

**MONEY ON THE TABLE: RECONSIDERING
COLLEGE SPORTS VIDEO GAMES AND
ATHLETE PUBLICITY RIGHTS POST-NCAA
STUDENT-ATHLETE LIKENESS
*LITIGATION***

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INTRODUCTION

Video games are enormously popular and generate revenues in the billions, even trillions, of dollars in sales globally.¹ Big-time college sports, specifically the elite teams in the Football Bowl Subdivision (“FBS”) and Division I men’s basketball in the National Collegiate Athletic Association (“NCAA”),² are also

¹ See, e.g., *Earnings Releases*, ELEC. ARTS INC., <http://investor.ea.com/releases.cfm?ReleasesType=Earnings> (reporting billions of dollars in revenues generated by videogame company Electronic Arts).

² NCAA schools are organized into three divisions. Division I, comprised of approximately 340 schools, is the highest level with more sports teams and more financial aid available to student-athletes than schools in Divisions II and III. Division

multi-billion dollar industries.³ For nearly twenty years, game developer and manufacturer Electronic Arts, Inc. (“EA”) produced NCAA-branded interactive videogame series, including NCAA Football, NCAA (Men’s) Basketball, and NCAA March Madness Basketball.⁴ The interactive video games simulated intercollegiate athletic competition among the top college football and basketball teams and featured player-avatars modeled after real student-athletes. Although actual college players’ names were not used, the players were depicted virtually as avatars with identical characteristics and playing styles and thus were readily identifiable.⁵

Millions of gamer fans, who paid \$30-60 per game, eagerly awaited the annual release of a new season videogame.⁶ The NCAA video games generated \$80-125 million per year in sales.⁷ From 1993 to 2013, EA had an exclusive agreement with the NCAA to license NCAA trademarks, logos, and intellectual property in order to manufacture the popular video games.⁸

I is further subdivided based on football scholarships, with the Football Bowl Subdivision (“FBS”) providing the higher number of scholarships and opportunities for postseason bowl play, and the Football Championship Subdivision (“FCS”) (previously Division I-A and I-AA). *See About the NCAA, NCAA*, <http://www.ncaa.org/about>.

³ This revenue is primarily derived from the licensing of rights to broadcast NCAA Division I FBS football and men’s basketball games to television networks on a variety of multimedia platforms and for use in a variety of merchandising endeavors. For example, CBS has a thirteen-year contract with the NCAA for rights to broadcast the NCAA Division I Men’s basketball tournament. ESPN has a \$7.3 billion deal to broadcast college football over a twelve-year period. *See O’Bannon v. NCAA*, 802 F.3d 1049, 1082 n.4 (9th Cir. 2015).

⁴ *See* Third Consol. Amended Class Action Complaint, In re NCAA Student-Athlete Name & Likeness Licensing Litig., No. 4:09CV01967, 2013 WL 3772677, at ¶¶ 483-84 (N.D. Cal. July 18, 2013) [hereinafter *3CAC*] (noting that EA’s annual sales of *NCAA Football* exceeded two million units).

⁵ *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010). *See also Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 146 (3d Cir. 2013) (noting that the game avatars use real player names, states, hometowns, jersey numbers, height, weight, and even facial features, and that gamers could also easily download a program which translates virtual to actual players). *See 3CAC, supra* note 4 (stating that “EA Sports describes their video games as including ‘simulated sports titles with realistic graphics based on real-life sport leagues, players, events and venues.’”) Further, EA releases new iterations of their games each year.

⁶ *See 3CAC, supra* note 4, at ¶ 483 (noting retail price of *NCAA Football PlayStation* games at \$59.95 per unit).

⁷ *Id.* (stating that EA garners approximately \$80 million a year in revenue).

⁸ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 7 F. Supp. 3d 955, 965 (N.D. Cal. 2014).

Member athletic conferences and schools also licensed use of their trademarks and intellectual property. Individual players, however, were not paid—and could not be paid, as student-athletes—for their athletic performances or publicity rights based upon NCAA amateurism rules.⁹ This uncompensated use of student-athletes' images and likenesses has prompted formidable legal challenges to the NCAA. In class actions filed in the Northern District of California, *Keller v. Electronic Arts, Inc.*¹⁰ alleged that the practice violates player publicity rights under state law, while *O'Bannon v. National Collegiate Athletic Ass'n*¹¹ argued that the practice violates the Sherman Antitrust Act. These cases have forced an examination of the rules, practices, goals, and treatment of student-athletes in intercollegiate sports, as well as a changed frontier for college sports in the United States. Yet, they seem to conflict.

This Article analyzes the impact of the monumental legal challenges to the NCAA's long-standing rules defining amateurism in intercollegiate sports and further explores options to mediate, if not optimize, the respective interests underlying amateurism, commercial opportunities, and student-athlete rights and well being. Section II examines the federal litigation challenging the use of student-athletes' names, images, and likenesses ("NIL") in video games, and as also expanded to telecasts, archived footage, and photos. Section III discusses the mounting student-athlete litigation that challenges amateurism beyond the grounds asserted in *O'Bannon* and *Keller*, as well as an apparent trend to resist expanding student-athlete rights. Section IV asserts that neither litigation nor legislation can remedy the controversy engulfing intercollegiate athletics. The uncertain legal landscape, combined with opportunities for new financial and media markets for college sports, provides conditions warranting that the stakeholders in the college sports industry

⁹ The NCAA has extensive rules and penalties regarding eligibility in furtherance of its edict that "[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport." 2013-14 NCAA DIVISION I MANUAL art. 12.01.1 (2013) [hereinafter NCAA MANUAL]. See also *id.* at art. 15.1 (providing that "[a] student-athlete shall not be eligible to participate in intercollegiate athletics if he or she receives financial aid that exceeds the value of the cost of attendance . . .").

¹⁰ *Keller*, *supra* note 5.

¹¹ *O'Bannon*, *supra* note 8.

work together. Rather than pretend to deny commercialism, either as a fact or an opportunity, or to retreat into pure amateurism, this Article proposes a model for joint partnership so that the parties can work together to optimize the academic and commercial benefits of intercollegiate athletics. This includes protection and representation of the student-athletes as partners.

I. STUDENT-ATHLETE LIKENESSES AS PUBLICITY AND ANTITRUST LAW VIOLATIONS

A. *The Publicity Rights Claims and Settlements*

In 2009, Sam Keller, a former quarterback at Arizona State University, filed a putative class action in California against the NCAA, EA Sports, and the Collegiate Licensing Company (“CLC”),¹² alleging that the defendants’ use of player images as video avatars for the marketing of the NCAA Football video games constituted a commercial misappropriation of his likeness without his consent or payment.¹³ In the same year, former Rutgers player Ryan Hart lodged similar complaints in the federal district of New Jersey, alleging publicity rights violations involving EA’s NCAA Basketball video games.¹⁴ Although the district court in *Hart* found that EA’s use of player images was sufficiently

¹² Collegiate Licensing Company (“CLC”), a subsidiary of IMG College, handles trademarked product licensing for the NCAA as well as for nearly two hundred colleges and universities, athletic conferences, bowl games, and the Heisman Trophy. *NCAA Licensing Program FAQs*, NCAA, <http://www.ncaa.org/championships/marketing/ncaa-licensing-program-faqs> (last visited Nov. 5, 2015). Note, however, that “[t]he NCAA does not manage or monitor the licensing agreements of the conferences, schools or its other member institutions.” *Id.*

¹³ Keller, *supra* note 5. Specifically, Keller alleged violations of California’s statutory and common law rights of publicity. In addition to objecting to defendants’ use of former student-athlete likenesses as avatars in video games, Keller challenged the defendants’ use in archival footage, photographs, and promotions. *Id.*

¹⁴ The right of publicity is defined as the right to control the “commercial value of a person’s identity.” RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). The right is recognized by statute or common law in twenty-nine states or through laws of unfair competition. Restatement (Third) of Unfair Competition § 46 states that “one who appropriates the commercial value of a person’s identity by using without consent the person’s name, likeness, or other indicia of identity for purposes of trade is subject to liability. . . .” *Id.* “Trade” purposes include unauthorized use in advertising or on merchandise or in connection with services by the user. *Id.* at § 47. Permissible use, however, includes “news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.” *Id.*

transformative to fall within the First Amendment's constitutional protection for creative works,¹⁵ the Third Circuit Court of Appeals, in a 2-1 ruling, reversed on the grounds that EA's use of the images depicted identical features of the players.¹⁶ Although stating at the outset that "[v]ideo games are protected by the First Amendment," the Ninth Circuit in *Keller v. NCAA* similarly affirmed, in a 2-1 ruling, Judge Wilken's 2010 decision that EA's First Amendment rights did not shield its use of student-athletes' likenesses in video games because the company "literally recreate[ed] Keller in the very setting in which he has achieved renown."¹⁷ The ruling was controversial, not only from the defendants' viewpoint, but also from the perspective of intellectual property and constitutional law scholars and members of the creative arts industry, who were concerned about the ruling's impact on, and interpretation of, transformative works under First Amendment protection.¹⁸

¹⁵ The "transformative use" defense is "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 799 (Cal. 4th 2001). See also Jordan M. Blanke, *No Doubt About It—You've Got to Have Hart: Simulation Video Games May Redefine the Balance Between and Among the Right of Publicity, the First Amendment, and Copyright Law*, 19 B.U. J. SCI. & TECH. L. 26 (2013) (examining the history of the right of publicity and its conflict with the First Amendment with a focus on the emerging technology of simulation video games).

¹⁶ *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757, 779 (D.N.J. 2011), *rev'd*, 717 F.3d 141, 145-47 (3d Cir. 2013) (although the transformative use test permits the use of one's likeness as "raw material" in a creative work, such as a video game, here the game's avatars use real players' names, stats, hometowns, jersey numbers, heights, weights, and even facial features).

¹⁷ *Keller v. Elec. Arts, Inc.*, 724 F.3d 1268, 1271 (9th Cir. 2013). Judge Bybee authored the 2-1 ruling, while Judge Thomas filed a dissenting opinion. Both judges presided over the appeal in *O'Bannon*. See *infra* Section II.D.

¹⁸ In *Davis v. Elec. Arts*, 775 F.3d 1172, 1175 (9th Cir. 2015), former NFL players sued EA for violations of their right of publicity in its *Madden NFL* series of games; relying heavily on *Keller*, the lower court found that the former players' likeness was "central to EA's main commercial purpose—to create a realistic virtual simulation of football games involving current and former NFL teams." A group of law professors, led by eminent constitutional and intellectual property law scholar, Eugene Volokh, filed an amicus brief in the Ninth Circuit, urging *en banc* review, contending that the *Keller* decision was wrongly decided and posed a grave threat to the use of images in media protected under the First Amendment, such as books, movies, and video games. See *Davis v. Elec. Arts, Inc.*, No. 12-15737, Brief of Amici Curiae; 27 Intellectual Property and Constitutional Law Professors In Support of Defendant-Appellants Petition for Rehearing En Banc; *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015) (No. 12-

In 2013, EA and CLC sought to extricate themselves from the sprawling class litigation by settling the *Keller* publicity rights litigation. The NCAA vowed to take *Keller* to the U.S. Supreme Court;¹⁹ the Supreme Court, however, declined to hear the defendants' petition seeking reversal of the Ninth Circuit's rejection of the First Amendment defense. Shortly thereafter, EA and CLC settled all claims against them for \$40 million, and the NCAA subsequently settled claims asserted by the *Keller* plaintiffs for another \$20 million.²⁰

B. Restrictions on Publicity Rights as Antitrust Violations

Although the use of these players' NILs constituted a distinct publicity rights claim under state law, the NCAA restrictions on plaintiffs' NIL publicity rights also formed the basis of a federal antitrust challenge.²¹ In 2010, former UCLA football player Ed

15737). (9th Cir. 2015). *See also* Brief of Amicus Curiae in Support of Plaintiffs-Appellees by Screen Actors Guild-American Federation of Television & Radio Artists, *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015) (No. 12-15737), 2014 WL 809034 (filed 9th Cir. 2014). EA is seeking review at the U.S. Supreme Court to answer whether its depiction of current and former NFL players in the videogame series is protected under the First Amendment. Petition for Certiorari, *Davis v. Elec. Arts, Inc.*, 775 F.3d 1172 (9th Cir. 2015) (U.S. No.15-424), 2015 WL 5834179, filed Oct. 5, 2015.

¹⁹ Steve Berkowitz, *NCAA Petitions Supreme Court in Sam Keller Case*, USA TODAY (Oct. 26, 2013, 1:01 PM), <http://www.usatoday.com/story/sports/college/2013/10/26/ncaa-supreme-court/3242209/>. Defendants did not file a petition for hearing *en banc* requesting the entire Circuit to reconsider *Keller*. *Id.* The certiorari petition was denied. *See* Steve Berkowitz, *NCAA Vows to Fight O'Bannon Suit to Supreme Court*, USA TODAY (Sep. 26, 2013, 3:13 PM), <http://www.usatoday.com/story/sports/ncaab/2013/09/26/ncaa-ed-obannon-ea-sports-lawsuit-supreme-court/2877579/>.

²⁰ *See* Assoc. Press, *\$60 Million Settlement Approved in NCAA Video Game Lawsuit*, N.Y. TIMES, July 18, 2015, <http://www.nytimes.com/2015/07/18/sports/ncaa-video-game-lawsuit-60-million-settlement-is-approved.html?ref=media> (noting that EA and CLC reached the \$40 million settlement with plaintiffs in 2013). The NCAA agreed to a separate \$20 million settlement with the *Keller* plaintiffs in June 2014. *Id.* The petition for \$14.38 million in attorneys' fees has not yet been approved. *Id.*

²¹ *Keller v. Nat'l Collegiate Athletic Ass'n*, Order No. 4:09-CV-1967 CW, 2015 WL 5005901 (N.D. Cal. Aug. 19, 2015). *See supra* note 19 ("NCAA/EA Videogame Settlement"). *Keller* and *O'Bannon* were consolidated, along with similarly situated student-athlete litigation, in a certified class action before Judge Wilken and restyled *In Re NCAA Student-Athlete Name & Likeness Licensing Litigation*. *Id.* at *1. The court, however, later deconsolidated the cases and maintained use of the original, separate captions to address the separate class settlements with respect to EA and to discern resolution of the publicity rights claims in *Keller* from the antitrust claims adjudicated (and pending appeal) in *O'Bannon*. *Id.* The cases were deconsolidated

O'Bannon sued the NCAA in the Northern District of California, attacking the NCAA's use of current and former players' images not only in video games, but also in television broadcasts, game rebroadcasts, and archived footage. The *O'Bannon v. NCAA* college player litigation morphed into a vast class action including former and current FBS football and Division I men's basketball players.²²

O'Bannon did not lodge an outright attack on the rules barring payment of players or seek to declare the players as employees, although these challenges arose in separate cases.²³ Rather, the plaintiffs alleged that the NCAA's amateurism rules—barring student-athletes from selling or receiving compensation beyond the value of grant-in-aid scholarships—unreasonably restrained the athletes' rights to participate in (i) the markets for “college education,” (ii) the “group licensing” of their publicity rights to networks, videogame developers, or third-party licensing entities, (iii) and the relevant submarkets for video games and live game telecasts.²⁴

1. The *O'Bannon v. NCAA* Antitrust Trial

In June 2014, Judge Wilken presided over a two-week bench trial solely on the antitrust claims involving only injunctive relief.²⁵ In August 2014, Judge Wilken first ruled that the NCAA

before antitrust trial as the claims against EA and CLC were settled. *O'Bannon v. NCAA*, Order No. C 09-1967 CW, 2010 U.S. Dist. LEXIS 19170 (N.D. Cal. Feb. 8, 2010).

²² In November 2013, Judge Wilken certified a class of current and former Division I football and men's basketball players for injunctive relief only, but denied plaintiffs' request to certify a damages subclass. *O'Bannon*, *supra* note 8, at 965. The *O'Bannon* plaintiffs include “twenty current and former student-athletes, all of whom play or played FBS football or Division I men's basketball between 1956 and 2014,” and who represent the class certified as “[a]ll current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I . . . college or university men's basketball team or an NCAA Football Bowl Subdivision . . . men's football team and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.” *Id.*

²³ *See, e.g.*, *Nw. Univ. v. College Athletes Players Ass'n*, 362 N.L.R.B. 167 (2015).

²⁴ *O'Bannon*, *supra* note 8, at 966-68.

²⁵ The bench trial lasted 15 days, involving 23 witnesses, 287 exhibits, a 3,395-page transcript, and a 99-page written decision. Plaintiffs Response Brief, *O'Bannon v.*

practices, specifically regarding its amateurism rules prohibiting payments to players, violated antitrust principles under the Sherman Act.²⁶ The rules, she wrote, “[u]nreasonably restrain trade in two national markets, . . . the ‘college education market’ and the ‘group licensing market.’”²⁷

The district court determined that NCAA rules negatively impact the college education market by fixing the price that players may be recruited at the athletic scholarship, capped at the amount of “grant-in-aid,” which is defined to cover tuition and fees, room and board, and required course-related books.²⁸ Judge Wilken also concluded that the NCAA’s amateurism rules—barring student-athletes from receiving compensation beyond the value of grant-in-aid athletic scholarships—unreasonably restrained the plaintiffs’ rights to sell and license their publicity rights in a group license to networks, videogame developers, or third-party licensing entities, in the relevant submarkets for live game telecasts, video games, and archival footage.²⁹

The district court noted that the NCAA, member schools, and conferences contract with networks to license rights to telecast live games and that these contracts also authorize use of the NILs of participating student-athletes.³⁰ As the networks compete in the market to telecast live games, as well as to use the NILs of participating student-athletes, the court found that a submarket for the sale of group licenses to networks exists.³¹ The court ruled, however, that the NCAA’s rules did not harm competition in the group licensing market because players or teams would not practicably compete against each other for group licensing of their publicity rights.³² Rather, they would have an incentive to

NCAA, No. 14-16601 (9th Cir. Jan. 21, 2015). The plaintiffs dropped their jury trial request and damages claim shortly before trial.

²⁶ O’Bannon, *supra* note 8.

²⁷ *Id.* at 973.

²⁸ *Id.* at 973-75. The trial did not address the claims regarding the use of player images as constituting violations of state publicity rights, nor did the court rule on whether the NCAA Form 08-A, which student-athletes are required to sign and waive their rights to NILs, constituted consent.

²⁹ *Id.* at 968-71.

³⁰ *Id.* at 970.

³¹ O’Bannon, *supra* note 8, at 993.

³² *Id.* at 993 (rejecting competition as a credible justification for limiting student pay considering that schools have unlimited spending on other aspects of athletic

cooperate in selling their NIL rights, which are valuable to a live game broadcaster or videogame company *only* if the NIL rights came as an entire package.³³

Judge Wilken considered the NCAA's stated procompetitive justifications for its amateurism rules prohibiting compensation, which include (1) preserving amateurism; (2) maintaining competitive balance; (3) integrating academics and athletics; and (4) increasing output in the college education market.³⁴ The court did not find the NCAA rules necessary to prevent commercial exploitation of student-athletes, to maintain competitive balance, or to increase output in terms of the number of schools willing to participate in fielding Division I college sport teams. For example, she noted that competitive balance is not necessarily achieved by NCAA compensation rules, noting that member schools have unlimited spending and thus disparities in other aspects, such as facilities and coaching pay, which "negate[s] whatever equalizing effect the NCAA's restraints on student-athlete compensation might have once had."³⁵

Judge Wilken did not accept wholesale the NCAA's amateurism defense, noting that consumer demand for college sports is not necessarily driven by the fact that students don't get paid; other factors, such as school loyalty or geographical location, also propel such demand.³⁶ Yet, she recognized that amateurism has some role "in preserving the popularity of NCAA's product."³⁷ The court also acknowledged that NCAA restraints on payments to student-athletes assist the "integration of athletics and academics" into the entire college environment and help prevent a social and financial "wedge" between athletes and the general

programming, such as coaching and facilities, and thus "negate[ing] whatever equalizing effect the NCAA's restraints on student-athlete compensation might have once had."). *Id.* at 1002.

³³ *Id.* at 993-98. The court reasoned that the value of an NIL license to a live game broadcaster or a videogame company would depend on the licensee's acquiring every other NIL license that was available. Otherwise, one player could have veto power over the entire deal.

³⁴ *Id.* at 999.

³⁵ O'Bannon, *supra* note 8, at 1002.

³⁶ *Id.* at 977-78 (rejecting that NCAA rules were "necessary to preserve the amateur tradition and identity of college sports."). *Id.* at 999.

³⁷ *Id.* at 1005.

student body.³⁸ Nonetheless, the district court determined that the NCAA “sweeping prohibition” rules were overly restrictive on the plaintiffs’ educational and athletic opportunities and that NCAA procompetitive justifications could be achieved through less restrictive means.³⁹

2. The Remedy—Less Restrictive Alternative?

Despite finding an antitrust violation, Judge Wilken stated that “[p]ermitting schools to make limited payments to student-athletes above the cost of attendance would not harm consumer demand for the NCAA’s product—particularly if the student-athletes were not paid more or less based on their athletic ability or the quality of their performances and the payments were derived only from revenue generated from the use of their own names, images, and likenesses.”⁴⁰ Judge Wilken determined that some limit, such as a \$5,000 stipend, would be an acceptable regulation and accommodation of NCAA objectives.⁴¹ She reasoned that holding these limited and equal shares of licensing revenue in trust until after student-athletes complete their eligibility or leave school would further minimize any potential impact on consumer demand.⁴² The court rejected proposed alternatives to allow student-athletes to receive money from endorsements, stating that such a measure would undermine NCAA objectives to protect against “commercial exploitation” of student-athletes.⁴³

In the landmark ruling, Judge Wilken entered a preliminary injunction prohibiting the NCAA

[F]rom enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS

³⁸ *Id.* at 1003.

³⁹ O’Bannon, *supra* note 8, at 963.

⁴⁰ 7 F. Supp. 3d at 983. *See also* NCAA Appeal Brief, *supra* note at 39-40 (arguing that “giving players an enforceable right to compensation for use of their NILs would significantly burden free speech because it would enable holdouts to block speech on public issues . . . Requiring broadcasters to pay a license fee to those who appear in any team sports telecast –or, for that matter, anyone who is in a parade or simply walking down a public street – would prove utterly impracticable and is fundamentally at odds with the First Amendment.”).

⁴¹ *Id.* at 983.

⁴² *Id.*

⁴³ *Id.* at 984.

football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid. The injunction will not preclude the NCAA from implementing rules capping the amount of compensation that may be paid to student-athletes while they are enrolled in school; however, the NCAA will not be permitted to set this cap below the cost of attendance⁴⁴

The district court's injunction, in part, allowed schools to provide deferred compensation to football and men's basketball players, although it also permitted the NCAA to cap the amount at no less than \$5,000 per year in 2014 dollars.⁴⁵

C. The NCAA's Reaction and Appeal

In March 2015, the same Ninth Circuit panel that had decided *Keller* presided over oral arguments in the appeal of Judge Wilken's ruling.⁴⁶ While the district court's order regarding athlete pay was to take effect August 2015, the Ninth Circuit granted the NCAA's request for a stay of the injunction to preserve the status quo pending the Ninth Circuit's review.⁴⁷

In its appeal, the NCAA argued that the district court erred by not applying *NCAA v. Board of Regents*, a 1984 U.S. Supreme Court ruling that the NCAA asserted protects its role to regulate

⁴⁴ 7 F. Supp. 3d at 1007-08.

⁴⁵ See Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2320 (2014) (agreeing that Judge Wilken correctly held that the NCAA unreasonably restrained trade in preventing athletes from sharing revenues derived from the use of their names and likenesses, but arguing that the holding was too narrow in its injunction by only mandating the NCAA to allow compensation through a deferred trust in amounts up to \$5,000 per year).

⁴⁶ The Panel consisted of Judge Bybee, Chief Judge Thomas, and senior district judge Gordon Quist (from the W.D. Mich., sitting by designation). Bybee wrote the majority opinion, and Thomas concurred in part and dissented in part. *Keller v. Elec. Arts, Inc.*, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

⁴⁷ *In re NCAA Student-Athlete Name & Likeness Litig.*, 2010 U.S. Dist. LEXIS 139724, 2010-2 Trade Cas. (CCH) P77,273, 2010 WL 5644656 (N.D. Cal. Dec. 17, 2010); *O'Bannon v. NCAA*, 2010 U.S. Dist. LEXIS 139724, 2010-2 Trade Cas. (CCH) P77273, (9th Cir. July 31, 2015).

amateurism in college sports “as a matter of law.”⁴⁸ Although *Board of Regents* ended the NCAA’s monopoly on television broadcasting of college football, the ruling included language stating that “[i]n order to preserve the character and quality of the [NCAA’s] ‘product,’ athletes must not be paid, must be required to attend class, and the like.”⁴⁹ Heretofore, student-athlete antitrust challenges had been filed based on *Board of Regents*.⁵⁰ Judge Wilken had concluded the Supreme Court’s ruling inapplicable, writing that although *Board of Regents*

[G]ives the NCAA “ample latitude” to adopt rules preserving “the revered tradition of amateurism in college sports . . . it does not stand for the sweeping proposition that student-athletes must be barred, both during their college years and forever thereafter, from receiving any monetary compensation for the commercial use of their names, images, and likenesses.”⁵¹

Judge Wilken distinguished *Board of Regents* noting, “the college sports industry has changed substantially in the thirty

⁴⁸ Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984).

⁴⁹ *Id.* at 102 (“The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it 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.”).

⁵⁰ See, e.g., *Agnew v. Nat’l Collegiate Athletic Ass’n*, 683 F.3d 328, 341 (7th Cir. 2012) (recognizing that the NCAA’s eligibility rules “have been blessed by the Supreme Court, making them presumptively procompetitive.”); *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338 (5th Cir. 1988) (holding that NCAA rules restricting student-athlete compensation to scholarships and limited financial benefits were presumptively procompetitive and reasonable as a matter of law); *Smith v. Nat’l Collegiate Athletic Ass’n*, 139 F.3d 180, 185-86 (3d Cir. 1998), vacated on other grounds, 525 U.S. 459 (1999) (holding that “the Sherman Act does not apply to the NCAA’s promulgation of eligibility requirements” because “the eligibility rules are not related to the NCAA’s commercial or business activities . . . [rather] primarily seek to ensure fair competition in intercollegiate athletics.”); *Bassett v. Nat’l Collegiate Athletic Ass’n*, 528 F.3d 426, 433 (6th Cir. 2008) (holding that “NCAA’s rules on recruiting student athletes, specifically those rules prohibiting improper inducements and academic fraud, are all explicitly non-commercial.”); *Bloom v. Nat’l Collegiate Athletic Ass’n*, 93 P.3d 621 (Colo. App. 2004) (upholding NCAA restrictions on student athlete endorsements as reasonable).

⁵¹ 7 F. Supp. 3d at 1007-8. See also Wilken, October 2013.

years since the case was decided.”⁵² The NCAA argued that college sports were highly commercialized then, as now.

The NCAA also argued that its rules regulate eligibility, not commerce, and thus were outside the purview of antitrust laws, stating that “[w]hatever economic consequences these rules may have, their purpose is to define who is eligible to play the sports that colleges sponsor.”⁵³ The NCAA also invoked *American Needle, Inc. v. NFL* to assert that its amateurism rules define college sports as a unique product and can be upheld as a matter of law, without “a detailed [rule of reason] analysis” and “in the twinkling of an eye.”⁵⁴

Finally, the NCAA argued that the *O’Bannon* plaintiffs lack antitrust injury, contending that the players seek payments for use of their NILs in live TV broadcasts, archival footage, and video games, yet “no state recognizes such a right in telecast of games and other claimed non-commercial uses, and the First Amendment and the Copyright Act would bar enforcement of any such right regardless.”⁵⁵ The NCAA denied that it authorized the use of student-athletes’ NILs and claimed that its licenses are for use of its own trademarks.⁵⁶ The NCAA further claimed that the

⁵² NCAA Brief, *supra* note 18, at 28 (arguing that “[a]lthough the revenue generated by FBS football and Division I men’s basketball has grown over the years, college sports was highly commercialized when Board of Regents was decided—a fact that could not have been lost on the Supreme Court, given that the agreements at issue there called for broadcasters to pay hundreds of millions of dollars to broadcast a limited number of college football games in light of college football’s ability to ‘generate an audience uniquely attractive to advertisers.’”). Rule 10.8.3.

⁵³ *Id.* at 19.

⁵⁴ *Id.* at 21. (citing *American Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 203 (2010) (“[w]hen ‘restraints on competition are essential if the product is to be available at all’ . . . the restraint must be judged according to the flexible Rule of Reason.”) (citing *National Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85, 101 (1984)).

⁵⁵ *Id.* at 39-40. The players invoked *Zachinni v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), where the U.S. Supreme Court recognized the performer’s right of publicity in his performance and to compensation against the defendant who broadcasted plaintiff’s entire “Human Cannonball” act. Notwithstanding, NCAA argues *Pittsburgh v. KVC* more apt, noting that it, with the teams, as producer who supplies the stadium, uniforms, competition administration, etc., own the right to license broadcast to the performance.).

⁵⁶ NCAA Brief, *supra* note 52, at 42 (“The NCAA has never authorized use of student-athletes’ NILS in college-sports videogames, nor does it intend to in the future . . . a viable college-sports videogame requires ‘the intellectual property of the colleges and the NCAA. But the NCAA does not currently license its own intellectual property

district court's injunction would vitiate amateurism and cost schools "about \$30,000 per student-athlete over four years" to pay football and men's basketball players, maintaining that "[t]hose who are paid to play are not amateurs, whether they are paid \$30,000 or \$300,000."⁵⁷

D. The Ninth Circuit Ruling: A Hollow Victory?

On September 30, 2015, a three-judge panel of the Ninth Circuit released its decision in *O'Bannon v. NCAA*. At the outset, the court rejected the NCAA's unqualified reliance on the *Board of Regents* and held that the NCAA, including its amateurism rules, is subject to the antitrust laws.⁵⁸ The court also deemed the NCAA eligibility/compensation rules "commercial" within the meaning of the Sherman Act, noting that the "[l]abor of student-athletes is an integral and essential component of the NCAA's 'product', and a rule setting the price of that labor goes to the heart of the NCAA's business."⁵⁹ In addressing *Board of Regents*, which held that the NCAA violated antitrust laws regarding its television plan, the court stated that the reason the amateurism rules were mentioned, although not at issue, in the Supreme Court case was to illustrate that competition rules are to be judged under a Rule of Reason standard.⁶⁰ Horizontal restraints among competitors are generally *per se* unlawful; however, because the NCAA's "product" is competition among its member institutions a level of joint action and some restraints on competition are essential "[i]f the product is to be available at all."⁶¹ While the court regarded *Board of Regents* "[a]s informative with respect to the procompetitive purposes served by the NCAA's amateurism rules . . .," it

for use in college-sports videogames, and there is no evidence or indication that it intends to do so in the future.").

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 3. *See also id.* at 30 (stating that "The [Board of Regents] Court's long encomium to amateurism, though impressive-sounding, was therefore dicta.").

⁵⁹ *See also id.* at 36 (recognizing that "a restraint that serves a pro-competitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives.").

⁶⁰ *Id.* at *29.

⁶¹ NCAA Brief, *supra* note 52, at 40 (citing 7 F. Supp. 3d at 101).

admonished that these “[r]ules’ validity must be proved, not presumed.”⁶²

Proceeding to assess the NCAA’s “compensation rules” under a rule of reason analysis,⁶³ the court agreed that NCAA compensation rules have a significant anticompetitive effect in the relevant markets of college education and group licensing because plaintiffs are barred from entering licensing agreements with videogame companies, which are otherwise interested in such negotiations.⁶⁴ The court, however, declined to answer the “[t]hornier questions of whether participants in live TV broadcasts of college sporting events have enforceable rights of publicity or whether the plaintiffs are injured by the NCAA’s current licensing arrangement for archival footage.”⁶⁵ Nor did the court answer whether the Copyright Act preempts plaintiffs’ publicity rights in video games or TV broadcasts, regarding that issue as “tangential” and “irrelevant.”⁶⁶ The court noted that videogame makers would rather pay players for NIL rights than risk legal uncertainty of assuming and using such images as free.⁶⁷ This question remains under review in *Davis v. Electronic Arts*.⁶⁸

Like the district court, the Ninth Circuit panel accepted that the NCAA compensation rules further the procompetitive purposes of integrating academics with athletics and “preserving the popularity of the NCAA’s product by promoting its current understanding of amateurism.”⁶⁹ The court agreed that

⁶² *Id.* at 32.

⁶³ Under a rule of reason test, the plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market. The defendant must then establish that such restraints further procompetitive benefits; and, if so, the plaintiff then must prove such legitimate objectives can be achieved through less restrictive alternatives. *Id.* at 44.

⁶⁴ *Id.* at *44 (recognizing the possibility that the NCAA could resume its support for college sports video games at some point in the future, given that the NCAA found such games to be profitable in the past).

⁶⁵ *Id.* at *38. *Id.* at *41 (stating that “[b]ecause the plaintiffs have shown that, absent the NCAA’s compensation rules, video game makers would likely pay them for the right to use their NILs in college sports video games, the plaintiffs have satisfied the requirement of injury in fact and, by extension, the requirement of antitrust injury.”).

⁶⁶ *Id.* at 40-41.

⁶⁷ *O’Bannon v. NCAA*, 802 F.3d 1049, 1069 (9th Cir. 2015).

⁶⁸ *Davis v. Elec. Arts*, 775 F.3d 1172 (9th Cir. 2015), *supra* note 18.

⁶⁹ *O’Bannon*, *supra* note 67 at 1076.

those objectives could be met in a manner consistent with Judge Wilken's ruling requiring the NCAA to allow member schools to award full cost-of-attendance scholarships.⁷⁰ The court noted that the NCAA had already taken such steps.

The court, however, vacated the portion of permanent injunction allowing member schools to pay players \$5,000 per year in deferred compensation for use of player NILs. Writing for the 2-1 majority, Judge Bybee wrote that "in finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is *precisely what makes them amateurs*."⁷¹ Judge Bybee added that "[t]he district court clearly erred in finding it a viable alternative to allow students to receive NIL cash payments untethered to their education expenses."⁷²

The majority accepted the NCAA's argument that any cash payments to students for their NIL rights would vitiate the "amateurism integral to the NCAA's market and transform it to a minor-league status."⁷³ The court was particularly concerned that payments have a connection to the educational purpose, stating "[t]he difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap."⁷⁴

In dissent, Judge Thomas argued that allowing students to be paid for NILs through deferred compensation would not diminish the demand for college sports.⁷⁵ Citing the multi-billion dollar broadcasting contracts and sport facilities, Judge Thomas found incredible the NCAA's contention "[t]hat this multi-billion dollar industry would be lost if the teenagers and young adults who play for these college teams earn one dollar above their cost of school attendance."⁷⁶

⁷⁰ *Id.* at 1074-1076 (explaining that an NCAA compensation cap set at full cost of attendance is a less restrictive alternative).

⁷¹ *Id.* at 1076.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ O'Bannon, *supra* note 67. at 1078

⁷⁵ *Id.* at 1081.

⁷⁶ *Id.* at 1083.

The court's ruling was, arguably, a “[h]ollow [v]ictory” for the plaintiffs.⁷⁷ The *O'Bannon* plaintiffs, at various stages of the litigation, sought multi-million dollars in damages and elimination of the NCAA compensation rule.⁷⁸ Former student-athletes get no relief under the ruling, and the victory at the Ninth Circuit provides current student-athletes with a cost-of-attendance remedy that the conferences had already implemented. The case is certainly significant in holding that the NCAA is subject to the antitrust laws, a ruling that exposes the NCAA and member conferences to future scrutiny and liability.

II. MOUNTING STUDENT-ATHLETE LITIGATION HITS ROADBLOCKS

The NCAA's no-pay-for-play amateurism rules have provoked even more aggressive challenges than *O'Bannon*. Named defendants expand beyond the NCAA to major athletic conferences and broadcast networks. While the Northern District of California remains the epicenter of student-athlete litigation, similarly-themed lawsuits⁷⁹ across the country proliferate.

A. Efforts to Unionize Student-Athletes Rejected

While the *NCAA Student Likeness* litigation was pending in the federal courts, the College Athlete Players' Association (“CAPA”), a labor organization, filed a petition with the National

⁷⁷ See Joe Nocera, *O'Bannon's Hollow Victory Over the N.C.A.A.*, N.Y. TIMES (Oct. 2, 2015) (“[a]fter spending much of their decision explaining why the amateurism rules are not exempt from antitrust scrutiny, the two judges in the majority spent the latter part of the decision echoing the N.C.A.A.'s hoary rationale that amateurism is the *sine qua non* of college sports.”), available at http://www.nytimes.com/2015/10/03/opinion/joe-nocera-obannons-hollow-victory.html?_r=0; Sasha Volokh, *No Slam Dunk in Ninth Circuit Antitrust Ruling in O'Bannon v. NCAA*, WASH. POST, (Sept. 30, 2015) <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/30/no-slam-dunk-in-ninth-circuit-antitrust-ruling-in-obannon-v-ncaa/>.

⁷⁸ Maureen A. Weston, *Gamechanger: NCAA Student-Athlete Name & Likeness Litigation and the Future of College Sports*, 3 MISS. SPORTS L. REV. 77, 81 (2014) (referencing Plaintiffs' Third Amended Complaint requesting fifty percent of all NCAA and conference revenue—including live broadcasts—in addition to elimination of NCAA no-compensation rule).

⁷⁹ See e.g., *Jenkins v. NCAA*, No. 4:14-cv-02758-CW, 2014 WL 1396975, (N.D. Cal. Mar. 17, 2014).

Labor Relations Board (“NLRB”) on behalf of scholarship football players at Northwestern University. The players’ petition contended that Northwestern football players who receive grant-in-aid scholarships are “employees” within the meaning of Section 2(3) under the National Labor Relations Act (“NLRA”) and are therefore entitled to pursue rights under the NLRA to unionize and engage in collective bargaining. The Regional Director for the NLRB in Chicago agreed with the union, citing that the players not only generate revenue for the university, but also are paid in the form of an athletic scholarship, subject to rigorous team and conference rules, eligibility requirements, and time commitments related to their athletic duties. Thus, the Director ruled that Northwestern football players who receive grant-in-aid scholarship were employees and entitled to choose whether or not to be represented for the purposes of collective bargaining.⁸⁰

Northwestern University appealed the decision to the full Board of the NLRB. On August 17, 2015, the Board overturned the Regional Director’s ruling, yet declined to answer the question of whether the college athletes are employees. Instead, the Board decided to “punt” on the question and exercised its discretion to decline jurisdiction over college football and college athletics generally because it would not “effectuate the purposes of the Act” to assert jurisdiction over such activities. As a practical matter, Northwestern was the only private university in the Big Ten conference, and the Board could not exercise jurisdiction over competitor public schools, which are subject to varying state labor laws.⁸¹ The Board also noted that in the year and a half since the Northwestern players first sought to form a union, the NCAA has granted its five most profitable conferences substantial autonomy

⁸⁰ *Nw. Univ. v. Coll. Athletes Players Ass’n (CAPA)*, Case 13-RC121359 at *2, 19 (Mar. 26, 2014), *available at* <https://www.nlr.gov/case/13-RC-121359>, vacated by Case 13-RC-121359 (Aug. 17, 2015). The Regional Director did note that the value of the football scholarship at Northwestern typically amounts to \$61,000 (tax-free) each academic year.

⁸¹ *Nw. Univ. v. Coll. Athletes Players Ass’n (CAPA)*, Case 13-RC121359, 362 N.L.R.B. 167, at *5 (Aug. 17, 2015), *available at* <https://www.nlr.gov/case/13-RC-121359> (“At least two states—which, between them, operate three universities that are members of the Big Ten—specify by statute that scholarship athletes at state schools are not employees. Under these circumstances, there is an inherent asymmetry of the labor relations regulatory regimes applicable to individual teams.”).

to pass rules that would allow them to give athletes more resources, which they promptly did, authorizing a few thousand dollars more in financial aid.⁸² The Board concluded that the issue is better left to either Congress or college sports administrators, ruling that “even if the scholarship players were statutory employees (which, again, is an issue we do not decide), it would not effectuate the policies of the Act to assert jurisdiction.”⁸³

B. Judicial Reluctance to Find Publicity Rights Claims in Live Broadcasts and Photos

Although *O’Bannon* declined to rule on viability of publicity rights in live broadcasts, other courts have dismissed such claims. In *Marshall v. ESPN*, a putative class action by former Division I college athletes against major broadcast networks, athletic conferences, and licensing partners, the players alleged publicity rights violations by using their images in the broadcast of college games.⁸⁴ The players also claimed constitutional rights violations, false endorsement, and anticompetitive collusion under federal antitrust laws.⁸⁵ The court dismissed on all counts, holding that participants have no right of publicity interest (under Tennessee law) in sporting events and broadcasts.⁸⁶

The court in *Maloney v. T3Media, Inc.* also rejected publicity right claims asserted by former college athletes against the licensing and digital hosting of photographs from NCAA championships, which include pictures of plaintiffs.⁸⁷ The court held that the Copyright Act preempted state law publicity claims regarding use of likeness contained within a copyrighted work and

⁸² *Id.* at *6.

⁸³ *Id.* at *3.

⁸⁴ *Marshall v. ESPN Inc.*, 2015 WL 3606645 at *1 (M.D. Tenn. 2015). Appeal to Sixth Circuit filed July 2015.

⁸⁵ *Id.* at *2.

⁸⁶ *Id.* at *6.

⁸⁷ *Maloney v. T3Media*, 94 F. Supp. 3d 1128, 1138-39 (C.D. Cal. 2015) (stating that the plaintiffs’ “likenesses [can] not be detached from the copyrighted [work] and their claims are preempted.”) (quoting *No Doubt v. Activision Publ’g, Inc.*, 702 F. Supp. 2d 1139, 1144 (C.D. Cal. 2010). Issues presented in the *O’Bannon* appeal include whether the video games’ use of player images is protected under the creative and transformative works test of the First Amendment, and also whether players have publicity rights to use of their images in live telecasts under First Amendment public interest doctrine.

that that the photographs depicted moments of NCAA history and were matters of public interest within the fair use of copyright law.⁸⁸

C. Wholesale Attacks on Amateurism—Jenkins v. NCAA & Conferences

The *O'Bannon* decision appeared groundbreaking in applying antitrust laws to the NCAA's limits on athletic scholarships, yet it authorizes the NCAA to set limits on student-athlete compensation provided they are tied (tethered) to educational objectives.⁸⁹ However, two class action lawsuits pending before Judge Wilken charge that *any* limits on student-athlete compensation or recruitment constitute illegal restraints: *Jenkins v. NCAA* (filed by sports labor attorney Jeffrey Kessler),⁹⁰ and *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*,⁹¹ which consolidates seven cases challenging various scholarship restrictions. These cases name as defendants eleven athletic conferences: the Pacific-12 Conference ("Pac-12"), Big Ten Conference ("Big Ten"), the Big 12 Conference ("Big 12"), Southeastern Conference ("SEC"), Atlantic Coast Conference ("ACC"), American Athletic Conference ("AAC"), Conference USA, Mid-American Conference ("MAC"), Mountain West Conference ("MWC"), Sun Belt Conference ("Sun Belt"), and Western Athletic Conference ("WAC").⁹²

Beyond the injunction ordered in *O'Bannon*, these lawsuits seek to ban the NCAA and member conferences from adopting any

⁸⁸ *Id.* at 1139.

⁸⁹ *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1075-76 (9th Cir. 2015), (concluding that an "injunction requiring the NCAA to permit schools to provide compensation up to the full cost of attendance was proper").

⁹⁰ Complaint and Jury Demand—Class Action Seeking Injunction and Individual Damages, *Jenkins v. NCAA*, No. 4:14-cv-02758-CW, 2014 WL 1396975, (N.D. Cal. Mar. 17, 2014), ¶ 51, at *17.

⁹¹ *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 24 F. Supp. 3d. 1366 (N.D. Cal. 2014) (mem.) [hereinafter *Grant-in-Aid Cap*].

⁹² Complaint and Jury Demand, *supra* note 89, ¶ 42, at *12 (challenging "all NCAA rules, along with all rules of each Power Conference, that are applicable to the FBS Football Players Market and the D-I Men's Basketball Players Market . . . and that prohibit, cap, or otherwise limit the remuneration that players in each of [the asserted] markets may receive for their athletic services.").

limit on compensation that may be paid to student-athletes.⁹³ In addition, the *Jenkins* plaintiffs seek damages on behalf of themselves only,⁹⁴ while plaintiffs in the consolidated action seek damages on behalf of a class of student-athletes.⁹⁵ Although Judge Wilken has stated that *O'Bannon* does not necessarily impact *Jenkins*,⁹⁶ certainly the Ninth Circuit's insistence in *O'Bannon* that compensation be tied to educational purposes poses an obstacle to the mission to bring free agency to college sports.

III. COLLEGE SPORTS IN THE AFTERMATH: UNCERTAINTY & MONEY ON THE TABLE

The mounting litigation and criticism against the NCAA⁹⁷ has impelled the Association to change certain practices.⁹⁸ This reform, in some areas, went too far or not far enough. Much

⁹³ *Id.* CAC ¶ 15; Complaint and Jury Demand, *supra* note 89, at 41.

⁹⁴ Notice of Motion and Memorandum of Points and Authorities in Support of Motion to Dismiss the Complaints, *Jenkins v. NCAA*, No. 4:14-cv-02758-CW, 2014 WL 6685707, at *1 (Sept. 4, 2014), available at <http://www.ncaa.org/sites/default/files/2014-09-04%20-%20Dkt%2089%20-%20Motion%20to%20Dismiss.pdf>. NCAA filed its appeal to the Ninth Circuit on October 21, 2014.

⁹⁵ *Grant-in-Aid Cap*, *supra* note 90, AC ¶¶ 9, 502(c), 541.

⁹⁶ Nocera, *supra* note 77 (expressing skepticism about Judge Wilken's comment in a preliminary hearing that "[t]he Ninth Circuit's *O'Bannon* ruling won't necessarily have any effect on the *Jenkins* case.").

⁹⁷ Numerous other lawsuits challenging NCAA amateurism rules and practices followed. See Alex Moyer, Note, *Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model*, 83 GEO. WASH. L. REV. 761, 793 (2015) (describing student-athlete antitrust challenges to various NCAA rules regarding eligibility and scholarships).

⁹⁸ NCAA Division I, Form 15-3a Student-Athlete Statement, Academic Year 2015-16 (required by NCAA Constitution 3.2.4.6 and NCAA Bylaw 12.7.2) requires an affirmation of compliance with NCAA Division I bylaws related to eligibility, recruitment, financial aid, amateur status and involvement in gambling activities. Previous NCAA Form 08-3a required student-athletes to certify that "[y]ou authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs." See, e.g., NCAA Division I Student-Athlete Statement, Form 08-3a, at 4 (2010), available at <http://www.liberty.edu/media/1912/compliance/newformsdec2010/currentflames/compliance/SA%20Statement%20Form.pdf>. The legal impact of NCAA Form 08-3a and whether it constitutes a waiver of rights authorizing the NCAA to use and license a student-athlete's name, image, and likeness, both commercially and in perpetuity, were central questions in the pending *In re Likeness* litigation.

uncertainty continues to pervade the legality of continued practices by member conferences and schools.

A. Power Five Conferences' Autonomy

One day before the district court's decision in *O'Bannon* was announced, the NCAA voted to significantly overhaul the governance structure of the organization. The changes provide members of the so-called "Power Five" conferences—comprised of the SEC, ACC, Big 12, Big Ten, Pac-12, as well as FBS independent Notre Dame—the autonomy to establish their own governance rules regarding recruitment of athletes, compensation for student-athletes, and other aspects of collegiate athletics.⁹⁹ At their annual meeting in January 2015, the five power conferences adopted new rules allowing aid for full costs-of-attendance.¹⁰⁰ The NCAA adopted a series of other reforms, generally relaxing stringent rules regarding food limits, academic eligibility, and multi-year scholarships, and increasing funds for student insurance, student-athlete well-being, and travel expenses for family members in football and basketball championships through the NCAA Student Assistant Fund.¹⁰¹

B. Keller's Publicity Rights Payout

On July 17, 2015, Judge Wilken approved a \$60 million settlement of the publicity rights claims.¹⁰² Under the settlement,

⁹⁹ See Dennis Dodd, *Players About to Get Paid as Money Changes Game in College Athletics*, CBS SPORTS (Feb. 27, 2015, 12:08 PM), <http://www.cbssports.com/collegefootball/writer/dennis-dodd/25083726/players-about-to-get-paid-as-money-changes-game-in-Dcollege-athletics> (reporting on the shift to full cost-of-attendance by Power Five conference schools and noting NCAA retreat on rules such as food limits and provisions, through the NCAA Student Assistant Fund, for student insurance and travel expenses for family members in football and basketball championships).

¹⁰⁰ See, e.g., Jake New, *'Autonomy' Arrives at the NCAA*, INSIDE HIGHER ED (Jan. 19, 2015), <https://www.insidehighered.com/news/2015/01/19/power-five-leagues-expand-athletic-scholarships-cover-full-cost-attendance>.

¹⁰¹ See Dodd, *supra* note 98; *Reform Efforts*, NCAA, <http://www.ncaa.org/governance/reform-efforts> (last visited Nov. 23, 2015) (setting forth various NCAA reforms in areas of academic eligibility, student-athlete assistance, enforcement, and rules).

¹⁰² *\$60 Million Settlement Approved in NCAA Video Game Lawsuit*, N.Y. TIMES, July 18, 2015, at D5, available at <http://www.nytimes.com/2015/07/18/sports/ncaa->

class members who were listed on a roster of an NCAA Division I Men's Football or Basketball team, which was included in an EA Sports video game between May 4, 2003 and September 3, 2014, may file a claim for compensation based on a "Season Roster Appearance" point system.¹⁰³ All claimants receive a minimum of \$100, and the maximum an individual may claim from the settlement is \$7,026.¹⁰⁴ The Court awarded \$12 million in aggregate attorneys' fees, representing thirty percent of the Settlement Fund.¹⁰⁵ With respect to the *NCAA Likeness* antitrust litigation, U.S. Magistrate Judge Nathaniel Cousins, on July 13, 2015, ordered the NCAA to pay plaintiffs' attorneys' fees in the amount of \$44,422,856.04, and \$1,545,870.58 in costs and expenses.¹⁰⁶

C. Practices Amid Legal Uncertainty

1. Discontinued Ventures—NCAA Product Licensing

In July 2013, the NCAA announced it would not renew its videogame contract with EA Sports, which was set to expire at the end of 2013.¹⁰⁷ Two days later, more than 150 colleges,

video-game-lawsuit-60-million-settlement-is-approved.html?ref=media (noting that EA and CLC reached the \$40 million settlement with plaintiffs in 2013). The NCAA agreed to a separate \$20 million settlement with the *Keller* plaintiffs in June 2014. *Id.* The petition for \$14.38 million in attorneys' fees has not yet been approved. *Id.*

¹⁰³ Order Granting Final Approval of Class Action Settlement and Final Judgment, *O'Bannon v. NCAA*, No. 4:09-cv-3329 CW, at *7 (N.D. Cal. Aug. 19, 2015), available at http://www.ncaa-ea-likeness-settlement.com/media/354716/2015-08-19_final_approval_order_ea_settlement_.pdf.

¹⁰⁴ *Id.* See also *Class Notice*, available at http://www.ncaa-ea-likeness-settlement.com/media/263419/v9_ncel1_notice_022015_final.pdf.

¹⁰⁵ *Id.* at *4.

¹⁰⁶ Order Granting Motion for Attorneys' Fees, *O'Bannon v. NCAA*, No. 09-cv-03329-CW, 2015 WL 4274370, at *1, *15 (July 13, 2015) (requested amount (\$45,573,985.45), Court's reductions (\$1,151,129.41)). As to costs and expenses, the Court orders the NCAA to pay plaintiffs in the amount of \$1,545,870.58 (requested amount (\$5,295,062.20)—Court's reductions (\$3,749,191.62)). See also Joshua Calo, *\$46 Million Fee Award Sparks Secondary Dispute in O'Bannon v. NCAA—NCAA Seeks Reversal of Magistrate Judge's Ruling that Student Athletes May Recover Attorneys' Fees and Costs for Unsuccessful Claims*, <http://lawweb2009.law.villanova.edu/sportslaw/?p=3068>.

¹⁰⁷ Steve Berkowitz, *NCAA Ending Deal with Video Game Maker EA*, USA TODAY (July 17, 2013, 9:53 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/07/17/ncaa-ending-videogame-contract-with-ea-electronic-arts/2525843/>.

conferences, and bowl games individually signed on to extend the contract with EA Sports for another three years.¹⁰⁸ Due to the continued litigation, EA decided to cancel the series altogether.¹⁰⁹ The retail market for collegiate licensed merchandise is in the range of \$4.6 billion.¹¹⁰ Yet, in August 2013, the NCAA also ceased sale of individual and team jerseys and athlete memorabilia through its website, conceding that such sales can be considered “hypocritical” in light of the NCAA’s amateurism creed.¹¹¹

Individual schools and other merchandising sites, however, continue the sale of such items.¹¹² Most NCAA revenue comes from its 14-year, \$10.8 billion agreement with Turner Broadcasting and CBS Sports for rights to the Division I Men’s Basketball Championship.¹¹³ Other NCAA revenue is generated through ticket sales, media, alumni contributions, guarantees and royalties.¹¹⁴ Despite the extraordinary revenue, expenses for

¹⁰⁸ Brent Schrottenboer, *EA Sports Re-ups on College Football After NCAA Snub*, USA TODAY (July 19, 2013, 8:30 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/07/19/ea-sports-college-football-contract-renewed/2570119/>.

¹⁰⁹ Assoc. Press, *supra* note 101.

¹¹⁰ *About CLC*, CLC, <http://www.clc.com/About-CLC.aspx> (last visited Nov. 23, 2015).

¹¹¹ Mike Schlabach, *NCAA Puts End to Jersey Sales*, ESPN (Aug. 9, 2013), available at http://espn.go.com/college-sports/story/_/id/9551518/ncaa-shuts-site-jersey-sales-says-hypocritical. NCAA President Mark Emmert, commenting on the shift, stated that “[i]n the national office, we can certainly recognize why that could be seen as hypocritical, and indeed I think the business of having the NCAA selling those kinds of goods is a mistake, and we’re going to exit that business immediately. It’s not something that’s core to what the NCAA is about, and it probably never should have been in the business.” *Id.*

¹¹² Raphielle Johnson, *NCAA Will No Longer Sell Jerseys, Memorabilia Associated with Individual Players*, NBC SPORTS (Aug. 8, 2013, 9:19 PM), available at <http://collegebasketballtalk.nbcsports.com/2013/08/08/ncaa-will-no-longer-sell-jerseys-memorabilia-associated-with-individual-players/>. A Google search of “Manziel jersey” triggers numerous results of Texas A&M jerseys affixed with “2” and/or “Manziel.” See, e.g., GOOGLE, <https://www.google.com/#q=manziel+jersey>.

¹¹³ Projected NCAA revenue for 2012-13 is \$797 million, \$712 million of which (90 percent) is projected to come from media rights payment. *Revenue*, NCAA.ORG, available at <http://www.ncaa.org/about/resources/finances/revenue>.

¹¹⁴ See NCAA, *Division I Intercollegiate Athletic Report 2004-2014*, at *9 (2015), available at <http://www.ncaa.org/sites/default/files/2015%20Division%20I%20RE%20report.pdf> (reporting athletic revenues as (1) allocated revenues (comprised of: student fees directly allocated to athletics); direct institutional support in financial payments; indirect institutional support, in the payment of utilities, maintenance, support

athletic-related spending generally exceeds revenue, and most athletic programs operate “in the red.”¹¹⁵

2. Continued Use of Player Images Despite Legal Uncertainty

The *Keller* settlement ostensibly resolved the complaints regarding the use of player images in video games, which the NCAA has since ceased to license. The NCAA has removed the right of publicity waiver from the standard form that student-athletes are required to sign for the 2015-16 academic year.¹¹⁶

Neither the *Keller* nor *O'Bannon* decisions addressed the question of whether the use of player images was authorized by the former NCAA Form 08-3a, which obligated student-athletes to waive rights to NILs, although the NCAA cited to this form as evidence of consent. Student-athletes contended that Form 08-3a, which “allows the NCAA to use the Student Athlete’s name or picture to generally promote NCAA championships or other NCAA events, activities or programs,” was an unenforceable adhesion contract. Although not ruling directly on that claim, Judge Wilken held in *O'Bannon* that the practice itself violated antitrust laws.

Notwithstanding the legal uncertainty, the NCAA, major athletic conferences (e.g. the “Power Five”) and member institutions continue to use player images in a variety of

salaries, direct governmental support, such as athletic-designated funds from state and local governmental agencies; and (2) generated revenues are produced by the athletics department and include ticket sales, radio and television receipts, alumni contributions, guarantees, royalties).

¹¹⁵ *Id.* at *8 (finding that “[a] total of 24 athletics programs in the FBS reported positive net revenues for the 2014 fiscal year. The net gap between the ‘profitable’ programs and the remainder, over \$23 million, was greater than was observed in 2013.”).

¹¹⁶ See NCAA Removes Right of Publicity Release from Agreements with Student Athletes, INTELL. PROP. L. BLOG (Aug. 8, 2014, 2:33 PM) available at <http://www.gandb.com/Blog/2014/August/NCAA-Removes-Right-Of-Publicity-Release-From-Agr.aspx> (noting, however, that some individual conferences, such as the Big Ten, and schools continue to require athletes to sign broad publicity releases); NCAA MANUAL, 2014-15, at art. 3.2.4.19 (2015), available at <http://www.ncaapublications.com/productdownloads/D115APR.pdf>. See also, Missouri NIL Waiver, CHICAGO TRIBUNE (Mar. 26, 2015, 7:19 PM) (providing links to NIL waivers used by schools in the SEC and Big Ten Conferences), available at <http://www.chicagotribune.com/chi-missouri-nil-waiver-20150326-htmlstory.html>.

marketing, commercial promotions, and game broadcasts.¹¹⁷ Uncompensated use of player images continues, but policy guidance on the scope of permissible use is not readily available.¹¹⁸ An article in the *Chicago Tribune* notes that journalists had to make public records requests to review the (mostly unpublished) policies of major athletic conferences. It also linked to waivers used at several different universities regarding student-athlete publicity rights.¹¹⁹ It appears that the continued use of player images is so central to the business model of collegiate sports that participants are willing to accept the risks attendant to continued use. Obviously, a more prudent practice would involve an agreed-upon arrangement by all stakeholders.

IV. MONEY ON THE TABLE

Under *Keller*, student-athletes depicted in the NCAA video games were entitled to compensation for the use of their NILs. Yet *O'Bannon* rejected a \$5,000 deferred compensation model proposed by Judge Wilken, although the prospective compensation was ordered at a time after the NCAA had discontinued its contract with EA Sports. The NCAA also decided not to sell team-related merchandise or jerseys with numbers associated with star players, conceding that such practices may be considered “hypocritical.”¹²⁰ As part of its settlement, EA announced that it would not produce a 2014 version of the football video game,

¹¹⁷ John Keilman & Jared S. Hopkins, *College Athletes Routinely Sign Away Rights*, CHICAGO TRIBUNE (March 26, 2015 8:23 PM), <http://www.chicagotribune.com/sports/college/ct-ncaa-waivers-met-20150326-story.html>.

¹¹⁸ *Jenkins v. Nat'l Collegiate Athletic Ass'n attacks the entire system of prohibiting payments to players*.

¹¹⁹ See Keilman & Hopkins, *supra* note 116.

¹²⁰ See, e.g., Mark Schlabach, *NCAA Puts End to Jersey Sales*, ESPN (Aug. 9, 2013), available at http://espn.go.com/college-sports/story/_id/9551518/ncaa-shuts-site-jersey-sales-says-hypocritica (noting comment by NCAA President Mark Emmert); Bill Chappell, *NCAA Will Stop Selling Player Jerseys, Takes Web Shop Down*, NPR.ORG (Aug. 9, 2013, 5:16 PM), <http://www.npr.org/sections/thetwo-way/2013/08/09/210566486/ncaa-will-stop-selling-player-jerseys-takes-web-shop-down>; Steve Eder, *Points for Product Placement: N.C.A.A. Cashes in, but Not the Players.*, N.Y. TIMES (Apr. 5, 2014), available at http://www.nytimes.com/2014/04/06/sports/ncaabasketball/financial-rewards-of-ncaasponsorship-deals-arent-shared-with-players.html?_r=0.

perhaps to the dismay of the plaintiffs' counsel.¹²¹ The “golden goose” of NCAA sports videogame and merchandise sales is apparently dead, but the EA President testified in trial that the company would be delighted to revive the NCAA game series if it could.¹²²

The market for the use of college player images in various mediums in the modern college sports industry remains strong. The national, even international, multimedia platforms also benefit the players, providing them a forum for celebrity and “brand” recognition. The players did not object to the commercial uses, but justifiably wanted to be compensated.

Questions remain as to whether EA Sports and the NCAA needed to settle *Keller* at all. Intellectual property and constitutional law scholars contend that the depiction of players in video games is a transformative use protected by the First Amendment. The *Marshall* decision appears to support that contention.¹²³ The U.S. Supreme Court is poised again in *Davis v.*

¹²¹ See Steve Berkowitz, *EA Drops Football in '14, Settles Cases as NCAA Fights*, USA TODAY (Sept. 26, 2013, 10:37 PM), available at <http://www.usatoday.com/story/sports/college/2013/09/26/ea-sports-ncaa-13-video-game-keller-obannon/2878307/>.

¹²² *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 970 (N.D. Cal. Aug. 8, 2014) (reporting testimony of EA Vice-President Joel Linzer, stating that “EA would be interested in acquiring the same rights from student-athletes in order to produce college sports-themed videogames, if it were permitted to do so.”). The Court thus found that “absent the challenged NCAA rules, there would be a demand among videogame developers for group licenses to use student-athletes’ names, images, and likenesses.” *Id.*

¹²³ See also *Dryer v. Nat'l Football League*, 55 F. Supp. 3d 1181 (D. Minn. 2014) (upheld the NFL’s use of video footage of players in games, over publicity claims, as activity protected under the First Amendment, within the public interest, newsworthy, and creative expressive works telling the story of the NFL); *aff’d* – F.3d —, 2016 WL 761178 (Feb. 26, 2016); *C.B.C. Distrib. & Mktg, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007), *cert. denied*, 128 S.Ct. 2872 (2008) (holding First Amendment protects fantasy rights producer’s uses of the “names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player” in an interactive form in connection with its fantasy baseball products.); *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307 (Cal. App. 2001) (“common law right does not provide relief for every publication of a person’s name or likeness,” and where defendant “is simply making historical facts available to the public through game programs, Web sites and video clips . . . the recitation and discussion of factual data concerning the athletic performance of these plaintiffs commands a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection”).

Electronic Arts to answer whether use of player images in sport video games is protected under the First Amendment.

Money is on the table, and the stakeholders in the college sports industry can come together to negotiate a fair arrangement to optimize and advance not simply commercial, but also educational, health, and safety endeavors.¹²⁴

A. *Considering Revenue Sharing and Market Optimizing*

Big-time college sports is enmeshed in litigation—in control of the courts and out of control of those who presumably are in the best position to govern. The financial landscape of college sports has long been lucrative with broadcasting contracts, but new technology and innumerable media platforms expand these opportunities. Reform lies in a system that honors the principles of amateurism, furthers the educational mission of intercollegiate sports, and permits players to share in the revenues and market opportunities, while also satisfying the fans, consumer and public interest.

1. Emerging Acceptance of Payments to Players

The notion that student-athletes share in the revenues they help to generate within the context of intercollegiate sports is gaining increasing acceptance. A system for compensating players is feasible, as demonstrated in the decree in *Keller*.¹²⁵ The NCAA has acceded to allowing players to receive compensation in payment for publicity and trademark rights in other contexts, and

¹²⁴ A number of thoughtful proposals have been advanced. *See, e.g.*, Matthew Mitten & Stephen Ross, *Regulate, Don't Litigate, Change in College Sports*, INSIDE HIGHER ED (June 10, 2014), available at <https://www.insidehighered.com/views/2014/06/10/college-sports-would-be-better-reformed-through-federal-regulation-lawsuits-essay> (proposing antitrust immunity for NCAA in exchange for series of pro-athlete reforms).

¹²⁵ *\$60 Million Settlement Approved in NCAA Video Game Lawsuit*, N.Y. TIMES (July 17, 2015), available at <http://www.nytimes.com/2015/07/18/sports/ncaa-video-game-lawsuit-60-million-settlement-is-approved.html> (Plaintiff's lawyer Steve Berman, stating "This landmark decision marks the first time student-athletes will be paid for the likeness or image, and stands as a huge victory in the ongoing fight for student-athletes' rights.").

the cost-of-attendance legislation indicates a willingness to expand benefits within the educational parameters.¹²⁶

Recall that the *Keller* plaintiffs did not object to the use of their images as offensive, but rather wanted to be paid.¹²⁷ Given the public fascination and lucrative market for these products, is it possible, acceptable, or even advisable for the NCAA and the college sports industry to capitalize on these market and media opportunities while providing compensation to players (and not run afoul of other legal obligations, such as Title IX)? Did the NCAA videogame deal need to die? Gambling on college sports is estimated to be \$60-70 billion, surpassing the industry itself. Does it make sense to leave such lucrative financial opportunities on the table?

2. Bring Back NCAA Video Games (and more)?

In response to lawsuits filed by players whose likenesses were used in the college sport video games, EA Sports discontinued sales of the games in 2013. Annual release dates have come and gone without the new games, much to the disappointment of devoted gamers, many of whom remain willing and eager to bring back the game.¹²⁸ As one fan lamented, “It’s the second Tuesday of July, which is just another day on the calendar to most people. But for us NCAA Football video game diehards, it’s like the anniversary of a relative’s death. That’s because today *should* have been the release of NCAA Football 16 with Marcus Mariota on the cover.”¹²⁹

¹²⁶ Christie Cho, Comment, *Protecting Johnny Football®: Trademark Registration for Collegiate Athletes*, 13 NW. J. TECH. & INTELL. PROP. 65 (2015) (noting that trademark law provides an property interest independent of the NCAA, and an intriguing solution to protect symbols, names, and other marks affiliated with student-athletes, such as Johnny Manziel’s trademark rights to “Johnny Football”).

¹²⁷ See *infra* Section IV.

¹²⁸ See Adam Jacobi, *EA Sports’ College Football 15 Could’ve Included Enormous Customization Overhaul*, SBNATION.COM (Oct. 1, 2013, 11:20 AM), available at <http://www.sbnation.com/college-football/2013/10/1/4790720/ea-sports-college-football-video-game-2014> (“College Football 15, the next edition of EA Sports’ NCAA Football series, is dead. Dead as can be.”); *id.* (reporting that sales of newly-launched video games “were down almost 70 percent, which was almost entirely the result of the lack of a new version of NCAA Football.”).

¹²⁹ Jim Weber, *Why There’s Hope for NCAA Football 17*, LOSTLETTERMAN (July 14, 2015), available at <http://lostlettermen.com/why-theres-hope-for-ncaa-football-17/>.

In professional sport leagues, EA negotiates deals with leagues and with players. Judge Wilken suggests that the NCAA “could negotiate contracts with gaming companies and agree to hold some portion of the proceeds to be split among players who appear in the games, paying them ‘limited and equal shares of licensing revenue’ which players could receive after they graduated.”¹³⁰ EA executive Joel Linzer testified that the company would like to bring back EA college football video games.¹³¹

3. Shifting from NCAA to the Power Conferences FBS Business Model

A mutually beneficial solution to the conundrum of video games and other electronic and mobile media platforms may be to allow the conferences to negotiate with the media companies such as EA, letting the NCAA sit on the sidelines. The NCAA can maintain its stance with regard to amateurism, and the conferences could go forward to pursue the revenue and the exposure that both the conferences and the vast majority of student athletes want (such as the operation of the FBS). The NCAA would only need to amend current bylaws to allow this, in much the same way as it does with regard to the College Football Playoff. The NCAA does not actually participate in the operation of the College Football Playoff, but it has cleared the way for the conferences to pursue it.¹³² The open question would be the mechanism to negotiate with the student-athletes for permission and/or compensation, but given the concept of holding monies in trust for players, it appears that there is a way forward.

¹³⁰ Joshua Brustein, *NCAA Legal Controversy Leads to a Slow Summer for Video Games*, BLOOMBERG BUSINESS (Aug. 15, 2014), available at <http://www.bloomberg.com/bw/articles/2014-08-15/video-game-sales-down-after-cancellation-of-ncaa-game>.

¹³¹ See *id.*; see also Bryan Wiedey, *What’s the Role of College Players in NBA2K16?*, SportingNews.com (Sept. 25, 2015), available at <http://www.sportingnews.com/ncaa-basketball-news/4656187-nba-2k16-college-basketball-teams-kansas-georgetown-ucla-arizona-michigan-wisconsin> (noting the inclusion of licensed universities in game); Bryan Wiedey, *O’Bannon Appeal Complicates a Potential Return of College Sports Video Games*, SportingNews.com (Sept. 30, 2015), available at <http://www.sportingnews.com/ncaa-football/story/2015-09-30/obannon-ncaa-ruling-compensating-athletes-amateurism-ea-sports-ncaa-football-video-game>.

¹³² For example, in FBS football, post-*Board of Regents*, conferences and individual schools negotiate broadcasting rights.

4. Student-Athlete Marketing Association

Teams, leagues, and producers of sporting events generally obtain consent to use the identity of athletes participating for advertising and promotional purposes by contractual agreements. In major league sports, players assign licensing rights to player associations, which negotiate licensing arrangements as well as authorize and police the use of player and group publicity rights.¹³³ Where such market opportunities exist in intercollegiate sports, student-athletes participate in revenue-generation, group licensing, similar to the model used in the professional leagues.¹³⁴ Rather than a union, student-athletes can be represented by a voluntary players' association to negotiate group-licensing rights on behalf of the players.¹³⁵

CONCLUSION

College sports is a multi-billion dollar industry. Revenues are generated from deals to license rights to broadcast games on a variety of media sources -media and to exploit school and player images in a variety of merchandising endeavors. The games would not be possible without the athletes whose performances and images are central to the games. And the success of the college sports industry would not be possible without the athletic associations, conferences and institutions that govern and essentially produce the product of college sports. While the revenues in big-time college sports have enriched the power-conferences, NCAA rules historically prohibit payment to the

¹³³ See *Uhlaender v. Henricksen*, 316 F. Supp. 1277 (D. Minn. 1970).

¹³⁴ Although Judge Wilken rejected the endorsement proposal, this model is used with success in the Olympics, which has also transitioned from amateurism. See, e.g., Arash Afshar, Comment, *Collegiate Athletes: The Conflict Between NCAA Amateurism and a Student Athlete's Right of Publicity*, 51 WILLAMETTE L. REV. 101 (2014) (proposing Olympics endorsement system as model for granting NCAA athletes rights of publicity).

¹³⁵ Joe Nocera, *Let's Start Paying College Athletes*, N.Y. TIMES MAGAZINE (Dec. 30, 2011), available at <http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html> (proposing modified free-market system for recruiting college players, team salary caps, a six-year year scholarship, lifetime health insurance, and formation of a player association to "[m]anage the health insurance, negotiate with the N.C.A.A. to set the salary caps and salary minimums, distribute royalties and serve as an all-around counterweight to the NCAA.").

players.¹³⁶ The landscape of college sports is changing rapidly, but there remains a common interest between the conferences, institutions and the players themselves. With very few exceptions, all of the participants benefit, or would like to benefit, from the revenues and, just as importantly, the exposure and branding that occurs through the presentation of collegiate sports to a content-thirsty audience. There certainly must be a way forward that allows these benefits to flow to the various contributors to the collegiate sports enterprise in a way that is legally sound, acceptable to the NCAA, and also fundamentally fair to the other participants—most notably, the student-athletes.

Although the assault on amateurism continues apace, the varied judicial responses to student-athlete claims suggest that some aspects of amateurism in its current form may remain intact, but other aspects are certainly in need of reform. Preferably, such reform will occur within the current system, or perhaps legislatively, rather than in the courts. Litigation is uncertain and unproductive, and it tends to reward attorney fees rather than provide meaningful reform. The parties have mutual interests and need each other. The “product” of intercollegiate sports that is so popular and lucrative through broadcasting, the extension of intellectual property, and, yes, commercial endeavors, requires the regulatory governance of an athletic association, the production and organization of athletic conferences, institutions, and teams, and, certainly, the talent and commitment of the players. Rather than pretend to deny commercialism, either as a fact or an opportunity, the parties can work together productively to optimize the academic and commercial benefits of intercollegiate athletics in a joint partnership model acknowledging the contribution and interests of the student-athletes.

¹³⁶ Maureen A. Weston, *Gamechanger: NCAA Student-Athlete Name & Likeness Licensing Litigation and the Future of College Sports*, 3 MISS. SPORTS L. REV. 77 (2014).