

COMMENT

AN ALL-ENCOMPASSING PRIMER ON STUDENT-ATHLETE NAME, IMAGE, AND LIKENESS RIGHTS AND HOW *O'BANNON V. NCAA* AND *KELLER V. NCAA* FOREVER CHANGED COLLEGE ATHLETICS

John A. Maghamez[†]

I. INTRODUCTION

While paying student-athletes has been a controversial issue for years, recent events have pushed the issue to the forefront of the sports world. The attempted unionization by collegiate football players,¹ the suspensions of several high-profile collegiate athletes,² the sanctioning of several major universities,³ and recent monumental lawsuits⁴ have resulted in a contentious state of affairs for the National Collegiate Athletic Association (the “NCAA”). This Comment will analyze the history of the NCAA amateurism policies, predict the outcome of *Keller*, conduct an in-depth analysis of *O’Bannon*, and provide a solution for the problem.

[†] *Student Development Editor*, LIBERTY UNIVERSITY LAW REVIEW, Volume 9; J.D. Candidate, Liberty University School of Law (2015); B.A., Political Science/Government, University of Virginia (2012); University of Virginia Varsity Football Team: Offensive Line (2008-12). The biggest thank you to my parents, Al and Michele, and my sisters, Jessica and Kristin, for constantly encouraging me to pursue my dream and for making all of this possible. You have always been my biggest fans, whether it is in the courtroom or on the field and words cannot express my love and gratitude for you. Thank you also to all of my coaches, specifically Coach Pierce, Coach London, and Coach Wachenheim for constantly pushing me to be better and for teaching me what it means not just to be a football player, but a man. Lastly, a special shout out to my law school “brothers” for keeping me sane through it all.

1. Justin Baragona, *Jon Stewart Annihilates the NCAA’s Argument Against Student-Athlete’s Unionizing*, POLITICS USA (Apr. 11, 2014), <http://www.politicususa.com/2014/04/11/jon-stewart-annihilates-ncaas-argument-student-athletes-unionizing.html>.

2. See discussion *infra* Part II.A.

3. Associated Press, *Ohio State Vacates All 2010 Victories*, ESPN (July 22, 2011), <http://sports.espn.go.com/ncf/news/story?id=6749330>; see Gary Klein, *For USC Athletics, NCAA Sanctions are Ending, but Effects Remain*, L.A. TIMES (June 7, 2014), <http://www.latimes.com/sports/usc/la-sp-usc-ncaa-sanctions-20140608-story.html#page=1>.

4. See discussion *infra* Parts V-VI.

II. BACKGROUND

A. Famous "Law-Breaking" Student-Athletes

Recently, three high-profile college athletes were forced into the spotlight for violating the NCAA's rules prohibiting student-athletes from accepting any compensation for the use of their name or likeness. Texas A&M's Johnny Manziel was suspended for the first half of the opening game of the 2013 season for allegedly being paid to sign autographs during the offseason.⁵ Ohio State's Terelle Pryor was suspended, along with other teammates, for five games for selling his jersey and memorabilia in exchange for free tattoos.⁶ Georgia's Todd Gurley was suspended four games for being paid to sign autographs.⁷ Georgia's A.J. Green was suspended for four games for selling his bowl-game jersey to an agent.⁸

What did these college superstars all have in common? They all were punished or investigated by the NCAA for violating the NCAA's amateurism policies forbidding players from accepting any form of compensation in association with their persona as an "amateur" athlete.⁹ Each player was a transcendent figure in the college football world who likely created substantial value for his name brand because of his achievements on the football field.¹⁰ Yet, each player was prevented from

5. Tom Fornell, *Johnny Manziel Suspended for First Half of Rice Game*, CBSSPORTS.COM (Aug. 28, 2013), <http://www.cbssports.com/collegefootball/eye-on-collegefootball/23366173/johnny-manziel-suspended-for-first-half-of-rice-game>.

6. Associated Press, *Ohio State Vacates All 2010 Victories*, ESPN (July 22, 2011), <http://sports.espn.go.com/ncl/news/story?id=6749330>.

7. Andy Staples, *Todd Gurley Suspension Ruling Shows Major Problems with NCAA's System*, SPORTS ILLUSTRATED (Oct. 29, 2014), <http://www.si.com/college-football/2014/10/29/todd-gurley-georgia-bulldogs-ncaa-suspension>.

8. NCAA UPHOLDS A.J. GREEN'S SUSPENSION, ESPN (SEPT. 28, 2010), <HTTP://SPORTS.ESPN.GO.COM/NCF/NEWS/STORY?ID=5585220>.

9. See discussion *infra* Part III.A.

10. Johnny Manziel won the Heisman Trophy as a freshman. *Johnny Manziel Wins Heisman Trophy*, FOX SPORTS (June 6, 2014), <http://www.foxsports.com/collegefootball/story/johnny-manziel-heisman-trophy-texas-am-aggies-quarterback-first-freshman-to-win-beats-out-manti-teo-collin-klein-120812>. Todd Gurley was a leading Heisman candidate until his suspension. Chip Towers, *Ten@10: ESPN's Herbstreit Believes Gurley Could Still Win Heisman*, AJC.COM (Oct. 21, 2014), <http://ugasports.blog.ajc.com/2014/10/21/ten10-espns-herbstreit-believes-gurley-could-still-win-heisman/>. Terelle Pryor was the top-ranked prospect out of high school by several recruiting services, and the Rose Bowl MVP. *Terelle Pryor Player Profile* (Aug. 5, 2010), http://www.ohiostatebuckeyes.com/sports/m-footbl/mtt/pryor_terelle00.html. A.J. Green was voted an All-American and SEC Freshman of the Year. Paul Dehner Jr., *Crossing*

profiting from his image rights by the NCAA's amateurism policies prohibiting collegiate athletes from accepting any form of compensation in relation to his persona as a student-athlete.¹¹ Not only was each player prevented from profiting off of his own image, but each player was also required to grant any rights to his image to the NCAA in order to become eligible to compete for his school.¹²

B. *By the Numbers*

Companies and courts alike have pointed to the non-profit status of the NCAA—specifically, the promotion and preservation of the concept of amateurism—as justification for the continuation of the current system.¹³ This concept has slowly lost credibility, however, as college sports, like football and basketball, have grown into a colossal commercial enterprise. The NCAA, its member schools, and many third parties profit immensely from college athletics. As a whole, college athletics generates \$11 billion in annual revenues.¹⁴ CBS and Turner Sports reached a deal with the NCAA in 2011 worth \$10.8 billion for the next fourteen years of television rights to March Madness—the annual NCAA postseason basketball tournament.¹⁵ The deal is only for the postseason basketball tournament and does not include the television revenue created for the thirty-plus regular season games each college basketball team plays or the revenue from football.¹⁶ On top of that, the 2012 “March Madness” tournament generated over \$1

Patterns: A.J. Green vs. Julio Jones, CINCINNATI.COM (Sept. 13, 2014), <http://www.cincinnati.com/story/sports/nfl/bengals/2014/09/13/cincinnati-bengals-aj-green-julio-jones/15605949/>.

11. See discussion *infra* Part III.A-B.

12. *Id.*

13. See discussion *infra* Part VI.A.2.a.

14. Marc Edelman, *The Case for Paying College Athletes*, U.S. NEWS & WORLD REP. (Jan. 6, 2014), <http://www.usnews.com/opinion/articles/2014/01/06/ncaa-college-athletes-should-be-paid>.

15. *Time Warner Joins CBS in \$10.8 Billion March Madness TV Deal*, FOXBUSINESS (Apr. 22, 2010), <http://www.foxbusiness.com/markets/2010/04/22/time-warner-joins-cbs-billion-march-madness-tv-deal/>.

16. *Id.*

billion in advertisement sales revenue.¹⁷ The retail market for collegiate licensed merchandise is worth \$4.6 billion.¹⁸

Universities and conferences also generate extraordinary amounts of revenue from their major athletic programs. In 2013, the University of Texas's revenue stream from football alone was \$109 million, and the football program's value is estimated at \$139 million.¹⁹ The five Bowl Championship Series (BCS) conferences—the Atlantic Coast Conference (ACC), the Big Ten, the Big 12, the Southeastern Conference (SEC), and the Pacific-12 (Pac-12)—generated over \$1.4 billion combined from the television rights, the football bowl game payouts, and the tournaments.²⁰ This figure does not include ticket sales, concessions, merchandise revenue, or any other licenses granted by the schools in connection with their athletic teams (e.g. video game licenses). The Big Ten was the most profitable conference in the NCAA in 2013 with a revenue stream of \$310 million.²¹ It is believed that the conference could increase its revenue by \$100 million in 2016 by adding several other schools to the conference.²² Each school in the Big Ten receives close to \$13 million in basketball revenue alone.²³

College coaches are highly compensated for their jobs. Nick Saban, head football coach at the University of Alabama, recently signed a contract entitling him to a salary of \$7 million annually.²⁴ Among the forty-four head coaches in the BCS conferences, the average annual salary is \$2.1 million.²⁵

17. Anthony Crupi, *Show Me the Moneyball: March Madness Generates \$1 Billion in Ad Sales*, ADWEEK (Mar. 6, 2013), <http://www.adweek.com/news/television/show-me-moneyball-march-madness-generates-1-billion-ad-sales-147732>.

18. *About CLC: Connecting Passionate Fans to College Brands*, COLLEGIATE LICENSING CO., <http://www.clc.com/About-CLC.aspx> (last visited Dec. 20, 2014).

19. *College Football's Most Valuable Teams 2013*, FORBES, <http://www.forbes.com/pictures/emdm45efmkf/1-texas-longhorns-3/> (last visited Oct. 11, 2014).

20. Chris Smith, *The Most Valuable Conferences in College Sports*, FORBES (Jan. 16, 2013), <http://www.forbes.com/sites/chris-smith/2013/01/16/the-most-valuable-conferences-in-college-sports/>.

21. *Big Ten—In Photos: The Most Valuable Conferences in College Sports*, FORBES, <http://www.forbes.com/pictures/emdm45lme1/1-big-ten/> (last visited Oct. 11, 2014). This statistic was calculated by accounting for revenue, bowl revenue, and NCAA tournament revenue of every athletic program a school has. *Id.*

22. *Id.*

23. Patrick Rische, *Revenue Comparisons Among Division I Men's Basketball Conferences*, FORBES (Mar. 1, 2011), <http://www.forbes.com/sites/sportsmoney/2011/03/01/revenue-comparisons-among-division-i-mens-basketball-conferences/2/>.

24. Edelman, *supra* note 14.

25. *Id.*

The highest paid public employee in forty of the U.S. states is the state university's head football or basketball coach.²⁶ Additionally, the NCAA pays its president, Mark Emmert, \$1.7 million annually.²⁷ Clearly, there is a lot of money in college athletics.

Recently, a report came out calculating the fair market value of college basketball players at the top twenty revenue-producing college basketball schools.²⁸ At the top-ranked school of 2013, Louisville, each player is reportedly worth more than \$1.5 million.²⁹ The twentieth-ranked school's players are valued at over \$500,000 each.³⁰

Despite such a significant amount of revenue generated annually by college sports, and with student-athletes' values as high as they are, many players still struggle to cover miscellaneous expenses not covered under the standard grant-in-aid scholarship issued by NCAA Division I schools, which is the maximum scholarship given to even the elite student-athletes.³¹ These scholarships cover only tuition, books, and room and board; and many of them are only guaranteed for one year.³² Student-athletes on grant-in-aid scholarships in the NCAA pay an average of \$3,222 per year out of their own pockets for expenses incurred while in school.³³ Over four years, that amounts to an accumulation of personal debt of \$12,888. Recent studies compiled by the *O'Bannon* legal counsel found that student-athletes can leave school with as much as \$30,000 in debt despite possessing a full athletic scholarship.³⁴ Additionally, many student-athletes sustain injuries

26. *Id.*

27. *Id.*

28. Sam Vecenie, *Report: Louisville Basketball Team Worth \$1.5 million Per Player?*, CBS SPORTS (Dec. 17, 2014), <http://www.cbssports.com/collegebasketball/eye-on-college-basketball/24897427/report-louisville-basketball-team-worth-15-million-per-player>.

29. *Id.* The fair market value of the players is determined by implementing a revenue sharing system that the NBA currently uses, giving 51% of the money generated to the schools and 49% to the players. *Id.*

30. *Id.*

31. *O'BANNON V. NAT'L COLLEGIATE ATHLETIC ASS'N*, 7 F. SUPP. 3D 955, 971 (N.D. CAL. 2014); SEE JON SOLOMON, COLLEGE ATHLETES' RIGHTS: EFFORT TO MAKE SCHOLARSHIPS COVER ALL COSTS MEETS RESISTANCE, AL.COM (DEC. 30 2011), http://www.al.com/sports/index.ssf/2011/12/college_athletes_rights_effort.html.

32. *How Do Athletic Scholarships Work?*, NCAA (2012), <http://www.ncaa.org/sites/default/files/NCAA%2BAthletics%2BScholarships.pdf>.

33. Ramogi Huma & Ellen J. Staurowsky, *The Price of Poverty in Big Time College Sports*, NAT'L COLL. PLAYERS ASS'N 4, available at <http://www.ncpanow.org/research/body/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf> (last visited Dec. 20, 2014).

34. Third Amended Consolidated Class Action Complaint at ¶ 547, *In re NCAA Student-Athlete Name & Likeness Litig.*, No. C 09-01967 CW (N.D. Cal. 2013), WL 3810438.

that require ongoing medical treatment after they are no longer enrolled in school.³⁵ While the NCAA enacted a rule requiring that players have medical insurance while they are participating in athletics for the school, some of those insurance plans do not fully cover all medical expenses and some schools do not cover the additional medical expenses incurred while a student-athlete is playing for the university.³⁶ This severely hampers a player's future, causing participation in college athletics to become a burden when it should be a blessing.

III. HISTORY OF THE NCAA AND THE CURRENT SYSTEM

A. *The Concept of Amateurism*

One of the NCAA's primary objectives, as delineated by the 2013-2014 NCAA Division I Manual (the "NCAA Bylaws"), is its commitment to the concept of amateurism. It requires its member schools to comply with its standards of "scholarship and amateurism"³⁷ and to "maintain intercollegiate athletics as an integral part of the educational program" by "retain[ing] a clear line of demarcation between intercollegiate athletics and professional sports."³⁸ The NCAA Bylaws describe "amateurism" saying, "[s]tudent-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."³⁹ Under Section 12.1.2, entitled "Amateur Status," the NCAA Bylaws outline the requirements that a student-athlete must comply with to maintain his or her amateur status and list activities that will cause a student-athlete to be stripped of amateur status:⁴⁰

An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

35. *Id.* at ¶ 548.

36. *Id.*

37. See Nat'l Athletic Assoc'n, 2013-14 NCAA Division I Manual, art. 2.9 (2013), available at <http://www.ncaapublications.com/productdownloads/D114.pdf> [hereinafter "NCAA Bylaws"]; see also *id.* at art. 1.2(c).

38. *Id.* at art. 1.3.1.

39. *Id.* at art. 2.9.

40. *Id.* at art. 12.1.2.

- (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation⁴¹

B. National Letter of Intent, NCAA Bylaw 12.5, and Form 08-3a: Required Paperwork

Every February, on a day known as National Signing Day, hundreds of high school seniors all across the country sign their National Letter of Intent and their Statement of Financial Aid, which are contracts binding them to the respective schools of their choice.⁴² Both of these contracts specifically incorporate the NCAA Bylaws, requiring student-athletes to fulfill all NCAA requirements in order to be, and to remain, eligible to receive their scholarships.⁴³ Many of these seniors are still only seventeen years old and are making one of the biggest decisions of their lives, some with little or no guidance. Additionally, once these students step foot on campus as freshmen, but prior to participating in training camp, they are required to read and sign a plethora of forms waiving rights and agreeing to policies they are not fully aware of.⁴⁴ Among the piles of paperwork are both NCAA Form 08-3a and NCAA Bylaw 12.5.⁴⁵ If a student-athlete does not sign these forms each year, that player is not eligible to play.⁴⁶

41. *Id.*

42. See generally *National Letter of Intent*, NCAA ELIGIBILITY CENTER (Oct. 13, 2014), http://msnbcmedia.msn.com/i/CNBC/Sections/News_And_Analysis/_Story_Inserts/graphics/_PDF/NLI_2010_2011.pdf; Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1284 n.20 (1989) (stating that courts have ruled that a scholarship agreement and its accompanying forms constitute a contract).

43. Leslie E. Wong, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right of Publicity*, 42 TEX. TECH L. REV. 1069, 1073-74 (2010).

44. *NCAA Bylaws*, *supra* note 37, at art. 12.1.1.1.3.

45. *NCAA Form 08-3a*, NCAA (2008-2009) available at http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf [hereinafter *NCAA Form 08-3a*]; see generally *NCAA Bylaws*, *supra* note 37, at art. 12.5.

46. *NCAA Form 08-3a*, *supra* note 45. The form provides:

If you are an incoming freshman, you must complete and sign Parts I, II, III, IV [statement concerning the promotion of NCAA championships and other NCAA events], V and VII to participate in intercollegiate competition. If you are an incoming transfer student or a continuing student, you must complete and sign Parts I, II, III, IV, V and VI to participate in intercollegiate

NCAA Bylaw Section 12.5, labeled “Promotional Activities,” governs permitted uses of a player’s “name, picture, or appearance” by schools, conferences, or non-profits,⁴⁷ and restricts the student-athlete from accepting anything of value for the use of their own image or likeness related to their athletic identity.⁴⁸ It forbids student-athletes or any agency other than a non-profit from utilizing a student-athlete’s name, picture, or appearance to promote commercial ventures or to sell commercial items featuring the student-athlete’s name, likeness, or picture.⁴⁹ Ultimately, the NCAA Bylaws place the player’s name, likeness, and image rights solely in the hands of the school, the NCAA, or member institutions for “promotional activity” without designating a specific timeframe for these rights to be held.⁵⁰

competition. Before you sign this form, you should read the Summary of NCAA Regulations provided by your director of athletics or his or her designee or read the bylaws of the NCAA Division I Manual that deal with your eligibility.

Id.; see *NCAA Bylaws*, *supra* note 37, at art. 12.1.1.1.3; and *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, C 09-1967 CW, 2010 WL 445190, *1 (N.D. Cal. Feb. 8, 2010).

47. *NCAA Bylaws*, *supra* note 37, at art. 12.5.1; see *O’Bannon*, 2010 WL 445190, at *1-2.

48. *NCAA Bylaws*, *supra* note 37, at art. 12.5.2.1.

After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual:

(a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or

(b) Receives remuneration for endorsing a commercial product or service through the individual’s use of such product or service.

Id.

If a student-athlete’s name or picture appears on commercial items (e.g., T-shirts, sweatshirts, serving trays, playing cards, posters) or is used to promote a commercial product sold by an individual or agency without the student-athlete’s knowledge or permission, the student-athlete (or the institution acting on behalf of the student-athlete) is required to take steps to stop such an activity in order to retain his or her eligibility for intercollegiate athletics. Such steps are not required in cases in which a student-athlete’s photograph is sold by an individual or agency (e.g., private photographer, news agency) for private use.

Id. at art. 12.5.2.2. “A student-athlete may not participate in any promotional activity that is not permitted under Bylaw 12.5.1.”

Id. at art. 12.5.2.4.

49. *Id.* at art. 12.5.2.

50. See *id.* at art. 12.5.1.1.1. (“The NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of an enrolled student-athlete to generally promote NCAA championships or other NCAA events, activities or programs.”).

The other required document, NCAA Form 08-3a, requires the student-athlete to give the NCAA permission to use his image and likeness to “promote NCAA championships or other NCAA events, activities or programs.”⁵¹ This provision is identical to that found in NCAA Bylaw 12.5.1.1.⁵² It too requires the player to affirm that he has read all of the relevant NCAA Bylaws incorporated in the document and to accept all of the amateurism and eligibility policies.⁵³ These forms are to be filled out by both scholarship players and walk-on players alike.⁵⁴

C. *The Irony of the Current System*

Through the combination of the clauses above, uninformed student-athletes allegedly forfeit all rights to license their individual and group images and likenesses.⁵⁵ Ironically, all of the above contracts and regulations were implemented to prevent commercial exploitation of college athletics and distinguish amateur sports from professional sports,⁵⁶ yet the NCAA and the schools receive billions in revenue from these licenses.⁵⁷ The NCAA and individual schools are able to enter into license agreements on behalf of the players through its licensing group, the Collegiate Licensing Company (the “CLC”), which then sells the licenses to third parties, such as Electronic Arts, Inc. (“EA”), so that everyone may profit off of the players except the individual who is creating value out of his identity in the first place.⁵⁸

51. NCAA Form 08-3a, *supra* note 45.

52. NCAA Bylaws, *supra* note 37, at art. 12.5.1.1.1.

53. NCAA Form 08-3a, *supra* note 45.

54. *Id.* The phrase “For: Student-athletes” suggests that any person competing as a student-athlete must sign it, not just scholarship student-athletes. As a former walk-on player at the University of Virginia, I had to sign this form, so I also know from experience. A “walk-on” (a player not receiving a scholarship to be on the team) receives no consideration for the use of his name, image, or likeness like scholarship players who are at least receiving a free education. In essence, a “walk-on” is paying the school full tuition, up to approximately \$60,000 a year, in order for the school to use his image rights for their profit. Peter Jacobs, *America’s REAL Most Expensive Colleges*, BUS. INSIDER (July 10, 2013), <http://www.businessinsider.com/most-expensive-colleges-in-america-2013-7?op=1>.

55. John Infante, Mike Corgan & Peter Baran, *NCAA Student-Athlete Licensing Program—How Could It Happen and What Are the Elements?*, WINTHROP INTELLIGENCE (May 6, 2012), <http://winthropintelligence.com/2012/05/06/student-athlete-licensing-program-how-could-it-happen-and-what-are-the-elements/>.

56. NCAA Bylaws, *supra* note 37, at arts. 1.3.1 & 2.9.

57. *About CLC: Connecting Passionate Fans to College Brands*, COLLEGIATE LICENSING CO., <http://www.clc.com/About-CLC.aspx> (last visited Oct. 13, 2014).

58. *Licensing Info: NCAA/Bowls/Conferences*, COLLEGIATE LICENSING CO., <http://clc.com/Licensing-Info/NCAA-Bowls-Conferences-Events.aspx> (last visited Dec. 20, 2014).

As it stands now, the NCAA, utilizing the CLC, allegedly holds the licensing rights to players that have graduated and are no longer participating in college athletics.⁵⁹ Yet, nowhere in the NCAA Bylaws does it permit the NCAA or any other entity to license student-athletes' likenesses to third parties for commercial use, like EA's use of them in its video games.⁶⁰ In fact, the NCAA Bylaws seem to prohibit the use of a student-athlete's likeness for commercial profit.⁶¹

IV. O'BANNON AND KELLER, FORMERLY, *IN RE NCAA STUDENT-ATHLETE NAME & LIKENESS*

A. *Introduction to O'Bannon v. National Collegiate Athletic Association*

Ed O'Bannon was a former NCAA basketball star for the UCLA Bruins who won a national championship in 1995.⁶² He was named the NCAA Tournament's Most Outstanding Player during his title run, and was voted an All-American.⁶³ Upon seeing highlight reels and video games that were still using his player avatar two decades after graduating college, O'Bannon realized that the NCAA, and other third parties, were profiting off of his image and athletic accomplishments many years later while he received absolutely nothing.⁶⁴

The *O'Bannon v. NCAA* lawsuit originated in 2009 and has been gaining steam ever since news broke to the press.⁶⁵ O'Bannon, later joined by twenty-four other former student-athletes, including Oscar Robertson,⁶⁶ sued the NCAA, CLC, and EA for antitrust violations and right of publicity

59. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, C 09-1967 CW, 2010 WL 445190, *1-2 (N.D. Cal. Feb. 8, 2010).

60. See generally *NCAA Bylaws*, *supra* note 37.

61. *Id.* at art. 2.9.

62. Steve Eder & Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A.*, N.Y. TIMES (June 9, 2014), http://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html?_r=0.

63. *Id.*

64. *Id.*; Rob Dauster, *The Latest in the Ed O'Bannon Case, and Why the NCAA's Headed for Change*, NBCSPORTS.COM (May 8, 2013), <http://collegebasketballtalk.nbcsports.com/2013/05/08/the-latest-in-the-ed-obannon-case-and-why-the-ncaas-headed-for-change/>.

65. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, C 09-1967 CW, 2010 WL 445190, *2 (N.D. Cal. Feb. 8, 2010).

66. Oscar Robertson is a Hall of Fame professional basketball player who was also involved in a famous antitrust suit against the NBA in 1970, a suit very similar to this suit. Ron Flatter, *Oscar Defined the Triple-Double*, ESPN.COM, <http://espn.go.com/sportscentury/features/00016428.html> (last visited Oct. 13, 2014).

claims, alleging that the three defendants “conspired to deprive them of their rights of publicity and engaged in unlawful restraints of trade in violation of § 1 of the Sherman Act.”⁶⁷ The main premise of the suit was that current and former student-athletes should no longer be bound to the NCAA’s control of their images and likenesses.⁶⁸ In addition to controlling current players’ image rights, the NCAA is able to control the image and likenesses of former players who have not signed Form 08-3a and have since graduated or left school for other reasons.⁶⁹ The complaint alleged that college athletes can be depicted in video games, and jerseys with their number on it can be sold at school stores, yet the athletes still cannot receive profit from any revenue that the school and third parties make.⁷⁰

B. Introduction to Keller v. Electronic Arts, Inc.

At roughly the same time the *O’Bannon* suit originated, a similar lawsuit arose named *Keller v. Electronic Arts Inc.*⁷¹ Samuel Keller, a former starting quarterback for Arizona State University and the University of Nebraska, initiated the suit after receiving no compensation for the use of his image in the EA NCAA video games.⁷² Keller filed a suit similar to *O’Bannon* against the same parties—EA Sports, CLC, and the NCAA—but his suit revolved around the right of publicity violations instead of the antitrust claims.⁷³ Keller sought only compensatory damages, whereas *O’Bannon* sought compensatory damages and an injunction that would force the NCAA to eliminate the rule that prohibits college athletes from being paid for their image rights from video games and television broadcasts.⁷⁴ Since the two

67. *In re NCAA Student-Athlete Name & Likeness Litig.*, C 09-1967 CW, 2010 WL 5644656, *1 (N.D. Cal. Dec. 17, 2010).

68. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. C 09-3329 CW, 2014 WL 3899815, 962-63 (N.D. Cal. Aug. 8, 2014).

69. *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. C 09-1967 CW, 2010 WL 445190, *5 (N.D. Cal. Feb. 8, 2010).

70. Class Action Complaint at 7, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. CV 09 3329, WL 2416720 (N.D. Cal. 2009).

71. *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, *1 (N.D. Cal. Feb. 8, 2010), *aff’d sub nom.*, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

72. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271-72 (9th Cir. 2013), *cert. dismissed sub nom.*, *Elec. Arts Inc. v. Keller*, 135 S. Ct. 42 (2014).

73. Consolidated Amended Class Action Complaint at 3-4, *Keller v. Elec. Arts, Inc.*, No. C 09-01967 CW, WL 908883 (N.D. Cal. 2010).

74. Ben Strauss & Steve Eder, *N.C.A.A. Settles One Video Game Suit for \$20 Million as a Second Begins*, N.Y. TIMES (June 9, 2014), http://www.nytimes.com/2014/06/10/sports/ncaafball/ncaa-settles-sam-keller-video-game-suit-for-20-million.html?_r=0.

suits dealt with substantially similar subject matter, the federal court for the Northern District of California consolidated the two cases into one, entitled *In re NCAA Student-Athlete Name & Likeness Litigation*.⁷⁵

C. Settlement with EA and CLC

The case took a dramatic shift after all the defendants' motions to dismiss were denied, except the antitrust claim against EA, and after the Ninth Circuit Court of Appeals affirmed the holding that EA's use of former players' likenesses was not protected by the First Amendment.⁷⁶ On September 26, 2013, O'Bannon and Keller, on behalf of current and former college players, entered into a settlement agreement with EA and CLC, leaving the NCAA as the only remaining defendant.⁷⁷

On November 8, 2013, Judge Claudia Wilken of the U.S. District Court for the Northern District of California partially granted certification for a class action lawsuit while partially denying another key part of the lawsuit.⁷⁸ The judge certified a class action suit for an injunction against NCAA rules that prevent student-athletes from entering into contracts with licensing groups.⁷⁹ The judge, however, denied class certification for *damages* for student-athletes being compensated for the past use of their images and likenesses on television and video games.⁸⁰ This was a shocking blow to the lawsuit that relieved the NCAA of substantial amounts of potential monetary damages for past and current student-athletes. This did not have an effect on the plaintiffs' right to receive monetary damages, just on making the case a class action so that all former college athletes who felt wronged could join and recover damages. Still, the lawsuit's principal motive of changing the NCAA Bylaws so that student-athletes could be compensated was still intact.⁸¹ With such potentially drastic ramifications,

75. *In re NCAA Student-Athlete Name & Likeness Litig.*, C 09-1967 CW, 2011 WL 1642256 (N.D. Cal. May 2, 2011).

76. See *infra* text accompanying notes 133-36.

77. *Players to Receive \$40 million*, ESPN (Sept. 28, 2013), http://espn.go.com/college-football/story/_/id/9731696/ea-sports-clc-settle-lawsuits-40-million-source.

78. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, C 09-1967 CW, 2013 WL 5979327, *10 (N.D. Cal. Nov. 8, 2013).

79. *Id.* at *7.

80. *Id.* at *8-10.

81. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 962-63 (N.D. Cal. 2014).

the NCAA publicly stated that it would refuse to settle the claims and was willing to fight “all the way to the Supreme Court.”⁸²

Despite consolidating the *O’Bannon* and *Keller* cases in 2010, Judge Wilken ruled to deconsolidate the two cases into their original separate filings after the NCAA and *Keller* plaintiffs asked for the issue of the right of publicity and of antitrust to be tried separately.⁸³ Judge Wilken declared that the two claims from *In re Student-Athlete Likeness* were distinct enough to split the actions into two separate disputes.⁸⁴ Additionally, she stated that the facts from each claim were separate and distinct so as not to rule on each case twice.⁸⁵ Judge Wilken declared that the *O’Bannon* case would decide the antitrust issue and the *Keller* case would represent the right of publicity claims filed under California law.⁸⁶

After Judge Wilken deconsolidated the two cases, the NCAA, the sole remaining defendant left in both *Keller* and *O’Bannon* after the settlements by EA and CLC, and the *Keller* plaintiffs settled the right of publicity case for \$20 million on June 9, 2014.⁸⁷ The *Keller* trial was set for March 2015.⁸⁸ This left the *O’Bannon* case and its antitrust claim against the NCAA as the last remaining issue to be solved.

V. STUDENT-ATHLETES AND THEIR RIGHT OF PUBLICITY: PREDICTING THE OUTCOME OF *KELLER*

A. Background

The right of publicity—a fairly new cause of action—was first established as a common law right in 1953 in the case *Haelan Laboratories*,

82. Steve Berkowitz, *NCAA Vows to Fight O’Bannon Suit to the Supreme Court*, USATODAY (Sept. 26, 2013), <http://www.usatoday.com/story/sports/ncaab/2013/09/26/ncaa-ed-obannon-ea-sports-lawsuit-supreme-court/2877579/>.

83. *Keller v. Nat’l Collegiate Athletic Ass’n*, C 09-1967 CW, 2014 WL 2191464, *3 (N.D. Cal. May 23, 2014).

84. *Id.*

85. *Id.* The only two areas of fact that would coincide would be: 1) whether the student-athletes’ likenesses were used in EA video games; and 2) whether college athletes consented to that use, but both were secondary issues in the antitrust litigation. *Id.*

86. *Id.*

87. Ben Strauss & Steve Eder, *N.C.A.A. Settles One Video Game Suit for \$20 Million as a Second Begins*, N.Y. TIMES (June 9, 2014), http://www.nytimes.com/2014/06/10/sports/ncaafootball/ncaa-settles-sam-keller-video-game-suit-for-20-million.html?_r=0.

88. *Keller v. Nat’l Collegiate Athletic Ass’n*, C 09-1967 CW, 2014 WL 2191464, *5 (N.D. Cal. May 23, 2014).

*Inc. v. Topps Chewing Gum, Inc.*⁸⁹ In *Haelan*, a baseball player entered into a contract granting the exclusive right to use his photograph to a chewing gum manufacturer.⁹⁰ Defendant, a rival chewing gum manufacturer, knowing of the contract between the plaintiff and the baseball player, induced the player into a contract authorizing the manufacturer to use the player's photograph in connection with the sale of their chewing gum.⁹¹ The defendant maintained that a right of privacy could not be an exclusive property interest and the right only guaranteed the baseball player "a personal and non-assignable right not to have his feelings hurt by such a publication."⁹² The Second Circuit Court of Appeals ultimately held that, in addition to one's right of privacy, there is a separate and distinct right of publicity that enables one to protect his commercial identity.⁹³

B. Modern Approach

Today, many states recognize that the violation of the right of privacy and the violation of the right of publicity give rise to two distinct claims, although some states still unify the two into one claim.⁹⁴ The Restatement (Third) of Unfair Competition takes the former approach and establishes the elements of one's right of publicity: 1) use of the plaintiff's name, likeness, or other indicia of identity; 2) appropriation of the commercial value of plaintiff's identity; and 3) without the plaintiff's consent.⁹⁵ Many common law rules require a fourth element—that there be a resulting injury to the plaintiff.⁹⁶

"[T]he right of publicity . . . secures for plaintiffs the commercial value of their fame and prevents the unjust enrichment of others seeking to

89. Sean Hanlon & Ray Yasser, "J.J. Morrison" and His Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L.J. 241, 261 (2008) (citing *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953)).

90. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953).

91. *Id.*

92. Hanlon, *supra* note 89, at 262 (quoting *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 867 (2d Cir. 1953)).

93. *Id.* at 262-63.

94. *Id.* at 263.

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

96. *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 413-14 (9th Cir. 1996) (citing *Eastwood v. Super. Ct. for L.A. County*, 198 Cal. Rptr. 341, 347 (Cal. Ct. App. 1983)); *Stewart v. Rolling Stone LLC*, 105 Cal. Rptr. 3d 98, 111 (Cal. Ct. App. 2010) (citing *Eastwood v. Super. Ct. for L.A. County*, 198 Cal. Rptr. 341, 347 (Cal. Ct. App. 1983)).

appropriate that value for themselves.”⁹⁷ The majority of states have determined that the right of publicity extends to all people, not just celebrities.⁹⁸ Right of publicity claims are largely a state law issue, although federal law does provide some legal limitations on use of a person’s identity without permission.⁹⁹ The Supreme Court has only heard one right of publicity case in its history, *Zacchini v. Scripps-Howard Broadcasting*, in 1977.¹⁰⁰ In *Zacchini*, the Court held that a broadcasting company’s television broadcast of a human cannonball’s entire fifteen second act was not entitled to a First Amendment defense, thus cementing the right of publicity as an official cause of action.¹⁰¹ The Court implemented a balancing test, weighing the interests of the First Amendment against those encompassed by the right of publicity.¹⁰² Almost every court still uses a version of this balancing test today for right of publicity defenses, but the approaches have developed over time.¹⁰³ The two modern balancing tests most utilized today are the “transformative use” test and the *Rogers* test.¹⁰⁴

1. Rogers Test

The *Rogers* test was established in 1989 in *Rogers v. Grimaldi*, a Lanham Act case revolving around trademarks and consumer protection.¹⁰⁵ New York courts created this test, applying Oregon law when Oregon had no precedent regarding a right of publicity claim.¹⁰⁶ This test looks to the relationship between the celebrity image and the work as a whole in comparison to the First Amendment right to freedom of expression.¹⁰⁷ This test arguably only applies to celebrities,¹⁰⁸ and would likely not benefit any student-athletes who would not be categorized as celebrities. Additionally, the test is derived from Lanham Act cases involving trademarks, and most

97. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995).

98. Jonathan Faber, *Brief History of RoP*, RIGHT OF PUBLICITY (Mar. 2000), <http://rightofpublicity.com/brief-history-of-rop>.

99. 4 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES § 22:32 (4th ed.).

100. Faber, *supra* note 98; *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977).

101. *Zacchini*, 433 U.S. at 563-64, 578-79.

102. *Id.* at 574-75.

103. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 153 (3d Cir. 2013).

104. *Id.*

105. *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989).

106. *Id.* at 1002.

107. *Hart*, 717 F.3d at 154.

108. *Id.* at 155.

courts have refused to apply it to right of publicity claims that do not pertain to trademarks.¹⁰⁹ Notably, in both *Hart v. Electronic Arts, Inc.* and *Keller*—two cases pertaining specifically to student-athletes' rights of publicity—the courts refused to implement the *Rogers* test because it goes beyond the scope of what the Lanham Act was created to protect.¹¹⁰

2. Transformative Use Test

The transformative use test was established in 2001 in California in *Comedy III Prods., Inc. v. Gary Saderup, Inc.*¹¹¹ This is the test primarily used for standard right of publicity cases.¹¹² The test is “a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.”¹¹³ The California Supreme Court determined that “when a work contains significant transformative elements, it is not only especially worthy of First Amendment protection, but it is also less likely to interfere with the economic interest protected by the right of publicity.”¹¹⁴

There are five factors a court looks at to see whether the work has been transformed enough to be protected by the First Amendment.¹¹⁵ First, if “the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized,” it is more likely to be transformative than if “the depiction or imitation of the celebrity is the very sum and substance of the work in question.”¹¹⁶ Second, the work is protected if it is “primarily the defendant’s own expression”—as long as that expression is “something

109. *Id.* at 157.

110. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1280 (9th Cir. 2013) (stating that the Lanham Act and the *Rogers* test were implemented to prevent the risk of consumer confusion. The right of publicity does not seek the same goals. Rather, its main focus is to “protect[] a form of intellectual property [in one’s person] that society deems to have some social utility.” (citing *Comedy III Prods. v. Gary Saderup, Inc.* 21 P.3d 797 (Cal. 2001))); *Hart*, 717 F.3d at 158.

111. *Comedy II Prods. Inc.*, 21 P.3d at 808.

112. *Hart*, 717 F.3d at 164-65 (“Finally, we find that of the three tests, the Transformative Use Test is the most consistent with other courts’ ad hoc approaches to right of publicity cases.”).

113. *In re NCAA Student-Athlete Name & Likeness*, 724 F.3d at 1273 (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 2001)).

114. *Comedy III Prods., Inc.*, 21 P.3d at 808.

115. *In re NCAA Student-Athlete Name & Likeness*, 724 F.3d at 1274.

116. *Id.* (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001)).

other than the likeness of the celebrity.”¹¹⁷ This factor requires an examination of whether a likely purchaser's primary motivation is to buy a reproduction of the celebrity, or to buy the expressive work of that artist.¹¹⁸ Third, to avoid making judgments concerning “the quality of the artistic contribution,” a court should conduct an inquiry “more quantitative than qualitative” and ask “whether the literal and imitative or the creative elements predominate in the work.”¹¹⁹ Fourth, the California Supreme Court indicated that “a subsidiary inquiry” would be useful in close cases: whether “the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted.”¹²⁰ Lastly, the court indicated that “when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame,” the work is not transformative.¹²¹

C. Denial of First Amendment Rights

In EA's video games, they allowed users to control avatars representing college athletes and play in simulated collegiate games with those avatars.¹²² EA attempted to replicate each school, stadium, and player as accurately as it could so as to make the game as realistic as possible.¹²³ While EA attempted to avoid liability by leaving out players' individual names, it produced completely accurate player jersey numbers, skin tone, hair color, weight, height, career statistics, home states, and skill levels to the point where each avatar was almost an exact replica of his real-life persona.¹²⁴ EA attained all of these details by sending questionnaires to each team's equipment managers.¹²⁵ Additionally, by using EA's online gamer database, a user could download entire rosters from third parties containing every

117. *Id.*

118. *Id.* (citing J. Thomas McCarthy, RIGHTS OF PUBLICITY AND PRIVACY § 8:72 (2d ed. 2012)).

119. *Id.* (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001)).

120. *Id.* (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 810 (Cal. 2001)).

121. *Id.*

122. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013).

123. *Id.*

124. *Id.*

125. *Id.*

players' name on the back of their jersey.¹²⁶ While EA did not specifically create these roster downloads, EA allowed such updates to be placed on its servers.¹²⁷

In *Keller*, the applicable state law in the federal diversity action was California.¹²⁸ Although video games are entitled to full protections of the First Amendment, such rights are not absolute when a state recognizes a right of publicity claim.¹²⁹ California right of publicity law requires a plaintiff to prove: 1) the defendant used the plaintiff's identity; 2) knowingly; 3) to his advantage; 4) without the plaintiff's consent; 5) causing injury to the plaintiff; and 6) there is a direct connection between the defendant's alleged use and the commercial purpose.¹³⁰ Prior to merging into one case with *O'Bannon*, the NCAA, CLC, and EA filed separate motions to dismiss in 2010.¹³¹ The district court denied each of these motions.¹³² In denying EA's motion to dismiss, Judge Claudia Wilken held that a video game developer's use of college athletes' likenesses in its video games was not protected by the First Amendment, and therefore, former college football players' right of publicity claims against developers are not barred by California law.¹³³ Judge Wilken applied the transformative use test in administering her ruling.¹³⁴ While EA argued that the players had no names in the video games and were unidentifiable, Judge Wilken held that "EA does not depict Plaintiff in a different form; he is represented as . . . the starting quarterback for Arizona State University. Further . . . the game's setting is identical to where the public found Plaintiff during his collegiate career: on the football field."¹³⁵

On appeal, the Ninth Circuit examined the five transformative use factors and affirmed Judge Wilken's ruling that EA's use of former college athletes' likenesses in their video games is not protected by the First Amendment.¹³⁶ The Ninth Circuit sustained the use of the transformative

126. *Id.*

127. *Id.*

128. *Id.* at 1278.

129. *Id.* at 1270-71.

130. CAL. CIV. CODE § 3344 (West 2010).

131. *Keller v. Elec. Arts, Inc.*, C 09-1967 CW, 2010 WL 530108 *1 (N.D. Cal. 2010).

132. *Id.* at *11.

133. *Id.* at *5.

134. *Id.* at *3-5.

135. *Id.* at *5.

136. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1284 (9th Cir. 2013).

use test and rejected EA's request to implement the *Rogers* test.¹³⁷ Ultimately, the rulings by the district court and the Ninth Circuit led to a settlement by both EA and CLC with the plaintiffs.¹³⁸ The settlement was for a total of \$40 million, which was spread amongst the *O'Bannon*, *Keller*, and *Hart* plaintiffs, who are discussed in detail in the next section.¹³⁹ This particular holding by Judge Wilken had, and will continue to have, monumental and lasting effects, not only on the video game industry, but also on the NCAA.

D. *Hart v. EA Sports*

At roughly the same time that *O'Bannon* and *Keller* were initiated, Ryan Hart, former Rutgers University quarterback from 2002-2005, also sued EA, alleging a violation of his right of publicity in the *NCAA Football* video games, much like the other two cases.¹⁴⁰ In *Hart*, the U.S. District Court for the District of New Jersey actually ruled on summary judgment in favor of EA, holding that the *NCAA Football* video games were protected by the First Amendment.¹⁴¹ On appeal to the Third Circuit Court of Appeals, however, the ruling was reversed.¹⁴² The Third Circuit implemented the transformative use test while rejecting the *Rogers* test.¹⁴³ In applying the transformative use test, the Third Circuit found similar results to *Keller*, finding that “[t]he digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game. This is not transformative”¹⁴⁴ The Court ultimately determined that EA had not sufficiently transformed the plaintiff's likeness to their own

137. *Id.* at 1280-82.

138. *Players to Receive \$40 million*, ESPN (Sept. 28, 2013), http://espn.go.com/college-football/story/_/id/9731696/ea-sports-clc-settle-lawsuits-40-million-source.

139. *Id.*; Travis Waldron, *EA Sports Will Pay \$40 Million To College Athletes For Use Of Images In Video Games*, THINK PROGRESS (June 2, 2014), <http://thinkprogress.org/sports/2014/06/02/3443618/ea-sports-reaches-40-million-settlement-with-college-athletes/>.

140. *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 145 (3d Cir. 2013).

141. *Id.*

142. *Id.*

143. *Id.* at 163.

144. *Id.* at 166.

expressive work.¹⁴⁵ After this ruling, Hart joined the settlement EA had with *O'Bannon* and *Keller* and dropped his suit.¹⁴⁶

E. EA Halts Production: A Sign of the Times

In 2010, EA discontinued its *NCAA Basketball* series that had achieved large success at exactly the same time the *O'Bannon* suit originated.¹⁴⁷ Shortly after the settlement for *In re Student-Athletes* concluded, EA announced it was also halting the production of its college football video game series, *NCAA Football*.¹⁴⁸ The EA series made approximately \$100 million annually, and each Division I college received close to six figures annually from their licenses with EA.¹⁴⁹ After settling two suits in which EA received unfavorable rulings excluding its video games from First Amendment protection, EA credited its decision to terminate an otherwise extremely profitable video game directly to those suits brought by former players.¹⁵⁰ It is safe to assume that collegiate athletics video games will be nonexistent until a new system can be worked out that would perhaps use player avatars not resembling those of current student-athletes, or until an agreement is reached with college players as a whole to compensate them for their image rights.

F. College Licensing Committee also Joins Settlement

CLC, by also joining the settlement,¹⁵¹ apparently believes that players have a viable claim to their licensing rights on the college sports memorabilia that CLC produces. Since CLC controls more than 80% of the \$4.6 billion in revenue created from collegiate licensed merchandise, this

145. *Id.*

146. Jon Solomon, *EA Sports and CLC Settle Lawsuit by Ed O'Bannon Plaintiffs; NCAA Remains as Lone Defendant*, AL.COM (updated Sept. 28, 2013, 9:51 AM), http://www.al.com/sports/index.ssf/2013/09/ea_will_not_make_college_footb.html.

147. *NCAA Basketball Series Officially Cancelled*, PASTAPADRE (Feb. 10, 2013), [http://www.pastapadre.com/2010/02/10/ncaa-basketball-series-officially-canceled#more-\\$id](http://www.pastapadre.com/2010/02/10/ncaa-basketball-series-officially-canceled#more-$id).

148. Cam Weber, *Update on College Football*, EA SPORTS (Sept. 26, 2013), <http://www.ea.com/news/update-on-college-football>.

149. Jon Solomon, *EA Sports NCAA Football Video Game Trademarks: Who's in, Who's out and Who's on the Fence?*, AL.COM (updated Aug. 14, 2013, 10:12 AM), http://www.al.com/sports/index.ssf/2013/08/whos_in_and_whos_out_licensing.html.

150. Weber, *supra* note 148.

151. *Players to Receive \$40 million*, ESPN (Sept. 28, 2013), http://espn.go.com/college-football/story/_/id/9731696/ea-sports-clc-settle-lawsuits-40-million-source.

may affect the collegiate memorabilia world as a whole.¹⁵² Recently, the NCAA has removed all memorabilia for sale on its website and made a public statement permanently withdrawing from the collegiate athletic memorabilia market.¹⁵³ The ongoing actions by EA, CLC, and the NCAA in removing themselves from their respective markets concerning athletes' naming rights signals an impending change to the way the NCAA currently operates.

G. NCAA Petitions Supreme Court, Loses, and then Enters Settlement

Although EA had already settled its portion of the lawsuit, the NCAA filed a petition for a writ of certiorari to be heard by the Supreme Court on behalf of their ruling against EA.¹⁵⁴ The NCAA petitioned the Supreme Court in an effort to overturn the district and appellate court determinations that EA's use of student-athletes' likenesses in its video games was not protected by the First Amendment, and to convince the Court that it should implement the *Rogers* test rather than the transformative use test.¹⁵⁵ The Supreme Court denied the petition.¹⁵⁶ It makes sense that the NCAA would try to appeal such a ruling because much of its case hinges on an argument similar to EA's.

When fans enter a school store to buy a jersey, the only jerseys typically available for sale are the team's best and most popular players.¹⁵⁷ These jersey sales are indicative of the number on the jersey, and the sales are derivative of the player's identity, not the jersey itself.¹⁵⁸ In fact, the NCAA website underwent strict scrutiny after Jay Bilas, famous commentator and lawyer, searched "Johnny Manziel" and several other prolific college players by name, and even by nickname, on the NCAA website, and each time the

152. *About CLC: Connecting Passionate Fans to College Brands*, COLLEGIATE LICENSING CO., <http://www.clc.com/About-CLC.aspx> (last visited Oct. 13, 2014).

153. *NCAA Leaves Jersey-Selling Business*, FOX SPORTS (updated June 6, 2014, 3:07 PM), <http://msn.foxsports.com/collegefootball/story/ncaa-player-jerseys-will-not-sell-anymore-says-president-mark-emmert-080813>.

154. *NCAA's Right of Publicity Petition to U.S. Supreme Court Denied*, RIGHT OF PUBLICITY (Jan. 17, 2014), <http://rightofpublicity.com/ncaas-right-of-publicity-petition-to-u-s-supreme-court-denied>.

155. *Id.*

156. *Id.*

157. Darren Rovell, *NCAA President: No Pay for Players on Jersey Sales*, CNBC (Dec. 22, 2011), www.cnn.com/id/45768248.

158. Peter Berkes, *Official NCAA Store Set Up to Profit Off Player Names*, S.B. NATION (Aug. 6, 2013), www.sbnation.com/college-football/2013/8/6/4594858/official-ncaa-store-set-up-to-profit-off-player-names; Rovell, *supra* note 157.

search brought him to a page selling the correlating player's jersey.¹⁵⁹ Thus, if the courts analyze merchandise sales containing a player's number, they would likely find that the NCAA and CLC had not sufficiently transformed the apparel from its original owner's likeness.

H. How Keller Would Have Likely Played Out in Court

Had any of the aforementioned cases concerning student-athletes' image rights actually proceeded to trial, it would be a closely contested case likely hinging on the issue of consent and the NCAA scholarship contracts. The following sections include the elements of the right of publicity claim as applied to *Keller*, as if the case had actually gone to trial but using the elements from the Restatement (Third) of Unfair Competition.

1. Use of the Plaintiff's Name, Likeness, or Other Indicia of Identity

The right of publicity was established to protect one's public reputation or persona.¹⁶⁰ Thus, the scope of one's identity extends beyond their name or image to also include "those representations which are recognizable as likenesses of the complaining individual."¹⁶¹ One's identity can include their "name, voice, signature, photograph or likeness, in any manner,"¹⁶² among other things, as long as it is a characteristic that is distinct to the plaintiff.¹⁶³ Thus, student-athletes' jerseys or avatars in video games are very likely to be considered an extension of their identity as well. While right of publicity claims once only protected a celebrity's identity, most states now extend them to the protection of any individual's commercial identity, and simply use their fame as a measurement for how to allocate damages.¹⁶⁴

2. Student-Athletes' Identity

Student-athletes are identifiable by thousands—and in the case of the superstars, by millions—of fans simply by their faces. Players are recognized by their jersey numbers, accessories, and playing style, among other things. All such facets of their identity were being utilized in the sale

159. *Id.*

160. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 573 (1977).

161. *Negri v. Schering Corp.*, 333 F. Supp. 101, 104 (S.D.N.Y. 1971).

162. *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (stating that one's identity can even include "signs or symbols associated" with a person).

163. *Id.* at 463-64 (showing the distinction of one's voice as part of their identity); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995).

164. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, cmt. d (1995); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723, 729 (S.D.N.Y. 1978).

of their jerseys by the NCAA and the CLC, and by the use of their avatars in EA's video games.¹⁶⁵ Despite no name existing on the back of a jersey sold or on the avatar used in a video game, fans can identify their favorite player from their number alone.¹⁶⁶ It is an extension of the individual. Numbers are placed on jerseys to help fans, coaches, and referees alike identify an individual on their field of play. Since there is typically only one player on each team that wears a certain number, when a person buys that jersey number or plays with that avatar in the video game, they associate the player's number on his specific team with the real life individual. When a player is traded in the professional leagues, it is common practice for a more established star to pay a large sum of money to the player on the new team that already has the rights to his number.¹⁶⁷ This is because an athlete's jersey number is more than just a number; it becomes part of the athlete's personal brand.¹⁶⁸ Michael Jordan has made billions selling his brand "Air Jordan" with each sneaker typically having the insignia "23" placed somewhere on it.¹⁶⁹ Such brand loyalty and association shows that student-athletes' numbers are an extension of their likeness.

Couple that with EA's use of not only student-athletes' numbers but home states, attributes, skin tone, and year in school,¹⁷⁰ and there is no doubt that the NCAA, EA, and CLC all profit off of the identity of the student-athlete. The feature in EA's *NCAA Football* video games that allows all player names to be downloaded from a server would allow each and every plaintiff to easily prove the misappropriation of their identity in the video game simply by introducing such a feature into evidence.¹⁷¹

165. Berkes, *supra* note 158; Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108, *1 (N.D. Cal. 2010), *aff'd sub nom.*, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

166. Wong, *supra* note 43, at 1082 n.105.

167. Lee Jenkins, *What is a Number Worth? Some Athletes Pay the Price*, N.Y. TIMES (May 13, 2005), <http://www.nytimes.com/2005/05/13/sports/13numbers.html?pagewanted=print&r=0> (showing players paying up to \$40,000 for the rights to a number; the Washington Redskins Clinton Portis was once sued for not completing payments for the rights to his number).

168. *Id.* "If you play long enough," Glavine said, "that number becomes your identity." For many professional athletes, a jersey number is a personal brand. It is worn on shoes and helmets, wristbands and turtlenecks. It inspires tattoos and is engraved on medallions"
Id.

169. Kyle Newport, *Nike Made \$2.25 Billion Off Jordan Brand in 2013*, BLEACHER REP. (Feb. 6, 2014), <http://bleacherreport.com/articles/1951107-nike-made-225-billion-off-jordan-brand-in-2013>.

170. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013).

171. *Id.*

Additional proof that a number is an extension of a student-athlete's identity is the fact that when a customer searched the NCAA website for a specific player, i.e. Johnny Manziel, the search would lead the customer to a page selling the student-athletes exact jersey with his real number.¹⁷² Clearly, even the NCAA views a player's number on his jersey as an extension of his identity.

3. Appropriation of the Commercial Value of Plaintiff's Identity

The next element that student-athletes must prove is that the defendant appropriated his image or likeness for commercial gain.¹⁷³ "One may be liable for 'appropriation' if he pirate(s) the plaintiff's identity for some advantage of his own."¹⁷⁴ Proving that one's likeness has been appropriated requires showing "harm to both personal and commercial interests caused by an unauthorized exploitation of the plaintiff's identity."¹⁷⁵ As long as the plaintiffs show that their name had actual value prior to the infringement of their right of publicity, then they will prevail on this element.¹⁷⁶

The millions of dollars EA has made annually from its NCAA Football releases,¹⁷⁷ the \$4.6 billion collegiate merchandise market CLC controls,¹⁷⁸ and the almost \$11 billion broadcasting agreement the NCAA agreed to with CBS,¹⁷⁹ were all at the expense of thousands of student-athletes who received none of that actual revenue despite creating the intrinsic value in each case. This is sufficient to show not only that these three organizations were profiting off of the student-athletes' likenesses, but also that actual harm occurred to the student-athletes, fulfilling the third element. The student-athletes could establish the value of their identity by expert witnesses conducting research as to the value added by using real players'

172. Laken Litman, *NCAA was Selling Specific Athlete Apparel, Then the Internet Got Up in Arms About It*, USATODAY (Aug. 6, 2013), <http://ftw.usatoday.com/2013/08/how-to-buy-official-player-jerseys-from-the-ncaa/>.

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

174. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 571 n.7 (1977).

175. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995).

176. *Bi-Rite Enters., Inc. v. Button Master, Inc.*, 555 F. Supp. 1188, 1198-99 (S.D.N.Y. 1983).

177. Solomon, *supra* note 149.

178. *About CLC: Connecting Passionate Fans to College Brands*, COLLEGIATE LICENSING CO., <http://www.clc.com/About-CLC.aspx> (last visited Dec. 20, 2014).

179. *Time Warner Joins CBS in \$10.8 Billion March Madness TV Deal*, FOX BUSINESS (Apr. 22, 2010),

<http://www.foxbusiness.com/markets/2010/04/22/time-warner-joins-cbs-billion-march-madness-tv-deal/>.

avatars in the video games, or introducing the NCAA website link that brought up certain players' jerseys for sale if one entered that player's name in the search bar.¹⁸⁰ The price of each jersey could symbolize the player's value created through his number.

4. Without Consent

Any behavior that otherwise infringes on a plaintiff's right of publicity is permissible if the defendant has obtained the plaintiff's informed consent.¹⁸¹ The defendant is limited, however, to the scope of the consent given to him by the plaintiff.¹⁸² Any conduct outside the scope of the consent granted for use of the plaintiff's identity will subject the defendant to liability.¹⁸³

The best remaining defense that the NCAA, CLC, and EA would have in this lawsuit is that the student-athletes consented to the NCAA's use of their names, images, and likenesses. This is the best remaining defense because the courts previously held that the defendants in this lawsuit are not protected under the First Amendment,¹⁸⁴ although the legal standard was based on a motion to dismiss, which provides much more deference to the plaintiffs.¹⁸⁵ The NCAA would point to the National Letter of Intent, the Statement of Financial Aid, and NCAA Form 08-3a as evidence of the consent of every student-athlete.¹⁸⁶ Each agreement incorporates the NCAA Bylaws, including their amateurism rules; and each requires a signature from the student-athlete.¹⁸⁷ The incorporated NCAA Bylaws, specifically

180. Litman, *supra* note 172; Berkes, *supra* note 158.

181. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. b (1995).

182. *Id.* at § 46 cmt. f.

183. *Id.*

184. See discussion *supra* Part V.C.

185. Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108, *2 (N.D. Cal. Feb. 8, 2010), *aff'd sub nom.*, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013) ("In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff." (citation omitted)).

186. *In re NCAA Student-Athlete Name & Likeness Litig.*, No. C 09-1967 CW, 2011 WL 1642256, *1-2 (N.D. Cal. 2011); see Anastasios Kaburakis et al., *NCAA Student-Athletes' Rights of Publicity, Ea Sports, and the Video Game Industry*, 27 ENT. & SPORTS LAW. 1, 18 (2009).

187. *In re NCAA Student-Athlete Name & Likeness Litig.*, No. C 09-1967 CW, 2011 WL 1642256, *1-2 (N.D. Cal. 2011); Sean M. Hanlon, *Athletic Scholarships As Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41, 63 (2006); see NCAA Form 08-3a, *supra* note 45.

The conditions that you must meet to be eligible and the requirement that you sign this form are indicated in the following bylaws of the Division I Manual:

section 12.5.2.1, state that a student-athlete becomes ineligible for participation if he profits financially off of his image or likeness.¹⁸⁸ Additionally, each of the aforementioned documents, either expressly or through incorporation, includes language similar to the following: “[t]he NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of an enrolled student-athlete to generally promote NCAA championships or other NCAA events, activities or programs.”¹⁸⁹ Should a court find that such language does in fact convey student-athletes’ image rights completely to the NCAA, including for commercial purposes, then the student-athlete would forfeit all of his image rights upon signing the required contracts, and the NCAA would have complete, unfettered control of all student-athletes’ rights of publicity. The NCAA merely has to introduce the student-athletes’ signatures as evidence of their consent. Nevertheless, this defense may have its flaws.

The student-athlete’s best counteraction to the NCAA’s affirmative defense of consent is to argue: 1) that the NCAA’s licensing of student-athletes’ likenesses is outside the student-athletes’ scope of consent, and thus, the NCAA’s licenses constitute a breach of contract; 2) that the ambiguity of the forms student-athletes sign must be construed against the NCAA; and 3) that the forms the NCAA forces student-athletes to comply with create an unconscionable adhesion contract.

While the student-athletes consented to the forfeiture of any commercial gain from their right of publicity and allowed the NCAA to use it for the promotion of “NCAA championships . . . events, activities, or programs,”¹⁹⁰ the student-athletes never intended to grant the NCAA consent to utilize

-
- Bylaws 10, 12, 13, 14, 15 and 16
 - Bylaws 14.1.3.1, 18.4 and 31.2.3

You affirm that your institution has provided you a copy of the Summary of NCAA Regulations or the relevant sections of the Division I Manual and that your director of athletics (or his or her designee) gave you the opportunity to ask questions about them. You affirm that you meet the NCAA regulations for student-athletes regarding eligibility, recruitment, financial aid, amateur status and involvement in gambling activities.

Id.

188. *NCAA Bylaws*, *supra* note 37, at art. 12.5.2.1.

189. *See id.* at art. 12.5.1.1.1; *NCAA Form 08-3a*, *supra* note 45; *National Letter of Intent*, NCAA ELIGIBILITY CENTER (Oct. 13, 2014), http://msnbcmedia.msn.com/i/CNBC/Sections/News_And_Analysis/_Story_Inserts/graphics/_PDF/NLI_2010_2011.pdf.

190. *NCAA Bylaws*, *supra* note 37, at art. 12.5.1.1.1; *see Hanlon*, *supra* note 187, at 63.

their likenesses for profit.¹⁹¹ While the licensing of players' likenesses to EA and the CLC has in fact promoted NCAA athletics as a whole, the NCAA Bylaws were not intended to allow others to profit off of student-athletes in such a way.¹⁹² In fact, one of the primary purposes of the NCAA Bylaws is its "Commitment to Amateurism."¹⁹³ Part of the definition of the "Principle of Amateurism" in the NCAA Bylaws is to protect student-athletes "from exploitation by professional and commercial enterprises."¹⁹⁴

Additionally, the use of student-athletes' likenesses for profit by EA, NCAA, and the CLC, directly conflicts with NCAA Bylaw 12.5.2.1.2, which prohibits the "use of [a] student-athlete's name or picture [by an institution] in a manner contrary to Bylaw 12.5.2.1."¹⁹⁵ Bylaw 12.5.1.1 authorizes the use of players' images by the NCAA, or a third party acting on behalf of the NCAA, and then lists examples of third parties, such as host institutions, non-profits, conferences, or local organizing committees.¹⁹⁶ None of the third party examples listed is a for-profit organization intending to utilize the players' likenesses for commercial gain.¹⁹⁷ Instead, they are all NCAA-affiliated organizations with the ultimate goal of serving the NCAA's mission of "amateurism."¹⁹⁸ Had the NCAA intended for third party corporations to be able to profit off of players' likenesses, they would have included a section in the bylaws enabling such a use and not created a principle provision declaring, "student-athletes should be protected from exploitation by professional and commercial enterprises."¹⁹⁹

By consenting to the NCAA's use of their likenesses for promotion of NCAA events, programs, and activities, student-athletes consented only to use of their likenesses for non-commercially related endeavors enhancing the NCAA's reputation; it was generally understood that student-athletes'

191. Kaburakis, *supra* note 186, at 25-26 ("Although there are . . . express waivers regulated in the NCAA Manual (e.g., FERPA, HIPAA, and drug-testing releases), there are none for [student-athletes'] intellectual property rights other than what is extended from Bylaw 12.5.").

192. See *NCAA Bylaws*, *supra* note 37, at art. 2.9.

193. *Id.* at xiv ("The Commitment to Amateurism.").

194. *Id.* at art. 2.9.

195. *Id.* at art. 12.5.2.1.2. *NCAA Bylaw* 12.5.2.1, mentioned in art. 12.5.2.1.2, prohibits a student-athlete from the use or endorsement of his name or picture for commercial purposes. See *supra* text accompanying note 48.

196. *NCAA Bylaws*, *supra* note 37, at art. 12.5.1.1.

197. *Id.*

198. *Id.* at art. 12.5.1.1, art. 2.9.

199. *Id.* at art. 2.9.

likenesses would never be used by any third party for commercial gain as evidenced by the above bylaws.²⁰⁰ Nowhere in the NCAA Bylaws does it provide for the use of players' images in video games or media.²⁰¹ Thus, by granting licenses to CLC and EA, the NCAA directly violated the scope of consent contracted for with the student-athletes, which also constitutes a breach of contract.²⁰²

"In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."²⁰³ A provision is ambiguous if its language "is subject to two or more reasonable interpretations."²⁰⁴ It is standard practice in almost every court of law that ambiguous contractual terms are to be construed against the party who drafted the agreement.²⁰⁵ "The rule is often invoked in cases of standardized contracts and in cases where the drafting party has the stronger bargaining position . . ."²⁰⁶

The student-athletes' right of publicity suit would be centered around the meaning of the NCAA Bylaws and the provisions of the contractual forms constituting a scholarship, particularly the following:

Promotions Involving NCAA Championships, Events, Activities or Programs[:] The NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of an enrolled student-athlete to generally promote NCAA championships or other NCAA events, activities or programs.²⁰⁷

200. See *supra* text accompanying notes 192-99.

201. See generally *NCAA Bylaws*, *supra* note 37; see also Kaburakis, *supra* note 186, at 25-26.

202. See Pattern Inst. Kan. Civil 124.01-A; Vernon's Okla. Forms 2d, OUI-CIV 23.1 (2012 ed.).

203. RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

204. *Nat'l Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995).

205. See *Town of Smyrna v. Mun. Gas Auth. of Ga.*, 723 F.3d 640, 646 (6th Cir. 2013); *Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd.*, 525 F.3d 409, 423 (6th Cir. 2008); *Shay v. Aldrich*, 790 N.W.2d 629, 644 (Mich. 2010); *Klapp v. United Ins. Grp. Agency, Inc.*, 663 N.W.2d 447, 455 (Mich. 2003).

206. RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (1981). "It is in strictness a rule of legal effect, sometimes called construction, as well as interpretation: its operation depends on the positions of the parties as they appear in litigation, and sometimes the result is hard to distinguish from a denial of effect to an unconscionable clause." *Id.*

207. *NCAA Bylaws*, *supra* note 37, at art.12.5.1.1.1.

Should NCAA Bylaw 12.5.1.1.1, and the similar provision in NCAA Form 08-3a, be interpreted to indicate that the student-athletes consented to any use of their image rights by the NCAA, not just for non-commercial uses as could be interpreted from the provision, then it defeats any right of publicity claim brought against the NCAA and its licensees.²⁰⁸ Since two reasonable interpretations of this provision exist as to whether student-athletes have consented to any use of their likeness or to just a limited scope, the provision is ambiguous.²⁰⁹ Additionally, since the NCAA clearly has the one-sided bargaining position for this contract,²¹⁰ the court will likely weigh such a factor against the NCAA even further. This provision, along with several others,²¹¹ thus requires the courts to interpret the language against the drafter, in this case, the NCAA and the member schools.²¹²

If the courts find that the NCAA Bylaws actually allow the NCAA to license student-athletes' likenesses to for-profit third parties, then the student-athletes must proceed with their last defense—unconscionability. Unconscionability is one of the few defenses to a valid contract where consent was given from both sides. "Traditionally, a bargain was said to be unconscionable . . . if it was 'such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other . . .'"²¹³ A party may void a contract due to its unconscionability, but it first must prove two elements: 1) procedural unconscionability and 2) substantive unconscionability.²¹⁴ "Courts should apply a sliding scale in making this determination: the more substantively oppressive the contract term, the less evidence of

208. See *supra* text accompanying notes 192-199.

209. *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 542 (7th Cir. 2000).

210. The NCAA is an association of 1,281 different educational institutions, conferences, and organizations regulating over 450,000 collegiate athletes at one time. *Who We Are*, NCAA (Oct. 13, 2014), <http://www.ncaa.org/about/who-we-are>. The student-athletes signing the forms are sometimes as young as sixteen years old. *Amobi Okoye Player Profile*, CBSSPORTS.COM (Oct. 13, 2014), <http://www.cbssports.com/nfl/players/draft/436548>.

211. See discussion *supra* Part III.B.

212. See generally *NCAA Bylaws*, *supra* note 37; see also *NCAA Form 08-3a*, *supra* note 45.

213. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (quoting *Hume v. United States*, 132 U.S. 406 (1889)).

214. *Wattenbarger v. A.G. Edwards & Sons, Inc.*, 246 P.3d 961, 974 (Idaho 2010).

procedural unconscionability is required to come to the conclusion that the clause is unenforceable, and vice versa.”²¹⁵

“Procedural unconscionability concerns the bargaining process leading to the formation of a contract.”²¹⁶ Procedural unconscionability focuses on instances of oppression in the negotiation or formation of a contract.²¹⁷ It examines unequal bargaining positions, lack of voluntariness, non-negotiability of the stronger party’s terms, use of ambiguous words, and the inability to contract with another party.²¹⁸ It results from inequities or unfairness of a “contract term [that] is so one-sided that it has an overly harsh effect on the disadvantaged party.”²¹⁹

While it has already been determined that an NCAA scholarship constitutes a contract in the courts of law,²²⁰ student-athletes are not really afforded breach of contract or other contractual claims because the entire agreement consists of NCAA restrictions on the student-athletes; it does not really place any obligatory conditions on the NCAA except that they honor a student-athlete’s scholarship should he comply with all the NCAA regulations.²²¹ NCAA scholarships clearly equate to an adhesion contract because they are standard form contracts that cannot be negotiated and are provided in a “take-it-or-leave-it” manner.²²² Should the student-athlete choose not to consent to all NCAA bylaws and restrictions, including granting his right of publicity to the NCAA, then he cannot compete at any NCAA institution, from Divisions I, II, or III.²²³ The only other significant,

215. *Grayiel v. Appalachian Energy Partners 2001-D, LLP*, 736 S.E.2d 91, 102 (W. Va. 2012).

216. *Wattenbarger*, 246 P.3d at 974.

217. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).

218. *Wattenbarger*, 246 P.3d at 974.

219. *Dan Ryan Builders, Inc. v. Nelson*, 737 S.E.2d 550, 558 (W. Va. 2012).

220. *Hanlon*, *supra* note 187, at 61 (stating courts have recognized the National Letter of Intent and the Statement of Financial Aid as the two main documents that form a contract between the student-athlete and the university or college). The courts have also identified other documents, such as recruitment letters and university bulletins and catalogues, as part of the contract. *Id.*; see *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379 (N.C. 1972).

221. *National Letter of Intent*, NCAA ELIGIBILITY CENTER (Oct. 13, 2014), http://msnbcmedia.msn.com/i/CNBC/Sections/News_And_Analysis/_Story_Inserts/graphics/_PDF/NLI_2010_2011.pdf; *Hanlon*, *supra* note 187, at 73.

222. *National Letter of Intent*, NCAA ELIGIBILITY CENTER (Oct. 13, 2014), http://msnbcmedia.msn.com/i/CNBC/Sections/News_And_Analysis/_Story_Inserts/graphics/_PDF/NLI_2010_2011.pdf; see also *Hanlon*, *supra* note 187, at 71.

223. *NCAA College Athletics Statistics*, STATISTIC BRAIN (Oct. 13, 2014), <http://www.statisticbrain.com/ncaa-college-athletics-statistics/>. There are 120 NCAA Football Bowl Subdivision (formerly known as Division I-A) schools, 125 Football

organized collegiate athletic association aside from the NCAA that a student-athlete could choose to participate in is the National Association of Intercollegiate Athletics (“NAIA”).²²⁴ The NAIA represents only eighty-nine member schools that have a football team, and very few of these schools actually offer full scholarships to their athletes.²²⁵ While the NAIA has significantly fewer restrictions than the NCAA, the fact is, very few players actually play professionally after leaving a school that was a part of the NAIA and the schools get very little publicity and attendance compared to NCAA schools.²²⁶ Thus, the best high school athletes in the country essentially have one choice, consent to the NCAA’s restrictions, including the waiver of the right of publicity, or become irrelevant in the college athletics world and have very little chance of attaining any professional dreams.

The NCAA controls all of the bargaining power, which results in oppressive, one-sided “negotiations” that ultimately lead to the student-athlete agreeing to a coercive contract with no viable alternative. These take-it-or-leave-it contracts arguably meet all of the factors examined in order to satisfy procedural unconscionability.

Championship Subdivision (formerly known as Division I-AA) schools, 149 Division II schools, and 236 Division III schools with football programs. *Id.*

224. *2014-15 NAIA Football*, NAIA (Oct. 13, 2014), <http://www.naia.org/ViewArticle.dbml?ATCLID=205323224>.

225. *NAIA Scholarships*, SCHOLARSHIPS.COM (Oct. 13, 2014), <https://www.scholarships.com/financial-aid/college-scholarships/sports-scholarships/naia-scholarships>.

226. See *What Is the Difference Between the NCAA, NAIA, and NJCAA?*, SPORTS RECRUITING (Oct. 13, 2014), <http://www.sportsrecruitingusa.com/ncaa-naia-njcaa/4574871702>; *Difference Between NCAA and NAIA*, DIFFERENCEBETWEEN.NET (Oct. 13, 2014), <http://www.differencebetween.net/miscellaneous/difference-between-ncaa-and-naia/>; Jeremy Cabler, *Ray Ray Armstrong Looks to Restore His Draft Stock in the NAIA*, RANTSPOITS.COM (Oct. 13, 2014), <http://www.rantsports.com/ncaa-football/2012/08/14/ray-ray-armstrong-looks-to-restore-his-draft-stock-in-the-naia> (“Now NAIA schools will put out NFL talent every now and then. Recently Danny Woodhead, Patrick Crayton, and Derrick Ward have all came [sic] from those ranks and have found success in the NFL, but the prospects of most NAIA football players getting drafted are bleak.”); see also Alan Grosbach, *Russell Athletic-NAIA Football Championship Preview*, NAIA, <http://www.naia.org/ViewArticle.dbml?ATCLID=205824160> (last visited Oct. 13, 2014) (“The average attendance in the last four years [at the NAIA football championship] has been 5,854 fans. The highest attendance of 6,500 occurred in the 2008 event when Carroll (Mont.) and Sioux Falls (S.D.) squared off for the second-straight season.”). In comparison, in the Football Bowl Subdivision alone, average attendance for each game was 45,671, and three separate programs averaged attendance over 100,000 fans per game. *All-Division Attendance Mark Sets Records; Total Figure Tops 50 Million*, NCAA (Oct. 13, 2014), <http://www.ncaa.com/news/football/article/2014-02-03/all-division-attendance-mark-sets-records-total-figure-tops-50>. Ultimately, the two conferences do not compare.

The other aspect of unconscionability is substantive unconscionability. "Substantive unconscionability focuses on the contract's terms."²²⁷ The substantive aspect refers to overly harsh or one-sided results that benefit the drafting party at the other party's expense.²²⁸ Substantive unconscionability deals with terms "that impair the integrity of the bargaining process or otherwise contravene the public interest or public policy; terms (usually of an adhesion or boilerplate nature) that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law."²²⁹ Factors a court examines to determine substantive unconscionability include the "commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and public policy concerns."²³⁰

In terms of the substantive unconscionability element, much of the student-athletes' arguments will rely on public policy; and the current public consensus favors student-athletes. With Congress,²³¹ state legislatures,²³² professional athletes,²³³ celebrities,²³⁴ and even courts,²³⁵ all

227. 8 WILLISTON ON CONTRACTS § 18:10 (4th ed.).

228. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011); see 8 WILLISTON ON CONTRACTS § 18:10 (4th ed.).

229. 8 WILLISTON ON CONTRACTS § 18:10 (4th ed.).

230. Dan Ryan Builders, Inc. v. Nelson, 737 S.E.2d 550, 552 (W. Va. 2012). Other courts have a ten-factor test that must be analyzed in order to rule on the substantive unconscionability element. See Wille v. Sw. Bell Tel. Co., 549 P.2d 903 (Kan. 1976); Broadway v. Household Fin. Corp. of Huntsville, 351 So. 2d 1373 (Ala. Civ. App. 1977).

231. Recently, a congressional bill was introduced signaling an attempt by Congress to amend the NCAA Bylaws. Jon Solomon, *Introducing the NCAA Accountability Act: Two Members of Congress Propose Bipartisan Bill*, AL.COM (Aug. 1, 2013), http://www.al.com/sports/index.ssf/2013/08/introducing_the_ncaa_accountab.html. The bill seeks to prevent universities from implementing a policy that prohibits paying stipends to their student-athletes. *Id.*

232. California has proposed a bill that would allow all California schools to offer full cost-of-attendance scholarships. Mit Winter, *Will California Mandate Cost of Attendance Scholarships and Stipends?*, BUS. COLL. SPORTS (Aug. 22, 2013), <http://businessofcollegesports.com/2013/08/22/will-california-mandate-cost-of-attendance-scholarships-and-stipends/>. It would also set a stipend of \$3,600 to be paid in addition to the cost-of-attendance scholarship. *Id.*

233. Arian Foster, running back for the Houston Texans, spoke in a documentary about how he came home after a game and had no food despite just winning a game for the University of Tennessee. Brian T. Smith, *Texans' Arian Foster Opens Up About Pay-for-Play, Calls NCAA Bullies*, CHRON (Sept. 20, 2013), <http://blog.chron.com/ultimatetexans/2013/09/texans-arian-foster-opens-up-about-pay-for-play-calls-ncaa-bullies/#15770103=0&16147101=0>. Shabazz Napier, a professional basketball player for the Miami Heat, after winning the national championship for the University of Connecticut, complained of going to bed hungry. Justin

lending support to the student-athletes in some way, it may be the public policy factor that puts this litigation over the top. However, examining the other factors also leans favorably to the student-athletes. While the purpose and effect of the NCAA were once to protect the concept of education and amateurism, today those lines have become blurred. With the NCAA, a non-profit institution, now generating billions of dollars in revenue, all of which is derived from the student-athletes without allowing them any additional compensation beyond their scholarships, the motive of the NCAA seems to have shifted towards economic gain for itself and its member institutions.²³⁶ Thus, the NCAA's purpose is no longer clear; the effect its bylaws currently have would likely be construed against the NCAA by a court.²³⁷

Additionally, all of the risk involved in the contract is allocated to the student-athletes. One violation of the plethora of restrictions instituted by the NCAA can cause a student-athlete to forfeit his entire scholarship.²³⁸ Compare that with the risk taken on by the school in entering into the National Letter of Intent with the student-athlete: "The terms of this NLI shall be satisfied if [the student-athlete] attend[s] the institution named in this document for one academic year (two semesters or three quarters) as a full-time student."²³⁹ Essentially, the NCAA school must honor only one year of a student-athlete's scholarship. Even the NCAA's sole term in the bargain is contingent on the fact that the student-athlete abides by the NCAA Bylaws and maintains his eligibility.²⁴⁰

The commercial reasonableness of the terms weighs largely against the student-athletes as the billions generated in revenue by the student-athletes are largely disproportionate to the \$20,000-40,000 student-athletes are awarded annually in scholarships.²⁴¹ By preventing student-athletes from profiting off of their right of publicity, and essentially granting this right to

Baragona, *Jon Stewart Annihilates the NCAA's Argument Against Student-Athlete's Unionizing*, POLITICS USA (Apr. 11, 2014), <http://www.politicususa.com/2014/04/11/jon-stewart-annihilates-ncaas-argument-student-athletes-unionizing.html>.

234. Baragona, *supra* note 233.

235. See discussion *supra* Part V; see discussion *infra* Part VI.

236. See discussion *supra* Parts II.B, III.C.

237. *Id.*

238. *National Letter of Intent*, NCAA ELIGIBILITY CENTER § 7 (Oct. 13, 2014), http://msnbcmedia.msn.com/i/CNBC/Sections/News_And_Analysis/_Story_Inserts/graphics/_PDF/NLI_2010_2011.pdf.

239. *Id.*

240. *Id.*

241. See discussion *supra* Part II.B.

the NCAA, the terms of the adhesion contract may become such that “no man in his senses and not under delusion would make.”²⁴² Potentially famous student-athletes forego millions of dollars when they choose to play with the NCAA, but they have no other viable option when it comes to obtaining an education.²⁴³ Beyond the forfeiture of their right of publicity, famous student-athletes forfeit potentially millions of dollars in other areas as well by being forced to play in the NCAA.²⁴⁴ However, because very few student-athletes actually have valuable image rights and actually become professionals in their sport, the schools also take on significant risk in offering so many scholarships each year. While they are all contributing to the final product on the court or field, many players, by themselves, are barely worth the scholarship itself in monetary value. Thus, it is for the courts to determine whether a reasonable person would enter into such an adhesion contract unless they were coerced.

An adhesion contract is a standard form contract administered by one party to another party who has little to no control over its terms.²⁴⁵

242. *Hume v. United States*, 132 U.S. 406, 406 (1889) (“Courts of law will always refuse to enforce such a bargain, as against the public policy of honesty, fair dealing, and good morals.”).

243. See discussion *supra* Part V.H.4. While basketball players can play professionally overseas instead of the NCAA and make a decent salary, football players do not have any other league to play in where they can make comparable money. The Canadian Football League is the only other option, but they restrict the amount of foreign players allowed on each team. Darren Heitner, *NBA D-League vs. European Basketball: Why Don't More Players Go to Europe?*, SPORTS AGENT BLOG (July 30, 2013), <http://sportsagentblog.com/2012/07/30/nba-d-league-vs-european-basketball-why-dont-more-players-go-to-europe/>; CANADIAN FOOTBALL LEAGUE, http://www.cfl.ca/page/game_rule_ratio; see also text accompanying *infra* note 244.

244. Student-athletes are required to meet a minimum age requirement before entering both the NFL and the NBA. By forcing student-athletes to not only go to college but also to stay a number of years, they risk the millions that they could have earned by turning professional right out of high school. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 382-83 (S.D.N.Y. 2004); see Gordon Monson, *Monson: NFL and NBA Minimum Age Rules Discriminate, and Should Be Changed*, SALT LAKE TRIBUNE (Oct. 13, 2014) <http://www.sltrib.com/sltrib/sports/55887465-77/college-players-nfl-nba.html.csp>; Clay Travis, *Marcus Lattimore Out For Season: Is NFL's Age Restriction a Moral Issue?*, FOX SPORTS (Oct. 13, 2014), <http://msn.foxsports.com/college-football/outkick-the-coverage/marcus-lattimore-out-for-season-is-nfls-age-restriction-a-moral-issue.php>; Grant Hughes, *Why the NBA's 1-and-Done Rule Is Causing More Harm Than Good*, BLEACHER REP. (Oct. 13, 2014), <http://bleacherreport.com/articles/1723163-why-the-nbas-one-and-done-rule-is-causing-more-harm-than-good>. Student-athletes also are extremely regulated as to where and how many hours they can work while in school. Craig T. Greenlee, *Student-Athletes at Work: NCAA Work Rule Will be 'Difficult to Monitor.'*—National Collegiate Athletic Association, DIVERSEEDUCATION.COM (Oct. 13, 2014), <http://diverseeducation.com/article/7463>.

245. BLACK'S LAW DICTIONARY 366 (9th ed. 2009).

Typically, the party administering the adhesion contract has lopsided bargaining power over the recipient of the contract.²⁴⁶ It usually consists of a take-it-or-leave-it proposal by the stronger party where the weaker party can either accept the contract or look elsewhere.²⁴⁷ There are several reasons why courts sometimes look unfavorably on these types of contracts:

First, the party that proffers the form has had the advantage of time and expert advice in preparing it, almost inevitably producing a form slanted in its favor. Second, the other party is usually completely or at least relatively unfamiliar with the form and has scant opportunity to read it—an opportunity often diminished by the use of fine print and convoluted clauses. Third, bargaining over terms of the form may not be between equals or, as is more often the case, there may be no possibility of bargaining at all. The form may be used by an enterprise with such disproportionately strong economic power that it simply dictates the terms.²⁴⁸

An adhesion contract is not unconscionable per se simply because it has unfavorable terms and one party maintains more bargaining power than the other.²⁴⁹ Rather, courts see an adhesion contract as evidence of procedural unconscionability, but still require sufficient evidence proving the substantive unconscionability element of the claim.²⁵⁰ Here, the student-athletes could make a showing that the NCAA forms are an adhesion contract because the NCAA is the severely advantaged party who drafted the document and has used it and amended it for years; student-athletes typically are too young to realize what all of the terms mean, and student-athletes cannot bargain on any of the terms but are forced to accept them as is. At the same time, the NCAA already invests up to \$50,000 in each student-athlete each year and a handful of student-athletes are awarded more in their scholarship than the value they provide to the university.

Should the *Keller* case have proceeded to court, the student-athletes had strong support for winning the case, but it would not have been an easy argument. The wording of Judge Wilken's ruling in *O'Bannon* lends some insight into how she would have determined many similar issues in *Keller*.

246. *Id.*

247. *Id.*

248. *Id.*

249. Brian Welch, *Unconscionable Amateurism: How the NCAA Violates Antitrust by Forcing Athletes to Sign Away Their Image Rights*, 44 J. MARSHALL L. REV. 533, 543 (2011).

250. *Id.*

VI. ANTITRUST SUMMARY AND THE O'BANNON RULING

The next focus of this Comment is to analyze the claims made in *O'Bannon*, delineate the results of the federal district court's ruling, and examine their applicability to the current NCAA system.

To successfully establish a claim under Section 1 of the Sherman Antitrust Act, the plaintiffs must first establish that a conspiracy, contract, or other agreement exists that imposes an unreasonable restraint of trade affecting interstate commerce.²⁵¹ By showing that the NCAA was a hierarchical organization run by its members, grouped into conferences, and in accordance with the NCAA Division I Bylaws, the *O'Bannon* plaintiffs proved the conspiracy element.²⁵² The NCAA did not dispute that such an agreement existed nor did they dispute that the agreement affects interstate commerce; they only refuted that such restraint on trade was unreasonable.²⁵³

A. The Challenged Restraint and the Rule of Reason Analysis

After showing an agreement exists that affects interstate commerce, antitrust plaintiffs have to show that the agreement unreasonably restrained trade in a relevant market.²⁵⁴ Judge Wilken utilized a balancing test to determine reasonableness, otherwise known as the rule of reason analysis.²⁵⁵ "A restraint violates the rule of reason if the restraint's harm to the competition outweighs its procompetitive effects."²⁵⁶ "[T]he plaintiff bears the initial burden of showing that the restraint produces 'significant anticompetitive effects' within 'a relevant market.'"²⁵⁷ If sufficiently proven, the burden then shifts to the defendant to produce evidence of procompetitive justifications.²⁵⁸ If the defendant is then able to prove procompetitive justifications, then the burden shifts back to the plaintiff to prove less restrictive means are available to the current restraint.²⁵⁹

The *O'Bannon* plaintiffs' theory of the entire case was that the NCAA prohibited "current student-athletes from receiving any compensation from

251. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 2014-2 Trade Cases (CCH) ¶ 78865, 2014 WL 3899815, *18 (N.D. Cal. 2014).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

257. *Id.* (internal citation omitted).

258. *Id.*

259. *Id.*

their schools or outside sources for the use of their names, images, and likenesses in live game telecasts, video games, game re-broadcasts, advertisements, and other footage,” and that such rules restrained trade on the group licensing and college education markets.²⁶⁰

1. Anticompetitive Effects Against the Relevant Market

In past antitrust cases against the NCAA, the Supreme Court has found that relevant markets did not exist because the market that they were claiming was restricted was linked to an educational program, e.g. the NCAA, and thus there was no connection to commercial activities.²⁶¹ Judge Wilken defined a relevant market as the following:

[A relevant market] encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the area of effective competition . . . where buyers can turn for alternative sources of supply. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.²⁶²

In *O'Bannon*, the plaintiffs alleged that the agreements caused anticompetitive effects in two relevant markets: 1) the college education market, where colleges compete to recruit student-athletes to play Football Bowl Subdivision (“FBS”) football (formerly Division I-A) and Division I basketball; and 2) the group licensing market, where video game developers, television networks, and third parties fight to be granted the group license rights for the FBS football players and Division I basketball players.²⁶³

a. College education market

Judge Wilken held that the plaintiffs established the college education market as a relevant market because of the unique bundle of goods and services each school competed to sell to each athlete.²⁶⁴ Each school offered to pay prospective athletes’ college education in exchange for participation on their football or basketball team and their grant of their name, image, and likenesses to the school.²⁶⁵ The most that any school can give each of

260. *Id.* at *7.

261. See *Jones v. Nat’l Collegiate Athletic Ass’n*, 392 F. Supp. 295, 303 (D. Mass. 1975) (citing *Klors, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959)).

262. *O’Bannon*, 2014 WL 3899815, at *19 (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

263. *Id.*

264. *Id.*

265. *Id.*

these players is limited to the grant-in-aid scholarship afforded them by NCAA rules.²⁶⁶ While the NCAA and its member schools argued that the students' market was not restrained because they could play professionally at the Football Championship Subdivision ("FCS"), Division II, III, NAIA, or NCAA level, Judge Wilken claimed that none of those leagues offered similar products and opportunities.²⁶⁷ She stated that "[t]o determine whether a product has economic substitutes, courts typically consider two factors: 'first, [the product's] reasonable interchangeability for the same or similar uses; and second, cross-elasticity of demand, an economic term describing the responsiveness of sales of one product to price changes in another.'²⁶⁸ In determining the interchangeability of markets, one must examine the price, use, and qualities of all potential substitutes.²⁶⁹

Since most of the other divisions that the NCAA alleged that potential student-athletes could attend did not offer the same amount of money in scholarships as FBS football and Division I basketball, they were not considered interchangeable markets.²⁷⁰ Neither were the professional sports leagues, such as the NBA Developmental League or the foreign professional leagues, since neither could provide higher education or national exposure.²⁷¹ Judge Wilken cited the plaintiffs' evidence that student-athletes chose FBS football or Division I basketball more than 98% of the time for those same reasons.²⁷² Thus, she ruled that the college education market was a distinct market.²⁷³

Since the relevant market was established, the *O'Bannon* plaintiffs then had to show evidence supporting that there was a challenged restraint causing anticompetitive effects within that market.²⁷⁴ The plaintiffs pointed to the NCAA's strict limits permitting student-athletes to receive scholarships equivalent to the value of "full grant-in-aid" as an anti-competitive effect.²⁷⁵ Their argument rested on the fact that under the current NCAA Bylaws, if any school seeks to pay any player an amount

266. *Id.*

267. *Id.* at *20.

268. *Id.* (quoting *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1393 (9th Cir. 1984)).

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.* at *4.

273. *Id.* at *20.

274. *Id.* at *19.

275. *Id.* at *21.

above the NCAA's limit of "full grant-in-aid," that school is subject to sanctions by the NCAA.²⁷⁶ The plaintiffs established that full "grant-in-aid" only covers "tuition and fees, room and board, and required course-related textbooks," but often does not cover the full "cost of attendance of school."²⁷⁷ By doing so, Judge Wilken determined that the NCAA also undervalues the student-athletes' name, image, and likeness rights even though the NCAA does not place a specific monetary limit on those rights.²⁷⁸ Judge Wilken compared this implicit price-fixing agreement of players' name, image and likeness rights to *Major League Baseball Properties, Inc. v. Salvinio, Inc.* where Justice Sotomayor's concurring opinion said that antitrust plaintiffs could meet their burden of proving anticompetitive restraints of trade through an agreement to fix prices "indirectly" even though no explicit monetary price was set on the agreement.²⁷⁹

The plaintiffs' star witness, economic expert Dr. Roger Noll, testified that if the grant-in-aid limit or the total financial aid limit were higher, schools could compete for the best recruits by offering them larger scholarships, thus, curtailing the amount of money student-athletes would have to pay for the costs of school not covered by their scholarships.²⁸⁰ The NCAA's own witness, economic expert Dr. Daniel Rubinfeld, actually stated, "the NCAA does impose a restraint, the restraint we have been discussing in this case" and did not deny that the NCAA restricts competition for recruits.²⁸¹ Dr. Rubinfeld actually stated in one of his books that the NCAA is a "cartel," which Judge Wilken weighed heavily in favor of the plaintiffs in ultimately holding that the NCAA's restrictions on student-athletes through its member schools was an anti-competitive restraint of trade on the college education market as well as the group licensing market.²⁸²

276. *Id.*

277. *Id.* at *7. Cost of attendance calculates transportation, school supplies, and other expenses incidental to attending school that full grant-in-aid is not permitted to cover under NCAA rules. *Id.* at *8.

278. *Id.* at *22.

279. *Id.* "In other words, an agreement between competitors to 'share profits' or to make a third party the exclusive seller of their competing products that has the *purpose* and *effect* of fixing, stabilizing, or raising prices may be a *per se* violation of the Sherman Act, even if no explicit price is referenced in the agreement." *Major League Baseball Props., Inc. v. Salvinio, Inc.*, 542 F.3d 290, 336-37 (2d Cir. 2008) (Sotomayor, J., concurring).

280. *O'Bannon*, 2014 WL 3899815, at *8.

281. *Id.*

282. *Id.* at *8-9, *21.

The plaintiffs alleged that the NCAA and its member schools were not just a monopoly, but also a monopsony, since the NCAA could be characterized as buyers for the student-athletes' services as well.²⁸³ Judge Wilken upheld this argument citing another antitrust case involving the NCAA, *In re NCAA I-A Walk-On Football Players Litigation*, where the NCAA was sufficiently alleged to be a buyer in competition for collegiate football players.²⁸⁴ The NCAA ultimately disagreed with the characterization of the NCAA as buyers as well as sellers, and claimed that the only way for a buyer to restrain an input market in an anticompetitive way is if that restraint ultimately harms consumers by "reducing output or raising prices in a downstream market."²⁸⁵ However, the Supreme Court in *Mandesville Island Farms v. American Crystal Sugar Co.* held that "monopsonistic practices that harm suppliers may violate antitrust law even if they do not ultimately harm consumers."²⁸⁶ Thus, even labor markets can give rise to an antitrust violation.²⁸⁷ Ultimately, Judge Wilken ruled that the plaintiffs established sufficient evidence for determining that student-athletes, as both buyers and as sellers of their name, image, and likeness rights, were placed under anticompetitive restraints as a monopoly and monopsony, and thus shifted the burden back on the NCAA.²⁸⁸

b. Group license market

Judge Wilken also accepted the plaintiffs' identification of group licensing markets as relevant markets under a challenged restraint.²⁸⁹ The plaintiffs split the group licensing markets into three sub-groups: video games, live game telecasts, and re-broadcasts and archival footage.²⁹⁰

283. *Id.* at *23.

284. *Id.* "Plaintiffs have alleged a sufficient 'input' market in which NCAA member schools compete for skilled amateur football players." *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005).

285. *O'Bannon*, 2014 WL 3899815, at *24.

286. *Id.* (citing *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948)).

287. *See, e.g.*, *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 365 (1926) (holding that a multi-employer agreement among ship owners restrained trade in a labor market for sailors); *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (holding that a conspiracy among oil industry employers to set salaries at "artificially low levels" restrained trade in a labor market and noting that "a horizontal conspiracy among buyers [of labor] to stifle competition is as unlawful as one among sellers.").

288. *O'Bannon*, 2014 WL 3899815, at *24-25.

289. *Id.* at *6-9.

290. *Id.* at *5.

The plaintiffs' primary argument for these sub-categories was that since student-athletes are not permitted by NCAA rules to license their name, likeness, or image rights to television networks, the conferences and their member schools have the exclusive licensing rights with these television networks.²⁹¹ But for the NCAA rules, the student-athletes would be permitted to sell group licenses to any television networks, or a third party such as the school, which would then levy each network's bids for the group licenses to establish a market price for those rights.²⁹²

The NCAA first argued that under the First Amendment and state law student-athletes do not have the ability to assert their right of publicity over their image, name, and likeness rights.²⁹³ Judge Wilken quickly shot down this argument since she had previously established that all of the original defendants in this case were not protected by the First Amendment in asserting the use of the plaintiffs' name, image, and likeness rights.²⁹⁴ The NCAA also contended through its expert witness that television networks did not need the players' consent when broadcasting live television games.²⁹⁵ The plaintiffs then pointed to provisions from NCAA licensing agreements with CBS for March Madness telecast rights in 1994 and Fox broadcasting agreements with several FBS conferences for the rights to televise certain bowl games. The language specifically stated that Fox had the "rights to use the name and likeness, photographs and biographies of all participants, game officials, cheerleaders and other individuals connected to the game."²⁹⁶ Judge Wilken determined that these contracts sufficiently established that relevant markets existed for group license rights among television networks, and that players would be compensated were it not for the NCAA rules preventing them from doing so.²⁹⁷

However, despite ruling that the relevant market existed, Judge Wilken determined that the plaintiffs did not identify any harm to the competition in the group licensing market for live television broadcasts.²⁹⁸ Even though the judge held that the plaintiffs sufficiently alleged harm to themselves through the group licensing market, the "injury must go 'beyond the impact on the claimant' and reach a 'field of commerce in which the claimant is

291. *Id.* at *25.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at *6.

296. *Id.* (internal quotation marks omitted).

297. *Id.*

298. *Id.* at *26.

engaged.”²⁹⁹ She held that the restraint of *competition* in that market must be proven.³⁰⁰ The judge determined that the sellers in this relevant market would be the student-athletes, and thus, in order to prevail, the plaintiffs would have to prove that if the NCAA rules did not exist, teams of student-athletes would compete against each other to sell their group licensing rights.³⁰¹ However, Judge Wilken reasoned that television networks would have to get group licenses from every school or the marketplace for televised games would not exist.³⁰² If one school sold its student-athletes’ group licensing right, but the school that it was competing against did not, the television network would have no desire or ability to broadcast the game.³⁰³ Thus, the group license of the student-athletes from every Division I school or individual conference would have to be sold or the group licenses would carry no value whatsoever.³⁰⁴ This is how the current system already operates. Since no matter how the group licensing rights were sold, the teams of student-athletes from individual schools would never actually compete in the marketplace, and because the networks already compete for the student-athletes’ group licensing telecast rights, albeit through the conferences and schools, Judge Wilken held that no anticompetitive effects exist in the live telecast market.³⁰⁵

Judge Wilken also held that video game group licenses would be considered as a relevant market for players except that the NCAA rules forbid them.³⁰⁶ The plaintiffs utilized testimony from EA’s vice president that said that EA attempts to make the games as “authentic as possible” and that customers prefer more realistic depictions of athletes’ likenesses.³⁰⁷ The NCAA’s only defense to this was that it stopped granting group licenses for NCAA student-athletes to video game producers.³⁰⁸ Judge Wilken pointed to past production of EA’s collegiate video game series along with the fact that the NCAA never guaranteed it would stop making video games in the

299. *Id.* (quoting *Austin v. McNamara*, 979 F.2d 728, 738 (9th Cir. 1998)).

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at *26-27.

306. *Id.* at *6.

307. *Id.*

308. *Id.* at *7.

future.³⁰⁹ She held that past uses of players' likenesses were identical to their real-life persona, and thus, a relevant market exists.³¹⁰

Despite proving the existence of a relevant market for video games, Judge Wilken also did not agree that the NCAA rules produced anticompetitive effects that restrained group licensing rights in the sub-market.³¹¹ Implementing similar rationale from the live television sub-group, Judge Wilken held that even though players suffered individual injury from the NCAA's rules, the group license rights of players from each school would be valueless if not all of the schools' group licenses were obtained by the video game producer, since the video games would not be successful without including every Division I school.³¹² Thus, the players from each school would have no incentive to compete for higher group license prices than other schools' student-athletes.³¹³

Lastly, Judge Wilken found that re-broadcasts, highlights, and archival usage of NCAA game footage was also a relevant market.³¹⁴ She pointed to testimony from the NCAA's vice president, Mark Lewis, that established that the NCAA licensed all of its archival footage to a licensing company named T3Media.³¹⁵

Judge Wilken held that the plaintiffs did not provide evidence that the NCAA imposes any restraints on the market.³¹⁶ Since the NCAA's agreement with T3Media expressly prohibited selling any media licenses that featured current student-athletes, Judge Wilken held that no current student-athletes suffered any harm.³¹⁷ Additionally, even if the plaintiffs did show evidence of an injury, there is no restraint on the market for competition because, barring the NCAA rules, T3Media would have to obtain a group license from each individual school, making each individual school's license valueless unless they could all be obtained as one unit.³¹⁸ Thus, by denying that the NCAA's rules placed an anticompetitive restraint on the live telecast, video game, and media archive markets, all of the

309. *Id.*

310. *Id.*

311. *Id.* at *28.

312. *Id.*

313. *Id.*

314. *Id.* at *7.

315. *Id.*

316. *Id.* at *29.

317. *Id.*

318. *Id.*

plaintiffs' group licensing claims were defeated, leaving only the college education market claim.

2. Procompetitive Justifications

Once the plaintiffs prove the anticompetitive effects of the NCAA, the burden then shifts to the defendant, the NCAA, to establish "redeeming virtues."³¹⁹ "Redeeming virtues" must show that the procompetitive aspects of their bylaws outweigh the anticompetitive effects.³²⁰ Since Judge Wilken accepted the plaintiffs' arguments for anticompetitive effects in the college education market, but denied them in the group licensing market, the NCAA only needed to show procompetitive justifications for its restraints on the college education market. In *O'Bannon*, the NCAA asserted four procompetitive justifications for its restraints of trade: "(1) the preservation of amateurism in college sports; (2) promoting competitive balance among FBS football and Division I basketball teams; (3) the integration of academics and athletics; and (4) the ability to generate greater output in the relevant markets."³²¹

a. Amateurism

Judge Wilken shot down the NCAA's amateurism justification in *O'Bannon* despite the undeniable success of the use of this justification in previous cases against the NCAA.³²² The NCAA's amateurism defense was much less effective than in past cases where the courts denied antitrust claims against the NCAA because its activities were educational and were carried on to further the principle of amateurism.³²³ Today, courts have delineated two different types of NCAA rulemaking foundations in antitrust cases: 1) those with the objective of furthering an economic purpose, and 2) those with a noneconomic purpose whose primary intent is to protect amateurism.³²⁴ This was the approach first implemented in *Justice*

319. *Id.*

320. *Id.* "Redeeming virtues" provide the defendants with a safe harbor should the plaintiffs meet their required burden of proof for anticompetitive effects. If the defendants can prove the restriction's precompetitive effects outweigh its anticompetitive effects, there is a redeeming virtue and the issue is ruled in favor of the defendant. See *Cal. Dental Ass'n v. FTC* 526 U.S. 786, 786 (1999).

321. *O'Bannon*, 2014 WL 3899815, at *29.

322. *Id.*

323. See *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 185-86 (3d Cir. 1998); *Gaines v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 738, 743-44 (M.D. Tenn. 1990).

324. *Gaines*, 746 F. Supp. at 743 (citing *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356 (D. Ariz. 1983)).

v. NCAA that is now adopted by almost all federal jurisdictions in determining whether a restriction is procompetitive or anticompetitive.³²⁵ In cases where the bylaw is implemented to protect amateurism, a presumption is given to the NCAA because such rules are the primary purpose of the NCAA's organizational approach—to further its educational purpose and demarcate college athletics from professional sports.³²⁶

The NCAA's chief argument was that the tradition and identity of college sports are directly attributed to the popularity of the sport.³²⁷ Judge Wilken, in *O'Bannon*, found that the primary purpose of the NCAA's restrictions on student-athlete compensation was not to preserve amateurism, as evidenced by the history of NCAA Bylaws.³²⁸ Judge Wilken cited the Seventh Circuit Court of Appeals in *Agnew v. NCAA* in determining that the scholarships given to student-athletes by schools are in fact commercial transactions since schools stand to make millions from their athletic programs.³²⁹ The NCAA cited dicta from the Supreme Court case *NCAA v. Board of Regents of Oklahoma*, where the Court said that in order to preserve the quality of the NCAA's product, student-athletes "must not be paid."³³⁰ Judge Wilken held that this statement was not based on any factual findings but was merely dicta and was counterintuitive to the NCAA's chief defense where it claimed that the NCAA was not "relying on amateurism as a procompetitive justification."³³¹ Citing the history of the NCAA's bylaws, Judge Wilken determined that, due to the inconsistency and frequent changes to the rules regarding student-athlete compensation, there is no

325. See *Justice v. Nat'l Collegiate Athletic Ass'n*, 577 F. Supp. 356, 383 (D. Ariz. 1983) ("In sum, it is clear that the NCAA is now engaged in two distinct kinds of rulemaking activity. One type, exemplified by the rules in *Hennessey* and *Jones*, is rooted in the NCAA's concern for the protection of amateurism; the other type is increasingly accompanied by a discernible economic purpose."); see also *Smith v. Nat'l Collegiate Athletic Ass'n*, 139 F.3d 180, 185-86 (3d Cir. 1998); *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1148-49 (W.D. Wash. 2005); *Jones v. Nat'l Collegiate Athletic Ass'n*, 392 F. Supp. 295, 303 (D. Mass. 1975).

326. *Justice*, 577 F. Supp. at 382 (citing *Hennessey v. Nat'l Collegiate Athletic Ass'n*, 564 F.2d 1136, 1153 (5th Cir. 1977)); see *Jones*, 392 F. Supp. at 303.

327. *O'Bannon*, 2014 WL 3899815, at *29.

328. *Id.* at *10.

329. *Id.* at *21 (quoting *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328 (2012) ("[T]ransactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act.")).

330. *Id.* at *29 (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984)).

331. *Id.*

concrete definition of amateurism even though it is purported to be one of the NCAA's core principles.³³²

The NCAA also attempted to show, through surveys and comparisons to professional sports leagues, that by paying student-athletes more, the public would lose interest in the sport.³³³ Judge Wilken discredited the survey saying it was not credible evidence to support the idea that consumer interest in the NCAA would decline.³³⁴ Ultimately, there was no evidence that supported the idea that throughout its history the NCAA's removal of incidental expenses or other changes it made to the grant-in-aid paid to student-athletes had an impact on the popularity of college sports.³³⁵ Thus, Judge Wilken found that restrictions on compensating student-athletes were not directly correlated to consumer demand for NCAA football and basketball.³³⁶

b. Competitive balance

The second of the NCAA's justifications for its restrictions on compensating student-athletes was its desire to maintain a competitive balance amongst its member schools.³³⁷ While the Supreme Court had previously ruled that "a sports league's efforts to achieve the optimal competitive balance among its teams may serve a procompetitive purpose if promoting such competitive balance increases demand for the league's product," Judge Wilken did not find that applied in *O'Bannon*.³³⁸ Although *Board of Regents* had determined that maintaining a competitive balance was a procompetitive justification, Judge Wilken determined that it was not binding precedent due to the factual discrepancies between the two cases.³³⁹ She alluded to reports published by the academic community, along with expert testimony, in determining that the NCAA's compensation rules have

332. *Id.* at *30.

333. *Id.* at *10-12. The NCAA utilized testimony from Dr. J. Michael Dennis in regard to a poll he conducted over a sample size of approximately 2,500 people. *Id.* The results showed that 69% expressed opposition to paying student-athletes. *Id.* Judge Wilken said that the poll did not ask questions pertaining to paying student-athletes for their image rights and was too general. *Id.* It also did not support the fact that a large part population would stop watching the sports altogether. *Id.*

334. *Id.* at *11.

335. *Id.* at *12.

336. *Id.*

337. *Id.* at *13.

338. *Id.* at *14, 31 (citing *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 204 (2010)).

339. *Id.* at *32.

no effect on the competitive balance among its member schools.³⁴⁰ Several witnesses even stated that by restricting the amounts paid to student-athletes, schools simply spend the money they save on other areas, such as coaches' salaries, training budgets, facilities, and recruiting.³⁴¹ She alluded to the NCAA's distribution scheme, which awards the most money to those schools that already have the largest budgets to work with, as another reason to strike down the NCAA's argument.³⁴² Ultimately, Judge Wilken stated that all evidence went against the NCAA for this justification, and the NCAA was never able to delineate anything more than an ambiguous determination of the competitive balance that is required to maximize their consumer demand.³⁴³

c. Integration of academics and athletics

Another justification the NCAA offered for the restriction on athlete's compensation was that doing so integrates academics and athletics, which increases the quality of educational services that schools can provide their student-athletes.³⁴⁴ The NCAA pointed to the testimony of their expert witness, Dr. James Heckman, who testified that the NCAA is able to provide tutoring, academic support, mentorship, and other educational services which lead to significantly greater academic and labor market outcomes for student-athletes over other socioeconomic groups.³⁴⁵ Judge Wilken rejected this argument, holding that none of those benefits are actually mandated by the NCAA, but rather are done independently through the school's own discretion.³⁴⁶ While there are some NCAA rules that promote academic integration, the NCAA's only argument that seemed valid to Judge Wilken was that by paying student-athletes more, they would "create a wedge" between student-athletes and normal students that would cause them to be viewed differently.³⁴⁷ However, this too was not enough of a justification for Judge Wilken, who found that the same argument could be made for wealthy students.³⁴⁸ Further, Judge Wilken pointed to the plaintiffs' testimony from Ed O'Bannon, who said he felt like "an athlete

340. *Id.* at *13.

341. *Id.*

342. *Id.*

343. *Id.* at *13-14.

344. *Id.* at *14.

345. *Id.*

346. *Id.*

347. *Id.* (citation omitted).

348. *Id.*

masquerading as a student” during college, even under the current NCAA rules.³⁴⁹ Since athletes would still receive all of the same educational benefits regardless of compensation, Judge Wilken rejected this justification.³⁵⁰ Thus, the NCAA had one remaining justification.

d. Increased output

By restricting student-athletes’ compensation, the NCAA claimed that they limit costs, enable more schools to participate in Division I basketball and FBS football, and also attract schools with a “philosophical commitment to amateurism.”³⁵¹ However, Judge Wilken also rejected this justification.³⁵² She claimed that the number of schools that participate in those two sports has increased because participating in those sports raises the school’s public profile and generates additional revenue.³⁵³ She justified her rationale by pointing to the fact that several bigger schools are promoting the raising of grant-in-aid for their student-athletes.³⁵⁴ Additionally, there is no evidence that shows that any Division I schools originally joined due to the NCAA’s amateurism rules, when they could have just joined Division II, III, or even the NAIA, all of whom implement the same amateurism principles.³⁵⁵ This instead points to a solely financial motivation.³⁵⁶ While the NCAA was able to show that many Division I schools operate at a financial loss and increasing costs would cause them to drop their athletic programs altogether, several school’s athletic directors testified that they would continue to participate in NCAA Division I sports even if student-athletes were required to be paid more.³⁵⁷ Judge Wilken also noted that the plaintiffs’ suit does not demand that schools compensate student-athletes more, but rather demands that it give schools the option to pay their student-athletes more.³⁵⁸

349. *Id.* at *15 (citation omitted).

350. *Id.* at *32.

351. *Id.* at *33.

352. *Id.* at *16.

353. *Id.*

354. *Id.*

355. *Id.* at *15.

356. *Id.* at *15-16.

357. *Id.* at *16.

358. *Id.* at *33.

3. Less Restrictive Alternatives

Since the NCAA was able to justify their procompetitive restrictions successfully, the burden shifted back to the plaintiff to show that there were less restrictive alternatives to the one in place.³⁵⁹ In *O'Bannon*, the plaintiffs suggested three less restrictive means:

- (1) raise the grant-in-aid limit to allow schools to award stipends, derived from specified sources of licensing revenue, to student-athletes; (2) allow schools to deposit a share of licensing revenue into a trust fund for student-athletes which could be paid after the student-athletes graduate or leave school for other reasons; or (3) permit student-athletes to receive limited compensation for third-party endorsements approved by their schools.³⁶⁰

Ultimately, Judge Wilken held that two of these alternatives were legitimate.³⁶¹

Judge Wilken held that raising grant-in-aid would be a less restrictive alternative on the condition that such grant-in-aid does not exceed the full cost of attendance, thus maintaining compliance with NCAA amateurism rules.³⁶² She said that raising the scholarship cap would not have any effect on the NCAA's consumer demand, and it would actually help integrate student-athletes into the academic community, which ultimately would lead to a better education for the student-athletes.³⁶³

Plaintiffs' second proposal in the lawsuit was that money from group licenses be set aside in trusts for student-athletes accessible upon graduation.³⁶⁴ Judge Wilken ultimately ruled on this issue for the plaintiffs and held that establishing a trust for student-athletes to access upon graduation would be a less restrictive alternative to the current NCAA restrictions.³⁶⁵ The trusts would consist of a percentage of all licensing revenue shares that student-athletes were entitled to receive during their career.³⁶⁶ The defendant's own witness noted that he would not be troubled if such a trust was established and that it would actually lessen his concerns

359. *Id.* at *34.

360. *Id.* at *16.

361. *Id.* at *35.

362. *Id.* at *16.

363. *Id.*

364. *Id.*

365. *Id.* at *35.

366. *Id.* at *17.

about paying student-athletes.³⁶⁷ Ultimately, Judge Wilken held that a school established trust is a viable alternative to paying student-athletes, and that the NCAA can only cap the amount a player receives from each year of participation in college athletics at \$5,000 per year.³⁶⁸ This would allow a player at a school that implements such a trust to collect upwards of \$20,000 upon graduation. Judge Wilken justified limiting the amount student-athletes could receive by citing one witness's testimony who hypothesized that the ultimate effect paying student-athletes would have on consumer demand would depend upon the amount of money that they were paid.³⁶⁹ In addition to limiting the amount student-athletes could be paid, making the student-athletes wait until after their collegiate careers are over to collect the trust funds would further minimize the negative effect on consumer demand.³⁷⁰ Judge Wilken also recommended that the NCAA create a restriction that prevents players from taking out any loans on the trust prior to graduation so as to prevent any abuse.³⁷¹

The only less restrictive alternative proposed by the *O'Bannon* plaintiffs that Judge Wilken did not approve of was the idea of allowing players to be granted their own image rights so that they can contract with third parties for endorsements.³⁷² Wilken's rationale was that allowing student-athletes to partake in endorsement opportunities would negate the amateurism concept and its policy of preventing the "commercial exploitation" of student-athletes.³⁷³ She ultimately held that it did not provide less restrictive means to the current NCAA restrictions.³⁷⁴

Ultimately, Judge Wilken ruled:

[T]he NCAA's challenged rules unreasonably restrain trade in violation of [Section] 1 of the Sherman Act. Specifically, the association's rules prohibiting student-athletes from receiving any compensation for the use of their names, images, and likenesses restrains price competition among FBS football and Division I basketball schools as suppliers of the unique combination of educational and athletic opportunities that elite football and basketball recruits seek. Alternatively, the rules

367. *Id.*

368. *Id.* at *37.

369. *Id.* at *17.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.*

restrain trade in the market where these schools compete to acquire recruits' athletic services and licensing rights.³⁷⁵

Since the plaintiffs were able to identify less restrictive alternatives after prevailing in the suit, Judge Wilken issued an injunction against the NCAA prohibiting it from restricting Division I basketball and FBS football schools from offering a limited share of the revenue generated from the use of their names, images, and likenesses in addition to a full grant-in-aid.³⁷⁶ The injunction also prohibits the NCAA from preventing its member schools from establishing a trust holding name, image, and likeness group license proceeds for each student-athlete that is accessible upon graduation.³⁷⁷ The injunction does not, however, prevent the NCAA from capping the amount of compensation student-athletes can be paid, but it does require that such limit not be set below the cost of attendance, as it currently exists.³⁷⁸ The injunction prohibits the NCAA from capping the amount of the trust accessible to each student-athlete upon graduation at less than \$5,000 per year of participation in college athletics.³⁷⁹ The injunction does not prohibit the NCAA from making any other sort of rules regarding student-athlete compensation, such as a rule that does not allow a school to offer a recruit a greater amount of the trust after graduation than others.³⁸⁰ The amount of compensation that the schools place in the trust may vary from year to year.³⁸¹ All other NCAA rules will remain in effect as the plaintiffs only challenged the rules stated above.³⁸² Thus, the NCAA violated antitrust law by agreeing with its member schools and setting limits on the amount student-athletes could be compensated. The current ruling will become effective during the next recruiting cycle for Division I basketball and FBS football.³⁸³

VII. AN ATHLETE-TAILORED APPROACH

Pending appeal, *O'Bannon* is a minor step toward correcting the flaws in the NCAA. But there are still several tweaks that should be made that would

375. *Id.* at *36.

376. *Id.*

377. *Id.* at *37.

378. *Id.* at *36.

379. *Id.* at *37.

380. *Id.*

381. *Id.*

382. *Id.* at *36.

383. *Id.*

dramatically correct the flaws in the current system and in the *O'Bannon* ruling.

One of the most important concerns with changing the NCAA Bylaws, as evidenced by *O'Bannon*,³⁸⁴ is preserving the concept of amateurism. The innocence of college athletics is a huge selling point for fans and is what differentiates it from professional leagues where players are mostly self-interested. Student-athletes are students first and athletes second; otherwise, they are not eligible to play. While many will never play professionally, all student-athletes have the ability to receive a college degree. For many, receiving an athletic scholarship is the only way they will ever have the opportunity to receive a college education. Should players start being paid a salary as opposed to scholarships, college sports may lose some of its luster—although most fans would still watch due to loyalty and pride towards their schools. In a poll conducted by the NCAA's witness in *O'Bannon*, 69% of the 2,455 surveyed said they opposed paying college athletes and would be less inclined to watch college athletics if student-athletes were paid a salary of \$20,000 per year.³⁸⁵ To keep this survey in perspective, however, Judge Wilken observed many flaws in the way the poll was conducted and did not see the poll as persuasive.³⁸⁶ Still, there is some validity to the statistic.

Recently, athletes at Northwestern University have attempted to form the first ever union for college athletes.³⁸⁷ While this is an applause-worthy effort, the players do not realize that they are likely doing more harm than good for their fellow student-athletes. To shortly address a very complicated issue, should student-athletes become part of a union, they are then considered employees and the school would be considered employers.³⁸⁸ The NCAA would then likely get rid of the idea of a scholarship and simply pay recruits a yearly salary. As employees, all income they derive then becomes taxable, and does not fall within the current tax shield that athletic scholarships currently fall under.³⁸⁹ Issues of employer liability and worker's compensation would derive as a result,³⁹⁰ and the NCAA's non-profit

384. See discussion *supra* Part VI.A.2.a.

385. *O'Bannon*, 2014 WL 3899815, at *10-11.

386. *Id.* at *11.

387. Jake New, *Northwestern Gets an Assist*, INSIDE HIGHER ED (July 7, 2014), <https://www.insidehighered.com/news/2014/07/07/ncaa-republican-lawmakers-back-northwesterns-appeal-football-player-union>.

388. *Id.*

389. 26 U.S.C.A. § 61(a)(1) (West 2012); Rev. Rul. 77-263, 1977-2 C.B. 47.

390. RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006). If student-athletes were considered employees, the universities could be held liable for torts that may occur in an athletic event

classification would also be jeopardized.³⁹¹ This would destroy the concept of “amateurism” as we know it.

Another complex issue that could be addressed in its own separate article, Title IX requires equal treatment and equal opportunities be given to women as they are men, including in college sports.³⁹² Paying student-athletes more would require more money to also be pumped into women’s programs at the same schools since “[f]emale and male student-athletes must receive athletics scholarship dollars proportional to their participation.”³⁹³ The problem is that typically women’s basketball is the only women’s athletic program that can make any sort of profit for the school, while men’s basketball and football can make millions.³⁹⁴ If the federal government were to require equal sums of money to also be distributed to women’s sports, this could cause many schools to drop their non-revenue athletics programs altogether.

Lastly, paying players more than an athletic scholarship scares many schools because, unless they are in the Big 5 conferences, many schools struggle to make a profit in their athletic programs. Only about 19% of schools actually profit off of their athletic programs as an aggregate.³⁹⁵ The Big 5 conferences only account for 60 of the 120 FBS football teams.³⁹⁶ That still leaves half of the FBS football players unaccounted for. In basketball, profitable programs account for roughly 17% of the total Division I

or even outside of the event if the court determined that the employee was acting within the scope of his employment. *Id.* “An employer is subject to liability for torts committed by employees while acting within the scope of their employment.” *Id.*

391. Ivan Maisel, *Paying Players Might Create Havoc*, ESPN (July 15, 2011), http://espn.go.com/college-sports/story/_/id/6768571/legal-issues-arise-paying-student-athletes.

392. *Title IX Frequently Asked Questions*, NCAA, <http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions> (last visited Dec. 20, 2014).

393. *Id.*

394. See discussion *supra* Part II.B.

395. Rachel Bachman & Matthew Futterman, *College Football’s Big-Money, Big-Risk Business Model*, WALL ST. J. (Dec. 10, 2012) available at <http://www.wsj.com/articles/SB10001424127887324024004578169472607407806>. When a student enrolls in a school, he typically has access to the estimated full cost of attendance that he is likely to incur over the course of the school year. See *Cost to Attend U-M*, UNIV. OF MICH., <http://www.finaid.umich.edu/TopNav/AboutUMFinancialAid/CostofAttendance.aspx> (last visited Dec. 20, 2014).

396. NCAA FBS (Division I-A) Football Standings—2014, ESPN, <http://espn.go.com/college-football/standings> (last visited Dec. 20, 2014).

basketball programs.³⁹⁷ Additionally, by creating a market for players where teams could pay recruits any sum of money, the big schools would prevail almost every time. Even in simply requiring a full cost-of-attendance scholarship as opposed to a full grant-in-aid scholarship, as is currently in place, schools could pay up to as much as an additional \$10,000 per year per player. For the smaller schools not making a profit, this would become overbearing. The teams from smaller conferences with limited funds would have virtually no resources to compete with the Big 5 conferences. Thus, the Cinderella stories in March Madness and the major upsets in college football, which make college sports so captivating, would become even rarer and many schools would have to cut out several of their athletic programs just to stay afloat. In short, the rich would become richer and the parity would increase.

As it stands now, the aforementioned provisions in the NCAA Bylaws, NCAA Form 08-3a, the National Letter of Intent, and the other documents that constitute a scholarship, likely violate student-athletes' rights of publicity.³⁹⁸ They also violate antitrust laws as seen in *O'Bannon*.³⁹⁹ This Comment suggests an approach to reform the NCAA scholarship contract and its accompanying forms that would grant student-athletes the following: sole possession of their individual image rights while in college, and mandated full cost-of-attendance scholarships to student-athletes in the revenue-earning sports. All this can be added while maintaining the concept of amateurism that makes the NCAA so appealing to the masses and ensures athletes are students first above all else.

A. Grant Players Their Individual Name, Likeness, and Image Rights

The first step in resolving the current NCAA dilemma is to nullify those provisions from the NCAA Bylaws and scholarship contract that restrict a student-athlete's right of publicity.⁴⁰⁰ By simply doing this, the contracts

397. *College Basketball Teams*, ESPN, <http://espn.go.com/mens-college-basketball/teams> (last visited Dec. 20, 2014). There are currently 351 NCAA Division I basketball teams. *Id.* Thus, 60 (schools from the five major conferences) divided by 351 (total schools) would equal roughly 17%.

398. See discussion *supra* Part V.H.

399. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 2014-2 Trade Cases (CCH) ¶ 78865, 2014 WL 3899815, *36 (N.D. Cal. 2014).

400. See, e.g., *NCAA Bylaws*, *supra* note 37, at art. 12.5.2; *National Letter of Intent*, NCAA ELIGIBILITY CENTER (Oct. 13, 2014),

http://msnbcmedia.msn.com/i/CNBC/Sections/News_And_Analysis/_Story_Inserts/graphics/_PDF/NLI_2010_2011.pdf; *NCAA Form 08-3a*, *supra* note 45.

entered into with student-athletes would not violate the right of publicity because they would no longer be ambiguous and the NCAA would have actual consent.⁴⁰¹ By taking this step, student-athletes would then be free to contract with third parties through avenues such as advertising, endorsements, appearances, or autographs. For the sake of this Comment these individual licenses shall be referred to as “micro licenses.” Additionally, NCAA Bylaw 12.3 should be amended to allow student-athletes to contract with an agent or financial adviser while in school to assist them in exploring any and all such micro licenses.⁴⁰² Players’ names could be included on the back of jerseys and on gear as well as on video games, thus making those products more appealing to fans and triggering even greater sales than the current market allows. Players would get a portion of these proceeds in a revenue split with the schools.

Student-athletes could only participate in such activity in the offseason, or some other delineated period, so as not to add on to a student-athlete’s load during the season as both a student and an athlete, and to preserve the concept of amateurism. Then in the offseason, such micro license activities could take the place of a job. Since these activities do not require a rigid schedule, but rather can be worked around a student-athlete’s rigorous class and training schedule, they provide more flexibility to earn money in the offseason than a standard 9-to-5 job. Additionally, any student-athlete pursuing such offseason endeavors could be required to meet a certain GPA requirement before qualifying for such economic activities. This would encourage student-athletes to keep academics as their main priority, because failing to do so could result in a significant loss of profits. By making any income earned derivative of the individual player’s name, image, or likeness rights and through separate pursuits, the income would not come from the school and, thus, no employer/employee relationship would be formed. Players would have to pay individual income tax for such micro license ventures under the Internal Revenue Code section 61.⁴⁰³ This would still be much better than paying tax on the entire stipend paid to players if they were paid in salaries instead of athletic scholarships.

401. See discussion *supra* Part I.A.4.

402. Currently, a student-athlete cannot enter into a representation contract with a third party to market the athlete’s abilities or reputation until his eligibility expires. *NCAA Bylaws*, *supra* note 37, at art. 12.3. By permitting such a relationship, student-athletes could focus more on school and allow their agent to handle all of their other affairs.

403. 26 U.S.C.A. § 61 (West 2012). Since most players would not generate much income annually, they likely would pay minimal taxes.

B. Full Cost-of-Tuition Scholarships

Additionally, the grant-in-aid scholarship would be amended to provide schools the option of giving players full cost-of-attendance scholarships as opposed to just full cost-of-tuition scholarships, which do not cover all of a student-athlete's expenses.⁴⁰⁴ This would be available to all schools but would not be mandated. In 1956, students were actually paid a stipend to cover miscellaneous expenses aside from school, although that was ended a few decades later.⁴⁰⁵ Since many student-athletes' scholarships do not cover enough of their daily expenses, and because players do not have much time to get a job to cover these additional expenses, the full cost-of-attendance scholarship would help them cover the excess amounts. The full cost of attendance could be tied to an index, calculating inflation and the market price of costs in each location of the country in determining the most each school could pay its student-athletes. In 2014, the NCAA approved autonomous legislation, which will permit the schools in the Big 5 conferences, along with any other schools that please, to cover the full cost of attendance if they so desire.⁴⁰⁶ This is a step in the right direction. One alternative to this solution is allowing schools to offer full cost-of-attendance scholarships based on each individual player. Higher-rated recruits could receive a full cost-of-attendance scholarship while lower-rated recruits would just get a full cost-of-tuition scholarship. This would allow smaller schools in particular to ease their way into such an increase in spending.

With the many positives that full cost-of-attendance scholarships may resolve, there are problems that exist with this system, just like with every system. Even if student-athletes still are not considered employees, scholarship tax consequences exist for the players. The tax code specifically provides that scholarships used to pay tuition, fees, books, supplies, or

404. *How Do Athletic Scholarships Work?*, NCAA (2012),

<http://www.ncaa.org/sites/default/files/NCAA%2BAthletics%2BScholarships.pdf>.

405. Ivan Maisel, *Full Cost of Attendance Gains Traction*, ESPN (July 14, 2011), http://espn.go.com/college-sports/story/_/id/6765762/full-cost-attendance-student-athletes-gaining-traction. "In 1956, the membership approved a model to cover 'commonly accepted educational expenses' that included tuition, room, board, books, fees and a stipend of \$15 per month for the nine-month academic calendar. That stipend came as close to covering personal expenses as the NCAA cared to tread." *Id.* This stipend was later eliminated in the 1970s. *Id.*

406. Patrick Rische, *Will Big 5 Autonomy Create Greater Competitive Imbalance In College Athletics?*, FORBES (Aug. 7, 2014), <http://www.forbes.com/sites/prishe/2014/08/07/will-big-5-autonomy-create-greater-competitive-imbalance-in-college-athletics/>.

equipment are not taxable income.⁴⁰⁷ When the scholarship is used for any other school-related expenses, however, like travel, or any other funds the full cost-of-attendance scholarships might cover, it is considered gross income that the student-athlete must pay taxes on.⁴⁰⁸ The IRS would have to implement a new regulation defining athletic scholarships to include the full cost of attendance and exempting them from the current regulations.

While it may not be practical for every school to implement a full cost-of-attendance scholarship, providing all schools the option, not simply those in the Big 5 conferences, would create more parity than the alternative. It still would not mandate that smaller schools award full cost-of-attendance scholarships, but it would allow them to rework their budgets to stay competitive with the bigger schools, possibly sacrificing some of the outrageous amounts of money spent on coaches or other facets of the program to remain competitive. Some smaller schools have already begun enacting full cost-of-attendance scholarships.⁴⁰⁹

Congress would also have to re-hear Revenue Ruling 77-263, making not just athletic scholarships tax exempt but redefining the term “athletic

407. 26 U.S.C.A. § 117(a), (b)(1)(B) (West 2012). The codes reads, in pertinent part: Gross income does not include any amount received as a qualified scholarship by an individual who is a candidate for a degree at an educational organization The term “qualified scholarship” means any amount received by an individual as a scholarship or fellowship grant to the extent the individual establishes that, in accordance with the conditions of the grant, such amount was used for qualified tuition and . . . fees, books, supplies, and equipment required for courses of instruction at such an educational organization.

Id. Any portion of the scholarship that is not used by one of the five designations mentioned above is taxable as gross income of the recipient. Prop. Treas. Reg. § 1.117-6(c)(1), 53 Fed. Reg. 21,688 (June 9, 1988); see also IRS, *Withholding Federal Income Tax on Scholarships, Fellowships, and Grants Paid to Aliens*, <http://www.irs.gov/Individuals/International-Taxpayers/Withholding-Federal-Income-Tax-on-Scholarships,-Fellowships,-and-Grants-Paid-to-Aliens> (last visited Dec. 20, 2014). While any scholarship that is given in return for services received is considered taxable income under 26 U.S.C. § 117, the IRS created an exception for athletic scholarships. Rev. Rul. 77-263, 1977-2 C.B. 47. If, however, a full cost of attendance scholarship is awarded, which goes beyond the scope of Rev. Rul. 77-263, then unless Congress creates another exception, the portion outside of qualified tuition given to the student-athletes will be considered taxable income according to 26 U.S.C. § 61 and 26 U.S.C. § 117. 26 U.S.C.A. § 61 (West 2012); 26 U.S.C.A. § 117 (West 2012); Rev. Rul. 77-263, 1977-2 C.B. 47.

408. Rev. Rul. 77-263, 1977-2 C.B. 47; Prop. Treas. Reg. § 1.117-6(c)(1), 53 Fed. Reg. 21,688 (June 9, 1988).

409. Aaron Drawhorn, *Lobo Athletes to Have More Spending Money*, KRQE NEWS (Mar. 26, 2015), <http://krqe.com/2015/03/26/lobo-athletes-to-have-more-spending-money/>.

scholarship” to include the entirety of the full cost-of-attendance scholarship, including the incidental school expenses it covers.⁴¹⁰

C. Fully Guaranteed, 4-year Scholarships

Currently, many schools only offer one-year guaranteed scholarships.⁴¹¹ The full cost-of-attendance scholarships would be guaranteed for four years with two exceptions; a scholarship is not guaranteed if a player repeatedly violates NCAA Bylaws or turns professional prior to finishing school, along with any other fair exceptions formulated in the process. Guaranteeing scholarships for all four years would prevent institutions from pulling scholarships for players who were injured while playing for the school, or for pulling the scholarships because they want to offer them to a better player.

D. Reject the O'Bannon Group Licensing Trust Approach

Third parties would still need to contract with the NCAA or the schools for licensing rights that do not depend on the individual athlete's image rights but rather capitalize on the concept of a school as a whole. For the sake of this Comment, these will be called “macro licenses.” If students are granted their individual image rights, or micro licenses, as well as granted full cost-of-attendance scholarships as previously mentioned, the group licensing trust approach as outlined in *O'Bannon* is not necessary.⁴¹² Players could bundle their names together and grant the companies the use of the bundle of their names, images, and likeness rights and split the revenue in any way they see fit, in instances like video games. Players could also

410. Rev. Rul. 77-263, 1977-2 C.B. 47.

411. John Solomon, *Schools Can Give Out 4-Year Athletic Scholarships, but Many Don't*, CBS SPORTS (Sept. 6, 2014), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24711067/schools-can-give-out-4-year-scholarships-to-athletes-but-many-dont>.

412. A tiered approach similar to the revenue sharing concept mentioned above could be implemented instead and student-athletes could receive their money as soon as the agreement distributed the revenue. By placing the student-athletes' money in a trust fund not accessible until they exhausted their eligibility, however, it avoids the creation of an agency relationship and instead creates more of an independent contractor relationship, eliminating many of the vicarious liability concerns. Additionally, it maintains the current concept of amateurism by not allowing student-athletes to accept compensation for their athletic abilities, and keeping the emphasis on the schools instead of the individual players. The revenue splits devoted to student-athletes would depend on the macro license being issued. For instance, media contracts would distribute a total of 5% to the player trust fund. Only 2% of merchandise sales not containing a player's identity would be distributed to the players' fund since the team is the entity driving the sale and not the individual athlete.

contract individually. Either way, an additional \$20,000, as created by *O'Bannon* that could possibly be paid to each player upon graduation, is a steep amount that would destroy the parity of college athletics and would force many programs to stop competing all together.⁴¹³ Combining these *O'Bannon* trusts with full cost-of-attendance scholarships could cost a school paying that amount to two hundred student-athletes over \$2 million.⁴¹⁴

Upon graduation, players would be fully released from their scholarship contracts with the NCAA and would have to be additionally compensated for any use of their image rights beyond licenses issued while in college. Images of student-athletes could still be utilized after the player graduated as long as they consisted of the player's image and likeness while the player was in college, but not beyond. Third parties would then have to contract with individual student-athletes for any use of the student-athlete's post-college image or likeness.

VIII. CONCLUSION

This Comment's approach does not suggest the direct payment of a salary by the NCAA or the schools to enrolled student-athletes, as many have suggested. It is not practical to pay players a salary out of school funds when only 19% of Division I schools reported a profit last year from their athletics.⁴¹⁵ Forcing schools to pay too much more above the current scholarship amount would make many schools cut out their athletic programs altogether.⁴¹⁶ What is practical is to give schools the option of awarding full cost-of-attendance scholarships, which would not cost much more than \$4,000 per student-athlete annually.⁴¹⁷ Additionally, granting each player his individual name, image, and likeness rights would allow players to earn additional income, which would not be paid from each school's funds. This would help level the playing field and not necessarily deter an athlete from choosing a smaller school for fear of loss of opportunity. A five-star recruit could capitalize on the hype surrounding him no matter what school he attends because it is his individual brand that

413. See Michael Smith, *Is Cinderella Dead?*, SPORTS BUS. J. (Nov. 10, 2014), <http://www.sportsbusinessdaily.com/Journal/Issues/2014/11/10/In-Depth/Lead.aspx>.

414. *Id.*

415. Bachman, *supra* note 395.

416. *Id.*

417. Mitch Sherman, *Full Cost of Attendance Passes 79-1*, ESPN (Jan. 18, 2015), http://espn.go.com/college-sports/story/_/id/12185230/power-5-conferences-pass-cost-attendance-measure-ncaa-autonomy-begins.

carries the value. Lastly, making the full cost-of-attendance scholarships guaranteed for all four years would give players more security in an otherwise volatile situation.

The beauty of all of these solutions is that they could be implemented without creating the dangerous employer/employee relationship and without unionizing college athletics. Johnny Manziel, Todd Gurley, A.J. Green, and Terrelle Pryor would no longer be considered “perpetrators,” but rather would receive the compensation they rightfully deserved all along. Should such solutions be implemented, the NCAA Bylaws would no longer be a hypocritical, contradictory set of documents, but would actually protect student-athletes from “exploitation by professional and commercial enterprises,” including protection from the NCAA itself.⁴¹⁸

418. NCAA Bylaws, *supra* note 37.