data, which are gathered and maintained at a cost.

Regarding student-athletes, it could be analogized that this quasi-property right should protect the efforts and resources invested by athletes in building their personal brands and marketability, which are comparable to the newsgathering efforts in the *International News Service v. Associated Press* case. Just as the Associated Press was allowed to protect its news content from being freely used by competitors, athletes could argue for a similar protection against unauthorized commercial use of their personal data and NIL rights by third parties seeking to profit from their labor without compensation or consent.

F. Federal Statutes at Issue

HIPAA plays an important role in protecting sensitive information on a national level.[312] Since team trainers and physicians are employed by the university, they are not covered entities under HIPAA.[313] Nevertheless, outside healthcare providers, such as physicians and physical therapists who assist student-athletes, are still covered under the HIPAA provisions.[314] Professional athletes mitigate their lack of coverage under HIPAA by bargaining for specific privacy protections concerning their health in the league's CBA.[315] By mandating that leagues protect various forms of their personal data, professional athletes have leverage to ensure that they have some control over the use of records. For collegiate athletes, however, no such collective bargaining agreements prevent the unauthorized use of their personal health data.[316]

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[309] *Id.* at 1281.
[310] *Id.* at 1279.
[311] *See generally Int'l News Serv. v. AP*, 248 U.S. 215, 39 S. Ct. 68 (1918) (holding that when International News Services sold stories that were generated and published by and through the labor and time of the Associated Press, International News Services violated the Associated Presses quasi-property right that protects them from others free riding upon their labor).
[312] *See generally* Health Insurance Portability and Accountability Act of 1996 (HIPAA).
[313] *Id.*
[314] *Id.*
[315] *Id.*
[316] Joshua Hernandez, *The Largest Wave in the NCAA's Ocean of Change: The "College Athletes are Employees" Issue Reevaluated. MARQ. SPORTS L. REV.* (2023).

In contrast to HIPAA, the Family Education Rights and Privacy Act (hereafter, "FERPA") does apply to educational institutions – including affiliated intercollegiate athletic programs.[317] FERPA protects student educational records from unauthorized disclosure as a condition for the receipt of federal educational funds.[318] FERPA contains several essential provisions to protect student records: (1) academic institutions may not disclose student educational records to third parties without the express written consent of the student; and (2) students have the right to access their educational records. To be covered under either of these provisions, the records must contain directly "identifiable" information about the student at issue.[319] FERPA defines records as "files, documents and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting [on behalf of] the agency or institution."[320] However, the enforcement power of FERPA was undermined in the Supreme Court case *Gonzaga University v. Doe* when the Court held that FERPA does not provide a private right of action for students.[321] As a result of the *Gonzaga* holding, students can only bring claims for violations of FERPA via administrative complaints through the Family Policy Compliance Office or through tort violations – such as invasion of privacy.[322]

Under FERPA, an open question remains as to whether student-athlete biometric and health data falls within the scope of the law.[323] Nevertheless, student-athlete data could be considered an "educational record" that is maintained by the "educational agency or institution" by a court that considers the present reality of this data.[324] Namely, if the data collected directly pertains to the student, the data contains an express identifier, and it is maintained by a third-party entity, such as a data collector, then the use of such information may amount to a FERPA violation.[325] If a collegiate athlete's data is classified as an educational record under FERPA, it is subject to strict privacy protections, requiring written consent for disclosure and granting students' rights to access and amend their records.[326] Institutions are responsible for safeguarding this data and can face investigations and sanctions for violations, although there have been no significant monetary payouts specifically aside from withdrawal of federal funding for FERPA breaches.[327] However, similar laws like the Illinois Biometric Information Privacy

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[317] Family Educational Rights and Privacy Act, 20 USCA § 1232g.
[318] *Id.*
[319] *Id.*
[320] *Id.* at § 4(a).
[321] Gonzaga University v. Doe, 536 U.S. 273 (U.S., 2002).
[322] *See e.g., Id.*; Weston, *supra* note 117, at 43.
[323] *Id.*
[324] *See e.g., Id.*
[325] Family Educational Rights and Privacy Act, 20 USCA § 1232g, https://www.govinfo.gov/content/pkg/USCODE-2011-title20/pdf/USCODE-2011-title20-chap31-subchapIII-part4-sec1232g.pdf.
[326] *Protecting the Privacy of Student Education Records*, NCES (Jun. 19, 2024) https://nces.ed.gov/pubs97/web/97859.asp#:~:text=Student%20education%20records%20are%20official%20and%20confidential%20documents,that%20schools%20or%20education%20agencies%20maintain%20about%20students.
[327] Joel Lim, *FERPA Violations: Examples to Avoid in Education*, TRUSTWORTHY (Jan. 11, 2024) https://www.trustworthy.com/blog/ferpa-violations.

Act (hereafter, "BIPA") have resulted in substantial settlements, including a $500 million settlement with Facebook, that may be useful to gauge the monetary value potentially at stake.[328]

States like Illinois have established a few landmark cases regarding consumer data privacy violations.[329] Illinois passed BIPA in 2008 that focuses on biometrics for businesses and security screening, such as using a finger-scanner at stores and cafes.[330] An Illinois supreme court case decided in early 2023 provided a high amount of damages for violating the BIPA. In *Cothron v. White Castle System*, an employee filed a class action for failure to obtain written consent before requiring fingerprint scans.[331] The supreme court of Illinois said that violations were on a per scan basis and that each time the biometric identifier was collected, a violation occurred.[332] This meant that each time – and not just the first time – the information was collected, there was a violation. The court said the damages may collectively exceed $17 billion.[333]

Another landmark case occurred in 2021 when a class action was filed against a website for violating BIPA. In the case of *In Re Facebook Biometric Information Privacy litigation*, the court granted a proposed $650 million settlement.[334] Facebook collected and stored users' biometric data without consent from the user, in violation of BIPA.[335] The court points out that "the $650 million settlement amount is less than the theoretical possibility of billions of dollars were the class to hit a home run at trial."[336]

A class action was filed against BNSF Railway Company that required truck drivers to scan fingerprints to verify their identity, in alleged violation of BIPA.[337] The jury awarded the damages of $228 million; however, the court granted BNSF's motion for a new trial to re-assess the damages amount because the damages in the BIPA statute are discretionary and not

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[328] Natasha Singer, *Facebook to Pay $550 Million to Settle Facial Recognition Suit,* The New York Times (Jan. 29, 2020) https://www.nytimes.com/2020/01/29/technology/facebook-privacy-lawsuit-earnings.html#:~:text=Facebook%20said%20on%20Wednesday%20that%20it%20had%20agreed,raised%20questions%20about%20the%20social%20network%E2%80%99s%20data-mining%20practices; Jon Fingas, *Google Settles Photos Facial Recognition Lawsuit for $100 Million*, Yahoo! Finance (Jun. 6, 2022) https://finance.yahoo.com/news/google-photos-bipa-lawsuit-settlement-161237789.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jb20v&guce_referrer_sig=AQAAAMNA7PokrKaeR0J9gzpIAGL1QEUmj4q-kVqsToqej97urs9Havf19ZDzM3UhJCAXCRJuE-EBS2PppBfKAhGCTCHC8hJoTzpzhXe4_qStomy1nW4v84KOwtaIB7yMT7_HhG0ZrGPkwgeBjHaLjqhn32r4DxpSO13Vd6yqkDLLfxj.

[329] Daniel Wiessner, *White Castle Could Face Multibillion-Dollar Judgment in Illinois Privacy Lawsuit,* Reuters (Feb. 17, 2023, 3:27 PM), https://www.reuters.com/legal/white-castle-could-face-multibillion-dollar-judgment-illinois-privacy-lawsuit-2023-02-17/.

[330] *See generally* 740 Ill. Comp. Stat. Ann. 14/.

[331] Cothron v. White Castle System, Inc., 2023 IL 128004 (Ill., 2023).

[332] *Id.*

[333] *Id.* at ¶ 40.

[334] In re Facebook Biometric Information Privacy Litigation, 522 F.Supp.3d 617 (N.D.Cal., 2021).

[335] *Id.* at 621.

[336] *Id.* at 627.

[337] Rogers v. BNSF Ry. Co., No. 19 C 3083, 2023 WL 4297654 (N.D. Ill. June 30, 2023).

mandatory.[338] Following the trial, in September 2023, it was reported that BNSF Railway agreed to settle rather than go back to trial.[339]

An important distinction compared to FERPA is that BIPA includes a private right of action. Though the damages could be the same if the state is bringing suit, the user would not get the benefit or have the ability to bring the charges themselves.[340] While these cases are not specific to biometric data violations or for athlete data specifically, the damages awarded for similar privacy violations could potentially be similar.

The United States federal statutes covering data privacy also have a few examples of damages awarded. In 2023 Microsoft settled with the U.S. Federal Trade Commission (the "FTC") for violation of the U.S. Children's Online Privacy Protection Act.[341] The settlement amount was reported as $20 million.[342] Similarly, Equifax agreed to $671 million in a settlement with the FTC after a 2017 Equifax data breach.[343]

Other parts of the world are also handling damages for violations of data privacy rights in prospective countries. In Denmark, an online gambling service, Bet365, was brought to a Danish court for using names and photos of football athletes without consent.[344] Bet 365 was ordered by the court to pay $697,000 (4.7 million Danish Crowns) to athletes.[345]

G. Contract Law

With an absence of a clear legal framework surrounding the collection of personal data in college athletics, protecting the student-athlete from improper or unethical data collection and use is of the utmost importance.[346] Previously, women's basketball has had an issue with personal data and forced consent.[347] The head coach of the women's basketball team at Texas Tech University was fired after it was uncovered that, among other things, she was forcing her players

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[338] *Id.* at 8, 13.
[339] Mike Scarcella, *BNSF Railway Will Settle Biometric Privacy Case, After $228 Mln Verdict Wiped Out*, REUTERS (Sep. 18, 2023), https://www.reuters.com/legal/transactional/bnsf-railway-will-settle-biometric-privacy-case-after-228-mln-verdict-wiped-out-2023-09-18/.
[340] 740 Ill. Comp. Stat. Ann. 14/20.
[341] 41 No. 07 Westlaw Journal Computer & Internet 07.
[342] *Id.*
[343] Corrado Rizzi, *The Biggest Takeaways from the Historic $671 Million Equifax Data Breach Settlement*, CLASSACTION.ORG (July 14, 2022) https://www.classaction.org/blog/the-biggest-takeaways-from-the-historic-equifax-data-breach-settlement.
[344] Reuters, *Bet365 Must Pay Compensation to Danish Soccer Star Eriksen and Others, Court Finds*, REUTERS (May 8, 2023), https://www.reuters.com/sports/soccer/bet365-must-pay-compensation-danish-soccer-star-eriksen-others-court-finds-2023-05-08/.
[345] *Id.*
[346] *Id.*
[347] Dan Bernstein, *Texas Tech Basketball Abuse Allegations Show Risk of Wearable Tech in Sports*, THE SPORTING NEWS (Aug. 5, 2020), https://www.sportingnews.com/us/ncaa-women/news/texas-tech-abuse-allegations-wearable-tech-in-sports/1lan1crzqlel81wxloz0ibzqjr.

to wear heart monitors during games and practice.[348] The resulting data would then be used in a punitive manner if a certain threshold heart rate was not reached or sustained.[349] In the aftermath, when many players on the team were asked about the situation, some players felt they had not been in a position to confront their coach due to the power imbalance and what was at stake (e.g., playing time, scholarships, and professional opportunities).[350]

Beyond the challenge of coercion in contractual agreements exists a significant concern regarding athletes' lack of awareness about their rights and the implications of their consent.[351] Most college athletes are wholly unaware about their rights related to their personal data.[352] Furthermore, most college athletes' eligibility to participate in their respective sport is conditioned on the consent to certain waivers and agreements.[353] In doing so, the universities have all but abandoned the voluntariness of the agreement and have instead forced the athletes to consent lest they suffer the consequences (e.g., not participate in college sports at the university).[354] Forced consent or uninformed consent is unethical and needs to be addressed in order to protect college athletes.

The proposals from the NCAA DI Council illustrate their acknowledgement of such problems and their attempt to proactively address future encroachments on the rights of the student athlete.[355] The proposals include the introduction of the practice of using standardized contract terms for college athletes NIL agreements.[356] Although these proposals are aimed more generally at NIL sponsorship deals and arrangements of that nature, these proposals would serve the player's interest in securing rights related to their own personal data as well.[357] The NCAA DI Council's proposal additionally aim to tackle the deficiency in educational support for student-athletes in contractual matters.[358] The proposal includes education in areas of marketing, business, contracts and licensing for student-athletes in order to make them aware of all the options presented to them and how to wisely navigate them.[359] Additionally, the Council included that providing college athletes access to agents would help to educate the athletes and allow them to make more informed decisions when contracting.[360] One recommendation to the NCAA DI Council would be to consider limiting the amount of access to personal data and NIL rights that

[348] *Id.*
[349] *Id.*
[350] Jori Epstein & Daniel Libit, *Texas Tech Women's Basketball Players Describe Toxic Culture: 'Fear, Anxiety and Depression',* USA TODAY (Aug. 5, 2020, 6:39 AM), https://www.usatoday.com/in-depth/sports/ncaaw/big12/2020/08/05/marlene-stollings-texas-tech-program-culture-abuse-players-say/5553370002/.
[351] Brown, *supra* note 62, at 114.
[352] *Id.*
[353] *Id.*
[354] *Id.*
[355] *DI Council Introduces Proposals to Boost Student-Athlete NIL Protections*, NCAA (Oct. 3, 2023, 6:43 PM), https://www.ncaa.org/news/2023/10/3/media-center-di-council-introduces-proposals-to-boost-student-athlete-nil-protections.aspx [hereinafter *DI Proposals*].
[356] *Id.*
[357] *Id.*
[358] *Id.*
[359] *Id.*
[360] *Id.*

can effectively be signed away, or provide clear pathways for personal data distribution and usage based on informed consent.

Proposals like that of the NCAA DI Council indicate an effort to protect the players. However, without force of law or contract, they are merely proposals at this stage. Personal data collection in college athletics has become a routine part of the student-athlete experience to the point that athletes do not think twice about where that data is going or how it is being used.[361] The NCAA's belief that educating the athlete will lead to more transparency in the relationship between university and athlete is intuitive but needs more support in order to gain traction.[362]

H. Business Opportunities

NIL and athlete data are at the epicenter of revenue creation in sports. From broadcast to sports betting to trading cards, NIL and athlete data are the drivers for multi-billion dollar businesses, with the potential for more uses and analytical applications as technology advances. Yet, in many cases today, athletes only see a fraction of the value being created from their NIL and data.

While the exact figures are private, some analysts estimate that the EA Sports Madden NFL franchise brings in around $600 million in annual sales.[363] On the collegiate level, given the popularity of college football, EA Sports has announced that they will resume making their discontinued NCAA football game titled EA Sports College Football 25. Previously, EA Sports executive Joel Linzner revealed that the annual revenue from its NCAA football game was about $80 million.[364] Since February of 2024, EA Sports have announced that over 10,000 athletes have agreed to allow the company to use their NIL in the game in return for $600 and a copy of the game.[365] Additionally, athletes that agree to allow EA Sports to utilize their NIL will be able to monetize themselves in promotional capacities for the upcoming video game.[366]

Additionally, the *O'Bannon* case illustrates just how much money is at stake for these companies and individuals.[367] College football and basketball players, whose identities appeared in Electronic Arts video games between 2003 and 2014, are set to receive compensation as part of a $60 million settlement.[368] Out of the players who submitted claims, 24,819 were deemed

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[361] Brown, *supra* note 62 at 115.
[362] *DI Proposals*, *supra* note 355.
[363] Nelson Ayers, *How Much Money Did Madden 23 Make?*, 33RD SQUARE (Oct. 22, 2023), https://www.33rdsquare.com/how-much-money-did-madden-23-make/.
[364]

[365] *EA Sports Announces Over 10,000 Athletes Have Accepted NIL Deal For Its College Football Video Game,* THE ASSOCIATED PRESS (Mar. 4, 2024, 12:29 PM), https://apnews.com/article/ea-sports-college-football-nil-f9e6fef31a283d7c0b4de8c821c543f2.
[366] *Id.*
[367] Darren Rovell, *Athletes Whose Likenesses Appeared in Electronic Arts Games Will Share a $60 Million Settlement*, ESPN (Mar. 15, 2016, 3:01 PM), https://www.espn.com/college-sports/story/_/id/14980599/college-football-basketball-players-receive-average-1600-settlement-electronic-arts.
[368] *Id.*

eligible, translating to an average payout of approximately $1,600 per player after lawyers take a 30 percent share of the award.[369] The validated claims, disclosed in a letter filed by athletes' lawyers, shed light on the significant number of individuals whose names and likenesses were used without explicit permission.[370] Notably, the lawsuit against Electronic Arts and the NCAA led to the discontinuation of the college video game franchise, with NCAA Football '14, released in July 2013.[371]

These issues will expand in scope and become more prevalent with the advancement of software and computer technology, making the players' NIL no longer the only valuable form of intellectual property they can contribute to video games. Since 2021, Madden NFL has used Next Gen Stats, aiming to deliver a more authentic gaming experience by enhancing player movements, including changes of direction, acceleration, and deceleration, by using players' personal data, thereby offering a heightened level of realism and immersion in the virtual football experience.[372] This data has been collected from sensors embedded in the players' shoulder pads from Zebra Technologies as well as from other data capturing systems.[373] Now, players' personal data is being used alongside NIL information to create more realistic games, providing an opportunity for athletes to capitalize on their personal data and NIL.[374]

The rise in advertising and athlete sponsorships for NIL deals on the collegiate level has also made it clear that an athlete's personal information is valuable.[375] Although not all NIL deals and contracts are publicly available, some have been confirmed to be worth millions of dollars.[376] In 2021, Barstool Sports started offering sponsorship agreements to college athletes, resulting in over 75,000 applications being submitted.[377] Typically, NIL deals offer compensation in return for endorsement or the use of the player's image. Additionally, some schools like Georgia Tech have entered into agreements that extend to entire teams.[378] Georgia Tech signed an agreement with TiVo, stating that any player on the football team at the university could sign a deal to

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[369] *Id.*
[370] *Id.*
[371] Kevin Sweeney, *Why Did EA Sports Stop Making NCAA Football Video Games?,* Sports Illustrated (Feb. 2, 2021), https://www.si.com/college/2021/02/02/ncaa-football-ea-sports-stopped-making-games.
[372] *Madden 21 Adds Player Tracking Data From Next Gen Stats*, Sports Business Journal (Nov. 19, 2020), https://www.sportsbusinessjournal.com/Daily/Issues/2020/11/19/Technology/madden-21-adds-player-tracking-data-from-next-gen-stats.aspx.
[373] *Id.*
[374] *Id.*
[375] Rion Martin, *12 Massive NIL Deals in 2021*, Dreamfield Sports (Dec. 29, 2021), https://www.dreamfield.co/resources/12-biggest-nil-deals-in-2021.
[376] From NIL deals, Caitlin Clark made $3.1 million, Shadeur Sanders made $4.7 million, and Bronny James made $4.9 million. Weston Blasi, *These 10 College Athletes Are Making Over $1 Million a Year In NIL Deals,* Marketwatch (Apr. 2, 2024), https://www.marketwatch.com/story/these-10-college-athletes-are-making-over-1-million-a-year-in-nil-deals-203649d7.
[377] Stella Pratt, *Place Your Bets: An Analysis of Name, Image, and Likeness Deals with Barstool Sports*, 30 Jeffrey S. Moorad Sports L.J. 117, 141 (2023).
[378] Ken Sugiura, *TiVo signs NIL deal with 90 Georgia Tech Football Players*, The Atlanta Journal-Constitution (Sep. 2, 2021), https://www.ajc.com/sports/georgia-tech/tivo-signs-nil-deal-with-90-georgia-tech-football-players/4WZOZFYJV5ENDB72LA5SKS7BWU/.

endorse the streaming service in return for monetary compensation, apparel, and a subscription to their streaming services.[379] NIL negotiations in college sports have tended to favor athletes from larger schools with larger athletic programs, but there are examples of big NIL deals landing for athletes from small schools.[380] In 2022, a basketball team from a small school in New Jersey, the St. Peter's Peacocks, went on an unexpected and incredible winning streak in the NCAA March Madness tournament.[381] As a result, one of their players who played a major part in the team's success received an NIL deal from Buffalo Wild Wings.[382] These are but a few of the examples of NIL arrangements being made all over the country, but they exemplify the wide variety of opportunities available to athletes.

The sports betting ecosystem has also continued to benefit from the prevalent use of NIL and personal data. Since the 2018 case *Murphy v. NCAA*, legal sports betting in the U.S. has burgeoned into a robust industry that has resulted in the vast majority of states enacting some form of a gambling law.[383] Since then, it has become impossible for organizations to hide the already increasingly apparent value of the data collected from athletes.[384] Thinning the line between collegiate athletic departments and sports gambling, in April 2022, the NCAA granted schools the ability to sell competition statistics to data companies who in turn sell the aggregated data to sports betting companies.[385] At the collegiate and professional levels of sport, athletes' personal data and NIL are increasingly being leveraged by stakeholders to power the sports betting industry – one that is presently estimated to be worth tens of billions of dollars annually.[386] In some states like Colorado and Arizona, there are virtually no restrictions on athletes associating themselves with sports betting companies for NIL sponsorship agreements.[387] College athletes in these states have been able to secure NIL deals with companies like Barstool Sportsbook.[388] Conversely, other states such as New Jersey and Tennessee explicitly prohibit

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[379] *Id.*
[380] Jaylon Thompson, *Daily Sports Smile: Saint Peter's Standout Doug Edert Signs NIL Deal*, USA TODAY (Mar. 25, 2022, 5:00 AM), https://www.usatoday.com/story/college-basketball/2022/03/25/saint-peters-standout-doug-edert-signs-nil-deal-buffalo-wild-wings/7156912001/.
[381] *Id.*
[382] *Id.*
[383] *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) (Prohibiting states to outlaw or allow sports gambling for themselves under the Professional Amateur Sports Protection Act 28 U.S.C.S. § 3702(1), was federal commandeering activity).
[384] Matt Bonesteel *Sports Betting Timeline: From Las Vegas to the Supreme Court,* THE WASHINGTON POST (Aug. 29, 2022, 7:00 AM), https://www.washingtonpost.com/sports/2022/08/29/history-of-sports-gambling/.
[385] Dean Golembeski, NCAA Oks Sports Gambling Data Deals for Colleges and Conferences (May 9, 2022), https://www.bestcolleges.com/news/2022/05/09/ncaa-sports-betting-data-deals/.
[386] *The data revolution in sports betting,* WORLD LOTTERY ORGANIZATION (last visited, June 11, 2024), https://www.world-lotteries.org/insights/editorial/blog/the-data-revolution-in-sports-betting. Importantly, the data sold to data companies must be publicly available. Thus, collegiate athletes' personal data that is not available to the public will not be included. *See also* Eben Novy-Williams, *NCAA to Allow Sports Betting Data Deals for Schools, Conferences,* YAHOO! SPORTS (April 28, 2022), *https://sports.yahoo.com/ncaa-allow-sports-betting-data-193130883.html*.
[387] Pratt, *supra* note 377, at 141.
[388] Pratt, *supra* note 377, at 141. However, Barstool has since shuttered its principal NIL entity, TwoYay Marketplace, citing uncertainty in the constantly evolving NIL. *See* Dylan Manfre, *Barstool Sports Shutdowns NIL*

athletes from gaining compensation from representing entities associated with gambling.[389] Players' personal data is also highly relevant in the sports gambling world. While the world of college athletics previously attempted to steer clear of associating with sports betting companies, the Mid-American Conference changed that when they signed a partnership agreement with Genius Sports, who would manage the market and sell the conferences collected data.[390] In 2022, only a week after singing the partnership with Genius Sports, the Pac-12 Conference signed a similar technology and data deal with data company Tempus Ex Machina.[391] Not only are these deals anticipated to generate revenue through data brokering with sportsbooks, but they will result in new media interactions for fans (e.g. virtual reality and in-game interactive programs) that will generate additional revenue for teams.[392] However, it has not been made known whether the student-athletes will see any direct ties to revenue from the use of their data.

IX. Predictive analysis

A. Property Rights and Ownership

At the dynamic intersection of sports and technology, NIL and personal data ownership rights for athletes will be important rights for protecting individual privacy, providing control to the data subjects, and expediting financial benefits for athletes and institutions. To conceptualize the potential for treatment of personal data as a property right requires an analysis of how personal data fits into the five "bundle of rights:" 1. the right to possess; 2. the right to control; 3. the right to enjoy; 4. the right to dispose; and 5. the right to exclude.[393] Often, the discussion surrounding data concerns the individual's right to *control* how his or her data is processed—especially when such discussion concerns the enforcement of the GDPR and the CCPA—without reference to the other four bundles.[394] It should be noted that control differs from ownership, and while an individual may have the power to control their personal data, that does not necessarily mean that the individual has the power to exercise other rights and

Marketplace TwoYay, SPORTICO (Mar. 8, 2024), https://www.sportico.com/business/sports/2024/barstool-twoyay-shutdown-nil-marketplace-1234769989/.

[389] Pratt, *supra* note 377, at 141.

[390] Bill King & Michael Smith, *College Cash Call: MAC, Pac-12 Deals Just the Beginning as Conferences Eye Large Revenue Streams From Selling Official Data to Online Sportsbooks*, SPORTS BUSINESS JOURNAL (Mar. 21, 2022), https://www.sportsbusinessjournal.com/Journal/Issues/2022/03/21/Upfront/Colleges.aspx.

[391] Pac-12 Conference, *Pac-12 Conference and Tempus Ex Machina Announce Comprehensive Technology & Data Partnership*, PAC-12 (Mar. 15, 2022), https://pac-12.com/article/2022/03/15/pac-12-conference-and-tempus-ex-machina-announce-comprehensive-technology-data.

[392] *Id.*

[393] Denise Johnson, *Reflections on the Bundle of Rights,* 32 Vermont L. Rev. 247 (2007).

[394] Thorin Klosowski, *The State of Consumer Data Privacy in the U.S. (And Why It Matters),* N.Y. Times (Sept. 6, 2021), https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us/, and https://perma.cc/86JW-CV9Z.

responsibilities that historically accompany ownership.[395] While American and European property law today have roundly rejected the concept of data ownership, both legal systems are yet simultaneously recognizing intangible assets such as digital currencies and other digital assets.[396] Furthermore, the debate around data ownership is intensifying. Under the CCPA, California Governor Gavin Newsom noted that California's consumers should be in a position to "share in the wealth that is created from their data" and addressed the concept of data ownership with a "data dividend." A "data tax" concept was also proposed by New York State Senator David Carlucci. On a Federal level, Senator John Kennedy introduced legislation called the "Own Your Own Data Act," that would create a property right in data generated by users of the internet. Similarly, Senators Mark R. Warner, Josh Hawley, and Richard Blumenthal introduced the "Augmenting Compatibility and Competition by Enabling Service Switching Act" to establish data portability for consumers, with Senator Hawley noting that "[y]our data is your property." [397] In light of continued state and federal support, an emerging belief amongst experts in a myriad of fields is that the growing technological trends create ample opportunity for an individual to own his or her data and undermine the previous refrains of opponents.[398] However, even without legal ownership, control of personal data may be enough to satisfy an athlete's requirements, including control over collection, processing, and use (e.g., including monetization) of their personal data.

Ownership rights in personal data and forms of NIL can provide athletes with a heightened level of privacy protection. Athletes, like any other individuals, retain the right to control the dissemination of their personal information in some states through privacy laws.[399] Athletes, as rightful owners, may gain the authority to make decisions regarding the commercial exploitation of their personal data, with such control extending to partnerships and endorsements while ensuring that athletes have a say in how their image and data are utilized for financial gain.[400] This approach not only respects the autonomy of athletes but would also promote a collaborative environment between athletes and institutions.[401] Recognizing athletes' ownership of personal data can also expedite financial benefits for both athletes and institutions.[402]

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[395] Alyssa J. Wolfington and Kathryn B. Marshall, *Data Ownership: The Suitability of a Consumer Property Right in a 21st Century Economy,* VENABLE LLP (2020), https://www.venable.com/-/media/files/publications/2020/09/data-ownership-paper-final.pdf.

[396] Andreas Boerding, Nicolai Culik, Christian Doepke, Thomas Hoeren, Tim Juelicher, Charlotte Roettgen, and Max V. Schoenfeld, *Data Ownership-A Property Rights Approach from a European Perspective,* 11 J. Civ. L. Stud. (2018).

[397] Alyssa J. Wolfington and Kathryn B. Marshall, *Data Ownership: The Suitability of a Consumer Property Right in a 21st Century Economy,* VENABLE LLP (2020), https://www.venable.com/-/media/files/publications/2020/09/data-ownership-paper-final.pdf.

[398] Jeffery Ritter and Anna Mayer, *Regulating Data as Property: A New Construct for Moving Forward,* 16 DUKE L. & TECHNOLOGY REV. 220, 221 (2018).

[399] *See* California Consumer Privacy Act of 2018, Cal Civ Code §§ 1798.100 — 1798.199.100 (2018).

[400] Alicia Jessop, *Article: Examining the Fourth Amendment and Biometric Data Privacy Law Implications of NCAA Athletes' Mandated Use of Athlete Biometric Data Tracking Devices*, 40 CARDOZO ARTS & ENT. L.J. 81, 107 (2022).

[401] *NFLPA Provides WHOOP to All Active NFL Players*, WHOOP (Aug. 10, 2020), https://www.whoop.com/us/en/press-center/nflpa-provides-whoop-to-players/.

[402] *Id.*

The concept of ownership rights in athletes' NIL and personal data are indispensable in today's sports landscape. Beyond providing guardrails for personal data, these rights can offer essential privacy safeguards, promote individual control, and expedite financial benefits for athletes and institutions alike. Acknowledging the importance of ownership rights or fair ways for players to monetize their NIL and personal data establishes a fair and equitable balance between the commercial interests of institutions and the rights and agency of athletes, setting a precedent for responsible data management in the dynamic world of sports and technology.

Some laws have been created to find a balance between individual and institutional rights as it relates to personal data. Owners of software that collect or analyze data can potentially claim ownership of the collected data through database rights, which have been legally established in the EU and UK. Databases have been defined as "'a collection of independent works, data or other materials which are arranged in a systematic or methodical way and are individually accessible by electronic or other means.'"[403] While there are no specific database law rights within the United States, companies may seek database protection through copyright laws or other database exceptions.[404] With some exceptions, the copyright laws do not protect the data as facts itself but rather the program behind it. However, organizations that collect personal data in states with consumer data privacy rights can fall within the title of "controller" or "processor," which have restrictions on how they can collect, use, and sell the data.[405] In some cases, even if the data is sold, acquiring organizations would still be considered controllers or processors under most of the data privacy acts. However, for both the software owners and athletes, the concept of data ownership has not been firmly established by law or widely accepted in practice.[406] Currently, no "privacy or data protection laws expressly define which entity owns personal information."[407]

Governments, particularly in Europe, have attempted to carve out a clear framework for ownership.[408] In Germany, German politician Alexander Dobrindt proposed a law on data ownership with five overriding principles: 1. viewing data as a material commodity; 2. belonging to a particular person; 3. establishing transparent data processing so that individuals give informed consent before the data is processed; 4. ensuring that data is open to the public—or open source—to establish "all non-personalized data which is collected by the state should be an open source to ensure a digital value creation"; 5. creating payment options for personalized, non-open source data.[409]

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[403] *Database rights: the basics*, Pinsent Masons (Dec. 24, 2019), https://www.pinsentmasons.com/out-law/guides/database-rights-the-basics.
[404] Jane C. Ginsburg, *Copyright, Common Law, and Sui Generis Protection of Databases in the United States and Abroad*, 66 U. Cin. L. Rev. 151, 171-176 (1997).
[405] *See generally* Cal. Civ. Code Ann. § 1798.100-199 (West).
[406] *Data Ownership, rights and controls: Reaching a common understanding,* Royal Society and techUK seminar, at 5 (Oct. 3, 2018), https://royalsociety.org/-/media/policy/publications/2019/data-ownership-rights-and-controls.pdf.
[407] Ritter & Mayer, *supra* note 398, at 227.
[408] *Id.*
[409] Wir Brauchen Ein Datengesetz in Deutschland! [We Need a Data Law in Germany!], BUNDESMINISTERIUM FÜR VERKEHR UND DIGITALE INFRASTRUKTUR, https://www.bmvi.de/SharedDocs/DE/Artikel/DG/datengesetz.html (last visited Aug. 24, 2017).

In Continental Asia, Japan's Director General of International Cyber Policy issued guidelines for data leadership on this topic, emphasizing that contracts should be recognized as the authoritative source for data ownerships rights—particularly within commercial relationships.[410] Although non-personal data is generally unprotected by Japan's civil code, the policy guidance issued by Japan's director is another framework by which ownership can be established until the U.S. Congress and other states pass further legislation.[411] Japan has yet to codify any data ownership statutes, but the Director General's guidelines may provide a useful starting point for businesses transacting with each other.[412] These examples are merely theoretical; however, American courts are beginning to reckon with the concept of personal data ownership.

B. Case Law Developments

Previously, American and European Courts had rejected the personal-data-as-property concept.[413] But recent innovation has allowed courts to analyze increasingly tangible applications of such a concept. California provides an explicit example of this reversal. Nevertheless, these views have dulled in recent years in federal courts in California and other western states. Now, federal and state courts have "acknowledged that users have a property interest in their personal information."[414] In one case, *Doe v. Microsoft*, the Western District of Washington rejected a defendant's motion to dismiss for lack of standing, explaining that the Plaintiff had adequately pled an entitlement to Qualtric's profits from users' personal data because data is financially valuable and that there is a "growing" market for such data.[415] In this case, the defendant had allegedly engaged in unfair competition and unjust enrichment when the defendant sold Doe's health information, videos watched, health conditions, browsing data, and other personal information to third parties for a profit.[416] The Court acknowledged the growing trend of recognizing personal data as property in the context of remedying tort law violations: "the growing trend across courts . . . is to recognize the lost property value of this information." Thus, the Court held that the plaintiffs had "asserted an injury in fact" by demonstrating that there was an active market for users' personal data.[417]

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[410] *Id.* at 232.
[411] *See* Contract Guidelines on Data Utilization Rights ver. 1.0 Formulated, METI (May 30, 2017), http://www.meti.go.jp/english/press/2017/ 0530_002.html [hereinafter METI GUIDELINES].
[412] Ritter and Mayer, *supra* note 398, at 232-233.
[413] For example, in one case, *Wesch v. Yodlee*, the federal district court in the Northern District of California held that "lost value in one's personal information does not constitute economic harm under the UCL." According to this court, this explanation stems from the fact that courts have consistently rejected broad interpretations of "money or property" to include personal information.
[414] *Calhoun v. Google* LLC, 526 F. Supp. 3d 605, 635 (N.D. Cal. 2021).
[415] *Doe v. Microsoft Corporation et al,* No. 2:2023cv00718 – Document 61, at *7 (W.D. Wash. 2023).
[416] *Id.* at 21.
[417] *Id.* citing In re Marriott Int'l, Inc., Cust. Data Sec. Breach Litig., 440 F. Supp. 3d 447, 461 (D. Md. 2020); see also Brown, 2021 U.S. Dist. LEXIS 244695, 2021 WL 6064009, slip op. at 15 (plaintiffs had UCL standing where they alleged the "cash value" of the data which Google collected "can be quantified" and "there is an active market for such data"); Calhoun v. Google LLC, 526 F. Supp. 3d 605, 636 (N.D. Cal. 2021) ("[T]he Ninth Circuit and a number

The *In re Meta Pixel Tax Filing* cases in the Northern District of California summarized three theories under which a party could potentially recover losses to the value of its personal information pursuant to its ownership status under the Unfair Competition Law ("UCL"). The first theory concerned the transactional or benefit of the bargain theory.[418] Under this theory, if a user shares information with a company or individual with the expectation that such information will be protected, then the failure to protect such information decreases the value of the data and provides the plaintiff with a basis to sue for the lost value of the data.[419] The second theory is the diminished value theory, which means that the sale of one's personal data inevitably decreases the value of the person whose data has been sold.[420] The third theory is the right to exclude theory.[421] The court explained that given the predominant importance of the right to exclude in the bundle of property rights, "the unlawful disclosure of plaintiffs' sensitive financial information [or intangible property]" is a violation of their "right to exclude Meta from that intangible property.[422] Thus, the Court held that such action survived dismissal because the Plaintiff's property interest in his personal data could be violated by the "diminishment of a present or future property interest."[423]

C. Guidance from Professional Sport Organizations and Their Athletes

Professional sports provide a useful framework on which to base potential safeguards for collegiate athletes and the use of their personal data and NIL. Namely, American professional sports leagues each have a CBA that governs league rules, contracts, player rights, wages, hours and other relevant topics.[424] Each American professional league's CBA has established specific provisions to protect the player's data from unauthorized use by the teams, leagues, and third parties.[425]

The National Basketball Association ("NBA") has established specific rules governing the use of personal data.[426] First, the NBA's provision concerning electronic medical records provides that electronic medical records may only be accessed via a centralized database –maintained by the league – by specific authorized academic researchers.[427] Prior to accessing

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of district courts . . . have concluded that plaintiffs who suffered a loss of their personal information suffered economic injury and had standing.").

[418] *In re Meta Pixel Tax Filing Cases,* 2024 WL 1251350, at *21.

[419] *Id.*

[420] *Id.* at 24.

[421] *Id.* at 25.

[422] *Id.*

[423] *Id.* (explaining that the right to control dissemination and use of their personally identifiable financial and tax data and communications could likewise violate the plaintiffs' right to exclude—along with their right to control).

[424] Legal Institute Information, Cornell Law, https://www.law.cornell.edu/wex/collective_bargaining.

[425] Sarah M. Brown and Natasha T. Brison, *Big Data, Big Problems: Analysis of Professional Sports Leagues' CBAs and Their Handling of Athlete Biometric Data,* Journal of Legal Aspects of Sport 63, 68 (2020).

[426] NBA CBA, July 2023, https://imgix.cosmicjs.com/25da5eb0-15eb-11ee-b5b3-fbd321202bdf-Final-2023-NBA-Collective-Bargaining-Agreement-6-28-23.pdf.

[427] *Id.*

and collecting the player's data, the NBA and its league members must give notice to and receive consent from the National Basketball Players Association (hereafter, "NBPA").[428] Additionally, the NBA gives the players access to their medical data such that players can share the data with medical professionals of their choice.[429]

Additionally, in response to the growing concern about use of wearables, the latest NBA CBA established a wearables committee to set cybersecurity standards for the storage of data that the NBA collects from wearable devices.[430] As part of those standards, the league and its teams may not mandate that a player wear a specific device.[431] Thus, the player must give express consent to wearing a particular wearable device.[432] Proper consent demands the player receive information about the following characteristics: (1) what the device will measure; (2) the significance of using each measurement; and (3) how the player will benefit from the collection of such data.[433] In essence, players maintain complete access and control over the data collected from wearable devices.[434] Furthermore, the data cannot be "considered, used, discussed, or referenced for any other purpose such as in negotiations regarding a future player contract or other player contract transaction."[435] Importantly, neither the NBA nor any of its teams can use a player's data from a wearable device for any commercial purpose or make it available to the public.[436] Likewise, the NBPA may not distribute data collected from the players by the teams.[437] To enforce these provisions, the grievance committee can issue fines for up to $250,000 for any use by a team that violates the CBA's provisions.[438]

In the National Football League (hereafter, "NFL"), its CBA provides similar provisions to the NBA CBA but further considers the player's ownership of data.[439] In particular, the CBA states that "each individual player owns his personal data collected by sensors and wearing sensors shall not require or cause an individual player to transfer ownership of his data to the club or any other third-party.[440] Importantly, such ownership of personal data by the player cannot be waived when the team or league transfers the data to a third party.[441] Thus, the player must expressly consent to any use by a third-party company.[442] In contract negotiations, the club and player may not reference any of the data collected from sensors or wearable devices as a

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[428] *Id.*
[429] *Id.*
[430] *Id.*
[431] *Id.*
[432] *Id.*
[433] *Id.*
[434] *Id.*
[435] *Id.*
[436] *Id.*
[437] *Id.*
[438] *Id.*
[439] NFL CBA, 2020, NFLPA, § 14, pg. 224, https://nflpaweb.blob.core.windows.net/media/Default/NFLPA/CBA2020/NFL-NFLPA_CBA_March_5_2020.pdf.
[440] *Id.*
[441] *Id.* at § 14(d).
[442] *Id.*

basis for the negotiations.[443] Similar to the NBA CBA, the NFL Players Association (hereafter, "NFLPA") must provide "advanced approval for collection of any data from sensors for players outside of NFL games or practices."[444]

The Major League Soccer (hereafter, "MLS") has a wearables committee model that evaluates the data collection and processing standards of each team and subsequently makes recommendations to ensure that the teams abide by the relevant MLS CBA provisions.[445] The committee, known as the "Joint Advisory Committee," consists of three representatives appointed by the MLS and three appointed by the MLSPA.[446] Similar to the NFL and NBA CBA's, the MLS and its league affiliates may not publish player data unless the MLS Player Association approves of such publishing in advance.[447]

D. College Athletes as Employees

The current landscape of collegiate sports, marked by lucrative broadcasting deals, substantial revenue generation, and the commercialization of athletes' images, has fueled discussions about the fairness of maintaining strict amateur status.[448] With college athletes at the center of a multibillion-dollar industry, it may be ethically and economically untenable to continue to exploit them on account of the nostalgic notion of amateurism.

One potential solution for student-athletes to gain more control over their personal data is to attempt to make the distinction that they are employees of the universities and/or conferences and collectively bargain as a player's union or other collective to retain more control and input.[449] Without this employee-employer relationship, there would be no way to establish any kind of union-employer relationship. Considering the laws that are in place currently and the proposed bills and legislation to come, collective bargaining would be the easiest way to ensure the players have control over their personal data while not upsetting any other expectations of law or going through the bureaucratic process of getting legislature proposed, let alone enacted. This is evident in the success of professional leagues in collective bargaining for athletes' benefits.[450] However, the Supreme Court has acknowledged that amateurism in college athletics is important

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[443] *Id.*
[444] *Id.* at 295.
[445] Collective Bargaining Agreement Between Major League Soccer and Major League Soccer Players Association, 2020.
[446] *Id.*
[447] *Id.*
[448] *Id.*
[449] Steve Berkowitz, *College Athletes Are School Employees, New National Labor Relations Board Memo Says*, USA Today (Sep. 29, 2021, 11:44 AM), https://www.usatoday.com/story/sports/college/2021/09/29/nlrb-memo-says-college-athletes-school-employees/5915491001/.
[450] *Overview of NFL Player Benefits*, NFL Player Health & Safety (Apr. 1, 2020, 6:24 AM), https://www.nfl.com/playerhealthandsafety/resources/for-players-and-former-players/overview-of-nfl-player-benefits.

to maintain.[451] An employer-employee relationship and unionizing would not only erase whatever optics of amateurism still remain, but also do away with amateurism completely.[452]

The ability to collectively bargain could provide college athletes with a pathway to resolve issues surrounding the collection of various forms of personal data and the leverage to negotiate for rights similar to what exists in professional sports.[453] Most, if not all, athletic leagues – including in college athletics – have some policy stating that electronic trackers that have not been approved by the league may not be worn during games.[454] The ability to negotiate the rights to the collected personal data can potentially resolve any dispute over ownership claims by other organizations (e.g., sensor companies) claiming rights to such information. Additionally, the concept of college athletes collectively bargaining as employees introduces a potential remedy to the challenge of representing a diverse group of individuals. While navigating the complexities of existing laws and potential future legislation, collective bargaining emerges as a pragmatic means for athletes to assert influence over their NIL and data without necessitating extensive legal or bureaucratic processes.[455]

While there are multiple arguments in favor of creating an employer-employee relationship in collegiate athletes, there are potential drawbacks. As it is now, the athletes have some freedom over their NIL associations in the wake of legislation and Supreme Court rulings.[456] The creation of an employer-employee relationship may limit these freedoms. For example, if student-athletes were employees of their respective university or conference, they may not be in a position to accept sponsorship opportunities offered to them if they conflict with the university's or conference's pre-existing sponsorship arrangements with another sponsor.[457] Relatedly, universities may be stricter in regulating athlete's sponsorships that conflict with the core values and mission of the university or conference. All this is to say that there is a trade-off. If the end goal is the ability for college athletes to collectively bargain for their NIL and data rights, then establishing an employer-employee relationship between the university or conference and the student athlete would be an appropriate means to that end.

Another solution for student-athletes looking for control over their personal data and NIL rights is through copyright law. As is settled by law, facts themselves are not copyrightable.[458]

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[451] *See generally NCAA v. Alston,* 141 S. Ct. 2141 (2021) (The Supreme Court has continued to recognize that maintaining both amateurism and competitiveness in college athletics as important).
[452] *See generally* Jeffrey L. Kessler & David L. Greenspan, *The NIL in Amateurism's Coffin: How the NCAA's Policy Reversal Shows Once Again That Compensating Student-Athletes Won't Hurt College Sports*, Harv. J. Sports & Ent. L. (2020) (explaining how shifting the landscape in college football towards athletes being compensated by universities directly will destroy amateurism in the sport).
[453] Berkowitz, *supra* note 449.
[454] Associated Press, *Report: MLB Approves Players to Wear 2 Devices During Games*, ESPN (Apr. 5, 2016, 2:55 PM), https://www.espn.com/mlb/story/_/id/15140473/mlb-approves-wearable-technology-two-devices-season (documenting the MLB rules committee's first allowance of wearable devices in games with the contracts for multiple devices including wearable sleeves and bat sensors).
[455] Berkowitz, *supra* note 449.
[456] *See generally NCAA v. Alston*, 141 S. Ct. 2141 (2021).
[457] Cate Charron, *Everything We Know About NIL Law & Policy (So Far)*, The Student Press Law Center (Feb. 22, 2023), https://splc.org/2023/02/everything-we-know-about-nil-law-policy-so-far/.
[458] *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

However, when they are compiled in a fashion that adds some level of creativity to those facts by the way they are arranged or selected, the compilation is afforded protections under copyright law.[459] While some NIL creations may obviously be protected by copyright laws, various forms of personal data collected from individual athletes are less certain. By itself, raw personal data that can be categorized as physiological data, biomechanical data, or other similar types of information about an athlete's body or the status of the game or event would likely be considered a fact. Leveraging copyright law, a solution to garner more protection for student-athletes over their personal data is to compile the data collected in a unique and creative way that affords it protection. For example, billions of dollars are being generated by the sports gambling industry.[460] Sportsbooks rely on raw data and processed data collected from athletes during events to engage bettors and set accurate and efficient betting line odds in order to be profitable.[461] Currently, organizations are collecting data from athletes and selling it to these sports gambling entities which generate significant returns.[462] Athletes could arrange their own personal data in a unique way that makes it copyrightable and potentially exclude others from profiting off of their personal data without a license.[463] For example, they could arrange the data in a way that makes it efficient for the sports gambling entities to use in setting odds for specific events, making it valuable to the sports betting company while simultaneously excluding some use of the compiled data by the college athletic organizations.[464]

There are some challenges to this. First, copyrighting such data requires first that the athlete obtain or collect the data, which could be difficult given the rules in college athletics restricting the use of in-game, on-body sensors or other data collection systems to collect personal data.[465] Leagues around the world have refused to allow players to choose among the many technology companies available and instead have begun to slowly incorporate certain technologies, only allowing those companies products who have contracted with the leagues to be used.[466] Copyrighting personal data may therefore require some kind of initial bargaining or contract (e.g. bargaining for players to use personal sensors during an event) to facilitate the process of transforming the personal data into something copyrightable.

Leveraging copyright law, another path towards ownership is to introduce new forms of information that are combined with personal data and arranged or selected in a way that makes the new compilation an original work. For example, an athlete's recorded consent as to how their

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[459] *Id.*
[460] Associated Press, *Americans Have Bet $125bn on Sports in Four Years Since Legalization*, THE GUARDIAN (May 13, 2022, 3:56 PM), https://www.theguardian.com/sport/2022/may/13/sports-gambling-125-billion-anniversary.
[461] David Jarvis & Kevin Westcott, *The Hyperquantified Athlete: Technology, Measurement, and the Business of Sports*, DELOITTE INSIGHTS (Dec. 7, 2020), https://www2.deloitte.com/xe/en/insights/industry/technology/technology-media-and-telecom-predictions/2021/athlete-data-analytics.html.
[462] *Id.*
[463] *See generally* Feist Publ'ns, Inc. 499 U.S. 340 (1991).
[464] *See generally Id.*
[465] Ahmet Çağdaş Seçkin et al., *Review on Wearable Technology in Sports: Concepts, Challenges, and Opportunities*, 13 APPLI. SCI. 1, 16 (2023).
[466] *Id.*

personal data can be used can provide new, original form of digital information that, when combined with such personal data, can create a new packaged unit of information – a new digital asset. The digital asset – a grouping of selected consent data, personal data, and contextual data – could be considered an original work given that it is assembled by the author as a result of the author's selection of data and the individual's selection for how each type of data can be used based upon the individual's own judgment (i.e., their consent). As such, a digital asset may be recognized as an ownable digital asset under copyright laws.

To execute such a proposition, one could create a framework whereby the athlete's consent (e.g., agreement) is required and collected, which could include enabling the individual athlete to establish terms, permissions, conditions for personal data and how it can be used. Such consent could then be transformed into new information (i.e., rules) provided as metadata with the relevant personal data recognized as facts under copyright law. Digital assets for commercial purposes could then be created leveraging the consent-based metadata and the associated personal data that is selected and arranged in a unique format for relevant use cases. A smart contracting system could then be implemented to enable the sale or distribution of such digital asset(s), whereby a smart contract is created for each transaction related to the sale or distribution of digital asset(s) that treat each digital asset as a form of property, enabling its sale or distribution to an acquirer for other consideration. Lastly, a digital record for each athlete could then be created which would record each transaction, enabling future transactions to contemplate previously-assigned rights.

Another solution would be for Congress to pass national NIL legislation that outlines clear guidance for employment and NIL-related issues related to collegiate athletes and allows for effective regulatory enforcement. Universities, athletes, organizations, and other parties with an interest in NIL have called for such action by Congress since the genesis of NIL after the *Alston* decision.[467] At a minimum, such legislation could reduce the ambiguity of enforcement of these topics. More importantly, however, legislation would allow all athletes to harness their personal data and NIL more effectively. Such a scenario would provide business partners with more assurances that agreements entered into with collegiate athletes are supported at the federal level. At the same time, athletes would also be assured of their employment status at the university and could collectively bargain for their desired workplace benefits. As employees of the university, the university could then take an active role – in contrast to the passive, hands-off approach they are subjected to under NCAA guidelines – to ensure that their athletes are effectively represented in NIL sponsorship deals.

E. NCAA's Revolutionary Call for New Athlete-Compensation Model for Division 1 Colleges

Since the Supreme Court's seminal *Alston* holding, collegiate athletes—in all three divisions—have been given license to profit from their NIL. However, collegiate athletes still have been unable to share in the university revenue streams earned through the athlete's labor.

[467] *See generally NCAA. v. Alston*, 141 S. Ct. 2141 (2021).

Previously, the NCAA has stridently opposed the notion of colleges and universities compensating players directly for their services, even in the face of mounting antitrust litigation.[468] Former NCAA President Mark Emmert, a steadfast opponent of revenue sharing, has referred to compensating players generally and NIL as an "existential threat" to collegiate athletics.[469] However, in 2023, the NCAA underwent a leadership change when Charlie Baker became President of the NCAA.[470] Baker, in an attempt to navigate the sea change in collegiate athletics, penned a letter proposing a revolutionary framework that would upend the NCAA's current model.[471] This framework would allow Division 1 institutions to compensate athletes directly for the use of their name, image, and likeness and to offer "enhanced educational benefits" as the schools "deem appropriate."[472] Furthermore, the new framework would allow a subdivision of Division 1 schools with "the highest resources to invest in their student athletes."[473] The scope of which Division 1 schools that qualify as the "highest resourced" is not clear from Baker's letter. It is likewise unclear whether schools could offer employment status to collegiate athletes.[474] Nevertheless, the new approach demonstrates a shift toward a more permissive institutional model where schools pay collegiate athletes directly for their services.[475]

The benefits for student athletes would be numerous. Per the current NCAA guidance, universities are unable to arrange and directly engage in NIL deals with student athletes. However, given the proposed NCAA framework, high-resourced universities could enter into deals directly with the student-athlete such that the athlete could receive fixed payments or dynamic payments for the use of his or her NIL. The student-athlete in the case could negotiate with the university for such payments and ensure that the maximum value of their NIL is captured. Additionally, and unlike *O'Bannon* where the school prohibited the athlete from receiving compensation for the use of O'Bannon's NIL, universities would also have the flexibility to pay student-athletes in licensing deals that used the athlete's NIL. Universities could implement a similar approach in licensing deals with other companies—such as media and

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[468] Although the Ninth Circuit accepted the NCAA's procompetitive justification for preserving amateurism, the Court determined that compensating athletes for full-cost-attendance would not undermine its procompetitive purpose. *See* O'Bannon v. NCAA (O'Bannon II), 02 F.3d 1049, 1079 (9th Cir. 2015) (holding that the NCAA's restriction on compensation to grant-in-aid less than the full-cost-tuition violated Section 1 of the Sherman Act); see *NCAA v. Alston*, 141 S. Ct. at 2157.

[469] Dennis Dodd, *NCAA Prez Calls Name, Image, and Likeness, Rights an 'Existential Threat' to College Sports,* CBS Sports (Sept. 25, 2019), https://www.cbssports.com/college-football/news/ncaa-prez-calls-name-image-and-likeness-rights-an-existential-threat-to-college-sports/.

[470] *NCAA President Charlie Baker*, Nat'l Collegiate Athletics Ass'n (Mar. 1, 2023), https://www.ncaa.org/sports/2023/3/1/ncaa-president-charlie-baker.aspx#:~:text=Charlie%20Baker%20assumed%20the%20duties,the%2072nd%20governor%20of%20Massachusetts.

[471] Doug Lederman, *Revolutionary or Reactionary? NCAA Chief's New Model for Big-Time Sports*, Inside Higher Ed (Dec. 6, 2023), https://www.insidehighered.com/news/students/athletics/2023/12/06/charlie-bakers-plan-paying-players-and-sustaining-ncaa.

[472] *Id.*

[473] *Id.*

[474] *Id.*

[475] *Id.*

betting—who use the athlete's NIL. By compensating the players for the use of their NIL, universities would have more flexibility to use the athlete's NIL with less concern over looming litigation.

F. Pending Cases – Potential Impact on Athlete Data and NIL

Several cases pending in American courts could dictate the extent to which collegiate athletes could adopt a model analogous to professional sports. First, although Baker's proposal is limited to highly resourced schools in Division 1, the case *House v. NCAA* may require a more expansive approach.[476] In *House v. NCAA,* the NCAA settled multiple class action lawsuits (*Hubbard v. NCAA* and *Carter v. NCAA* were combined with *House*) with classes of former athletes who sought back pay for the NIL benefits they did not receive from the universities during the years preceding the *Alston* decision, with the settlement reaching $2.75 billion.[477]

In another case in front of the NLRB, unfair labor practices by the NCAA, the University of Southern California, and the Pac-12 Conference are at issue.[478] The primary question in front of the NLRB is whether collegiate athletes have been unlawfully mislabeled as "non-employee student-athletes."[479] The case could also determine whether universities and colleges, conferences, and the NCAA act as joint employers with shared power over an athlete's hours and working conditions.[480] Joint employment status is particularly important to athletes because some universities and colleges are private while others are public. The National Labor Relations Act (hereafter, "NLRA") provides assurance that workers in the private—but not public—sector can unionize and collectively bargain with their employers "without fear of retaliation."[481] Since the NCAA and the conferences are private not-for-profit organizations, an NLRB determination that the NCAA, the conference, and the school jointly employ the athletes would likely make athletes private employees—thereby enabling them to collectively bargain under the NLRA.[482] A clear NLRB determination would be beneficial to promote equitable treatment through a consistent framework across both public and private institutions, ensuring equitable treatment and protections for all collegiate athletes regardless, of the college's public or private status.

The *Alston* holding is likewise seminal when considering its analysis of the fundamental assumptions of amateurism.[483] In his concurring opinion, Justice Kavanaugh attacks the NCAA's

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[476] Jesse Dougherty, *The Legal Challenges That Could Overhaul College Sports,* The Washington Post, (Nov. 9, 2023, 1:33 p.m. EST), https://www.washingtonpost.com/sports/2023/11/09/ncaa-legal-cases-nil/.
[477] Ralph D. Russo, *NCAA votes to Accept $2.8 Billion Settlement That Could Usher In Dramatic Change for College Sports*, Ap News (May 23, 2024)
https://apnews.com/article/ncaa-settlement-3e26c017980afe0ee1c6a28f77abcf5a.
[478] University of Southern California et al., 31-CA-290326 (2023).
[479] J. Brady Mccollough, *Q&A: What USC's Hearing Before NLRB Could Mean For the Future of College Athletics,* L.A. TIMES (Nov. 6, 2023, 4:10 pm),
https://www.latimes.com/sports/usc/story/2023-11-06/usc-athletes-hearing-nlrb-impact-college-sports.
[480] *Id.*
[481] NLRA, 29 U.S.C. §§ 151-169.
[482] Brady, *supra* note 479.
[483] *Id.*

student-athlete justification for not paying players as circular.[484] Specifically, Kavanaugh concluded that the "[NCAA] justifies not paying athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that colleges do not pay student athletes."[485] Kavanaugh's concurrence is one of the bases for the recent NLRB Guidance deeming FBS football players employees and not student-athletes. With *Alston*, the NCAA has seen its role as the lone arbiter of an athlete's economic trajectory greatly diminished.[486]

Recently, the Dartmouth University Men's Basketball team voted to unionize.[487] The university's response in refusing to collectively bargain with the team demonstrates the resistance to the change in the amateur sports landscape.[488] Additionally, even though the *House* settlement toes the line of universities directly paying collegiate athletes for their services, recent proposed legislature to prevent college athletes from becoming employees further echoes this resistance.[489]

G. Generative Artificial Intelligence and Its Effect on the Athlete Data and NIL Landscape

Despite the sizable changes that have occurred in collegiate sports since the *Alston* decision, the advancement in artificial intelligence (hereafter, "AI") and in particular generative AI will have a sweeping impact on the intellectual property and First Amendment concerns that surround NIL and athletes' personal data.[490] Generative AI refers to programs – or deep learning models – that "generate high-quality text, images, and other content based on the data they were trained on."[491] Deep learning models are AI tools that simulate – or attempt to simulate – the human brain's capabilities by gathering and learning large sets of data and applying them to specific tasks.[492] The latest iteration of the deep learning models demonstrates a refined capacity to churn out human-like products such as poems, books, legal memoranda, natural images, molecules, software code, and many other features.[493] Because of generative AI's sophisticated training, it can generate real-life-looking images that are almost impossible to differentiate from the authentic version.[494] Due to the current effectiveness of generative AI tools, such features

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[484] *Id.*
[485] *Id.*
[486] *Id.*
[487] *Dartmouth College Refuses to Work with Basketball Players' Union. Here's What Could Happen Next,* CBS NEWS (Mar. 19, 2024, 8:40 AM), https://www.cbsnews.com/boston/news/dartmouth-college-basketball-players-union/.
[488] *Id.*
[489] Steve Berkowitz, *House Committee Approves Bill That Would Prevent College Athletes From Being Employees*, USA TODAY (Jun. 13, 2024, 4:11 PM).
[490] *See generally* Toni M. Massaro et al., *ARTICLE: SIRI-OUSLY 2.0: What Artificial Intelligence Reveals About the First Amendmen*t, 101 MINN. L. REV. 2481 (June 2017); *see generally* Gil Appel et al, *Generative AI Has an Intellectual Property Problem,* HARV. BUS. REV. (Apr. 7, 2023).
[491] Kim Martineau, *What Is Generative AI?*, IBM (Apr. 20, 2023), https://research.ibm.com/blog/what-is-generative-AI.
[492] *Id.*
[493] *Id.*
[494] Christian Mammen & Seiko Okada, *Right of Publicity Bill Would Federally Regulate AI-Generated Fakes,* JDSUPRA (Oct. 24, 2023), https://www.jdsupra.com/legalnews/right-of-publicity-bill-would-federally-4108699/.

have unsurprisingly been used to deceive consumers.[495] For instance, a supposed Tom Hanks was featured in a dental advertisement endorsing a specific dental plan.[496] However, the advertisement had used AI to manufacture a realistic, but a so-called "deepfake," video using Hanks' likeness without his consent.[497]

Generative AI products present unique challenges for collegiate and professional athletes concerned about the unauthorized use of their NIL and personal data.[498] Although states have passed legislation precluding universities, conferences, and the NCAA from imposing restrictions on a collegiate athlete's ability to capitalize on their NIL, state law applicability on unauthorized use by a non-human generative AI is unclear.[499] On the federal level, there is no statute that specifically limits the unauthorized use of one's image and voice.[500] Challenges could come in the form of defamation. Defamation is governed by state statutory and common law, and typically refers to a false statement of fact, negligently published or communicated, causing harm to an individual's reputation.[501] However, legal commentators have noted the difficulty in proving that a statement made via generative AI can be proven as a statement of fact.[502] Namely, that there are many contextual factors that could dissuade a court from finding liability.[503] As such, without additional statutory protection, current legal remedies may be unsatisfactory to solve the problem.[504]

With the help of these unique AI tools, scammers now have a cost-effective way to generate advertisements and endorsements of a product through one's NIL.[505] College athletes who can now leverage their NIL through product endorsements are likely to confront the tidal wave of manipulated content.[506] The NFL Security Chief – Tomás Maldonado – articulated his concern with generative AI-enhanced phishing attacks and deepfake content featuring NFL

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[495] AJ Vicens, *Online Influence Operators Continue Fine-Tuning Use of AI to Deceive Their Targets, Researchers Say,* Cyberscoop (Aug. 17, 2023), https://cyberscoop.com/online-influence-operators-continue-fine-tuning-use-of-ai-to-deceive-their-targets-researchers-say/.
[496] Nicole Laporte, *How Generative AI Got Cast In Its First Hollywood Movie,* Fast Company (Feb. 11, 2023), https://www.fastcompany.com/90847396/generative-ai-metaphysic-tom-hanks-robin-wright-zemeckis-here.
[497] *Id.*
[498] Matt Perl, *Generative AI: What Sports Teams and Leagues Should Know,* Sportico (Apr. 20, 2023), https://www.sportico.com/business/tech/2023/generative-ai-what-sports-teams-leagues-should-know-1234719623/.
[499] *Id.*
[500] *See e.g., Id.*
[501]Legal Information Institution, Defamation, Cornell University, https://www.law.cornell.edu/wex/defamation.
[502] Elif Hamutchu, *Deepfakes Are on the Rise: What Can We Do About It Now?* Science and Technology Law Review, Columbia University (December 18, 2023), https://journals.library.columbia.edu/index.php/stlr/blog/view/584.
[503] *Id.*
[504] *Id.*
[505] *See e.g.,* The Economic Potential Of Generative Ai: The Next Productivity Frontier, Mckinsey & Company (June 14, 2023).
[506] Rich Brand et al, *Generative AI is Exciting for Sports Industry, but Its Evolution Is Uncertain,* Sports Business Journal (Nov. 2, 2023), https://www.sportsbusinessjournal.com/Articles/2023/11/02/oped-02-brand-fishman-jasnow.aspx.

athletes.[507] In particular, the areas of focus for the NFL are in-house "player data, fan data, credit card information, player health information, stadium access control systems, and the networks that power the entire infrastructure."[508]

A looming concern is generative AI's ability to generate specific content through the training it receives from analyzing stockpiles of human-generated content scraped from the internet, including various forms of personal data.[509] Namely, a concern is whether an AI infringes on one's NIL or personal data without human intervention. For example, a user can make an AI write a song in the form of a particular artist. Defenders of these features claim that these AI features are protected by "fair use" because the AI tools are trained to perform tasks, but generative AI carries out tasks without human intervention.[510] Similarly, personal data models trained with real personal data to generate synthetic personal data calls into question whether the synthetic data is property of the individual from whom it is derived. A key feature of synthetic datasets is that such datasets are typically derived from, but not comprised of, real-world personal data. Synthetic datasets use "artificial data that is generated from original data and a model that is trained to reproduce the characteristics and structure of the original data."[511] Thus, the data is separated from the data subject but still allows generative AI to be trained on a sufficient amount of data.[512] According to Gartner, a technology consulting firm, 60% of the data used by generative AI will be synthetically generated.[513] Such questions will be increasingly asked as personal data and its synthetic derivatives are increasingly used in video gaming, sports betting, and other revenue-generating verticals.

To combat some of these issues, a bipartisan group of Senators in the United States Congress proposed the No Fakes Act—the first federal statute providing the right to control one's own image and voice.[514] The No Fakes Act would establish a new right to curb and control the unauthorized use of one's NIL via the use of digital replicas—or deep fakes.[515] Under the proposed bill, protection would last up to 70 years after the individual's death.[516] Importantly, the

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[507] Jai Vijayan, *NFL Security Chief: Generative AI Threats a Concern As New Season Kicks Off,* DarkReading (Sept. 7, 2023), https://www.darkreading.com/cyberattacks-data-breaches/generative-ai-threats-a-concern-for-nfl-security-chief-as-new-season-kicks-off.
[508] *Id.*
[509] Generative Ai: The Data Protection Implications, Confederation Of European Data Protection Organizations (Oct. 16, 2023).
[510] Generative Artificial Intelligence and Copyright Law, Congressional Research Service (Sept. 29, 2023).
[511] *Id.*
[512] *Id.*
[513] Press Release, *Gartner Identifies Top Trends Shaping the Future of Data Science and Machine Learning,* GARTNER (Aug. 1, 2023), https://www.gartner.com/en/newsroom/press-releases/2023-08-01-gartner-identifies-top-trends-shaping-future-of-data-science-and-machine-learning.
[514] Chris Coons et al., NURTURE ORIGINALS, FOSTER ART, AND KEEP ENTERTAINMENT SAFE (NO FAKES) ACT (2023), https://www.coons.senate.gov/imo/media/doc/no_fakes_act_one_pager.pdf.
[515] *Id.*
[516] Nathaniel Bach & Aïcha Forbes-Diaby, *A Federal Right of Publicity for the Age of AI? Unpacking the Proposed NO FAKES Act*, JDSUPRA (Nov. 7, 2023), https://www.jdsupra.com/legalnews/a-federal-right-of-publicity-for-the-1092236/.

No Fakes Act would establish a uniform legal body to enforce violations, which is lacking at the state level since state laws differ significantly in scope.[517] California, the state with the most protections for publicity, also extends protections for 70 years after the individual's death; other states have codified no protections at all.[518] Still, the primary tension between proponents and opponents is the protection of free expression under the First Amendment and the prevention of commercial exploitation, respectively.[519] The First Amendment concern is that the bill would be an overbroad content-based ban on expressive speech.[520] The bill does attempt to carve out exceptions, such as for parodies, news broadcasts, and documentaries, to assuage First Amendment concerns.[521] However, such a bill is likely to be fiercely challenged by First Amendment groups given its breadth, scope, and penalties for expressive speech and conduct.[522]

Labor negotiations also constitute a complex discussion point on the unauthorized use of athlete NIL and data.[523] Professional sports has seen a meteoric rise in the use of generative AI to enhance the fan experience through real-time updates, virtual assistants, ticketing assistance, social media engagement, predictive analytics, crowd monitoring, tailored merchandise, streaming, and localized experiences through virtual reality.[524] However, such use could present concerns about the unauthorized use of NIL and athletes' personal data by professional leagues, collegiate conferences, and Division 1 schools. Similar concerns in other industries have reached the collective bargaining table.[525] Over the summer and fall of 2023, one of the main concerns of actors and writers concerned the burgeoning use of generative AI in the entertainment industry.[526] The Screen Actors Guild-American Federation of Television and Radio Artists ("SAG-AFTRA") advocated for explicit protections from entertainment companies and studios against the unauthorized use of their NIL through generative AI.[527] With the cost-effective nature of

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[517] *Id.*
[518] *See e.g.,* CA Civil Code § 3344.1.
[519] Theo Belci, *Proposed US Legislation Would Penalize Use of AI to Generate Someone's Likeness Without Their Consent,* The Art Newspaper (Oct. 17, 2023), https://www.theartnewspaper.com/2023/10/17/artificial-intelligence-no-fakes-act-us-legislation-non-concensual-likeness.
[520] *See e.g.*, Isaiah Poritz, *AI Deepfakes Bill Pushes Publicity Rights, Spurs Speech Concerns,* Bloomberg L. (Oct. 17, 2023, 5:05 AM EDT), https://news.bloomberglaw.com/ip-law/ai-deepfakes-bill-pushes-publicity-rights-spurs-speech-concerns.
[521] *Id.*
[522] *See generally Id.*
[523] *See e.g.,* Pawan Budwar et al., *Human Resource Management in the Age of Generative Artificial Intelligence: Perspectives and Research Directions on ChatGPT,* HUM. RES. MGMT. J., at 626 (June 9, 2023).
[524] Dan Axman, *Game Changer: How AI and Generative AI are Transforming the Sports Industry: (Part 1 - What happens off the playing field)*, Linkedin (Oct. 11, 2023), https://www.linkedin.com/pulse/game-changer-how-ai-generative-transforming-sports-industry-dan-axman/.
[525] Angela Luna & Danielle Draper, *Hollywood Strikes Back Against Generative AI Disruption,* BIPARTISAN POL'Y CTR (Dec 6, 2023), https://bipartisanpolicy.org/blog/hollywood-strikes-back-against-generative-ai-disruption/#:~:text=In%20June%2023%2C%20the%20Guild,performance%20is%20changed%20using%20AI.
[526] *Id.*
[527] Charles Pulliam-Moore, *SAG-AFTRA's New Contract Hinges on Studios Acting Responsibly with AI,* The Verge (November 18, 2023, 10:30 AM EST),

generative AI, SAG-AFTRA feared that companies could exploit the technology without compensating the artists.[528] In the sports realm, players unions have already advocated for the specific protections noted in this paper. Furthermore, with generative AI's rapid growth, the players unions may need to seek specific protections concerning player data and NIL. Since generative AI uses advanced algorithms trained on personal data, the player's unions should amend their current proposals to restrict sharing and using player's personal data for generative AI purposes. Namely, if the teams and leagues are uncertain about the scope of personal data use by the algorithms, then the leagues should refrain from using such data given the uncertainty over how that data will be processed and used.

In the EU and UK, compliance with regulations like the GDPR provides more protections for individuals over use of their personal data and regulating, in part, the unauthorized use of personal data by generative AI companies.[529] However, generative AI's current training model poses challenges to the protections afforded to data subjects under the GDPR.[530] For instance, generative AI trains its models with personal data collected from the internet.[531] Such data is then firmly embedded in a complex algorithm where it becomes difficult to trace and identify for compliance under the GDPR.[532] Specifically, the GDPR's right to erasure and right to access personal data are thwarted under generative AI models since their algorithms are too complex and unwieldy to identify data.[533] Unlike a traditional database, where a data subject can merely request that their data be erased or accessed from that database, most generative AI models do not have a definitive manner in which to trace and identify data.[534] Such models likely run afoul of Article 30 of the GDPR, which states that data controllers should "maintain a record of processing activities under its responsibility" including a "description of the categories of data subjects and the categories of personal data[.]"[535] Furthermore, many generative AI tools only scrape data up to a certain date, and therefore have the tendency to provide inaccurate

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https://www.theverge.com/2023/11/18/23962349/sag-aftra-tentative-agreement-generative-artificial-intelligence-vote.

[528] *Id.*

[529] *See generally* David S. Levine, ARTICLE: GENERATIVE ARTIFICIAL INTELLIGENCE AND TRADE SECRECY, 3 J. FREE SPEECH L. 559 (2023).

[530] *See generally* Richinte Brand et al, *Generative AI is Exciting for Sports Industry, but Its Evolution Is Uncertain,* SPORTS BUSINESS JOURNAL (Nov. 2, 2023), https://www.sportsbusinessjournal.com/Articles/2023/11/02/oped-02-brand-fishman-jasnow.aspx. (Explaining how current laws leave gaps in protections for athletes).

[531] Katherine Miller, *Privacy in an AI Era: How Do We Protect Our Personal Information?*, STANFORD UNIVERSITY HAI (Mar. 18, 2024) https://hai.stanford.edu/news/privacy-ai-era-how-do-we-protect-our-personal-information#:~:text=For%20example%2C%20generative%20AI%20tools%20trained%20with%20data,people%20for%20purposes%20of%20identity%20theft%20or%20fraud.

[532] *Id.*

[533] *See e.g.,* Tiffany Li et al., *Humans Forget, Machines Remember: Artificial Intelligence and the Right to Be Forgotten,* BOSTON UNIV. SCH. OF L., at 4-5 (April 2018).

[534] *See* Lauren Leffer, *Your Personal Information is Probably Being Used to Train Generative AI Models,* SCIENTIFIC AMERICAN (Oct. 19, 2023), https://www.scientificamerican.com/article/your-personal-information-is-probably-being-used-to-train-generative-ai-models/.

[535] General Data Protection Regulation, Art. 30, § 1 (2016) (EU).

information based on outdated data.[536] GDPR Article 5(1)(d) specifically states that personal data shall be "kept up to date."[537] Given these challenges, the GDPR, under Article 6, provides three lawful bases for use of personal data: contract, legitimate interest, and consent.[538] Nevertheless, without objectively traceable data, such lawful purposes could be difficult to fulfill. Contract, under Article 6(1) requires that the use of the data be made for a necessary purpose to fulfill a contractual obligation.[539] Legitimate interest, refers to a data controller's legitimate business interest in the personal data that outweighs any countervailing data rights or freedoms of the individual.[540]

Educating the leagues, schools, and conferences on the ramifications of using such technologies should be a first step to mitigate such concerns over its use. Considering the looming risks, experts in data protection have advocated for a system known as "privacy by design," which merely refers to the idea that an organization should incorporate data protection into the fabric of their technological design.[541] In fact, privacy by design has gained adherence under GDPR Article 25, which expressly states that data controllers should adopt privacy by design into their technological development.[542] Article 25, § 1 states that data controllers shall "implement appropriate technical and organizational measures, such as pseudonymisation, which are designed to implement data protection principles[.]"[543] Pseudonymisation provides for sufficient data minimization so that the data controller does not use more than the necessary amount of personal data for its operations.[544] Article 25, § 2 states that the controller shall implement data minimization by limiting the "personal data collected, the extent of their processing, and the period of their storage and their accessibility."[545]

Collegiate athletes, in an effort to capitalize on their NIL, spend valuable time acting as part-time content creators.[546] Instead, collegiate athletes could license the use of their generative-AI-created NIL to capture endorsements.[547] Specifically, with the advent of generative AI, an athlete could license the use of his or her digital representation of themselves to an organization without having to shoot commercials or take photos; instead, the AI could create a lifelike avatar (i.e., a digital twin) that the company could use in lieu of the player's physical appearance. Such arrangements would reduce the time spent filming and posting social media

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[536] *When AI Gets It Wrong: Addressing AI Hallucinations and Bias,* MIT Sloan Teaching and Learning Technologies (Jun. 23, 2024) https://mitsloanedtech.mit.edu/ai/basics/addressing-ai-hallucinations-and-bias/.
[537] GDPR, Art. 5, § 1.
[538] GDPR, Art. 6, § 1(a)-(f).
[539] *Id.* at § 1(b).
[540] *Id.* at § 1(f).
[541] European Union Agency For Network And Information Security (Enisa), Privacy And Data Protection By Design (Jan. 12, 2015).
[542] GDPR, Art. 25, § 1.
[543] *Id.* at § 2.
[544] *See e.g., Id;* Information Commissioner's Office, Pseudonymisation, at 7 (Feb. 2022).
[545] GDPR, Art. 25, § 2.
[546] Rich Brand, Eric Fishman, and Dan Jasnow, *Generative AI is Exciting for Sports Industry, but Its Evolution Is Uncertain,* Sports Business Journal (Nov. 11, 2023), https://www.sportsbusinessjournal.com/Articles/2023/11/02/oped-02-brand-fishman-jasnow.aspx.
[547] *See e.g., Id.*

content and advertisements.[548] Further, such licensing could allow the athlete to capitalize on more endorsements and to generate more money with the time saved, including the use of generative AI content on social media that could enable additional content partnerships. An athlete's personal data, even in a pseudo-anonymized or anonymized format, could have tremendous value as training data for big industries including sports betting, healthcare, insurance, and others. However, such usage will likely involve more data and will leave the athlete with few remedies to retrieve or erase the data that generative AI collects and distributes. With robust use of personal data, an athlete may be susceptible to invasions of his publicity and privacy rights through broad dissemination of personal information in a manner that he cannot limit or control. Nevertheless, the increased calls for privacy by design—and the use of synthetic data—could give collegiate athletes assurances that their data is not used for purposes for which they do not consent.

X. Conclusion

College athletes with their newfound leverage with NIL and their soon-to-be employment status may have the opportunity to retain ownership over their personal data. With the development of new bills and implemented statutes, along with pressure on the NCAA to set stricter or more clearly defined rules pertaining to NIL deals, athletes are closer to controlling their personal data. An argument for college athletes is that their services constitute an employee-employer relationship, and thus they have the right to develop a collective bargaining agreement as employees because there is case law that supports such practices. From there comes the challenge of stipulating contract agreements. Another avenue is utilizing copyright law which will require initial bargaining with the university and data collecting entity. Outside the US, regulations like the GDPR provides guidance and reasoning for providing the college athletes more control over their personal data since the GDPR has played a significant role in this topic on a global scale.

Despite all these avenues, personal data from student-athletes are processed and distributed daily for commercial gain by other parties, oftentimes without their consent or knowledge. Thus, the current framework where an athlete provides rights to their personal data to the university and the university unilaterally capitalizes commercially is not sustainable without a more robust consent and revenue sharing-based framework in place. Given the tidal wave of changes happening in college sports, such a model will require significant overhaul in the coming years. Administrative decisions and federal court cases have combined for athletes to gain employment status at their universities. Furthermore, the *Alston* decision opened opportunities for athletes to have agency over their NIL and to prevent schools from operating under the false pretense of amateurism.[549] Contemporaneously with the *Alston* decision are state and federal statutes that could provide express protections for individuals, including athletes, and

[548] *Id.*
[549] *See generally NCAA v. Alston*, 141 S. Ct. 2141, 2157 (2021).

their personal data.[550] Going forward, athletes could be able to collectively bargain for explicit protections that are not yet protected in a particular state, such as the right to access their data, the right to consent to the use of their data, the right to delete their data, the right to publicity, and much more. These rights could be enshrined into collective bargaining agreements agreed upon by the athletes and schools. Conversely, opponents will continue to assert challenges to these rights via First Amendment challenges, amateurism arguments, and forced contractual consent to the use of athlete's NIL and personal data. However, such challenges face an uphill battle given all of the momentum concerning data rights, NIL protections, and collegiate athlete employment.

Personal data and NIL rights are in their infancy. Opportunities that leverage generative AI, while creating entirely new revenue channels for student-athletes and Universities, will bring more complexities to an already crowded debate. As such, policymakers, businesses, schools, and athletes must learn to be stewards of personal data to avoid the pitfalls of developing technology. Collegiate athletes, in particular, must be educated on the opportunities and risks that this developing technology will present. Collegiate athletes face sizable challenges that will shape sports and broader society. Thus, it is essential for lawyers and policymakers to invoke the athlete's competitive spirit in seeking NIL and other personal data protections.

[550] *Id.*