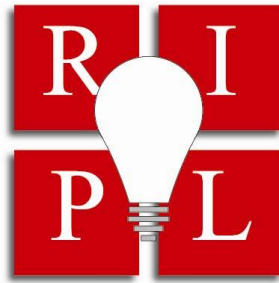


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



## STUDENT-ATHLETES PUT FULL-COURT PRESSURE ON THE NCAA FOR THEIR RIGHTS

TAYLOR RISKIN

### ABSTRACT

The struggle between the NCAA and student-athletes is one that will not slow down. The issue is whether the mandatory student-athlete agreement is reasonable and, further, if student-athletes should be compensated for the use of their likeness? The answers to these questions are crucial with over a century of tradition on the line. This comment analyzes the recent Ninth Circuit decision through an antitrust and right of publicity lens. Additionally, this comment proposes a solution that allows student-athletes to receive some type of compensation while the NCAA preserves amateurism.

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TAYLOR RISKIN\*

## I. INTRODUCTION: THE PREGAME WARM-UP

The National Collegiate Athletic Association states it “is a membership-driven organization dedicated to safeguarding the well-being of student-athletes and equipping them with the skills to succeed on the playing field, in the classroom and throughout life.”<sup>1</sup> The opportunity to grow as a player, student, and person are just a few of the bedrock principles that drive the National Collegiate Athletic Association (“NCAA”) to help student-athletes succeed.

Originally under NCAA policy, student-athletes received no type of direct payment; however, they were eligible to receive a scholarship that covered tuition.

In July 2009, a former UCLA basketball player, Ed O’Bannon (“O’Bannon”), filed a lawsuit against the NCAA, Collegiate Licensing Company (“CLC”), and Electronic Arts (“EA”).<sup>2</sup> O’Bannon, accompanied by twenty other former basketball and football college athletes, alleged the defendants violated the Sherman Antitrust Act and took actions that deprived him of his right of publicity.<sup>3</sup> Ultimately, this challenged the NCAA’s policy.

On August 8, 2014, Judge Wilken ruled that the NCAA’s practice of barring payments to its athletes violated antitrust laws.<sup>4</sup> This ruling expanded the scholarships to cover the cost of attendance, including living expenses in full.<sup>5</sup>

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<sup>1</sup> Who We Are, NCAA (Oct. 4, 2015), <http://www.ncaa.org/about/who-we-are>.

<sup>2</sup> Second Consolidated Amended Class Action Complaint, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-01967 CW, 2011 WL 2185126 (N.D. Cal. May 2, 2011) [hereinafter Second Amended Complaint]. Shortly thereafter, Samuel Keller, the former starting quarterback for Arizona State University and University of Nebraska football teams, filed suit regarding the right of publicity issue. *Keller v. Elec. Arts, Inc.*, 2010 U.S. Dist. LEXIS 10719 (N.D. Cal. Feb. 8, 2010). The Collegiate Licensing Company and EA settled for forty million dollars leaving the NCAA as the sole defendant. Tom Farrey, *Players, game makers settle for \$40M*, ESPN (May 31, 2014), [http://espn.go.com/espn/otl/story/\\_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm](http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm).

<sup>3</sup> See Second Amended Complaint. O’Bannon sued after discovering a player in a NCAA video game that shared similar physical characteristics as him such as height, weight, skin tone, hair style, and jersey number. *Id.*

<sup>4</sup> *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014).

<sup>5</sup> See *id.* at 1006. This decision would affect student-athletes who started attending school in August 2015. *Id.*

Additionally, Judge Wilken issued an injunction allowing colleges to place money generated by the use of the student-athletes' likeness into a trust fund.<sup>6</sup> This amount is limited to \$5,000 per year of eligibility.<sup>7</sup> The student-athlete would receive this money upon graduation.<sup>8</sup> If a school does not enter a contract to use the student's likeness, then no money is required to be placed into the trust fund.

Subsequently, the NCAA appealed to the Ninth Circuit.<sup>9</sup> On September 30, 2015, the Ninth Circuit affirmed the increase in scholarships; however, it struck the \$5,000 trust fund.<sup>10</sup> The Ninth Circuit's decision relied heavily on the NCAA's amateur reasoning<sup>11</sup> and policy-driven considerations.<sup>12</sup> The O'Bannon suit is not the only recent attempt by student-athletes to receive compensation; however, it has progressed the most in determining a solution.<sup>13</sup>

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<sup>6</sup> See *id.* at 963.

<sup>7</sup> See *id.* at 1008.

<sup>8</sup> See *id.* at 982.

<sup>9</sup> Brief for the National Collegiate Athletic Association, Second Amended Complaint, Nos. 14-16601, 14-17068, O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015). The NCAA argued that Judge Wilken did not properly consider *NCAA v. Board of Regents of the Univ. of Okla.* when making her decision. *Id.* at 26-31. See *Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 102 (1984) (stating that it is essential to preservation of the character and quality of college athletics that, "athletes must not be paid" and further, must have academics be their top priority).

The Ninth Circuit had not finished deliberating and therefore, issued an injunction of Judge Wilken's decision to delay its effects. Steve Berkowitz, *Judges Grant NCAA Request for a Stay; O'Bannon Injunction on Hold*, USA TODAY, July 31, 2015. The injunction delayed the effects of Judge Wilken's decision until the 2016-2017 school year. *Id.*

<sup>10</sup> O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015).

<sup>11</sup> See *id.* The NCAA argued that commercial pressures amongst college sports present the risk that "an avocation will become a profession and that athletics will become untethered from the academic experience." Claire Zillman, *As March Madness starts, the NCAA is Set to Fight to Preserve Athletes' Amateur Status*, FORTUNE (March 17, 2015), <http://fortune.com/2015/03/17/march-madness-ncaa-amateur-status/>. The NCAA pleads that "its amateurism rules are legitimate-and procompetitive-because they fundamentally define college athletics by ensuring that the players are students and not professionals." *Id.*

<sup>12</sup> Marc Tracy & Ben Strauss, *Victory for N.C.A.A. as Panel Strikes Down Pay for College Athletes*, N.Y. TIMES, Oct. 1, 2015, at B14. A Tulane law professor, Gabe Feldman, declared that:

[T]his is a huge victory for the N.C.A.A. There was some question about the future of the amateurism model, and at least for now, a majority of this panel of the Ninth Circuit has reaffirmed the N.C.A.A.'s amateurism model and their definitions. The N.C.A.A. is allowed to use amateurism as a justification in antitrust cases, and the N.C.A.A. is allowed to define amateurism as restricting any payments to the cost of attending.

*Id.*

<sup>13</sup> Ben Strauss, *Waiting Game Follows Union Vote by Northwestern Players*, N.Y. TIMES, Apr. 26, 2014, at D4. Beyond the recent at-issue lawsuit, college-athletes have attempted to receive compensation. In April 2014, scholarship football players from Northwestern University voted on the possibility to certify the first college sports union. *Id.* An official of the National Labor Relations Board determined that these players were employees of the University and therefore, ought to form a union. *Id.* This would allow student-athletes to be entitled to workers' compensation benefits and receive a portion of the college athletics revenue. *Id.*

Ultimately, the National Labor Relations Board struck down the petition to unionize the Northwestern football players, in August of 2015, denying that student-athletes are university employees. Ben Strauss, *Labor Board Rejects Northwestern Players' Union Bid*, N.Y. TIMES, Aug. 18, 2015, at B13. This decision relied heavily on the core principal that "college athletes are primarily students." *Id.*

This comment explores the *O'Bannon* case in greater detail throughout four sections. Part I provides background information on the applicable Antitrust and Right of Publicity law as well as the NCAA student-athlete rules. Part II analyzes the relationship between the law and the NCAA rules. Part II additionally discusses the flaws in the *O'Bannon* ruling. Part III introduces a new proposal to compensate athletes in exchange for use of their likeness in EA video games. Finally, Part IV concludes the comment's main points and reiterates a solution to minimize the conflict between the two authorities of law and the NCAA student-athletes contracts.

## II. BACKGROUND: THE TIP-OFF

Student-athletes sign a contract with the NCAA in which they agree to give up certain rights in exchange for the opportunity to play in the NCAA. This agreement gives rise to the dispute about athletes' rights under antitrust law and rights of publicity. This section deals with the legal history, policy implications, and the status of what the law currently demands. This section also focuses on the effect that the NCAA Bylaws and Compliance Forms have on student-athletes, which is the heart of the *O'Bannon* lawsuit.

### A. Antitrust Law

Antitrust law bars "unreasonable" restraints on trade.<sup>14</sup> The enactment of federal antitrust legislation followed the economic expansion and industrialization following the Civil War.<sup>15</sup> At the time, society viewed corporations as powerful and controlling forces in the American economy.<sup>16</sup> In response to a strong public fear towards anticompetitive business practices, Congress enacted The Sherman Act ("Act").<sup>17</sup> The Act, enacted in 1890, demonstrated the Supreme Court's reliance on economic concepts of competitiveness.<sup>18</sup> Congress designed the Act to correct the growing evils of corporate control that "threatened to destroy the competitive American economy," as well as the American free enterprise system.<sup>19</sup> Corporate

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Furthermore, the decision rests on the National Labor Relations Act and its promotion to create a labor environment that is both stable and predictable. Kevin Trahan, *NLRB rules Northwestern Players Can't Unionize*, USA TODAY, Aug. 17, 2015. If the Board were to allow Northwestern student-athletes to unionize and, furthermore, bargain with the University, it would go directly against the Board's Act by causing unsteadiness. *Id.*

<sup>14</sup> VON KALINOWSKI, SULLIVAN, & MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION, § 11.01 (2d ed. 2010).

<sup>15</sup> *See id.* § 9.02.

<sup>16</sup> *See id.*

<sup>17</sup> *See id.* Congress' power to enact the Act derived from its constitutional powers under the Commerce Clause. *Id.* § 6.01.

<sup>18</sup> *See id.* § 1.02. Congress enacted the Sherman Act during an era of "trusts" and of "combinations" of businesses organized and directed to control the market by suppression of competition in the marketing of goods and services; a tendency that had become a matter of public concern. *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975).

<sup>19</sup> *See* VON KALINOWSKI, SULLIVAN, & MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION, § 1.02 (2d ed. 2010). While the Act presented a powerful start in addressing anticompetitive

giants—such as the infamous Standard Oil Trust—motivated Congress to take action toward implementing federal antitrust laws.<sup>20</sup> Antitrust law rests on the principle that “the unrestrained interaction of competitive forces will yield the best allocation of our economic resource, the lowest prices, the highest quality, and the greatest material progress.”<sup>21</sup>

The Act’s principal substantive provision states that, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal.”<sup>22</sup> This section bans concerted activity that results in “unreasonable” restraints of trade.<sup>23</sup>

A violation of Section One of the Act requires three elements: (1) a concerted activity involving more than one actor, (2) an unreasonable restraint of trade, and (3) an effect on interstate commerce.<sup>24</sup> The main attribute separating Section One from other sections in the Act is the rigorous nature and degree of proof required to establish a section violation.<sup>25</sup> Conduct is more likely condemned under Section One due to the heightened proof a plaintiff must present.<sup>26</sup>

The first and third elements are straightforward. The first element simply states that more than one individual is involved with the activity.<sup>27</sup> Courts regularly substitute “contract, combination, and conspiracy” with “concerted action.”<sup>28</sup> The

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business practices, large and powerful corporations managed to get around the law and continue their illegal practices. *Id.* As a result of societal frustrations, the Court enacted the Clayton Act (“Clayton”) in 1914, expanding the scope of antitrust regulation. *Id.* § 3.01.

The substantive provisions prohibit the following: anticompetitive price and sale term discrimination, anticompetitive tying arrangements, exclusive dealing arrangements, anticompetitive mergers and acquisitions, certain corporate interlocks, and anticompetitive restrictions in certain markets. *Id.*

<sup>20</sup> *See id.* § 1.02. *See also* Standard Oil Co. v. United States, 221 U.S. 1 (1911). A large oil company used its size and power to weaken other oil companies through unfair tactics such as underpricing and threats to suppliers doing business with the large oil company’s competitors. *Id.* at 43. The court held that these methods were “anticompetitive” and therefore, divided the large oil company into several separate and eventually competing firms. *Id.* at 79.

<sup>21</sup> Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

<sup>22</sup> 15 U.S.C. § 1 (2015).

<sup>23</sup> *See* VON KALINOWSKI, SULLIVAN, & MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION, § 2.01 (2d ed. 2010). Under the Section 1 language of the Sherman Act not all commercial restraints are illegal. Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569, 580 (E.D. Pa. 2004). The restraint is illegal if it is unreasonable. *Id.* The courts determine unreasonableness using either a “per se” or “rule of reason” analysis. *Id.*

<sup>24</sup> Tan v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001). A restraint violates the rule of reason if its harm to competition outweighs its procompetitive effects. *Id.* at 1063.

<sup>25</sup> *See* VON KALINOWSKI, SULLIVAN, & MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION, § 2.04 (2d ed. 2010).

<sup>26</sup> Copperweld Corp v. Independence Tube Corp., 467 U.S. 752, 775 (1984).

<sup>27</sup> *See* VON KALINOWSKI, SULLIVAN, & MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION, § 2.02 (2d ed. 2010).

<sup>28</sup> *See id.* at § 1.02. The Third Circuit determined that the terms “combination” and “conspiracy” are interchangeable under Section 1 of the Sherman Act. Bogosian v. Gulf Oil Corp., 561 F.2d 434, 445 (3d Cir. 1977). *See also* Tidmore Oil Co. v. BP Oil Co./Gulf Prods. Div., 932 F.2d 1384, 1388 (11th Cir. 1991) (stating that “courts use the words contract, ‘combination,’ and ‘conspiracy’ interchangeably”).

Legislative history shows that Congress intends for the Sherman Act to be flexible in its definitions and to rely on common-law meanings. National Soc. of Professional Engineers v. United States, 435 U.S. 679, 688 (1978).

third element simply asks whether a “direct, substantial and reasonably foreseeable” effect on interstate commerce exists.<sup>29</sup>

The second element involves any “unreasonable” restraint of trade.<sup>30</sup> First, the courts look to whether the concerted activity deals with a horizontal or vertical restraint of trade.<sup>31</sup> A horizontal restraint of trade usually involves direct competitors or firms operating at the same market level.<sup>32</sup> This type of restraint of trade is applied with *per se* offenses.<sup>33</sup> A *per se* offense presumptively carries an anticompetitive effect with it.<sup>34</sup> On the contrary, a vertical restraint applies between suppliers and customers, and is not a *per se* offense.<sup>35</sup>

The second component that courts must decide is whether to apply the “*per se* rule” or the “rule of reason.” The *per se* rule applies to horizontal relationships while vertical instances are judged under the rule of reason.<sup>36</sup> The Supreme Court, in recent years, restricted application of the *per se* rule.<sup>37</sup> The rule of reason involves an expansive analysis into the reasons and effects of the alleged restraint.<sup>38</sup> The burden

<sup>29</sup> 15 U.S.C. § 6(a) (2015). A plaintiff may prove the third element using one of the following two theories: (1) flow of commerce test or (2) the affecting commerce test. *Carpet Group Int’l v. Oriental Rug Importers Ass’n, Inc.*, 227 F.3d 62, 75 (3d Cir. 2000). *See also* *United States v. Giordano*, 261 F.3d 1134, 1138 (11th Cir. 2001) (declaring that the first test can be pleaded when the activities took place in the “flow of interstate commerce” and the second test may be applied when the activities had or were likely to have a “substantial effect on interstate commerce”). In recent years, more plaintiffs rely on the affecting commerce test because it is easier to satisfy. *See* VON KALINOWSKI, SULLIVAN, & MCGUIRL, *ANTITRUST LAWS AND TRADE REGULATION*, § 6.02 (2d ed. 2010).

<sup>30</sup> *Copperweld*, 467 U.S. at 768. The Third Circuit held that the NCAA eligibility rules do not fall within the meaning of “trade” under section 1 of the Sherman Act. *Pocono Invitational*, 317 F. Supp. at 581.

<sup>31</sup> *United States v. Apple, Inc.*, 791 F.3d 290, 313 (2d Cir. 2015).

<sup>32</sup> *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 (1988).

<sup>33</sup> *See* VON KALINOWSKI, SULLIVAN, & MCGUIRL, *ANTITRUST LAWS AND TRADE REGULATION*, § 11.01 (2d ed. 2010).

<sup>34</sup> *Board of Regents*, 468 U.S. at 100.

<sup>35</sup> *Business Elec. Corp.*, 485 U.S. at 730.

<sup>36</sup> *See* VON KALINOWSKI, SULLIVAN, & MCGUIRL, *ANTITRUST LAWS AND TRADE REGULATION*, § 11.01 (2d ed. 2010). An example of a *per se* violation is price-fixing. *Bd. of Regents v. Nat’l Collegiate Athletic Ass’n*, 546 F. Supp. 1276, 1304 (W.D. Okla. 1982). A court uses a *per se* analysis when the restraint is “manifestly anticompetitive” on its face. *Pocono Invitational*, 317 F. Supp. at 584.

<sup>37</sup> *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 542 (2d Cir. 1993). When a court decides an action is illegal *per se*, they must find it “so plainly harmful to competition and so obviously lacking in any redeeming pro-competitive values that they are conclusively presumed illegal without further examination.” *Id.*

<sup>38</sup> *See* VON KALINOWSKI, SULLIVAN, & MCGUIRL, *ANTITRUST LAWS AND TRADE REGULATION*, § 12.01 (2d ed. 2010). When considering whether a restraint is unreasonable under the rule of reason analysis, courts consider factors such as the condition of relevant markets before and after the restraint, nature of the restraint, history of the restraint, the circumstances surrounding the way in which the restraint is imposed, and any abnormal facts surrounding the way that the restraint is applied. *Id.* Justice Brandeis outlined the scope of the rule of reason analysis:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil

initially rests on the plaintiff to show an “adverse effect on competition.”<sup>39</sup> If a plaintiff is successful, the defendant must show evidence of the restraint’s procompetitive effects. Following the production of such evidence, the burden shifts back to the plaintiff to establish other means “less likely to harm competition.”<sup>40</sup> Finally, courts balance the anticompetitive effects and the procompetitive effects of the restraint derived from the agreement.<sup>41</sup> The Clayton Act allows parties to recover remedies such as damages, attorney’s fees, costs for injuries resulting from antitrust violations, and injunctive relief.<sup>42</sup>

### *B. Right of Publicity*

Right of Publicity is the inherent right of every<sup>43</sup> individual to regulate the commercial use of his or her own identity<sup>44</sup> and persona.<sup>45</sup> The legal development is traced through a variety of historical landmarks;<sup>46</sup> however, Judge Frank coined it as

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believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1919).

The key inquiry under the rule of reason analysis looks to whether the restraint enhances competition. McCormack v. Nat’l Collegiate Athletic Ass’n., 845 F.2d 1338, 1344 (5th Cir. 1988).

<sup>39</sup> Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 307 (2d Cir. 2008). *See also* Banks v. Nat’l Collegiate Athletic Ass’n, 746 F. Supp. 850, 858 (N.D. Ind. 1990) (stating the initial issue in any rule of reason case is the market power; the ability to raise prices above the competitive level by restricting output). The purpose of the Sherman Act is not to protect competitors, but rather to protect competition. *Id.* at 859. To protect the benefits of competition, a less restrictive substitute must be put into place. Agnew v. NCAA, 683 F.3d 328, 335 (7th Cir. 2012).

Within the first step of the rule of reason analysis, the law demands that the plaintiff prove: (1) the defendants contracted or conspired amongst each other, (2) the contract or conspiracy produced an anti-competitive effect within the relevant product and geographic markets, (3) objects of and conduct derived from the contract or conspiracy were illegal, and (4) the plaintiffs were injured as a proximate result of that conspiracy. *Pocono Invitational*, 317 F. Supp. at 580.

<sup>40</sup> *See* VON KALINOWSKI, SULLIVAN, & MCGUIRL, ANTITRUST LAWS AND TRADE REGULATION, § 2.02 (2d ed. 2010).

<sup>41</sup> *See id.* § 2.02.

<sup>42</sup> 15 U.S.C. § 15 (2015).

<sup>43</sup> Donald S. Chisum, Tyler T. Ochoa, Shubha Ghosh, & Mary LaFrance, *Understanding Intellectual Property Law* 773 (LexisNexis 2015). Some courts have held that this right is only granted to celebrities, however a majority recognize this right for non-celebrities. *Id.*

<sup>44</sup> *Id.* at 769. The courts recognize one’s identity to encompass a person’s name, voice, signature, photograph, or likeness. *Id.*

<sup>45</sup> J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY, § 1.3 (2d ed. 2015). Persona is a label that signifies a “cluster of commercial values embodied in person[s] identity.” *Id.* The courts determined the traditional “name and likeness” to be inadequate and therefore, adopted the term “persona.” *Id.* Judge Sofaer added that “the right of publicity protects the persona—the public image that makes people want to identify with the object person, and thereby imbues his name of likeness with commercial value marketable to those that seek such identification.” *Bi-Rite Enterprises, Inc. v. Button Master*, 555 F. Supp. 1188, 1199 (S.D.N.Y. 1983).

<sup>46</sup> *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 215 (1905) (the first sign of a common law right of privacy occurred in the Georgia Supreme Court). A newspaper published an image of the plaintiff for a Life Insurance Company ad without his consent. *Id.* at 193. The Court



a “right of privacy.”<sup>47</sup> Currently, no federal right of publicity exists.<sup>48</sup> Most states recognize the right of publicity either at common law or by state statute.<sup>49</sup> The policy driven publicity rights originate from natural rights of property justification.<sup>50</sup>

To demonstrate that a defendant violated a plaintiff’s right of publicity, the plaintiff must prove validity and infringement.<sup>51</sup> To show validity, he must demonstrate that he owns an enforceable right in the identity or persona of an individual.<sup>52</sup> To demonstrate infringement, a plaintiff must show that: (1) the defendant, without permission, used that identity or persona and (2) the defendant’s use has a high likelihood of causing damage to the commercial value of the identity or persona.<sup>53</sup> For the first element of infringement, the plaintiff’s identity must be used in such a way that the plaintiff is “identifiable”<sup>54</sup> from the defendant’s use.<sup>55</sup> The second element requires the plaintiff to show that the defendant received commercial gain from the use.<sup>56</sup> While each state slightly varies in remedies, most offer a successful plaintiff either injunctive or monetary relief.<sup>57</sup>

### C. NCAA’s Amateurism Policy

The NCAA Bylaws declare “only an amateur<sup>58</sup> student-athlete is eligible for intercollegiate athletics participation in a particular sport.”<sup>59</sup> Additionally, the

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determined that the publication “trespass[ed] upon plaintiff’s right of privacy.” *Id.* at 222. While this right is founded in natural law, an individual may waive this right either expressly or impliedly. *Id.* at 199.

<sup>47</sup> See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 1.26 (2d ed. 2015). The Second Circuit Court of Appeals first introduced the term “right of publicity” under New York common law in 1953. *Id.* § 6.3.

<sup>48</sup> *Id.* § 1.2.

<sup>49</sup> Donald S. Chisum, Tyler T. Ochoa, Shubha Ghosh, & Mary LaFrance, *Understanding Intellectual Property Law* 769 (LexisNexis 2015). More than thirty U.S. states recognize a right of publicity. *Id.*

<sup>50</sup> See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 2.1 (2d ed. 2015). One policy theory is a “self-evident natural property right.” Donald S. Chisum, Tyler T. Ochoa, Shubha Ghosh, & Mary LaFrance, *Understanding Intellectual Property Law* 770 (LexisNexis 2015). The policy driving this inherent property interest is the right to control how an individual, usually a celebrity, is commercialized. Jonathan Faber, *A Brief History of the Right of Publicity, Indiana: A Celebrity Friendly Jurisdiction*, *Res Gestae*, March 2000, Vol. 43, No. 9 (July 31, 2015). Beyond an individual’s control over how his likeness is used, an individual must control if he will be used at all. *Id.*

<sup>51</sup> See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 3.2 (2d ed. 2015).

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* § 3.7. The courts ought to focus on “whether the figure is recognizable, not the number of people who recognized it.” *Negri v. Schering Corp.*, 333 F. Supp. 101, 104 (S.D.N.Y. 1971).

<sup>55</sup> See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 3.2 (2d ed. 2015).

<sup>56</sup> See *id.*

<sup>57</sup> Restatement (Third) of Unfair Competition § 48-49 (2007).

<sup>58</sup> Amateurism, NCAA.org <http://www.ncaa.org/amateurism> (last visited Oct. 4, 2015). Generally, amateurism requirements ban things like “contracts with professional teams, salary for participating in athletics, prize money above actual and necessary expenses, play[ing] with professionals, tryouts, practice, or competition with a professional team, benefits from an agent or prospective agent, agreement to be represented by an agent, and delayed initial full-time collegiate enrollment to participate in organized sports competition.” *Id.*

Bylaws clearly state that student-athletes must retain “amateur” status to maintain a clear line between college athletics and professional sports.<sup>60</sup> The NCAA considers amateur competition a core principle for college athletics.<sup>61</sup> The policy behind the implementation and maintenance of amateur status aims at placing academics and a well-rounded education above athletics.<sup>62</sup> NCAA’s push to keep a clear line of demarcation has led them to require all incoming student-athletes to sign various documents. This documentation encompasses an agreement between the NCAA, respective college, and the student to abide by NCAA regulations intended to protect the student and his or her education.<sup>63</sup> One form in particular, Form 15-3a, designates an area for a student to affirm amateur status.<sup>64</sup>

The NCAA’s amateur athleticism model has received a lot of pushback in the past. Starting in 1984, the Supreme Court ruled that the NCAA cannot restrict the number of televised games it allows.<sup>65</sup> However, Justice John Paul Stevens stated that the NCAA may enjoy some freedom on enforcing rules to govern players, but this was not discussed further.<sup>66</sup> Additionally, in 2013 Ryan Hart also filed suit claiming that the EA video game violated his publicity rights.<sup>67</sup> In 2009, Sam Keller claimed that EA’s use of his player’s likeness in its football game violated publicity rights.<sup>68</sup> This case eventually combined with the O’Bannon class-action suit in 2010. This is one of the most recent and major cases that may completely alter the NCAA’s amateurism policy.

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<sup>59</sup> NCAA, 2015-16 NCAA DIVISION 1 MANUAL CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS § 12.01.1 (2015), available at [www.ncaapublications.com/productdownloads/D116OCT.pdf](http://www.ncaapublications.com/productdownloads/D116OCT.pdf) [hereinafter NCAA MANUAL].

<sup>60</sup> *See id.*

<sup>61</sup> Amateurism, NCAA.org, <http://www.ncaa.org/amateurism> (last visited Oct. 4, 2015). Athletic programs play an essential part in the educational program. NCAA MANUAL, § 12.01.2.

<sup>62</sup> Amateurism, NCAA.org, <http://www.ncaa.org/amateurism> (last visited Oct. 4, 2015).

<sup>63</sup> 2015-2016 Division I Compliance Forms, NCAA.org, <http://www.ncaa.org/2015-16-division-i-compliance-forms> (last visited Oct. 4, 2015).

<sup>64</sup> Form 15-3a: Student-Athlete Statement-NCAA Division I, NCAA.org, <https://www.ncaa.org/sites/default/files/Form%2015-3a%20-%20Student-Athlete%20Statement.pdf> (last visited Oct. 9, 2015). Part III, entitled “Affirmation of Status as an Amateur Athlete” reads as follows:

By signing this part of the form, you affirm that, to the best of your knowledge, you have not violated any amateurism rules since you requested a final certification from the NCAA Eligibility Center or since the last time you signed a Division I student-athlete statement, whichever occurred later. You affirm that . . . you have not provided false misleading information concerning your amateur status to the NCAA, the NCAA Eligibility Center or the institution’s athletics department, including administrative personnel and the coaching staff.

*Id.*

<sup>65</sup> *Board of Regents*, 468 U.S. at 120.

<sup>66</sup> *See id.* at 117. Justice Paul John Stevens stated that “it is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics.” *Id.*

<sup>67</sup> *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 146-147 (3d Cir. 2013). The court held that EA did not sufficiently transform Hart’s identity in its game. *Id.* at 170.

<sup>68</sup> *Keller v. Elec. Arts, Inc.*, 2010 U.S. Dist. LEXIS 10719 (N.D. Cal. Feb. 8, 2010). The court held that EA’s use of Hart’s real-world physical likeness and football statistics are not sufficiently transformative to engage First Amendment protection. *Id.*

## III. ANALYSIS: THE PLAY-BY-PLAY

The student-athletes brought this suit chiefly to question the contract that they signed with the NCAA.<sup>69</sup> The student-athletes asserted that the contract caused an unreasonable restraint of trade and therefore offended their antitrust rights.<sup>70</sup> Furthermore, the student-athletes alleged that the defendant's use of their likeness violated their publicity rights.<sup>71</sup>

*A. Antitrust Law*

The student-athletes dispute the validity of the form that the NCAA requires them to sign before committing to play for a school.<sup>72</sup> They claim that the NCAA highly profits from the NCAA video games that feature the student-athletes.<sup>73</sup> The student-athletes argue that the NCAA has committed an antitrust violation because the contract restricts student-athletes from receiving any of those profits and restricts them from entering into any personal contracts.<sup>74</sup>

To demonstrate a Sherman Act violation, the student-athletes must prove the contract creates an unreasonable restraint of trade.<sup>75</sup> To do so, the student-athletes use the rule of reason framework.<sup>76</sup> This framework initially places the burden on the plaintiff to show the contract has anticompetitive effects.<sup>77</sup> If the plaintiff is successful, then the defendant must provide evidence of the restraint's procompetitive effects.<sup>78</sup> A successful production of procompetitive evidence leads to a shift back to the plaintiff to argue for substantially less restrictive alternatives.<sup>79</sup> Finally, the courts must balance the anticompetitive effects with the procompetitive effects.<sup>80</sup>

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<sup>69</sup> See Second Amended Complaint. The contract includes a clause that reads:

By signing this part of the form, you affirm that, to the best of your knowledge, you have not violated any amateurism rules since you requested a final certification from the NCAA Eligibility Center or since the last time you signed a Division I student-athlete statement, whichever occurred later. You affirm that . . . you have not provided false misleading information concerning your amateur status to the NCAA, the NCAA Eligibility Center or the institution's athletics department, including administrative personnel and the coaching staff.

Form 15-3a: Student-Athlete Statement-NCAA Division I, NCAA.org, <https://www.ncaa.org/sites/default/files/Form%2015-3a%20-%20Student-Athlete%20Statement.pdf> (last visited Oct. 27, 2015).

<sup>70</sup> See Second Amended Complaint.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See VON KALINOWSKI, SULLIVAN, & MCGUIRL, *ANTITRUST LAWS AND TRADE REGULATION*, § 2.02 (2d ed. 2010).

<sup>76</sup> *O'Bannon*, 802 F.3d at 1071.

<sup>77</sup> See *id.*

<sup>78</sup> See *id.* at 1072.

<sup>79</sup> See *id.* at 1070.

<sup>80</sup> See VON KALINOWSKI, SULLIVAN, & MCGUIRL, *ANTITRUST LAWS AND TRADE REGULATION*, § 12.02 (2d ed. 2010).

### 1. Anticompetitive Effects

The plaintiffs claimed that the contract is an unreasonable restraint of trade because it has significant anticompetitive effects on the players.<sup>81</sup> The Ninth Circuit agreed with the players, holding that the “NCAA’s rules had significant anticompetitive effects within the college education market, in that they fixed an aspect of the ‘price’ that recruits pay to attend college.”<sup>82</sup> The Ninth Circuit reached this decision by relying on two previous cases: *Catalano* and *Board of Regents*.<sup>83</sup> The *Catalano* Court used a *per se* analysis and held that the agreement was unlawful *per se*.<sup>84</sup> In the *O’Bannon* case, the Ninth Circuit erred by relying on this case. To reiterate, the court uses a *per se* analysis when a horizontal restraint of trade is present or when direct competitors operate at the same market level.<sup>85</sup> The court applies the rule of reason in instances involving vertical restraint which is between suppliers and customers.<sup>86</sup> Nevertheless, the Supreme Court held that the issue of whether an agreement was necessary “is a factor relevant to whether the agreement is subject to the Rule of Reason.”<sup>87</sup>

The second case that the Ninth Circuit relied on is *Board of Regents*.<sup>88</sup> The *Board of Regents* court declared that college sports need to enter certain horizontal agreements to function.<sup>89</sup> The *Board of Regents* court held that many NCAA rules are part of the “character and quality of the [NCAA’s] product” and therefore, should be analyzed using a rule of reason analysis.<sup>90</sup> The *Board of Regents* court used the proper rule of reason analysis as stated above.<sup>91</sup> However, the court recognized the NCAA’s failure to tailor its plan to serve their competitive interests.<sup>92</sup> The NCAA’s

<sup>81</sup> See Second Amended Complaint.

<sup>82</sup> *O’Bannon*, 802 F.3d at 1070.

<sup>83</sup> See *id.* at 1071-1072. *Catalano* involves a group of beer retailers who alleged that another group of beer retailers conspired with one another to end the customary practice of extending retailers interest-free credit for a month following delivery of the beer. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 643-645 (1980).

The *Board of Regents* case involves the NCAA television plan. The court determined that the plan had “a significant potential for anticompetitive effects” however, it failed to analyze in greater detail the specificity of how much the plan was restrictive. *Board of Regents*, 468 U.S. at 104-105.

<sup>84</sup> *Catalano*, 446 U.S. at 647. The court reasoned that the agreement was a way of “extinguishing one form of competition among the sellers.” *Id.* at 649.

<sup>85</sup> *Business Electronics Corp.*, 485 U.S. at 730.

<sup>86</sup> See *id.*

<sup>87</sup> *American Needle, Inc. v. NFL*, 560 U.S. 183, 199 (2010).

<sup>88</sup> *O’Bannon*, 802 F.3d at 1071-1072.

<sup>89</sup> *Board of Regents*, 468 U.S. at 103.

<sup>90</sup> See *id.* at 102.

<sup>91</sup> *Id.* at 103.

<sup>92</sup> See *id.* at 119. NCAA’s television plan fails to “regulate the amount of money that any college may spend on its football program or the way the colleges may use their football program revenues, but simply imposes a restriction on one source of revenue that is more important to some colleges than to others.” *Id.* at 117-120.

The *Board of Regents* court also held that the NCAA’s television plan operates to raise price and reduce output, which are both unresponsive to consumer preference and therefore, represents anticompetitive behavior. *Id.* at 113. On the contrary, here, the NCAA contract does not operate to restrict price or output and therefore, does not have a negative effect on consumers. Form 15-3a: Student-Athlete Statement-NCAA Division I, NCAA.org, <https://www.ncaa.org/sites/default/files/Form%2015-3a%20-%20Student-Athlete%20Statement.pdf>

action in the *O'Bannon* case differs because it successfully tailored its restraint to serve its competitive interests.<sup>93</sup> Even if the NCAA's contract creates an anticompetitive effect, it still has the opportunity to present pro-competitive justifications.

## 2. Pro-Competitive Effects

If the student-athletes successfully show anticompetitive effects, the NCAA must present pro-competitive justifications for having the contract laid out in its current form. The NCAA provided four pro-competitive justifications for its compensation rules; however, the Ninth Circuit's analysis included only one justification.<sup>94</sup> The Ninth Circuit focused on the NCAA's protection of amateurism as they deemed it to be its strongest procompetitive effect of the restraint. As seen in the *Board of Regents*, the NCAA has a "revered tradition of amateurism in college sports."<sup>95</sup>

The NCAA's strongest argument for its policy having a procompetitive effect is that its restraint broadens choices and, therefore, is competitive.<sup>96</sup> The Supreme Court indicated that a restraint that widens consumer choice can be procompetitive.<sup>97</sup> The NCAA's amateurism policy broadens consumer choice for the fans and athletes by distinguishing college sports from professional sports.<sup>98</sup> It is important to maintain a clear line between college sports and professional sports so athletes recognize the choice between the two.<sup>99</sup> The NCAA provides the only opportunity for young men and women to achieve a college education while playing competitive sports as a student.

The Supreme Court declared that the NCAA "plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable."<sup>100</sup> The NCAA wants fans to identify its "product," that is, the blend of student and athlete.<sup>101</sup> The Supreme Court held that "the preservation of the student-athlete in higher education . . . is entirely consistent with the goals of the Sherman Act."<sup>102</sup> In order for the NCAA to

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(last visited Oct. 28, 2015). The NCAA contract asks that student-athletes give up extra-profit opportunities; however, the NCAA provides scholarships in return. *Id.*

<sup>93</sup> *Board of Regents*, 468 U.S. at 119.

<sup>94</sup> *O'Bannon*, 802 F.3d at 1058. The NCAA's four procompetitive justifications in favor for its compensation rules are: (1) promoting amateurism, (2) promoting competitive balance among NCAA schools, (3) integrating student-athletes with their schools' academic community, and (4) increasing output in the college education market. *Id.* The district court accepted the promotion of amateurism, integration of student-athletes and schools' academic community, but rejected the other two justifications. *O'Bannon*, 7 F. Supp.3d at 1001-1004.

<sup>95</sup> *Board of Regents*, 468 U.S. at 120.

<sup>96</sup> *O'Bannon*, 802 F.3d at 1072. Amateurism increases the popularity of college sports. *Board of Regents*, 468 U.S. at 101-102.

<sup>97</sup> *See id.* at 102.

<sup>98</sup> *See id.* at 101-102.

<sup>99</sup> *Agnew*, 683 F.3d at 340-345.

<sup>100</sup> *See Board of Regents*, 468 U.S. at 102. The product involves a brand of football that distinguishes an academic tradition from professional sports. *Id.* at 101.

<sup>101</sup> *See id.* at 102.

<sup>102</sup> *See id.* at 120.

maintain the quality and character of its “product,” it must assure that students attend class and are not paid.<sup>103</sup> The NCAA pledges its loyalty to amateurism through creation of a mutual agreement with the student-athletes to maintain the integrity of its brand.<sup>104</sup> By signing the 15-3a Form, student-athletes pledge their commitment to amateurism.<sup>105</sup> This commitment to amateurism increases its appeal to consumers, which is a pro-competitive effect.

The NCAA’s restraint on student-athletes is in attempt to protect its brand and moreover, protect amateurism, and therefore has a meaningful, pro-competitive effect. Amateurism allows student-athletes to gain a college education and utilize skills received from playing a competitive sport such as, leadership, communication, and teamwork in order to excel in a future career. With the NCAA’s presentation of its pro-competitive effects, the student-athletes would have the duty to present any alternatives to the current contract that is substantially less restrictive.

### 3. *Substantially Less Restrictive Alternatives*

The student-athletes proposed two resolutions to the NCAA’s current restraint on compensation: (1) increasing the scholarship amounts that NCAA member schools give to the student-athletes and (2) allowing student-athletes to receive \$5,000 per year when their name, image, or likeness is used in a video game or for other commercial purposes.<sup>106</sup> The first alternative involves increasing the current scholarship cap of just tuition to scholarships that cover full cost of attendance.<sup>107</sup>

The second alternative allows the NCAA to give student-athletes a cash compensation for its use of their likeness in its video games.<sup>108</sup> This alternative would brand student-athletes as professionals, which alters a NCAA bedrock principle: its amateur policy.<sup>109</sup>

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<sup>103</sup> *See id.*

<sup>104</sup> *See id.*

<sup>105</sup> Form 15-3a: Student-Athlete Statement-NCAA Division I, NCAA.org, <https://www.ncaa.org/sites/default/files/Form%2015-3a%20-%20Student-Athlete%20Statement.pdf> (last visited Dec. 15, 2015).

<sup>106</sup> *O’Bannon*, 7 F. Supp. 3d at 982. The Ninth Circuit agreed with the first alternative; however, struck down the second alternative. *O’Bannon*, 802 F.3d at 1079.

<sup>107</sup> *O’Bannon*, 7 F. Supp. 3d at 971. In addition to tuition, this plan would include travel expenses, housing, food, and other expenses. *Id.* While the president of the NCAA agrees that this would not violate its amateurism principles, he worries—along with fifteen other scholars—that this could open up the floodgates to new lawsuits demanding more changes of the NCAA’s rules. *O’Bannon*, 802 F.3d at 1074.

<sup>108</sup> *See id.* at 1076. The option to compensate student-athletes concerns the Ninth Circuit as to not compensate student-athletes is “precisely what makes them amateurs.” *Id.*

<sup>109</sup> Amateurism, NCAA.org, <http://www.ncaa.org/amateurism> (last visited Oct. 28, 2015). Following the presentation of anticompetitive effects, procompetitive effects, and substantially less restrictive alternatives, the Court now has a duty to compare these procompetitive effects with any anticompetitive effects. VON KALINOWSKI, SULLIVAN, & MCGUIRL, *ANTITRUST LAWS AND TRADE REGULATION*, § 12.02 (2d ed. 2010).

### B. Right of Publicity

The student-athletes also presented a right of publicity claim for the NCAA's use of their likenesses in the video games.<sup>110</sup> They argued that the NCAA featured their likenesses in the video games without their consent.<sup>111</sup>

#### 1. The Transformative Use Test

Using the transformative use test, the district court incorrectly ruled in favor of the student-athletes.<sup>112</sup> The court erred when determining the NCAA video game to not be transformative because the Supreme Court holds that video games are expressive works.<sup>113</sup>

A case similar to the present one at issue is *Hart v. Elec. Arts, Inc.*<sup>114</sup> Ryan Hart, a football player from Rutgers, claimed that EA used his likeness in the NCAA football video game.<sup>115</sup> The court found in his favor, holding that EA did not sufficiently transform his likeness in the game.<sup>116</sup> This court held that an interactive player's ability to transform the avatar's characteristics is not sufficiently transformative.<sup>117</sup> However, a defendant's reproduction of a celebrity image that

<sup>110</sup> See Second Amended Complaint. Ultimately, on this issue, EA ended up settling with the players for \$40 million because the district court ultimately held that the use of these student-athletes was not protected under the First Amendment. Tom Farrey, *Players, game makers settle for \$40M*, ESPN (May 31, 2014), [http://espn.go.com/espn/otl/story/\\_id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm](http://espn.go.com/espn/otl/story/_id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm).

<sup>111</sup> See Second Amended Complaint.

<sup>112</sup> *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1284 (9th Cir. 2013). The *Comedy III Productions* court laid out the transformative use test: "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the celebrity depiction or imitation is the very sum and substance of the work in question" and "whether a product containing a celebrity likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness." *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 406 (Cal. 2001). The quantity, over the quality, must be observed which means whether the literal and imitative or the creative elements predominate in the work. *Id.* at 407.

<sup>113</sup> *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1248 (9th Cir. 2013). See also *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2765 (2011) (holding that a football-themed video game embodies expressive and artistic elements).

<sup>114</sup> *Hart*, 717 F.3d at 141. The Third Circuit balanced the interests of use protected by the first amendment and right of publicity protection. *Id.* at 149. The court framed the issue as, whether Hart's identity was sufficiently "transformed" in the NCAA football video game? Professor Rodney A. Smolla, *Videogame Avatars: A Question of Transformative Use*, THE MEDIA INSTITUTE (Aug. 26, 2013), <http://www.mediainstitute.org/IPI/2013/082613.php>.

<sup>115</sup> *Hart*, 717 F.3d at 145-147.

<sup>116</sup> See *id.* at 170. Specifically, the court stated that:

The digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays football, in digital recreations of college football stadiums, filled with all the trappings of a college football game. This is not transformative; the various digitized sights and sounds in the video game do not alter or transform the Appellant's identity in a significant way.

*Id.* at 160.

<sup>117</sup> Ronald S. Katz, *When Rights of Publicity Trump 1st Amendment*, LAW 360 (May 22, 2013), <http://www.law360.com/articles/444030/when-rights-of-publicity-trump-1st-amendment>. When

incorporates expressive elements is entitled to as much First Amendment protection as an original work of art.<sup>118</sup>

In the present case, the district court found that student-athletes should win on the right of publicity claim.<sup>119</sup> This outcome is incorrect because NCAA games are highly creative and sufficiently transformative. EA created a new, digital world that encompasses all of the components that sports fans love about the games of football and basketball. The video game includes virtual stadiums, coaches, fans, sound effects, music, announcer commentary, and includes aspects of the NCAA teams such as players, jerseys, and mascots.<sup>120</sup> Beyond the normal play mode, an interactive user can create his own character, roster, and playing conditions such as special events and weather conditions.<sup>121</sup> In creating a character, one can pick everything from physical features to player statistics to even picking the character's hometown.<sup>122</sup> Furthermore, a player has the option of creating his own playbook in which he gets to use his talents to create completely new plays.<sup>123</sup> The interactive user can create, upload, and share rosters with other interactive users.<sup>124</sup>

Additionally, the Ninth Circuit's decision to rule that EA's video game is not transformative due to its visual depiction of real people poses a threat to other mediums that visually depict real people such as, novels, documentaries, and songs.<sup>125</sup> Justice Thomas worried that the Ninth Circuit's decision "jeopardizes the creative use of historic figures in motion pictures, books, and sound recordings."<sup>126</sup> Mediums such as a documentary would be granted even less protection than video games as it is solely a literal depiction.<sup>127</sup>

Even if the video game is not successful under the transformative use test, it is successful under the Rogers Test as supported by Ninth Circuit case law.

## 2. *The Rogers Test*

The Rogers Test is used when dealing with expressive works.<sup>128</sup> The *Hart* court quickly shut down the Rogers Test.<sup>129</sup> The Rogers Test is often used in similar cases,

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determining whether a work is sufficiently transformative, courts may find it useful to look at the marketability and economic value and whether it derives primarily from the fame of the celebrity depicted. *Comedy III Productions*, 25 Cal. 4th at 407.

<sup>118</sup> *See id.* at 408.

<sup>119</sup> *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d at 1284.

<sup>120</sup> Video game: NCAA Football 14 (Electronic Arts 2013).

<sup>121</sup> *See id.* An example of a special event is the NCAA championship game.

<sup>122</sup> *See id.*

<sup>123</sup> *See id.*

<sup>124</sup> *See id.*

<sup>125</sup> Eugene Volokh, *Freedom of Speech vs. Right of Publicity in Sports Computer Games*, THE WASHINGTON POST, Feb. 2, 2015.

<sup>126</sup> *Keller v. Electronic Arts Inc.*, 724 F.3d 1268, 1290 (9th Cir. 2013). Justice Thomas expressed his concerns in his dissent. *Id.*

<sup>127</sup> Eugene Volokh, *Freedom of Speech vs. Right of Publicity in Sports Computer Games*, THE WASHINGTON POST, Feb. 2, 2015.

<sup>128</sup> Tom Zuber & Jeff Zuber, *Brown v. Electronic Arts, Inc.: Lanham Act Protects Video Games, not Athletes*, LawUpdates.com (Sept. 24, 2013), [http://www.lawupdates.com/commentary/ibrown\\_v\\_electronic\\_arts\\_inc\\_i\\_lanham\\_act\\_protects\\_video\\_games/](http://www.lawupdates.com/commentary/ibrown_v_electronic_arts_inc_i_lanham_act_protects_video_games/).



however, like *Brown v. EA*.<sup>130</sup> The law required retired football player James Brown to overcome this test by showing that the NCAA football game either (1) has no artistic relevance to the underlying work or (2) if it does have any artistic relevance, the use of his likeness explicitly misleads as to the source or content of the work.<sup>131</sup> The Supreme Court held that video games are expressive works.<sup>132</sup> The *Brown* court quickly agreed that the game contains at least some artistic relevance, satisfying the first prong, and promptly moved on to the second prong.<sup>133</sup> As the *Brown* court determined, the Madden game does have at least some artistic relevance and therefore, Brown had to show that the use of his likeness explicitly misled as to the source or content of the work.<sup>134</sup> The Ninth Circuit ultimately found in favor of EA using the Rogers Test.<sup>135</sup>

The Madden games include the same creative features as the NCAA game.<sup>136</sup> Similar to the court in *Brown*, the *O'Bannon* court ought to find that the video game is artistic enough to overcome the student-athletes' claim. Although the NCAA video game can be viewed as transformative, the student-athletes must still consent to the NCAA's use of their likenesses.

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<sup>129</sup> *Hart*, 717 F.3d at 157. The Third Circuit deemed the Rogers Test a “blunt instrument, unfit for widespread application in cases that require a carefully calibrated balancing of two fundamental protections: the right of free expression and the right to control, manage, and profit from one’s own identity.” *Id.*

The test focuses on consumer confusion and whether the title of a work will mislead consumers as to the work’s content. Ronald S. Katz, *When Rights of Publicity Trump 1<sup>st</sup> Amendment*, LAW 360 (May 22, 2013), <http://www.law360.com/articles/444030/when-rights-of-publicity-trump-1st-amendment>.

<sup>130</sup> *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235 (9th Cir. 2013). Retired football player James Brown filed suit against EA for the use of his likeness in its Madden NFL video game. *Id.* at 1240.

<sup>131</sup> *See id.* at 1239.

<sup>132</sup> *See id.* at 1248. *See also Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. at 2765 (holding that a football-themed video game embodies expressive and artistic elements).

<sup>133</sup> *Brown v. Elec. Arts, Inc.*, 724 F.3d at 1243-1247. *Rogers* stated “that balance will normally not support application of the Lanham Act unless the use of the trademark or other identifying material encompasses no artistic relevance to the underlying work whatsoever.” *Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d Cir. 1989). This is different than Brown’s argument that the rule only requires that the artistic relevance be merely above zero. *Brown v. Elec. Arts, Inc.*, 724 F.3d at 1243.

<sup>134</sup> *See id.* at 1246. Brown’s presented four arguments: (1) the use of his likeness combined with a consumer survey raises a triable issue of fact under the second prong, (2) the written materials with versions of the game proves the defendant attempted to explicitly mislead consumers, (3) altering his likeness satisfies the second prong, and (4) defendant’s verbal comments demonstrates sufficient evidence to satisfy the second prong. *Id.* at 1245-1248. His four arguments in favor of this prong failed to satisfy the second prong. *Id.*

<sup>135</sup> *Brown v. Elec. Arts, Inc.*, 724 F.3d at 1241. The Ninth Circuit determined that the video game was creative and artistic enough to overcome Brown’s claim and therefore, video games are protected under the First Amendment as guaranteed in the U.S. Constitution. *Id.* at 1248.

<sup>136</sup> Video game: Madden NFL 14 (Electronic Arts 2013). As the Madden games recreate and add to the NFL league, the NCAA game recreates its league while adding creative elements. *Id.* The “NCAA Football” video game will not mislead a consumer as the game is related to NCAA football. *Id.*

As previously explained, the contract that student-athletes sign to play makes them a part of the NCAA and a crucial component of its “product.”<sup>137</sup> The student-athletes agree to maintain amateur status by not doing things such as, “receive any compensation” and “enter into any contract or agreement with a professional team or sports organization.”<sup>138</sup> Instances of explicit deception as to the source or content of the work is diminished when the student-athletes assign their publicity rights to the NCAA.<sup>139</sup> The contract on its face is fair to athletes as the court established that maintaining amateur status is an essential part of the NCAA student-athlete program. While NCAA’s contract language is fair, an issue may be that the student-athletes do not fully understand the terms to which they are agreeing and the repercussions of signing the contract. The NCAA Bylaws must be changed in order to better fit antitrust and right of publicity law in its policy.

#### IV. PROPOSAL: OVERTIME

The student-athletes want to receive compensation for the NCAA’s use of their likeness for commercial purposes.<sup>140</sup> The NCAA has a high desire for students involved in its athletic program to maintain an “amateur” status.<sup>141</sup> The best solution would encompass a portion of what each party wants.

##### *A. Antitrust Law Proposal*

An NCAA witness, Neal Pilson, testified that “if you’re paid for your performance, you’re not an amateur.”<sup>142</sup> He added that he would still be troubled with payment to students even if it were deferred until after the student-athletes graduate.<sup>143</sup> The court compares options that offer student-athletes education-related compensation and offering student-athletes cash sums completely unrelated to their educational expenses.<sup>144</sup> The court determined that the distance between the two is great in size.<sup>145</sup>

The consumer’s desire for amateurism, rather than the NCAA’s high demand for amateurism, is most relevant in an antitrust analysis.<sup>146</sup> Dr. J. Michael Dennis, an expert witness, conducted surveys regarding consumer attitudes towards college sports and compensation.<sup>147</sup> The survey results demonstrated that “the public’s

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<sup>137</sup> Form 15-3a: Student-Athlete Statement-NCAA Division I, NCAA.org, <https://www.ncaa.org/sites/default/files/Form%2015-3a%20-%20Student-Athlete%20Statement.pdf>. (last visited Oct. 28, 2015).

<sup>138</sup> NCAA MANUAL, § 12.2.

<sup>139</sup> *See id.*

<sup>140</sup> *O’Bannon*, 7 F. Supp. 3d at 982.

<sup>141</sup> *See id.* at 973.

<sup>142</sup> *O’Bannon*, 802 F.3d at 1077. Neal Pilson was previously a television sports consultant for CBS. *Id.*

<sup>143</sup> *See id.* at 1078.

<sup>144</sup> *See id.* at 1078-1079.

<sup>145</sup> *See id.* The court describes the difference as a “quantum leap.” *Id.*

<sup>146</sup> *See id.* at 1081.

<sup>147</sup> *See O’Bannon*, 802 F.3d at 975.

attitudes toward student-athlete compensation depend[s] heavily on the level of compensation that student-athletes would receive.”<sup>148</sup> The conclusion runs parallel to Mr. Pilson’s testimony that “smaller payments to student-athletes would bother them less than larger payments.”<sup>149</sup> Overall, the general public opposes student-athletes being compensated beyond their scholarships.<sup>150</sup>

The NCAA spends over \$2.7 billion in assisting its participating schools to support student-athletes.<sup>151</sup> It is no secret, however, that the student athletic programs at a number of Universities are flawed. Student-athletes experience difficulty balancing their schoolwork and the mandatory hours necessary towards their team. More than a dozen NCAA schools failed to graduate at least half of their players.<sup>152</sup> Furthermore, student-athletes suffer emotional and mental health issues associated with the end of the sport and graduating.<sup>153</sup> Not all schools have programs specifically tailored to accommodate these health issues.<sup>154</sup> Finally, student-athletes express an overwhelming struggle to jumpstart their careers after graduation.<sup>155</sup> The NCAA could distribute the money that it makes from using the student-athletes for commercial purposes, such as the NCAA video games, to benefit both the NCAA and student-athletes. A portion of the proceeds earned from the video games can be given back to the schools to help fund athletic programs. The money can go towards athlete costs like travel expenses, lodging, training facilities, trainers, athlete living expenses, and physical and mental health programs. The NCAA could also disburse funds to support student programs geared towards academics and post-graduation. These programs could embrace enhanced tutoring

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<sup>148</sup> *See id.*

<sup>149</sup> *See id.*

<sup>150</sup> Alex Prewitt, *Large Majority Opposes Paying NCAA Athletes*, Washington Post-ABC News poll finds, THE WASHINGTON POST, Mar. 23, 2014. Sixty-four percent of the general public are against paying college athletes. *Id.* This compares to the mere thirty-three percent who support paying salaries to college athletes. *Id.*

<sup>151</sup> Investing where it matters, NCAA.org, <http://www.ncaa.org/about/resources/media-center/investing-where-it-matters> (last visited Nov. 14, 2015). An overwhelming majority of the money goes towards team travel, food, lodging, participating in tournaments, insurance programs, and tutoring services. *Id.*

<sup>152</sup> Jen Christensen, *Life after basketball takes former players down different paths*, CNN (April 5, 2012), <http://www.cnn.com/2012/04/02/us/ncaa-basketball-graduation>. The study conducted by the Institute for Diversity and Ethics in Sport observed student-athletes and their likelihood to complete their degrees in six years. *Id.*

<sup>153</sup> Elena Schneider and Cara Cooper, *After Final Whistle, Former College Athletes Face Relief, Depression*, HELIX (June 18, 2013), <https://helix.northwestern.edu/article/after-final-whistle-former-college-athletes-face-relief-depression>. Sports psychologists, through their studies, have determined that thousands of NCAA student-athletes experience emotional and physical difficulties with transitioning from a “life centered on athletics” to a life without any sports involvement. *Id.*

<sup>154</sup> *See id.* Several Big Ten athletic departments lack mental-health services for their senior players. *Id.* Upon graduating, many former student-athletes experience a sense of loss that creates difficulty in moving forward with life beyond college. *Id.*

<sup>155</sup> About After the game, NCAA.org, <http://www.ncaa.org/student-athletes/former-student-athlete/about-after-game> (last visited Nov. 14, 2015). The NCAA launched “NCAA After the Game” which is intended to assist student-athletes in moving forward after their college careers come to an end. *Id.*

The program “uses compelling texts and videos to highlight what former NCAA student-athletes are doing now.” *Id.* The program also includes a job board in which students can post their resumes and look for job opportunities. *Id.*

programs and temporary sponsors or career counselors to assist with the completion of their degree and with their job search. This proposal allows student-athletes to receive indirect compensation, which essentially allows the NCAA to maintain amateurism.<sup>156</sup>

### *B. Right of Publicity Proposal*

The student-athletes also claim that their contract with the NCAA intrudes upon their right to protect one's "name, voice, signature, photograph, image, and likeness."<sup>157</sup> When a student takes on the role of both a student and an athlete, he is required to sign a contract with the NCAA. This contract lays out a wide variety of terms that encompass the NCAA Bylaws including, conditions on the use of a student-athlete's name or likeness.<sup>158</sup> Mainly, a non-institutionalized charitable, educational, or nonprofit agency may use a student-athlete's likeness; however, a number of conditions must be fulfilled.<sup>159</sup>

Similar to any contract, it can be difficult to read and fully understand all the implications that one is agreeing to upon signature. Currently, the NCAA Bylaws prohibit any individual that strives to be a student-athlete from being represented by an athlete agent during present or future negotiations.<sup>160</sup> Thus, while a student-athlete is signing his contract, he cannot have a representative there to assist him with his understanding of the terms and conditions. On its face, the student-athlete's signature on this agreement does not violate his publicity rights. If

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<sup>156</sup> Another possible solution is to allow the student-athletes to decide if they want their likeness to be used in exchange for a trust-fund. When signing the NCAA contract, student-athletes could enter either class A or class B. Class A would give the NCAA permission to use their likeness and the student-athletes would receive the trust-fund upon graduation. On the other hand, if student-athletes enter class B they would deny the NCAA permission to use their likeness; however, they would receive no trust-fund.

This is problematic because (1) it gives student-athletes too much power in the decision-making process and (2) this would diminish the NCAA's amateurism policy and is therefore, not effectively solving the problem. Additionally, uniformity appears to be an essential component in maintaining amateurism and this proposal creates a divide amongst the student-athletes.

<sup>157</sup> Jonathan Faber, *A Brief History of the Right of Publicity, Indiana: A Celebrity Friendly Jurisdiction*, Vol. 43, No. 9 (July 31, 2015).

<sup>158</sup> See NCAA MANUAL. The Bylaws state, under section 3.2.4.19.1:

For agreements that may involve the use of a student-athlete's name or likeness, an institution shall include language in all licensing, marketing, sponsorship, advertising, broadcast and other commercial agreements that outlines the commercial entity's obligation to comply with relevant NCAA legislation, interpretation and policies on the use of a student-athlete's name or likeness.

*Id.*

The NCAA Bylaws also contain the rules surrounding promotional activities. *Id.* Section 12.5 indicates that a "non-institutional charitable, educational or nonprofit agency may use a student-athletes name, picture or appearance to support its charitable or educational activities or to support activities considered incidental to the student-athlete's participation in intercollegiate athletics." *Id.* An agency may do so as long as a long list of conditions are met, described in sub-sections (a)-(i). *Id.*

<sup>159</sup> See *id.*

<sup>160</sup> Current Student-Athletes, Notre Dame, [http://www3.nd.edu/~ncaacomp/Amateurism\\_Agents.shtml](http://www3.nd.edu/~ncaacomp/Amateurism_Agents.shtml) (last visited Nov. 16, 2015).

he is not fully aware of what he is agreeing to, however, then he has not fully consented, which does rise to a right of publicity violation.

To ensure a student-athlete is knowledgeable with regard to the terms and conditions, the NCAA must be required to assist students in being well-versed in what it means to give up one's "likeness." The NCAA must alter its Bylaws to include a NCAA representative that meets with the potential student-athlete before signing the contract. The assigned representative will explain exactly what one's "likeness" entails and what it means to assign his rights to the NCAA. Furthermore, the NCAA can require potential student-athletes to attend "likeness training." During these training sessions, student-athletes gain the knowledge they need to make an informed decision and furthermore, consent, to release their publicity rights.

#### V. CONCLUSION: UPDATING THE PLAYBOOK

Congress introduced the Sherman Act in response to a rise of fear and distrust in large corporations.<sup>161</sup> The policy driving publicity rights stems from natural property rights.<sup>162</sup> O'Bannon and a number of student-athletes argued that the NCAA's rules violate both the Sherman Act and their right of publicity.<sup>163</sup>

O'Bannon argued the NCAA's contract that all student-athletes are required to sign creates an "unreasonable" restraint on trade.<sup>164</sup> O'Bannon also claimed that the NCAA violated his publicity rights.<sup>165</sup> The Ninth Circuit affirmed the increase in amount of scholarships granted to student-athletes; however, it struck the \$5,000 trust fund.<sup>166</sup>

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<sup>161</sup> See VON KALINOWSKI, SULLIVAN, & MCGUIRL, *ANTITRUST LAWS AND TRADE REGULATION*, § 9.02 (2d ed. 2010). The public feared the presence of anticompetitive business practices in the American economy. *Id.*

<sup>162</sup> See J. THOMAS MCCARTHY, *THE RIGHTS OF PUBLICITY AND PRIVACY*, § 1.2 (2d ed. 2015). Judge Frank devised this as a right of publicity. *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953). Society wants individuals to regulate any commercial use involving his own identity.

<sup>163</sup> See Second Amended Complaint.

<sup>164</sup> See Second Amended Complaint. The Sherman Act bars any activity that results in "unreasonable" restraints on trade. See VON KALINOWSKI, SULLIVAN, & MCGUIRL, *ANTITRUST LAWS AND TRADE REGULATION*, § 2.01 (2d ed. 2010). The Act's principal substantive provision states that, "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal." 15 U.S.C. § 1 (2015).

The contract prohibits student-athletes from receiving any profits generated from NCAA video games. Form 15-3a: Student-Athlete Statement-NCAA Division I, NCAA.org, <https://www.ncaa.org/sites/default/files/Form%2015-3a%20-%20Student-Athlete%20Statement.pdf>. (last visited Nov. 15, 2015). Furthermore, the contract restricts the student-athletes from entering licensing deals with anyone outside of the NCAA realm. *Id.*

<sup>165</sup> See Second Amended Complaint. O'Bannon argued that the NCAA used his likeness, without his consent, and profited greatly from it. *Id.* The court analyzed and balanced the NCAA's policy of barring student-athletes from earning compensation and its "procompetitive" reasoning behind it. *O'Bannon*, 7 F. Supp. 3d at 999.

<sup>166</sup> *O'Bannon*, 802 F.3d at 1079. Judge Wilken initially ordered that the schools give student-athletes a \$5,000 trust fund, which the student-athletes could access upon graduation. *O'Bannon*, 7 F. Supp. 3d at 982.

Under an antitrust analysis, the NCAA's desire to maintain and promote amateurism creates a reasonable restraint on trade. As the NCAA keeps student-athletes as amateurs, they experience a healthy integration of both academics and athletics.<sup>167</sup> Furthermore, the court erred when it declared that the NCAA video games failed to be transformative. Using the transformative test analysis, the video games are transformative as the games create an entire virtual arena. The games allow the interactive user to add creative elements and completely be in charge of the game. Even if the video games were to fail using the transformative test, they succeed under the Rogers Test. The Ninth Circuit previously held that the NFL Madden video games are artistic and expressive, which is sufficient to pass the Rogers Test.<sup>168</sup> The NCAA games are almost identical to the NFL games and therefore, are sufficiently transformative.

The most successful proposal is one that encompasses the student-athletes' demand for compensation and the NCAA's continued enforcement of its amateur policy. To better accommodate antitrust law, the NCAA can create a system that compensates student-athletes indirectly. The NCAA can disburse a number of the proceeds earned to help fund student-athletic programs like training facilities, tutors, career guides, and health programs. This proposal represents the NCAA's student-athlete brand well and allows the NCAA to preserve amateurism.

To fix the publicity rights issue, the NCAA must allow a representative to help student-athletes before they sign the contract and understand what use of their "likeness" means. The NCAA can also implement likeness training to better inform student-athletes about signing this portion of the contract.

The NCAA "supports learning through sports by integrating athletics and higher education to enrich the college experience of student-athletes."<sup>169</sup> In order "to create the framework of rules for fair and safe competition" the NCAA's amateurism policy must remain active.<sup>170</sup>

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The Ninth Circuit agreed with Judge Wilken that both an antitrust violation and right of publicity violation was present. *O'Bannon*, 802 F.3d at 1053. The Ninth Circuit, however, declined Judge Wilken's \$5,000 trust fund proposal. *Id.*

The sole reason for Judge Wilken's \$5,000 trust fund proposal was Neal Pilson's "offhand comment." Jon Solomon, *Court shuts down plan to pay athletes, says NCAA violates antitrust law*, CBS SPORTS, Sep. 30, 2015. Under cross-examination, Pilson stated that "a million dollars would trouble me and \$5,000 wouldn't but that's a pretty good range." *Id.*

<sup>167</sup> *O'Bannon*, 7 F. Supp. 3d at 1002-1003. This restraint protects the student-athletes and the consumer which is essential to continue fueling college athletics. *Id.*

<sup>168</sup> *Brown v. Elec. Arts, Inc.*, 724 F.3d at 1243.

<sup>169</sup> Who We Are, NCAA.org, <http://www.ncaa.org/about/who-we-are> (last visited Dec. 21, 2015).

<sup>170</sup> *See id.*