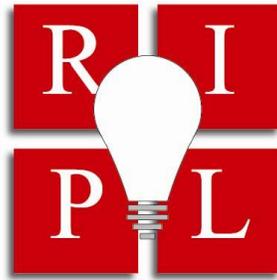


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



AN EVOLVING NCAA LEADING TO AN EXPANDING CLIENT LIST

FRANK BATTAGLIA

ABSTRACT

On the heels of the popular March Madness National Collegiate Athletic Association (“NCAA”) Basketball tournament, and following Northwestern University student-athletes’ success in unionizing, the extent of student-athlete publicity rights is now more contentious than ever. The divide between an ever-profiting NCAA and exploited NCAA student-athletes has sparked an evolving class-action lawsuit by former student-athletes, who challenge the licensing of their images and likenesses. This lawsuit has become a landmark test of the NCAA’s governance and notions about amateurism in college athletics. The outcome of this case will be a possible sign that compensation for both current and former student-athletes may be on the horizon. Regardless of the current litigation’s outcome, both publicity rights standards and the NCAA’s governance are at stake. In turn, a fair NCAA with a new set of regulations is likely to open up a whole new class of legal representation for athletic agents and lawyers negotiating on student-athletes’ behalf.

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AN EVOLVING NCAA LEADING TO AN EXPANDING CLIENT LIST

FRANK BATTAGLIA*

I. INTRODUCTION

A distinguished non-profit organization describes itself as a “voluntary association of more than 1,000 institutions, conferences and organizations.”¹ This same non-profit organization states its basic purpose is “to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.”² In doing so, this organization “retain[s] a clear line of demarcation between intercollegiate athletics and professional sports.”³ This non-profit organization is known as the National Collegiate Athletic Association (“NCAA”)⁴ and is the same organization whose official licensing representative, Collegiate Licensing Company (“CLC”), a for-profit entity, states there is a “\$4.0 billion annual market for collegiate licensed merchandise.”⁵

Despite this incredible market, student-athletes, under the guise of the NCAA, are punished year-in and year-out for violating NCAA Bylaws that address the use of one’s own likeness.⁶ Yet, the NCAA allegedly licenses these publicity rights, which student-athletes sign away by way of waiver, to game makers and others.⁷ Chris

* © Frank Battaglia. J.D. Candidate, May 2014, The John Marshall Law School. B.A. in Political Science and Legal Studies, Northwestern University, Evanston, Illinois. As a former wrestler at Northwestern University, and a proud brother to three other Division 1 student-athletes, the collegiate student-athlete landscape and law surrounding it is a very passionate and personal topic for me. I would like to thank The John Marshall Review of Intellectual Property Law for its assistance throughout the creation of this article.

¹ Second Consolidated Amended Class Action Complaint ¶ 16, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-01967 CW, 2011 WL 2185126 (N.D. Cal. May 16, 2011) [hereinafter Second Amended Complaint].

² *Id.* ¶ 280.

³ NCAA, 2010-11 NCAA DIVISION I MANUAL: CONSTITUTION, OPERATING BYLAWS, ADMINISTRATIVE BYLAWS § 1.3.1 (2010), available at <http://www.ncaapublications.com/productdownloads/D111.pdf> [hereinafter NCAA MANUAL].

⁴ See Second Amended Complaint, *supra* note 1, ¶ 6 (addressing the aforementioned descriptions of the NCAA).

⁵ *Id.* ¶ 16 (explaining that the CLC stated on their website there is a “\$4.0 billion annual market for collegiate licensed merchandise”).

⁶ Mark Yost, *School for Scandals*, WALL ST. J., Sept. 14, 2010, at D5. Reggie Bush was punished for hiring a sports agent prior to declaring for the NFL draft. Bill Pennington, *Bush, Ineligible for ‘05, Returns His Heisman*, N.Y. TIMES, Sept. 15, 2010, at B15; Chris Dufresne, *Reggie Bush Gives Back the Heisman Trophy*, L.A. TIMES, Sept. 15, 2010, at C1. Next, twenty-eight Ohio State University football players were punished for selling their own likenesses (mainly autographs, memorabilia, and jerseys) in exchange for cash and tattoos. Tedd Greenstein, *Cloud of Disgust; Buckeyes Coach Steps Down Amid Ever-widening Charges of Serious NCAA Violations*, CHI. TRIB., May 31, 2011, at C1.

⁷ See Tom Farrey, “Student-Athlete” Term in Question, ESPN, http://espn.go.com/espn/otl/story/_/id/8396753/ncaa-policy-chief-proposes-dropping-student-athlete-term (last updated Sept. 19, 2012) (stating Harvey Perlman, University of Nebraska chancellor, wrote to Big 12 commissioner, Dan Beebe, stating “I’m still trying to figure out by what authority

Plonsky, a proponent of current NCAA practices and longtime University of Texas Administrator, claims athletes “voluntarily sign the release waiver” and refers to their governance of student-athletes as a “version of the Army.”⁸ He has also stated, “[w]e have certain things we have to do a certain way to raise funds and pay for the scholarships and other things [student-athletes] and their parents expect.”⁹ Those allegations come from an administrator whose “army” raked in more than \$150 million in 2010-11.¹⁰

This divide amongst an ever profiting NCAA and partnered organizations has sparked an emerging class-action lawsuit by current and former student-athletes who challenge the NCAA’s licensing of their images and likeness.¹¹ Spearheading this lawsuit is former University of California at Los Angeles (“UCLA”) basketball star, Edward O’Bannon, who helped the 1994–95 Bruins win the coveted NCAA Division I national title.¹² After college he went on to play in the NBA for several years,¹³ but now is a car salesman in Nevada.¹⁴ In 2009, O’Bannon individually filed suit against the NCAA, EA, and the CLC.¹⁵ Since then, other former student-athletes have joined the suit that is now labeled *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*.¹⁶ This class action suit against the NCAA, EA Sports, and the CLC claims they engaged in anti-competitive practices in violation of the Sherman Antitrust Act¹⁷ and that they violated student athletes’ publicity rights.¹⁸

This Comment will analyze the student-athletes’ publicity rights and antitrust claims in the context of the current class action dispute against the NCAA, CLC, and EA. Part I of this Comment provides background information on the NCAA Manual

the NCAA licenses these rights to the game makers and others. I looked at what our student athletes sign by way of waiver and it doesn’t come close.”)

⁸ See Farrey, *supra* note 7.

⁹ See *id.*

¹⁰ See Steve Wieberg, Jodi Upton, & Steve Berkowitz, *Texas Athletics Overwhelm Rivals in Revenue and Spending*, USA TODAY (May 15, 2012), <http://usatoday30.usatoday.com/sports/college/story/2012-05-15/texas-athletics-spending-revenue/54960210/1> (“The Longhorns took in a little more than \$150 million in 2010–11, the most recent year for which public schools’ filings with the NCAA are available.”).

¹¹ Second Amended Complaint, *supra* note 1, ¶¶ 6–7; see also Farrey, *supra* note 7 (“[T]he philosophical divide emerges in depositions and frank emails unsealed this week in a class-action lawsuit by former UCLA basketball star Ed O’Bannon and other players who challenge the NCAA’s licensing of their images to video games manufacturers and other third parties.”).

¹² Second Amended Complaint, *supra* note 1, ¶ 45 (stating that “[i]n the 1994–95 season, Mr. O’Bannon led his team to a national championship, and scored 30 points and had 17 rebounds in the championship game.”).

¹³ See *Ed O’Bannon*, BASKETBALL-REFERENCE.COM, <http://www.basketball-reference.com/players/o/obbanned01.html> (last visited Oct. 3, 2012) (showing that O’Bannon played four seasons in the NBA).

¹⁴ See Second Amended Complaint, *supra* note 1, ¶ 45.

¹⁵ See *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 WL 445190, at *1 (N.D. Cal. Feb. 8, 2010).

¹⁶ See Second Amended Complaint, *supra* note 1, ¶ 8 (stating antitrust plaintiffs were Ed O’Bannon, Harry Flournoy, Alex Gilbert, Sam Jacobson, Thad Jaracz, David Lattin, Patrick Maynor, Tyrone Prothro, Damien Rhodes, Eric Riley, Bob Tallent, and Danny Wimprine). The publicity rights plaintiffs include Samuel Keller, Bryan Cummings, Lamarr Watkins, and Byron Bishop. *Id.* ¶¶ 40–43.

¹⁷ 15 U.S.C. § 1 (2012).

¹⁸ Second Amended Complaint, *supra* note 1, ¶¶ 46–47.

and Bylaws. This discussion focuses on the contract that student-athletes enter into with the NCAA, as well as the current antitrust and right of publicity arguments that current and former student-athletes are making in litigation against the NCAA. Part II analyzes potential arguments for and against current NCAA practice, including discussing the suggested revisions from proponents of student-athlete compensation. Part III proposes possible implications to student-athletes and the NCAA, and a possible emerging legal field of representation.

II. BACKGROUND

The current controversy between the NCAA and student-athletes revolves around the NCAA Manual and Bylaws, possible implications under antitrust law, and the student-athletes' publicity rights. Accordingly, this section focuses on the different parties involved in the suit, the contract student-athletes enter into with the NCAA, as well as the current arguments student-athletes are making in litigation against the NCAA.

A. Relationship Between the NCAA, CLC, and EA Sports

As previously stated, the NCAA's main purpose is to govern "intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body."¹⁹ In doing so, this organization "retain[s] a clear line of demarcation between intercollegiate athletics and professional sports."²⁰

The CLC "represents nearly 200 of the nation's top colleges, universities, bowl games, athletic conferences, the Heisman Trophy, and the NCAA."²¹ This trademark licensing company has been the "leader in connecting passionate college fans to their favorite college brands for more than three decades."²² Since the CLC formed, they have "paid its collegiate partners more than \$1 billion in royalties."²³ In 2005, CLC entered in an exclusive contract with EA Sports, granting them the exclusive right to develop and distribute interactive NCAA football and basketball video games.²⁴

EA Sports, headquartered in California, is one of the world's leading developers and publishers of videogames.²⁵ The exclusive contract entered into with the CLC granted EA Sports the exclusive rights to the "teams, stadiums and schools for use in its best-selling college football videogames."²⁶ The relationship between the NCAA,

¹⁹ *Supra* note 3, § 1.3.1.

²⁰ *Id.*

²¹ *About CLC*, COLLEGIATE LICENSING COMPANY, <http://www.clc.com/About-CLC.aspx> (last visited Jan. 26, 2014).

²² *Id.*

²³ *Id.*

²⁴ *CLC Grants EA Exclusive College Football Videogame License*, BUSINESSWIRE (Apr. 11, 2005, 8:30 A.M.), <http://www.businesswire.com/news/home/20050411005378/en/CLC-Grants-EA-Exclusive-College-Football-Videogame#.UuL2dxDnbIU>.

²⁵ *Id.*

²⁶ *Id.*

its partnered licensing company, CLC, and EA Sports has generated incredible revenue since its inception.

B. Student-Athlete Contract

Freshmen—mostly teenage—student-athletes enter their respective universities and are bombarded within the first weeks of school with numerous speeches, meetings, and documents that require their signatures. Having experienced this firsthand, this can be an overwhelming series of events. One of the documents student-athletes are faced with is the “Student-Athlete Statement” (“Form 08-3a”). Student-athletes’ eligibility is contingent upon the signing of Form 08-3a,²⁷ specifications for content and administration of which are set forth in the Bylaws.²⁸ This is important, because a contractual release can waive an individual’s publicity right.²⁹ Essentially, student-athletes sign Form 08-3a to establish eligibility, but relinquish their publicity rights in the process.³⁰ Determining whether Form 08-3a is a valid contract has become the forefront issue in recent litigation brought forth by former student-athletes.³¹

C. NCAA Division I Manual

As the Supreme Court noted in *NCAA v. Board of Regents of the University of Oklahoma* (“*Board of Regents*”), the NCAA plays a critical role in the maintenance of a revered amateurism tradition in college sports.³² This principle is reflected throughout the NCAA Division I Manual.³³ The Bylaws cited in this manual govern student-athletes and their respective institutions.³⁴ Furthermore, the Bylaws set forth numerous instances where student-athletes may lose amateur status.³⁵ In particular, student-athletes are prohibited from accepting pay, or the promise of pay, based on their sports.³⁶ Example forms of pay include, but are not limited to, salary,

²⁷ NCAA MANUAL, *supra* note 3, § 14.1.3.1 (stating that “[f]ailure to complete and sign the statement shall result in the student-athlete’s ineligibility for participation in all intercollegiate competition.”).

²⁸ *Id.* § 14.1.3.2.

²⁹ See *Marder v. Lopez*, 450 F.3d 445, 453–54 (9th Cir. 2006) (holding that the plaintiff’s release of all claims against the defendant barred the plaintiff’s claims for publicity right licensing revenues and copyright violations).

³⁰ NCAA MANUAL, *supra* note 3, § 14.1.3.2; Second Amended Complaint, *supra* note 1, ¶ 296.

³¹ Second Amended Complaint, *supra* note 1, ¶ 296.

³² Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88 (1984).

³³ See NCAA MANUAL, *supra* note 3, § 1.3.1 (explaining that the basic purpose of the NCAA is to “retain a clear line of demarcation between intercollegiate athletics and professional sports.”); see also NCAA MANUAL, *supra* note 3, §§ 12.1.2.1 to § 12.1.2.3 (discussing amateur status and the “prohibited” forms of pay).

³⁴ *Id.* § 1.3.2 (stating “[m]ember institutions shall be obligated to apply and enforce this legislation, and the enforcement procedures of the Association shall be applied to an institution when it fails to fulfill this obligation.”).

³⁵ *Id.* §§ 12.1.2.1 to 12.1.2.3.

³⁶ *Id.* § 12.1.2.

benefits, or preferential treatment.³⁷ Student-athletes are prohibited from using their names, likenesses, or pictures to promote a business.³⁸ Additionally, if student-athletes have knowledge of such unpermitted usages, they must take steps to cease this usage.³⁹ A failure to do so results in a loss of eligibility.⁴⁰

Moreover, student-athletes are prohibited from using agents to market their athletic ability.⁴¹ This includes the presence of a lawyer at negotiations⁴² or using an agent in placing the prospective student-athlete in a collegiate institution.⁴³

D. Student-Athlete Name & Likeness Licensing Litigation

Former student-athletes have made the argument that these Bylaws place significant economic burdens on student-athletes even after their tenures as collegiate athletes end.⁴⁴ Accordingly, former student-athletes filed a pivotal class-action suit in the Northern District of California against the NCAA.⁴⁵

This suit consists of two distinguished classes: the antitrust class and the publicity rights class.⁴⁶ The antitrust class claims that the NCAA forces student-athletes to sign away their likenesses, by conspiring with EA and the CLC to prevent compensation for their images, which ultimately violates antitrust law.⁴⁷ The publicity rights class claims that the NCAA unlawfully uses student-athletes' images and likenesses by refusing to compensate the student-athletes even after graduation.⁴⁸

³⁷ *See id.* § 12.1.2.1. The various forms of pay include, but are not limited to: salary; gratuity or compensation; educational expenses; division or split of surplus; expenses, awards and benefits; cash; payment based on performance, preferential treatment, benefits or services; prize for participation. *Id.*

³⁸ *Id.* § 12.5.2.

³⁹ *See id.* § 12.5.2.2 (“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.”).

⁴⁰ *Id.* § 12.5.2.1.

⁴¹ *Id.* § 12.3.1 (“An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport.”).

⁴² *Id.* § 12.3.2.1.

⁴³ *Id.* § 12.3.3.

⁴⁴ Second Amended Complaint, *supra* note 1, ¶ 45.

⁴⁵ *Id.* ¶ 6.

⁴⁶ *Id.* ¶ 2 (indicating the court’s preference that the complaint has discrete sections for the right of publicity claims and the antitrust claims).

⁴⁷ *See id.* ¶ 9 (explaining that the antitrust plaintiffs allege that the NCAA, EA, and the CLC have engaged in a price-fixing conspiracy and a group boycott because they refuse to deal with the plaintiffs in the commercial exploitation of their images). The plaintiffs also contend that the defendants have conspired to deprive the plaintiffs “from receiving compensation in connection with the use of their names, images, and likenesses in EA’s various NCAA video game products.” *Id.* ¶ 10.

⁴⁸ *See id.* ¶ 296 (explaining that at a hearing on Dec. 17, 2009, upon questioning from the Court, the NCAA counsel confirmed that the NCAA’s rights to the athlete’s likeness continues even after they graduate).

1. Antitrust Class

The antitrust plaintiffs allege that the NCAA, EA, and the CLC have continued to use their images after their collegiate careers end.⁴⁹ In doing so, the plaintiffs allege the NCAA, EA, and CLC have committed antitrust law violations pursuant to the Sherman Antitrust Act.⁵⁰

In regards to antitrust law and amateurism, legal precedent has consistently ruled in the NCAA's favor.⁵¹ In 1984, in *Board of Regents*, the Supreme Court stated that the NCAA should be given authority in safeguarding the character and quality of its product.⁵² The Court reiterated that the NCAA has authority to enforce its historic role in the preservation and encouragement of amateur athletics.⁵³ The Court reasoned that since the NCAA's inception in 1905, it has adopted and enforced "playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs."⁵⁴ With these goals in mind, the Court held that the NCAA's practices are "entirely consistent with the goals of the Sherman Act."⁵⁵

Although precedent seems to rule in the NCAA's favor, the case-at-hand presents a viable claim: whether the NCAA's goal of maintaining amateurism applies to former student-athletes.⁵⁶ The former student-athlete plaintiffs contend it does not.⁵⁷

⁴⁹ *Id.* ¶ 9.

⁵⁰ *See id.* ¶ 26 ("The NCAA's abridgement of former student-athletes' economic rights in perpetuity is unconnected to any continuing pro-educational benefits for former student-athletes, who by definition are no longer student athletes. Defendants' patently anticompetitive illegal scheme has unreasonably restrained trade, and is a violation of Section 1 of the Sherman Act."); 15 U.S.C. § 1 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

⁵¹ *See Gaines v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 738, 744–45 (M.D. Tenn. 1990). In this case, a former college NCAA football player entered the NFL draft, was not selected, and then attempted to return to the NCAA and was denied eligibility. *Id.* at 740. The Court ruled in favor of the NCAA, stating that the NCAA's eligibility rules were not subject to the antitrust analysis and were not a violation of the Sherman Act. *Id.* at 744–45. In another case, a student-athlete alleged the NCAA violated the Sherman Act by capping the number of scholarships given per team and prohibiting multi-year scholarships. *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 332–33 (7th Cir. 2012). The court held that this did not have an anticompetitive effect on the market for student-athletes. *Id.* at 343. Here, the Seventh Circuit recognized the NCAA has a strong interest in protecting the amateur objectives of NCAA college football by enforcing eligibility rules. *Id.*

⁵² *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101–02 (1984).

⁵³ *See id.* at 88 ("[S]ince its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports."). The court reasoned that the NCAA plays a vital role in maintaining a tradition of amateurism in collegiate sports. *Id.* at 120. The Court stated "[t]here can be no question but that [the NCAA] needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Id.*

⁵⁴ *Id.* at 88.

⁵⁵ *Id.* at 120.

⁵⁶ *See* Second Amended Complaint, *supra* note 1, ¶ 17–19.

⁵⁷ *Id.*

In determining whether there is a Sherman Antitrust violation, courts have adopted the per se analysis and rule of reason doctrine.⁵⁸ The per se analysis is applied when “there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable”⁵⁹ That is to be compared with the rule of reason analysis, which requires a consideration of the nature, purpose, and competitive effect of any challenged agreement before a decision on its legality is made.⁶⁰ As discussed below, modern antitrust precedence has consistently analyzed the NCAA’s governance under the rule of reason analysis.

In *Board of Regents*, the Supreme Court applied the rule of reason test because “th[e] case involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all.”⁶¹ This decision solidified the Supreme Court’s adequate acceptance of the competitive balance argument, which suggests justification for this case to be analyzed under the rule of reason.⁶² Accordingly, the rule of reason is the appropriate test to apply in this situation.

Under the rule of reason test, courts will go through a three-step process that involves shifting the burden of proof from one party to the other. First, the claimant must show that (1) the restraint has had substantial, adverse anti-competitive effects; the defendant then (2) must show that the conduct promotes a sufficiently pro-competitive objective; and, in rebuttal, the claimant must demonstrate that (3) the restraint is not reasonably necessary to achieve the stated objective.⁶³

A restraint has a substantial, adverse anti-competitive effect when: (1) the defendants contracted or conspired among each other; (2) this led to anti-competitive effects within the relevant product markets; (3) the objects of that contract or conspiracy were illegal; and (4) “the plaintiffs were injured as a proximate result.”⁶⁴

Next, the second and third factors respectively require the defendant to rebut with a sufficiently pro-competitive objective and for the plaintiff to establish facts demonstrating these restraints are not reasonably necessary to achieve that stated objective.⁶⁵ The true test of legality under these factors is whether the restraint imposed is such that it merely regulates, and perhaps thereby promotes, competition or whether it is such that it may suppress or even destroy competition.⁶⁶

The antitrust plaintiffs argue that the NCAA, EA, and the CLC have continually used their images after their collegiate careers end, which results in antitrust violations.⁶⁷ First, the athletes argue that the NCAA, CLC, and EA have agreed and

⁵⁸ See FEDERAL CONTROL OF BUSINESS § 40 (2013). The rule of reason is not necessarily a rule, it is more of a concept that can adapt over time. *Id.* This Section explains that “it is based on and thus confined by the purpose of the Sherman Anti-trust Act itself.” *Id.*

⁵⁹ *N. Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 5 (1958).

⁶⁰ *Chi. Bd. of Trade v. U.S.*, 246 U.S. 231, 238 (1918).

⁶¹ *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984).

⁶² *Id.* at 119.

⁶³ *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997); *Pocono Invitational Sports Camp, Inc. v. Nat’l Collegiate Athletic Ass’n*, 317 F. Supp. 2d 569, 580 (E.D. Pa. 2004).

⁶⁴ *Tunis Bros. Co., Inc. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991); see also *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72, 81 (3d Cir. 1977).

⁶⁵ *Chi. Bd. of Trade*, 246 U.S. at 238.

⁶⁶ Tibor Nagy, *The “Blind Look” Rule of Reason: Federal Courts’ Peculiar Treatment of NCAA Amateurism Rules*, 15 MARQ. SPORTS L. REV. 331, 338 (2005).

⁶⁷ Second Amended Complaint, *supra* note 1, ¶ 9.

conspired to permit the use of player names and likenesses.⁶⁸ In doing so, the student-athletes make a convincing argument that Form 08-3a enforcement is unconscionable, making it an illegal contract.⁶⁹ The student-athletes argue that Form 08-3a is both procedurally and substantively unconscionable.⁷⁰ They argue that it is procedurally unconscionable because it is an adhesion contract,⁷¹ and because NCAA rules prohibit student-athletes from hiring agents or attorneys to negotiate these contracts on their behalf.⁷² The student-athletes argue that Form 08-3a is substantively unconscionable because the detriment to the student-athletes outweighs the benefits.⁷³ More specifically, the athletes target the unfavorable language in Form 08-3a that releases their publicity rights to the NCAA in perpetuity.⁷⁴

In response, the NCAA must show that it created a sufficiently pro-competitive objective.⁷⁵ The NCAA would argue that precedent supports its purpose of promoting amateurism and therefore it does not violate the Sherman Act.⁷⁶ However, the plaintiffs rebut that the regulations promulgated by the NCAA to protect amateurism are not applicable and do not apply to former student-athletes.⁷⁷

Last, the student-athletes must establish facts demonstrating the NCAA's restraints are not reasonably necessary to achieve its amateurism objective.⁷⁸ While current and former student-athletes make up the present plaintiff class, case law that has consistently ruled in the NCAA's favor addressed current student-athletes.⁷⁹

⁶⁸ *Id.* ¶ 228.

⁶⁹ *Id.* ¶¶ 23, 402.

⁷⁰ *Id.* at ¶ 23.

⁷¹ See *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1412 (9th Cir. 1996) (“California law defines a contract of adhesion as . . . a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.”) (citing *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 817 (1981)).

⁷² See NCAA Manual, *supra* note 3, § 12.2.1; see also Dan Fitzgerald, *Oliver v. NCAA: Court Throws Out NCAA Baseball Lawyer-Agent Rule*, CONNECTICUT SPORTS LAW (Feb. 25, 2009) <http://ctsportslaw.com/2009/02/25/oliver-v-ncaa-court-throws-out-ncaa-baseball-lawyer-agent-rule/>.

⁷³ See Second Amended Complaint, *supra* note 1, ¶ 304.

⁷⁴ See Second Amended Complaint, *supra* note 1, ¶ 300. The complaint alleges:

The NCAA, through its total control of intercollegiate athletics, and due to a gross disparity in bargaining power, requires student-athletes sign nonnegotiable forms, as the terms are nonnegotiable. Any Class member declining to do so is barred by the NCAA and the relevant member institution from all further intercollegiate athletic competition.

Id.

⁷⁵ *Id.* ¶ 17.

⁷⁶ *Id.* ¶¶ 28–29; *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 88 (1984).

⁷⁷ *Id.* ¶ 30.

⁷⁸ *Id.*

⁷⁹ See *Bd. of Regents*, 468 U.S. at 135–36 (upholding the notion of the NCAA as the defender of amateurism in collegiate sports); see also *Banks v. Nat'l Collegiate Athletic Ass'n*, 746 F. Supp. 850, 862–63 (N.D. Ind. 1990) (denying a motion regarding enforcement of the NCAA's “no draft” rule when a player who entered the NFL draft, went undrafted, and was denied a return to college football); *McCormack v. Nat'l Collegiate Athletic Ass'n*, 845 F.2d 1338, 1344 (5th Cir. 1988) (holding that restrictions on athlete compensation were not price fixing in violation of the Sherman Act).

Accordingly, the plaintiffs argue that this precedent does not apply to former student-athletes who are being harmed.⁸⁰

2. Right of Publicity Class

In continuing to use the student-athletes' images, a class also claims violation of the right of publicity. The "right of publicity" is a recent development in the law, having only been coined in 1953.⁸¹ This signified the emergence of a property right in a person's identity.⁸² Since then, through judicial precedent and the enactment of state statutes, one has a publicity right in one's physical likeness, voice, and name or nickname.⁸³ One infringes upon this right through the "unpermitted use of a person's identity in a commercial setting."⁸⁴ The right of publicity has increasingly expanded over the past fifty years.⁸⁵ Accordingly, as of 2012, thirty-one states have established either a common law or statutory publicity right.⁸⁶

In this suit, the NCAA, CLC, and EA are subject to California and Indiana law.⁸⁷ California and Indiana are two of the nineteen states that recognize a statutory right of publicity.⁸⁸ Typically, courts use the transformative test to determine whether one's publicity right is violated.⁸⁹

⁸⁰ Second Amended Complaint, *supra* note 1, ¶ 26.

⁸¹ See 1 J. THOMAS MCCARTHY, RIGHTS OF PUBLICITY AND PRIVACY § 1.26 (2d ed. 2012) [hereinafter MCCARTHY, PUBLICITY] ("Judge Jerome Frank in 1953 was the first to coin the term 'right of publicity.' He used it to denote a property right in a person's identity.").

⁸² *Id.*

⁸³ See *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 825–26 (9th Cir. 1974) (holding that courts would afford legal protection to an individual's proprietary interest in his own physical interest and likeness); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (holding "that when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs"); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 414 (9th Cir. 1996) (the Court held that "name or likeness" is not limited to present or current use of one's name, and that the use of one's name, which adequately reflects that same person, and used to gain a commercial advantage, is an infringement of one's publicity right).

⁸⁴ See MCCARTHY, PUBLICITY, *supra* note 81, § 1:26.

⁸⁵ See, e.g., Matea Gold, *Schwarzenegger Isn't Buying It*, L.A. TIMES (Jan. 22, 2003), <http://articles.latimes.com/2003/jan/22/local/me-arnold22> ("[F]or actor Arnold Schwarzenegger, the unauthorized use of his picture in a newspaper ad for an Ohio car dealership was serious enough to warrant a multimillion-dollar lawsuit.").

⁸⁶ See MCCARTHY, PUBLICITY, *supra* note 81, § 6:3 (stating that as of March 2012, "courts have expressly recognized the right of publicity as existing under the common law of 21 states"). According to McCarthy, "eight [states] also have statutory provisions broad enough to encompass the right of publicity" and "ten states have statutes which, while some are labeled 'privacy' statutes, are worded in such a way that most aspects of the right of publicity are embodied in those statutes." *Id.*

⁸⁷ See Second Amended Complaint, *supra* note 1, ¶ 260. The EA has its headquarters in California, subjecting them to California law, and the CLC executives who negotiated the contracts with EA were located in California. *Id.* ¶¶ 257, 259. License negotiations between the NCAA and CLC have required frequent contact in Indiana by EA. *Id.* ¶ 257. Moreover, "[t]he NCAA has its principal place of business in Indiana and is therefore an Indiana resident and citizen." *Id.* ¶ 258.

⁸⁸ See *Statutes, RIGHT OF PUBLICITY*, <http://rightofpublicity.com/statutes> (last visited Jan. 26, 2014). The right of publicity is currently recognized by statute in California, Florida, Illinois,

The transformative test determines whether the expression possessing the individual's likeness is transformative enough to qualify for First Amendment protection.⁹⁰ The growing tension between the student-athletes and the NCAA is exemplified by a growing expansion of what constitutes a protected publicity right under this test. A combination of evolving media technology, collegiate athletes' personas becoming increasingly popular, and an expanding publicity rights class give rise to this claim.

In establishing a right of publicity claim, the student-athletes must show: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."⁹¹

In the past, the Ninth Circuit ruled in the claimant's favor where the claimant's publicity right had a distinctive and recognizable nature that resulted in a commercial value, and could be affixed to the claimant's identity.⁹² The Court also held that when the individual aspects of publicity examined are not sufficient for a statutory publicity rights cause of action, but viewed in totality, give rise to a common law publicity rights claim, the claimant has a sufficient cause of action.⁹³

As a result of increased popularity in college sports, collegiate athletes' personas have become increasingly popular. Increased interest in collegiate athletics has led to increased demand for sports merchandise,⁹⁴ an evolving technology that has created more marketing channels,⁹⁵ and increased video game popularity.⁹⁶ This growing value of student-athletes' publicity rights, which are signed away to the NCAA, creates a greater case for unfairness.

Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. *Id.*

⁸⁹ *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808–10 (Cal. 2001).

⁹⁰ Drew Sherman, *The Right of Publicity and the First Amendment Defense in California*, 9 INTELL. PROP. L. BULL. 29, 32 (2004); *see also Comedy III Prods.*, 21 P.3d at 810 (applying the traditional copyright concept of transformativeness to a right of publicity case).

⁹¹ *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 803 (N.D. Cal. 2011) (citing *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417 (1983)).

⁹² *See Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 827 (9th Cir. 1974). In this case, a race car driver sued a tobacco company for using an altered photo of his racecar in a cigarette advertisement. *Id.* at 822. The Court held in the race car driver's favor, stating that the car had a distinctive and recognizable nature, resulting in commercial value that could be affixed to the plaintiffs' identity. *Id.* at 827.

⁹³ *See White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1399 (9th Cir. 1992). In this case, Vanna White, the famous hostess for the game show "Wheel of Fortune," brought suit against Samsung. *Id.* at 1396. White alleged that Samsung aired an advertisement featuring a female robot that performed very similar acts to those that she performed on "Wheel of Fortune." *Id.* The Court held that individual aspects of the advertisement were not sufficient for a statutory publicity rights cause of action, but viewed all together, there was little doubt that Samsung wrongfully replicated White. *Id.* at 1399.

⁹⁴ PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: TEXT, CASES, PROBLEMS* 769 (2d ed. 1998). The collegiate sports merchandise market has grown from less than \$100 million in the early 1980s to an estimated \$4.3 billion in 2009. *Id.*

⁹⁵ *See, e.g., Watch ESPN*, ESPN, <http://espn.go.com/watchespn/> (last visited Mar. 8, 2014); *NCAA Live*, NCAA, <http://www.ncaa.com/liveschedule> (last visited Mar. 8, 2014); *Big Ten Digital Network*, BTN.COM, <http://video.btn.com/allaccess/> (last visited Mar. 8, 2014).

⁹⁶ Anastasios Kaburakis et al., *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry*, 27-SUM ENT. & SPORTS LAW. 1, 14 (2009).

The student-athlete plaintiffs argue that the NCAA does not officially allow for the licensing of student-athlete likenesses.⁹⁷ More specifically, the plaintiffs claim that NCAA Bylaw 12.5 “prohibits the commercial licensing of an NCAA athlete’s ‘name, picture or likeness.’”⁹⁸ In order to enforce this rule, all incoming freshman and transfer student-athletes are required to enter Form 08-3a to maintain eligibility.⁹⁹ This same contract, Form 08-3a, prohibits the NCAA from using these athlete’s likenesses for commercial purposes.¹⁰⁰ However, the plaintiffs allege that the NCAA “sanctions, facilitates and profits from EA’s use of student-athletes’ names, pictures, and likenesses despite contractual obligations prohibiting such conduct.”¹⁰¹

The plaintiffs allege that EA, with the knowledge, participation, and approval of the NCAA and CLC, extensively utilizes actual student-athletes’ names and likenesses for greater profit.¹⁰² The plaintiffs point to evident similarities between actual student-athletes and characters in the video games.¹⁰³ This class alleges that EA, the NCAA, and the CLC violate student-athletes’ common law right of publicity,¹⁰⁴ Indiana’s right of publicity statute,¹⁰⁵ and California’s right of publicity statute.¹⁰⁶

In re NCAA Student-Athlete Name & Likeness Licensing Litigation has become a “landmark test of the NCAA’s governance and notions about college athletes.”¹⁰⁷ On November 8th, 2013, Northern District of California Judge Claudia Wilken, issued her order on the plaintiff’s class certification.¹⁰⁸ The decision allowed the players to certify their class, but it significantly reduced the scope of the class.¹⁰⁹ While the plaintiffs were certified to pursue an injunction barring the NCAA from prohibiting current and former student-athletes from pursuing licensing deals for the uses of their names, images, and likenesses, Judge Wilken denied the plaintiffs’ attempt for certification to seek monetary damages.¹¹⁰ This ruling means that players cannot sue as a class over past and current NCAA profits arising from television broadcasts, video games, and other products. However, these individual student-athletes can file complaints detailing the player’s history as an NCAA student-athlete and a specific

⁹⁷ Second Amended Complaint, *supra* note 1, ¶ 181.

⁹⁸ *Id.*

⁹⁹ *Id.* ¶ 182.

¹⁰⁰ *See id.* ¶ 183 (alleging that Form 08-3a is contradictory to NCAA Bylaw 12.5, which specifically prohibits the commercial licensing of NCAA athletes’ name, picture or likeness).

¹⁰¹ *Id.* ¶ 184.

¹⁰² *See id.* ¶ 180. EA is not permitted to use the player likenesses. *Id.* According to the complaint, “however, EA with the knowledge, participation and approval of the NCAA and CLC extensively utilizes actual player names and likenesses.” *Id.* This allows EA users to identify college athletes playing the game. *Id.* The alleged motivation for the NCAA here is “more money” because “heightened realism in NCAA videogames translates directly into . . . increased revenues for Electronic Arts and increased royalties for CLC and the NCAA.” *Id.*

¹⁰³ *Id.* ¶¶ 200–26.

¹⁰⁴ *Id.* ¶¶ 261–67; *Browne v. McCain*, 611 F. Supp. 2d 1062, 1069 (C.D. Cal. 2009).

¹⁰⁵ *See* Second Amended Complaint, *supra* note 1, ¶¶ 261–67; IND. CODE § 32-36-1-1 (2009).

¹⁰⁶ *See* Second Amended Complaint, *supra* note 1, ¶¶ 261–67; CAL. CIV. CODE § 3344(a) (2009).

¹⁰⁷ Farrey, *supra* note 7.

¹⁰⁸ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, C 09-1967 CW, 2013 WL 5979327, at *10 (N.D. Cal. Nov. 8, 2013).

¹⁰⁹ *Id.* at *9, 10.

¹¹⁰ *Id.* at *10.

accounting of how they were harmed by the NCAA.¹¹¹ This suit will move forward nonetheless and the NCAA model, along with the conferences receiving hundreds of millions of dollars in television rights, is still at risk.

The case is scheduled to go on trial in June 2014 and the outcome of this case is a possible sign that compensation for both current and former student-athletes may be on the horizon.¹¹² Regardless, after many failed attempts the student-athletes' hopes to break into this colossal market seems more viable now than ever.

III. ANALYSIS

While the antitrust and publicity rights classes have different claims, their allegations revolve around the same issue: whether student-athletes consent to the NCAA's continual use of their publicity rights.¹¹³ The student-athletes contend that Form 08-3a is an unconscionable adhesion contract that is unenforceable and an antitrust violation.¹¹⁴ Additionally, the student-athletes argue that the NCAA's continual use of their names and likenesses is a publicity rights violation.¹¹⁵

A. Antitrust and Contract Unenforceability Analysis

The former student-athletes argue that Form 08-3a is an adhesion contract that is procedurally and substantively unconscionable, making it an illegal and unenforceable contract. Additionally, their antitrust argument is strengthened if Form 08-3a is found unenforceable.¹¹⁶

As previously stated, the Supreme Court has created a very high standard for student-athletes who bring antitrust claims against the NCAA.¹¹⁷ This is based on the NCAA's critical role in maintaining the amateurism tradition in collegiate sports.¹¹⁸ But contrary to the existing case law, the current plaintiffs argue that the NCAA's marketing of student-athletes' images and likenesses in perpetuity is an antitrust violation.¹¹⁹ To prove a Sherman Act violation, the student-athletes must show that the NCAA's practice is an unreasonable trade restraint.¹²⁰

¹¹¹ *Id.* at *7.

¹¹² Michael McCann, *O'Bannon Expands NCAA Lawsuit*, SPORTS ILLUSTRATED (Sept. 1, 2012, 11:11 A.M.) http://sportsillustrated.cnn.com/2012/writers/michael_mccann/09/01/obannon-ncaa-lawsuit [hereinafter McCann, *O'Bannon Expands Lawsuit*]. The author explained that this suit seeks to expand the class action to include current D-1 football and men's basketball players. *Id.* The plaintiffs seek a temporary trust set up for monies generated by the licensing of their names, likeness, and images. *Id.* These trusts would be acceptable at the completion of their collegiate career. *Id.* This argument can have many consequences that will be discussed *infra*.

¹¹³ See Second Amended Complaint, *supra* note 1, ¶¶ 7, 25.

¹¹⁴ See *id.* ¶ 302.

¹¹⁵ See *id.* ¶ 25.

¹¹⁶ See *id.* ¶¶ 24–25.

¹¹⁷ Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984).

¹¹⁸ See NCAA MANUAL, *supra* note 3, §§ 1.3.1, 12.1.2.1 to 12.1.2.3 (discussing amateur status and the "prohibited" forms of pay).

¹¹⁹ See Second Amended Complaint, *supra* note 1, ¶ 9.

¹²⁰ See *id.* ¶ 449.

1. Rule of Reason and Unconscionability

As previously discussed in the background, to prove the NCAA's practice is an unreasonable trade restraint, under the rule of reason test: (1) the student-athletes must show that the restraint has had substantial, adverse anti-competitive effects; (2) the defendant must show that the conduct promotes a sufficiently pro-competitive objective; and (3) the student-athletes must show that the restraint is not reasonably necessary to achieve the stated objective.¹²¹

2. Substantial, Adverse Anti-Competitive Effect

First, the athletes argue that the NCAA, CLC, and EA have agreed and conspired to permit the use of player names and likenesses.¹²² The student-athletes make a strong argument that Form 08-3a enforcement is unconscionable, making it an unenforceable contract, which strengthens the antitrust argument.¹²³ To establish unconscionability, the student-athletes must show that Form 08-3a is both procedurally¹²⁴ and substantively unconscionable.¹²⁵

A contract is procedurally unconscionable when one party is unfairly surprised by the terms in the contract, or has no meaningful choice but to sign.¹²⁶ The student-athletes argue that Form 08-3a is procedurally unconscionable because it is an adhesion contract¹²⁷ enforced annually by the NCAA on young student-athletes, whose signing is mandatory to maintain eligibility.¹²⁸ They argue these athletes are young, inexperienced and cannot fully comprehend the Form 08-3a terms.¹²⁹ These incoming student-athletes, most teenagers, are presented with vast legal documents

¹²¹ *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997).

¹²² See Second Amended Complaint, *supra* note 1, ¶ 228.

¹²³ See *id.* ¶¶ 302, 448–49.

¹²⁴ See *Navellier v. Sletten*, 262 F.3d 923, 940 (9th Cir. 2001) (stating procedural unconscionability “is manifested by (1) ‘oppression,’ which refers to an inequality of bargaining power resulting in no meaningful choice for the weaker party, or (2) ‘surprise,’ which occurs when the supposedly agreed-upon terms are hidden in a document.”) (citing *A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 486 (Cal. Ct. App. 1982)).

¹²⁵ See 8 WILLISTON ON CONTRACTS § 18:9 (4th ed. 2013) (“Perhaps most courts today consider two aspects as central to determining whether a contract or clause is unconscionable: The “absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”) (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir 1965)).

¹²⁶ *Navellier*, 262 F.3d at 940.

¹²⁷ See *Am. Bankers Mortg. Corp. v. Fed. Home Loan Mortg. Corp.*, 75 F.3d 1401, 1412 (9th Cir. 1996) (“California law defines a contract of adhesion as ‘. . . a standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’”) (citing *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 817 (1981)).

¹²⁸ See Second Amended Complaint, *supra* note 1, ¶ 23.

¹²⁹ See Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Anti-Trust Case*, SPORTS ILLUSTRATED (July 21, 2009), <http://athleterightsguide.com/ncaa-faces-unspecified-damages-changes-in-latest-anti-trust-case/> (claiming that a lack of life experience of most seventeen-year-old incoming student-athletes makes the process exploitive); See McCann, *O'Bannon Expands Lawsuit*, *supra* note 112.

and forms.¹³⁰ Universities require these teenage student-athletes to sign these documents to maintain eligibility, ultimately leaving incoming student-athletes with no meaningful choice.¹³¹

Moreover, NCAA rules prohibit student-athletes from hiring agents or attorneys to negotiate these contracts on their behalf.¹³² Additionally, student-athletes' eligibility and scholarships are contingent upon signing Form 08-3a.¹³³ This leaves them with no meaningful choice but to sign Form 08-3a or lose eligibility.¹³⁴

The NCAA would argue that the Student-Athlete Statement is seven pages long and requires individual signatures for each separate clause.¹³⁵ Moreover, student-athletes are required on an annual basis to meet with compliance staff to clarify these regulations.¹³⁶ The NCAA argues that they are presenting an opportunity to these student-athletes, an opportunity that is not recognized as a legal right.¹³⁷

Although the student-athletes may have a strong argument for procedural unconscionability, they must also show Form 08-3a is substantively unconscionable. In determining whether there is substantive unconscionability, the court will look to Form 08-3a's terms and weigh the benefits and detriments incurred by student-athletes.¹³⁸ The student-athletes argue that Form 08-3a is substantively unconscionable because the detriment to the student-athletes outweighs the benefits.¹³⁹ More specifically, the NCAA's incredible merchandise revenue and television contracts outweigh possible student-athlete scholarship benefits.¹⁴⁰

The athletes will point to the unfavorable language in Form 08-3a that releases their publicity rights to the NCAA in perpetuity.¹⁴¹ In signing Form 08-3a, it may have been foreseeable that the student-athletes were giving up their publicity rights for the academic year;¹⁴² however, it was not reasonably foreseeable that the NCAA obtained these publicity rights for eternity.¹⁴³ When student-athletes sign Form 08-3a, they do so with an understanding that they have athletic and academic

¹³⁰ *NLI Provisions*, NAT'L LETTER INTENT, <http://www.nationalletter.org/nliProvisions/index.html> (last visited Mar. 8, 2014); NCAA MANUAL, *supra* note 3, § 14.1.3 ("To be eligible to represent an institution in intercollegiate athletics competition, a student-athlete shall be in compliance with all applicable provisions of the constitution and bylaws of the Association.").

¹³¹ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965).

¹³² *See* NCAA Manual, *supra* note 3, § 12.2.1; *see also* Fitzgerald, *supra* note 72.

¹³³ *See* Second Amended Complaint, *supra* note 1, ¶ 187.

¹³⁴ *Id.*

¹³⁵ *See id.* ¶ 187 ("The contract has seven parts, all of which must be executed by the student to receive certification that he is eligible to participate in NCAA Division I sporting events.").

¹³⁶ *See* Form 13-3a, *Student-Athlete Statement—NCAA Division I*, NCAA 7 (2013), available at <http://www.ncaa.org/2013-14-division-i-compliance-forms> ("Any questions regarding this form should be referred to your director of athletics or your institution's NCAA compliance staff, or you may contact the NCAA at [phone number].").

¹³⁷ *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 659 (Cal. 1994) (stating there is "no legal right to participate in intercollegiate athletic competition").

¹³⁸ *See* Second Amended Complaint, *supra* note 1, ¶¶ 301–04.

¹³⁹ *Id.*

¹⁴⁰ *Robertson v. Nat'l Collegiate Athletic Ass'n*, No. CV 11-0388, 2001 WL 240797, at *25 (N.D. Cal. Jan. 26, 2011).

¹⁴¹ *See* Second Amended Complaint, *supra* note 1, ¶ 300.

¹⁴² *See id.* ¶ 285.

¹⁴³ *Id.* ¶ 296.

obligations to perform in living up to their scholarships.¹⁴⁴ However, once their tenures as student-athletes end, one would think that their own likenesses leave the university with them.¹⁴⁵

The plaintiffs argue they do not receive compensation from NCAA products that continue to generate profits using student-athletes' likenesses.¹⁴⁶ Student-athletes argue that the NCAA returns profit from video footage, memorabilia, commercials, and DVD sales, all of which use student-athletes' likenesses.¹⁴⁷ If the former student-athletes can prove that Form 08-3a is both procedurally and substantively unconscionable, it is likely that Form 08-3a will be found void.

If Form 08-3a is found void and unenforceable, the NCAA is using illegal means to further anti-competitive effects on student-athletes.¹⁴⁸ As for damages, the student-athletes have been denied compensation after their college careers for the continual use of their publicity rights.¹⁴⁹

3. *Conduct Promotes a Sufficiently Competitive Objective*

Second, the NCAA must show that it created a sufficiently pro-competitive objective.¹⁵⁰ The NCAA would argue that precedent supports its contention—that its purpose is to promote amateurism—and that it does not violate the Sherman Act. The Supreme Court has held that the NCAA regulations will generally lead to reasonable trade restraints.¹⁵¹ In *McCormack v. NCAA*, the Fifth Circuit noted that the “NCAA markets college football as a product distinct from professional football. The eligibility rules create the product and allow its survival in the face of commercializing pressures. The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal.”¹⁵² Summarily, the pro-competitive nature of these regulations outweighs the anticompetitive effects.¹⁵³ Next, the student-athletes must rebut the NCAA’s argument of pro-competitive effects.

¹⁴⁴ See Brian Davidson, *End of NCAA As We Know It?*, NCSA ATHLETIC RECRUITING (July 22, 2009), <http://www.ncsasports.org/blog/2009/07/22/end-of-ncaa-as-we-know-it/> (O’Bannon stated, “When you’re in school you’re obligated to live up to your scholarship . . . [b]ut once you’re done, you physically, as well as your likeness, should leave the university and the NCAA.”).

¹⁴⁵ *Id.*

¹⁴⁶ See Second Amended Complaint, *supra* note 1, ¶ 6–7.

¹⁴⁷ See *id.* ¶¶ 331–36.

¹⁴⁸ See Dan Wetzel, *Making NCAA Pay?*, YAHOO SPORTS (July 21, 2009, 4:22 P.M.), <http://sports.yahoo.com/news/making-ncaa-pay-202200316--ncaab.html> (“It’s proof that the NCAA has no right over former athletes.”).

¹⁴⁹ See Second Amended Complaint, *supra* note 1, ¶ 492.

¹⁵⁰ See *id.* ¶¶ 496–97.

¹⁵¹ Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

¹⁵² *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338, 1344–45 (5th Cir. 1988).

¹⁵³ See *Banks v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 850, 862 (N.D. Ind. 1990).

4. Restraint is Not Reasonably Necessary to Achieve the Stated Objective

Third, the student-athletes argue the NCAA's means are not reasonably necessary to achieve its amateurism objective.¹⁵⁴ While former student-athletes make up the present plaintiff class, case law that has consistently ruled in the NCAA's favor addressed current student-athletes.¹⁵⁵ While the *Board of Regents* dicta clearly states that NCAA regulations are valid trade restraints furthering amateurism, the plaintiffs argue that any regulation on former student-athletes does not further the amateurism ideal.¹⁵⁶ Accordingly, the plaintiffs contend that less restrictive, alternative means are available that will allow for an amateurism ideal to stand.¹⁵⁷ Some of these alternatives include: group-licensing methods that share revenues between student-athletes and their respective teams; trust funds for health insurance; educational training; and student-athlete pension plans.¹⁵⁸

The student-athletes have a strong argument that Form 08-3a is an illegal contract that is unenforceable. Therefore, the NCAA is using illegal means to further anti-competitive effects on the student-athletes. Historically, the NCAA has successfully combated this by arguing that its purpose is to promote amateurism. However, student-athletes have a compelling argument that the NCAA no longer is using reasonably necessary means to achieve this amateurism objective. Regardless, student-athletes still argue that the NCAA is violating their publicity rights in refusing to compensate them after their collegiate careers end.

B. Right of Publicity Analysis

The student-athletes claim that the NCAA unlawfully uses their images and likenesses by refusing to compensate them, even after graduation. First, the student-athletes argue that they never consented to the uses of their likenesses, images, names, or other distinctive appearances by EA.¹⁵⁹ Accordingly, the plaintiffs argue that EA, in conspiracy with the NCAA and CLC, has used their likenesses broadly, and that they are suffering from that illegal usage.¹⁶⁰ In opposition, EA argues that student-athlete likenesses are only a small part of the many "raw materials" that go

¹⁵⁴ See Second Amended Complaint, *supra* note 1, ¶ 497.

¹⁵⁵ See *Bd. of Regents*, 468 U.S. at 120 (upholding the notion of the NCAA as the defender of amateurism in collegiate sports); *Banks*, 746 F. Supp. at 862–63 (denying a motion regarding enforcement of the NCAA's "no draft" rule when a player who entered the NFL draft, went undrafted, and was denied a return to college football); *McCormack*, 845 F.2d at 1343–44 (holding that restrictions on athlete compensation were not price fixing in violation of the Sherman Act).

¹⁵⁶ Second Amended Complaint, *supra* note 1, ¶ 169.

¹⁵⁷ See *id.* ¶ 30 (stating "establishment of funds for health insurance, additional educational or vocational training, and/or pension plans to benefit former student athletes.").

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* ¶¶ 452–55.

¹⁶⁰ See *id.* ¶¶ 326–30.

into the creation of games.¹⁶¹ Supporting this position, EA points to precedent protecting expressions in video games under the First Amendment.¹⁶²

But the plaintiffs have evidentiary ammunition to back their claim. Early emails released in the discovery process addressed that the NCAA knew EA made video games intended to match the characteristics of actual student-athletes.¹⁶³ These emails exposed communications between NCAA and EA representatives, which show that they had actual knowledge that everything but the student-athletes' names were being utilized to create a more realistic effect in the video games.¹⁶⁴ While the NCAA claims any alleged use of a former or current athlete's name, image, or likeness could not be sanctioned by the NCAA because the NCAA does not have, and does not claim to have, any rights to license such names or likenesses, the evidence tends to show that the NCAA knowingly used student-athlete's likenesses for profit, which gives the student-athletes a strong right of publicity violation argument.

That being said, two appellate courts held earlier this year that EA could not invoke this First Amendment defense to the athletes' right of publicity claims.¹⁶⁵ The 9th Circuit Court of Appeals decided 2-1 that EA was not protected by its free speech argument.¹⁶⁶ In determining this argument was not sufficient, the court noted the First Amendment did not apply to EA's use of Sam Keller's image "because it literally recreates Keller in the very setting in which he has achieved renown."¹⁶⁷

Accordingly, on September 26, 2013, EA Sports and CLC filed notice that they reached a settlement over the use of the college athletes' likenesses in its popular NCAA video games.¹⁶⁸ This settlement included claims brought by the plaintiffs in the aforementioned lawsuit; however, it does not affect the plaintiffs' claims against the NCAA.¹⁶⁹ More than 100,000 athletes will be eligible for compensation

¹⁶¹ Beth A. Cianfrone & Thomas A. Baker III, *The Use of Student-Athlete Likeness in Sport Video Games: An Application of the Right of Publicity*, 20 J. LEGAL ASPECTS SPORT 35, 53 (2010) (citing *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 809 (Cal. 2001)).

¹⁶² See *id.* at 55 ("To support its position, EA cites *Romantics v. Activision* (2008), *E.S.S. Entertainment 2000, Inc. v. Rock Star Video Games, Inc.* (2006), and *Kirby v. Sega of America, Inc.*, (2006) as examples of cases where courts applied the First Amendment to protect expressions in video games.").

¹⁶³ See Jon Solomon, *NCAA Knew EA Sports Video Games Used Real Players, E-Mails From Ed O'Bannon Lawsuit Show*, AL.COM (Nov. 12, 2012, 8:28 P.M.), http://www.al.com/sports/index.ssf/2012/11/ncaa_knew_ea_sports_video_game.html# [hereinafter Solomon, *NCAA Knew*]. The newest e-mails that have been released in discovery address that the NCAA knew Electronic Arts Sports made video games that intended to match the characteristics of actual college athletes. *Id.* The article addresses that in July, 2003 internal emails showed the NCAA conceded to the knowing this, "[w]e don't actually use player names but we do use all the attributes and jersey numbers of the players." *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Debra Cassens Weiss, *First Amendment Doesn't Protect Video Game Maker for Using Athlete Avatar, 9th Circuit Says*, ABA J. (Aug. 1, 2013, 7:17 A.M.), http://www.abajournal.com/news/article/first_amendment_doesnt_protect_video_game_maker_for_using_athlete_avatar_9t/.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Jon Solomon, *EA Sports and CLC Settle Lawsuit by Ed O'Bannon Plaintiffs; NCAA Remains as Lone Defendant*, AL.COM (Sept. 26, 2013, 9:51 A.M.), http://www.al.com/sports/index.ssf/2013/09/ea_will_not_make_college_footb.html.

¹⁶⁹ *Id.*

depending on their individual claim.¹⁷⁰ Additionally, EA announced it would no longer produce its 2014 *NCAA Football* video game and may discontinue producing the game indefinitely.¹⁷¹

In regards to the NCAA, the publicity rights claim is still alive because the NCAA failed to prevent EA from using the players' likenesses.¹⁷² However, the NCAA's chief legal officer told *USA Today Sports* that the non-profit association is prepared to go to the Supreme Court if necessary to defend lawsuits involving the use of college athletes' names, images, and likeness.¹⁷³

Due to the possible publicity and antitrust consequences of the student-athlete complaint, the NCAA may need to reshape its current practices. This complaint exemplifies the growing agitation over the NCAA's procedures in obtaining student-athletes' image rights without compensation. Accordingly, an evolved world of amateur athletics may be on the horizon for former, current, and prospective student-athletes.

IV. PROPOSAL

The NCAA and its constituent groups recognize that NCAA regulations have not adapted at the same rate as evolving media technology.¹⁷⁴ Accordingly, there has been a lack of reform to account for the growing market usage of student-athletes' names, images, and likenesses.¹⁷⁵ Regardless of the current litigation's outcome, the NCAA needs to reform its practices and regulations to avoid this problem and address the evolving times. In doing so, a Form 08-3a reformation is necessary to ensure student-athletes have chances to negotiate their own publicity rights. Accordingly, these student-athletes will need legal representation to assist in this process, which will expand lawyers' and sports agents' possible client lists.

A. Resolving Issues with Former Student-Athletes

Based on the ongoing litigation, it is evident that a Form 08-3a reformation is necessary to address the student-athletes' perpetual publicity rights release.¹⁷⁶ The

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See Kaburakis et al., *supra* note 96, at 15 (explaining “[o]ver the past five years, the NCAA’s constituent groups have recognized that current NCAA amateur policies in Bylaw 12.5 do not account for new media technology that has altered the way in which marketers utilize SAs’ names, images, and likenesses”). The author then goes on to explain that the NCAA has been working on this issue for a number of years, but it has been a very complex process. *Id.* at 16. Moreover, there are a lot of stakeholders that would be greatly impacted by a substantial NCAA policy overhaul, so they have been cautious to make quick decisions. *Id.*

¹⁷⁵ See *id.* at 15.

¹⁷⁶ See Solomon, *NCAA Knew*, *supra* note 163; Farrey, *supra* note 7 (“This whole area of name and likeness and the NCAA is a disaster leading to catastrophe as far as I can tell.” *Id.*

NCAA argues that student-athletes voluntarily release their publicity rights.¹⁷⁷ Regardless, to avoid this issue in the future, the NCAA needs to make Form 08-3a clearer to the contracting student-athletes. This would require Form 08-3a to explicitly state that student-athletes are releasing their publicity rights to the NCAA while in college and in perpetuity. Acknowledging this would arguably create a fair bargain between student-athletes and the NCAA. However, student-athletes still may feel like this is an unfair bargain. Mainly, the “elite athletes” who believe their likenesses have a future market value will not be satisfied with this bargain. Accordingly, a changing era for current student-athletes may be in the near future.

B. Effect on Current and Future Student-Athletes

If the NCAA were to establish a new set of regulations that fairly addressed student-athletes’ likeness, current and future student-athletes would experience a different collegiate experience. To create a fair bargain with student-athletes who believe their likeness will have a future market value, the NCAA must allow these student-athletes to negotiate the relinquishment of their publicity rights. Along with allowing student-athletes to negotiate their own publicity rights, the NCAA would also need to allow legal representation throughout this process.

Currently, student-athletes are prohibited from using representation throughout their collegiate process.¹⁷⁸ Revised NCAA regulations would allow student-athletes the opportunity for representation throughout this process. It is unreasonable to think that teenagers, graduating from high school, can negotiate the terms of their likenesses without legal assistance.¹⁷⁹ For most student-athletes, signing away their likenesses will not be second-guessed. In fact, the value of many student-athletes’ likenesses would not even equal the total value of their athletic scholarship.¹⁸⁰ For example, it was estimated the 2009–10 Stanford football team’s per-athlete average likeness value was \$36,463, which is less than the roughly \$50,000 full athletic scholarship they received.¹⁸¹

¹⁷⁷ JOSEPH N. CROWLEY, *IN THE ARENA: THE NCAA’S FIRST CENTURY* 43, 55 (2006). The author explains that the NCAA was established in 1910 as the country’s main “regulatory and enforcement body for intercollegiate athletics.” *Id.* Over time, there were some issues that “seemed to blur the amateur status of player and the role of students as athletes.” *Id.* at 42–43.

¹⁷⁸ See NCAA MANUAL, *supra* note 3, § 12.3.1 (explaining that the NCAA manual prohibits the use of agents not only as a student-athlete, but also as a prospective student-athlete).

¹⁷⁹ See *supra* II.B.

¹⁸⁰ See Mit Winter, *A Deeper Look Into The Potential Damages In The O’Bannon Case*, BUS. C. SPORTS (Oct. 31, 2012), <http://businessofcollegesports.com/2012/10/31/a-deeper-look-into-the-potential-damages-in-the-obannon-case>. In explaining that many student-athletes likeness would not equal that of their scholarship value, the author looks to the expert report submitted by Roger Nolls. *Id.* Nolls submitted an expert report that examined the estimated value of student-athletes’ likenesses. *Id.* The author addressed the problem with many student-athletes whose likenesses do not even cover their athletic scholarships. *Id.* According to Winter, “In many instances, a BCS football player’s live broadcast damages would not even be equal to the value of his athletic scholarship. For example, the per-athlete number for Stanford’s 2009–10 football team was \$36,463. The value of a full athletic scholarship at Stanford in 2009-10 was over \$50,000.” *Id.*

¹⁸¹ *Id.*

But the super-star, “Ed O’Bannon type,” elite athletes may recognize their likeness has a great potential for future market value. Studies have found that these super-star athletes’ likenesses can reach up to a quarter million dollars per athletic year.¹⁸² Accordingly, those athletes may find it wise to preserve the opportunity to collect on this likeness usage once their collegiate career ends.

This proposal would allow for a fair negotiation between the NCAA and the respective student-athlete. It would also allow for more individualized likeness recognition without affecting NCAA athletics uniformly. Superstar student-athletes could negotiate for many different compensation methods. The National College Players Association (“NCPA”) argues for an “Olympic model” that would allow student-athletes to sign their own endorsement deals while in college.¹⁸³

Regardless of which method the NCAA chooses with each student-athlete, an overarching “pay-for-play” compensation is not adequate. Adopting standards on an individual basis would allow the NCAA to maintain its overall amateur status, while compensating student-athletes who deserve revenue for their likenesses. This would allow the NCAA to avoid the feared “pay-for-play” model. They feel that model would undermine the amateur status of collegiate athletics¹⁸⁴ and create an even greater negative impact on high school athletics.¹⁸⁵ Regardless, this proposal would allow student-athletes the option to their own publicity right, or to forfeit it to the NCAA in perpetuity.

The current litigation argues for a pure “pay-for-play” model; however, this model has its downfalls. The NCAA would essentially forfeit its amateurism status in a pay-for-play model. Collegiate athletics would fundamentally transform into a

¹⁸² See *id.* In contrast to the explanation that many student-athletes’ likenesses would not equal that of their athletic scholarship, the author addresses the extreme situations where student-athletes’ likenesses are worth quite a bit. *Id.* The Nolls report found that in the 2009–10 season: SEC football players’ share per school was \$5,129,016; Pac-10 football players’ share per school was \$2,625,316; SEC basketball players’ share per school was between \$3,490,636 and \$3,597,328; and Pac-10 basketball players’ share per school was between \$2,744,750 and \$3,551,969. *Id.*

¹⁸³ See CROWLEY, *supra* note 177, at 42. Originally, Olympic athletes were forbidden to profit from their success in the Olympics. Alexander Theroux, *The Olympic Sham*, WALL ST. J., Jan. 13, 1999, at A22. However, Olympic athletes are now permitted to make profit off advertisements, television, and other marketing. See, e.g., Michael E. Ruane, *Olympics Still Months Away, Swimmer Brings Home Gold*, WASH. POST, June 1, 2004, at A01 (detailing Michael Phelps’ advertisements). See also Michael Rosenberg, *Change is Long Overdue: College Football Players Should Be Paid*, SPORTS ILLUSTRATED (Aug. 26, 2010), http://sportsillustrated.cnn.com/2010/writers/michael_rosenberg/08/26/pay.college/index.html (proposing that change is long overdue for NCAA’s policy prohibiting college athletes to benefit from their success and the best model to do so is the Olympic model).

¹⁸⁴ See *On the Mark, Quotes from President Emmert on Various NCAA Topics: Pay for Play*, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/NCAA+President/NCAA+President+Mark+Emmert> (last visited Dec. 28, 2012) (“The stronger the link is between our athletics programs and our academic programs—the more those athletics experiences are incorporated into the academic experiences—then we don’t have to talk about athletics and academics as separate entities but as part of the whole academic experience.”).

¹⁸⁵ See Joe Nocera, *Let’s Start Paying College Athletes*, N.Y. TIMES MAG., Dec. 30, 2011, available at <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-collegeathletes.html?pagewanted=all>. Some harmful effects to high school athletes that may result from a “pay-for-play” model include: an emphasis on athletics over academics, more so than what currently exists; more competitive high school athletics knowing that success in high school could result in a profitable college future. *Id.*

professional sport, where athletics come first and a college degree is an afterthought. Instead, a model that would allow student-athletes the opportunity to negotiate their own likenesses on individual bases would allow the NCAA to ensure amateurism's future and still create a fair bargain with student-athletes.

Based on this proposal, an emerging class of legal representation may be in the near future. Athletic agents and lawyers, such as Sonny Vacarro,¹⁸⁶ who once targeted professional athletes, will now be expanding their clientele to potential superstar high school athletes. On October 2, 2013, nationally renowned law firm Winston & Strawn LLP announced the launch of the firm's college sports practice group.¹⁸⁷ According to the press release, the practice group will provide "comprehensive legal services to clients involved in all aspects of college and amateur athletics, including the representation of colleges and universities involved in NCAA enforcement investigations and violations of NCAA legislation."¹⁸⁸

Just as the current litigants argue, high school athletes who sign Form 08-3a are not in positions to realize the implications that accompany signing a letter of intent with a collegiate university.¹⁸⁹ Moreover, student-athletes may not comprehend their publicity right value. Providing legal representation, such as Winston & Strawn's sports practice group, would ensure student-athletes are fully aware of the legal relationship they are entering into with the NCAA.

Allowing student-athletes legal representation throughout this process will create a fair bargaining agreement between the NCAA and student-athlete. A cut of this incredible likeness revenue that historically has gone into the NCAA's "pocket" may eventually be spread to the respective student-athletes and their legal representation. This proposal would prevent future litigation addressing student-athletes' publicity rights while in college and in perpetuity.

V. CONCLUSION

The NCAA historically has relied on the participation of student-athletes to return "eye-opening" annual profits. The NCAA's arbitrary rules and regulations allow it to continually return a profit without acknowledging the unfair compensation to student-athletes. What once was considered an institution that promoted amateurism is now seen as a billion-dollar industry that deprives student-athletes an opportunity to profit on their own likeness. These student-athletes deserve the chance to profit off their own abilities.

¹⁸⁶ See *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, Joint Case Management Conference Statement, 2012 WL 2849057, at 5.D.1. (N.D. Cal. May 9, 2012). In this conference the NCAA served Sonny Vaccaro with a subpoena for specific documents. *Id.* Vaccaro is known as a prominent "runner" who procured "several of the name plaintiffs to join in these suits." *Id.* Vaccaro is seen as a very popular negotiator and agent for "big time" athletes. *Id.*

¹⁸⁷ *Winston & Strawn Launches College Sports Practice Group*, WINSTON & STRAWN, (Oct. 2, 2013) <http://www.winston.com/en/thought-leadership/winston-strawn-launches-college-sports-practice-group.html>.

¹⁸⁸ *Id.*

¹⁸⁹ See *supra* Part II.B.

But to avoid turning the NCAA “on its head,”¹⁹⁰ a new set of regulations that give student-athletes a fair chance is essential. In turn, a fair NCAA with a new set of regulations is likely to open up a whole new class of legal representation for athletic agents and lawyers negotiating on student-athlete’s behalf.

¹⁹⁰ See Winter, *supra* note 180. The author addresses some of the main problems that would accompany paying student-athletes; mainly, a shock to college athletics. For example, Division I members will lose a great portion of their athletics budgets. *Id.* As a result, all the money distributed to Division I schools will be lost. *Id.* Accordingly, the schools that do not turn over a profit, and are dependent upon other schools in their conference to return profit, will struggle to maintain their sporting programs. *Id.*