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**Gamechanger: NCAA Student-
Athlete Name & Likeness Licensing
Litigation and the Future of College Sports
IHELG Monograph**

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**GAMECHANGER: NCAA STUDENT-
ATHLETE NAME & LIKENESS LICENSING
LITIGATION AND THE FUTURE OF
COLLEGE SPORTS**

*Maureen A. Weston**

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INTRODUCTION

Envision, if you can, what the world of college sports would look like if some or all collegiate student-athletes were paid or, perhaps, if the players were not even students. Imagine Saturdays in the fall with no college football telecasts, or weekends in March without access to watch—on TV, the internet, or other media devices—the famed NCAA Men's Basketball March Madness tournament, all in order to preserve amateurism in college sports. Each of these scenarios is likely unthinkable to the millions of fans—alumni, students, and devoted followers of college sports—and to the multi-billion dollar industry that is generated by the broadcast of NCAA Division I men's football and basketball. Whether players can and should be paid is seemingly an age-old

question and the subject of fierce debate.¹ Some have likened the non-payment of college athletes in big-time college sports to “indentured servitude,”² while the NCAA and others believe that amateurism is vital to preserve the essence of an already enriched student-athlete experience.³ The question, however, is now at the forefront of a class-wide litigation in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*.⁴

The requirement of amateurism is the proclaimed foundation of intercollegiate sports. That is, athletes play without pay as part of their collegiate experience and for the pure enjoyment of the sport. As the governing body of intercollegiate athletics, the NCAA’s mission has been to ensure a “clear line of demarcation”⁵ between amateur and professional sports. The NCAA has

¹ For nearly a quarter of a century, only one college football game was televised on Saturdays in the fall, and revenue shared among the NCAA and televised teams. See *Bd. of Regents v. Nat’l Collegiate Athletic Ass’n*, 546 F. Supp. 1276, 1243 (W.D. Okla. 1982). Since the Supreme Court’s 1984 decision declaring this practice in violation of federal antitrust laws, NCAA policies and practices have been subject to numerous antitrust challenges.

² Ramogi Huma & Ellen J. Staurowsky, *The \$6 Billion Heist: Robbing College Athletes Under the Guise of Amateurism*, NAT’L COLLEGE PLAYERS ASS’N, 9 (2012), available at http://assets.usw.org/ncpa/pdfs/6-Billion-Heist-Study_Full.pdf. See also Andrew Zimbalist & Allen Sack, *Thoughts on Amateurism, the O’Bannon Case and the Viability of College Sport* (2013), available at <http://thedrakegroup.org/2013/04/10/drake-group-report-obannon-amateurism-and-the-viability-of-college-sport/>; Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Sept. 7, 2011, 11:28 AM), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/>; CHARLES T. CLOTFELTER, BIG-TIME SPORTS IN AMERICAN UNIVERSITIES (2011).

³ See, e.g., *About: Office of the President*, <http://www.ncaa.org/about/who-we-are/office-president> (last visited Apr. 6, 2014) (noting that athletic grants can be worth more than \$100,000 and the many benefits of the student-athlete experience); Associated Press, *Syracuse’s Jim Boeheim: Paying NCAA Athletes ‘idiotic’*, USA TODAY (Oct. 2, 2013, 7:35 PM), <http://www.usatoday.com/story/sports/ncaab/acc/2013/10/02/syracuse-orange-jim-boeheim-college-players-student-athletes-pay/2912327/> (“That’s really the most idiotic suggestion of all time,” Boeheim said. “I don’t believe players should be paid. I believe they are getting a tremendous opportunity.”); Alex Prewitt, *Large Majority Opposes Paying NCAA Athletes*, *Washington Post-ABC News Poll Finds*, THE WASHINGTON POST (Mar. 22, 2014), http://www.washingtonpost.com/sports/colleges/large-majority-opposes-paying-ncaa-athletes-washington-post-abc-news-poll-finds/2014/03/22/c411a32e-b130-11e3-95e8-39bef8e9a48b_story.html.

⁴ See 2013 WL 5778233 (N.D. Cal. Oct. 25, 2013).

⁵ *Fundamental Policy*, 2012-13 NCAA DIVISION I MANUAL art. 12.01.1 (2012) [hereinafter NCAA MANUAL], available at <http://www.ncaapublications.com/productdownloads/D113.pdf>.

extensive rules and penalties on eligibility in furtherance of its edict that “[o]nly an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.”⁶ In support and defense of its amateurism regulations, the NCAA has relied upon Justice Stevens’ statement, in *NCAA v. Board of Regents*, 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.”⁷

Why amateurism in college sports must exist at all, or be defined as requiring no “over the table”⁸ monetary payment to student-athletes is under scrutiny in an age of exorbitant coaching and administrator salaries, billion dollar television contracts, lucrative merchandising deals, star players with internet and multimedia platforms, and seemingly unlimited opportunities to showcase live and archived video footage spanning over sixty years of college sports contests.⁹ In its challenge to the NCAA’s use of student-athletes’ names, images, and likenesses in business ventures without specific authorization from or compensation to those student-athletes, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*¹⁰ threatens to dismantle the NCAA’s longstanding rules on amateurism and intercollegiate sports as we know it.¹¹ The lawsuit seeks certification of a class comprised of current and former student-athletes dating back over sixty years—potentially hundreds of thousands of plaintiffs—in a class action lawsuit naming the NCAA, Collegiate Licensing Company (CLC), and Electronic Arts, Inc. (EA) as defendants.¹²

⁶ *Eligibility for Intercollegiate Athletics*, NCAA MANUAL, *supra* note 5, at art. 1.3.1.

⁷ Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984) (“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.”) *Id.* at 120.

⁸ Ray Yasser et al., *Sports Law: Cases and Materials* 2 (7th ed. 2011).

⁹ *See infra* Section I.B.

¹⁰ *See generally* Order Denying Motions to Dismiss, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 5778233 (N.D. Cal. Oct. 25, 2013) (denying the NCAA’s motion to dismiss).

¹¹ *Id.*

¹² *See* Third Consolidated Amended Class Action Complaint, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 3772677 (N.D. Cal. July 18, 2013).

In re NCAA Student-Athlete Name & Likeness Licensing Litigation is a consolidated lawsuit that arose principally from two federal lawsuits filed in California in 2009 against the NCAA, EA, and the CLC: *Keller v. Electronic Arts, Inc.*,¹³ and *O'Bannon v. National Collegiate Athletic Ass'n.*¹⁴ These cases attack the practice of using the names, images, and likenesses (NIL) of student-athletes in broadcasts and rebroadcasts of games, DVDs, photos, video games, etc., without compensation to the athletes.¹⁵ The litigation initially claimed, principally, two violations of law; first, that the NCAA's policies unlawfully restrain trade in violation of federal antitrust laws; and second, that the NCAA violates former student-athletes' right of publicity.¹⁶

The lawsuit took a sharp turn in January 2013 when the plaintiffs amended their consolidated class action lawsuit to add current student-athletes to the class and to expand their claims beyond video games. Now, the plaintiffs seek fifty percent of all revenue generated by the NCAA (and conference television contracts), including live broadcasts.¹⁷ In November 2013, U.S. District Court Judge Claudia Wilken issued an order granting certification for the purpose of injunctive relief to a class of all current and former NCAA Division I men's basketball and Football Bowl Subdivision men's football players "whose images, likenesses and/or names may be, or have been, included in game footage or in video games licensed or sold by Defendants, their co-conspirators, or their licensees after the conclusion of the athlete's participation in intercollegiate athletics."¹⁸ As such, the

See also NCAA's Opposition to Motion for Class Certification, *In re NCAA Student-Athlete Likeness Antitrust Litig.*, 2013 WL 1005475, at *1 (N.D. Cal. Mar. 14, 2013).

¹³ 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

¹⁴ 2009 WL 4899217 (N.D. Cal. Dec. 11, 2009).

¹⁵ *See* Jason M. Breslow, *NCAA Lawsuit Asks, Should Student-Athletes Be Paid?*, PBS (June 20, 2013, 1:03 PM), <http://www.pbs.org/wgbh/pages/frontline/sports/money-and-march-madness/ncaa-lawsuit-asks-should-student-athletes-be-paid/>.

¹⁶ *See* Order Denying Motions to Dismiss, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 5778233, at *2 (N.D. Cal. Oct. 25, 2013).

¹⁷ Third Consolidated Amended Class Action Complaint, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 3772677, at ¶9 (N.D. Cal. July 18, 2013).

¹⁸ Order Granting in Part and Denying in Part Motion for Class Certification, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 5979327, at *10 (N.D. Cal. Nov. 8, 2013). This order granted class certification on antitrust claims, but, citing manageability problems with ascertaining harm, denied the request to certify a damages subclass *Id.* at *17. Affected athletes may sue for damages individually. *Id.*

“pay-for-play” debate is at the precipice,¹⁹ and the imminent future of college sports broadcast contracts, if not the NCAA, lies in peril.²⁰

This Article examines the implications of the challenges raised in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* on the future of amateurism, the NCAA, and intercollegiate athletics. Part I provides an overview of the NCAA’s regulatory structure and operations. Part II chronicles the litigation as it has unraveled over the past five years and analyzes the respective arguments involving the legal claims and defenses to the alleged antitrust and right of publicity violations. With the June 2014 trial date looming, the respective parties are entrenched in seemingly intractable positions, in an apparent downward spiral where the prospect of capturing the mutual

As amended, the antitrust class comprises “[a]ll current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as “University Division” before 1973) college or university men’s basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I–A until 2006) 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.” Order Resolving Cross-Motions for Summary Judgment, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014 WL 1410451, at *20 (N.D. Cal. Apr. 11, 2014). In March 2014, a similar class action lawsuit was filed in federal court in New Jersey by noted sports law labor attorney Jeff Kessler and the Winston and Strawn law firm, which had previously announced its opening of a division for college athlete representation. *See e.g.*, Complaint and Jury Demand - Seeking Injunction and Individual Damages, *Jenkins v. NCAA*, Case No. 3:33-av-0001 (N.J. March 17, 2014). *See also infra* note 101.

¹⁹ Stewart Mandel, *USC’s Haden: Ed O’Bannon case could cause seismic NCAA change*, SPORTS ILLUSTRATED (April 1, 2013, 10:57 AM), <http://sportsillustrated.cnn.com/college-football/news/20130401/pat-haden-ed-obannon-ncaa/>. The Sherman Antitrust Act also provides for treble damages and attorneys fees. 15 U.S.C. §§ 1-7 (2004).

²⁰ Michael McCann, *Judge Partially Certifies Class Action Status in O’Bannon Suit*, SPORTS ILLUSTRATED (Nov. 9, 2013, 12:41 AM), <http://sportsillustrated.cnn.com/college-basketball/news/20131109/obannon-ncaa-class-action-lawsuit/> (suggesting that television networks may have to negotiate broadcast rights “not only with the NCAA but with student-athletes . . . [and] the NCAA and student-athletes might strike separate licensing contracts with two different video game publishers.”). In defense, the NCAA maintains that the fair use and newsworthiness doctrines in federal copyright law and the First Amendment preempt plaintiffs’ claims to rights to broadcast revenue. However, the court did not find this argument sufficiently convincing to warrant dismissal of the claims. *See infra* Section I.B.1. *See also* Class Certification Order, 2013 WL 5979327, at *8-9.

benefits of commercial opportunities in college sports is at risk. Part III considers the practical impact on NCAA sports, should the plaintiffs' class claims succeed, and explores options to resolve the dispute in a manner that benefits the interests of all in intercollegiate athletics.

I. NCAA AMATEURISM REGULATIONS

A. *The NCAA and the Student-Athlete*

The National Collegiate Athletic Association (NCAA) “was founded in 1906 to protect young people from the dangerous and exploitive athletics practices of the time.”²¹ Since its inception, the NCAA has sought to combat abuses in intercollegiate sports by enforcing the requirement of amateurism.²² The NCAA is an association of over 1,200 member institutions, schools, colleges, universities, and athletic conferences.²³ Each year, the NCAA oversees more than 430,000 student-athletes as they compete in twenty-three sports.²⁴ The NCAA is subdivided into three

²¹ *About: Health and Safety*, NCAA, <http://www.ncaa.org/about/what-we-do/health-and-safety> (last visited Apr. 6, 2014). See also *Name, Purposes and Fundamental Policy*, NCAA MANUAL, *supra* note 5, at art. 1; *Branch*, *supra* note 1 (noting that the death of twenty-five college football players in the 1905 season prompted the call for reform of the sport and the formation of the association).

²² *Amateurism*, NCAA MANUAL, *supra* note 5, at art. 12. See also Zimbalist & Sack, *supra* note 1, at 1-2 (describing the evolution of NCAA rules as initially prohibiting any form of compensation or inducements to student-athletes in order to address concerns of improper recruiting to allowing athletic-based scholarships given the increased commercialism of college sports).

²³ *About: Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Apr. 6, 2014). The NCAA is led by a president and features an Executive Committee with budgetary oversight functions. Representative member institutions compose an extensive committee structure which examines issues and makes legislative and policy recommendations to leadership groups in each Division. These groups include the Division I Board of Directors, the Division II Presidents Council, and the Division III Presidents Council.

²⁴ *2011-12 Path to the Student-Athlete*, NCHSAA, available at https://www.nchsaa.org/sites/default/files/attachments/NCAA-Eligibility-Center-Brochure_0.pdf (last visited Apr. 6, 2014). The NCAA is divided into three divisions of play from which member schools can choose to participate. Division I, comprised of 340 member schools, has the largest programs and provides the most athletically related financial aid for student-athletes. Division II provides limited financial aid across 290 member schools. Division III provides no athletic financial aid to its 436 schools. The NCAA also contains ninety-five member conferences in all three divisions. Overall membership—counting schools, conferences and related associations—is 1,273.

divisions. Division I, which is comprised of the largest schools with the most extensive athletic programs, is the primary target of the litigation.

The NCAA exists to ensure a level playing field in collegiate athletic competitions and to administer championships²⁵ and the association proclaims commitment to the best interests of the student-athletes' education, welfare, and athleticism.²⁶

As the governing body of intercollegiate athletics, the NCAA's mission has been to ensure a "clear line of demarcation" between intercollegiate athletics and professional sports in order "to maintain intercollegiate athletics as an integral part of the education program and the athlete as an integral part of the student body"²⁷ The Association has extensive rules governing student-athlete eligibility in furtherance of its principle that "[o]nly an amateur student-athlete is eligible for intercollegiate athletics in a particular sport."²⁸ Among these rules are academic eligibility standards as well as prohibitions on the use of agents, involvement with professional teams, outside employment, and receipt of pay for participation in athletics or for promotion of commercial items or activities.²⁹

While NCAA rules prohibit payments to student-athletes, institutions may award athletic scholarships not to exceed the actual costs of tuition, room and board, required books, and

Division I is further subdivided based on football affiliation. The Football Bowl Subdivision ("FBS") is comprised of 125 schools with football programs participating at the highest level of intercollegiate football competition and is characterized by postseason competition play outside the NCAA structure (such as invitational "bowl" games) and by higher financial aid allocations. The Football Championship Subdivision ("FCS"), formerly known as Division I-AA, contains 122 schools that participate in the NCAA's Division I Football Championship. *Id.* The remaining ninety-eight Division I schools do not sponsor football.

²⁵ Josephine R. Potuto, *The NCAA Rules Adoption, Interpretation, Enforcement and Infractions Processes: The Laws that Regulate Them and the Nature of Court Review*, 12 VAND. J. ENT. & TECH. L. 257, 262 (2010).

²⁶ *Name, Purposes and Fundamental Policy*, NCAA MANUAL, *supra* note 5, at art. 1.3.1. *See also Responsibility for Control*, NCAA MANUAL, *supra* note 5, at art. 2.1.1 (providing that "[i]t is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the [NCAA].").

²⁷ *Fundamental Policy*, NCAA MANUAL, *supra* note 5, at art. 1.3.1.

²⁸ *Id.* at 59.

²⁹ *Id.* at 73-4 (listing non-permissible promotional activities).

medical and life insurance.³⁰ Athletic scholarships, however, may fall short of the full cost of attendance, failing to account for expenses such as transportation to and from school, entertainment, and other basic life necessities.³¹ Student-athletes are generally not considered “employees” of their respective institutions and therefore are not eligible for state or federal employment programs such as workers’ compensation or social security disability insurance protection. A recent petition seeking to unionize certain scholarship student-athletes also threatens to unsettle this status.³²

NCAA rules impact more than 450,000 student-athletes who participate in competitive NCAA sports.³³ Although not “members” of the NCAA, these student-athletes must agree to abide by NCAA regulations, which require the waiver of certain

³⁰ *Id.* at 199-222 (listing nine specific benefits that may be financed by the university).

³¹ See Huma & Staurowsky, *supra* note 2, at 3. See also Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1022 (2012) (reporting that the average deficit between full athletic grant-in-aid scholarships and the actual cost of attendance ranges between \$3,222 and \$6,000 per year).

³² Northwestern Univ. & College Athletes Players Ass’n, 13-RC-121359 (NLRB-Reg. 13, Mar. 26, 2014), available at <http://www.nlr.gov/case/13-RC-121359>. The NCAA has consistently prevailed in challenges by student-athletes seeking payment under state workers’ compensation schemes. Fram & Frampton, *supra* note 31, at 1015. Limited health care insurance is provided to qualifying current student-athletes who become injured or disabled during their eligibility. *Student-Athlete Insurance Programs*, NCAA, <http://www.ncaa.org/about/resources/insurance/student-athlete-insurance-programs> (last visited Apr. 6, 2014). In January 2014, a group of football players at Northwestern University filed a petition to form a labor union with the National Labor Relations Board (NLRB). This effort to unionize asserts that college scholarship athletes are “employees.” Peter Sung Ohr, Regional Directors of the NLRB Region 13, ruled that Northwestern scholarship football players are “employees” of the school within the meaning of the National Labor Relations Act and eligible to form a union. See *Northwestern University and College Athlete Players Association, (CAPA)*, 13-RC-121359 (NLRB-Reg. 13, Mar. 26, 2014), <http://online.wsj.com/public/resources/documents/Decision032614.pdf> (last visited April 10, 2014). The University has appealed to the full NLRB headquarters in Washington DC. See *Northwestern’s Request for Review of Regional Director’s Decision and Direction of Election*, 13-RC-121359 (NLRB-Reg. 13, April 9, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

³³ *About: Who We Are*, NCAA, <http://www.ncaa.org/about/who-we-are> (last visited Apr. 6, 2014).

rights enjoyed by the general student population.³⁴ For example, NCAA regulations restrict student-athletes in employment and outside income, impose mandatory drug testing, and require consent to waive federal educational privacy laws and publicity rights.³⁵ NCAA rules also prohibit a student-athlete from using his or her name or picture for commercial purposes,³⁶ or accepting compensation for or permitting the use of “of his or her name or picture to advertise, recommend or promote . . . a commercial product or service”³⁷ As a condition of participation, however, Division I student-athletes are required to sign NCAA Form 08-3a, which provides 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.”³⁸ 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, is a central question in the pending *In re Likeness* litigation.

B. NCAA Business and Licensing Model

Despite the strict requirements of amateurism, the commercial market for big-time college sports is seemingly insatiable. While student-athletes may not receive compensation beyond the athletic scholarship, head coaches at elite programs in Division I men’s football and basketball garner multi-million dollar contracts.³⁹ In addition to regulating athletic competition

³⁴ *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F.2d 1081, 1090 n.11 (7th Cir. 1992) (“The NCAA is a private, voluntary membership organization, and, as such, any athletes participating in intercollegiate competition at its member institutions must abide by its rules to compete.”).

³⁵ See Maureen A. Weston, *NCAA Sanctions: Assigning Blame Where It Belongs*, 52 B. C. L. REV. 551 (2011).

³⁶ *Nonpermissible*, NCAA MANUAL, *supra* note 5, at 73.

³⁷ *Id.*

³⁸ FORM 08-3A: STUDENT-ATHLETE STATEMENT - DIVISION I (2010), *available at* <http://www.liberty.edu/media/1912/compliance/newformsdec2010/currentflames/compliance/SA%20Statement%20Form.pdf> (last visited Apr. 6, 2014).

³⁹ Zimbalist & Sack, *supra* note 2, at 13-14 (“The salaries of the top-paid FBS football head coaches in 2011-12 ranged from \$2,275,545 to \$5,193,500. For the 25 top-paid basketball coaches the range was \$1,521,370 to \$4,987,578.”). See also Christian

among its members, the NCAA also enters into agreements to license the NCAA name and logo and negotiates television and promotional contracts relating to NCAA championship events.⁴⁰

According to the NCAA, “college athletics programs annually generate about \$6.1 billion from ticket sales, radio and television receipts, alumni contributions, guarantees, royalties and NCAA distributions. Another \$5.3 billion is considered allocated revenue, which comes from student fees allocated to athletics, direct and indirect institutional support, and direct government support.”⁴¹ The NCAA projects its own revenue for 2012-13 at \$797 million.⁴² Top athletic programs receive lucrative sponsorship deals, millions in television revenue, and potential athletic notoriety presumably “worth billions in publicity” to the schools.⁴³

1. Media Broadcasts

The overwhelming majority of NCAA revenue comes from the \$10.8 billion, fourteen-year agreement with CBS Sports and Turner Broadcasting for the media rights to broadcast the Division I Men’s Basketball Championship.⁴⁴ Revenues in college football are even more lucrative. Contrary to popular belief, the NCAA does not receive or control money from the Football Bowl Championship Series—that revenue is instead maintained within the six elite conferences.⁴⁵ The NCAA was held to have violated

Dennie, *Changing the Game: The Litigation That May Be the Catalyst For Change in Intercollegiate Athletics*, 62 SYRACUSE L. REV. 15, 17-18 (2012) (noting that intercollegiate athletic conferences negotiate separate media rights agreements, such as the Southeastern Conference’s fifteen-year, \$2.5 billion deal with ESPN).

⁴⁰ RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 2 (7th ed. 2011).

⁴¹ *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Apr. 6, 2014).

⁴² *Id.*

⁴³ Fram & Frampton, *supra* note 31, at 1019 (quoting Texas Christian University chancellor Victor Boschini Jr.). Texas A&M University reported skyrocketing donations, in excess of \$740 million, during the 2012-13 fiscal year, its first after joining the Southeastern Conference. See Sam Khan Jr., *Texas A&M Raises \$740 Million*, ESPN (Sep. 18, 2013, 4:19 PM), http://espn.go.com/college-football/story/_/id/9690028/texas-raises-record-740-million-donations-fiscal-year.

⁴⁴ *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Apr. 6, 2014).

⁴⁵ *Finances*, NCAA, <http://www.ncaa.org/about/resources/finances> (last visited Apr. 6, 2014). In addition to the post-season bowl games, a new College Football Playoff (CFP) system will go into effect in the 2014-15 season, with two semi-final games

federal antitrust laws when it attempted to preclude the member schools' rights to negotiate television rights for college football games in *NCAA v. Board of Regents of the University of Oklahoma*.⁴⁶ Since that decision, individual schools and conferences have negotiated their own respective broadcasting deals.⁴⁷ The trend, certainly in football, is toward direct dealings between the network and elite conferences and schools. For example, ESPN agreed to pay over \$10 billion in a five-year deal to televise college football in contracts with individual conferences and universities.⁴⁸ In a deal with the Southeastern Conference alone, ESPN will pay \$2.25 billion over fifteen years for wall-to-wall SEC coverage; \$2.8 billion over twenty-five years for the television rights to Big Ten Conference games.⁴⁹ In a recent Drake Group report, economist Andrew Zimbalist identified a daunting, growing inequality in resources between the elite conferences within the FBS (formerly Division IA) and the remaining 78.5% non-elite Division I schools, concluding that “[t]he growing inequality is clearly painting a bleak picture for all but the top FBS programs.”⁵⁰

2. NCAA Product Licensing

In addition to broadcast agreements, the NCAA receives revenue through business arrangements with various commercial enterprises to license the rights to use and sell NCAA products

culminating in a national championship game. ESPN will reportedly pay \$5.64 billion under a twelve-year contract for broadcasting rights to the CFP. *See e.g.*, Complaint and Jury Demand - Seeking Injunction and Individual Damages, *Jenkins v. NCAA*, Case No. 3:33-av-0001, at ¶ 84 (N.J. March 17, 2014).

⁴⁶ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984).

⁴⁷ James Andrew Miller, Steve Eder & Richard Sandomir, *College Football's Most Dominant Player? It's ESPN*, N.Y. TIMES (Aug. 24, 2013), http://www.nytimes.com/2013/08/25/sports/ncaafotball/college-footballs-most-dominant-player-its-espn.html?pagewanted=all&_r=0.

⁴⁸ *Id.*

⁴⁹ *See* Third Consolidated Amended Class Action Complaint, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 3772677, at ¶ 442 (N.D. Cal. July 18, 2013).

⁵⁰ Zimbalist & Sack, *supra* note 2, at 11 (noting that revenue distribution from the NCAA Men's Basketball Championship is allocated according to success in the tournament or according to the athletic program size and scholarships, rather than to markers of academic success).

and merchandise. The Collegiate Licensing Company (CLC), a subsidiary of IMG College, handles trademarked product licensing for the NCAA⁵¹ as well as nearly two hundred colleges and universities, athletic conferences, bowl games, and the Heisman Trophy. The retail market for collegiate licensed merchandise is in the range of \$4.6 billion.⁵² Team jerseys affixed with the numbers of the star players are the highest selling products.⁵³ Stated reasons for the licensing programs are to protect NCAA “Officially Licensed” trademarks, ensure product and quality control for the consumer, and to “[g]enerate revenue to support and enhance NCAA programs and to fund scholarships, programs or services to student-athletes of [the] member schools and conferences.”⁵⁴ In August 2013, however, the NCAA ceased the sale of individual and team jerseys and athlete memorabilia through its website, acknowledging such sales as “hypocritical.”⁵⁵ Individual schools and other merchandising sites continue the sale of such items.⁵⁶

⁵¹ NCAA *Licensing Program FAQs*, NCAA, <http://www.ncaa.org/championships/marketing/ncaa-licensing-program-faqs> (last visited Apr. 6, 2014). Note, however, that “[t]he NCAA does not manage or monitor the licensing agreements of the conferences, schools or its other member institutions.” *Id.*

⁵² *About CLC*, CLC, <http://www.clc.com/About-CLC.aspx> (last visited Apr. 6, 2014).

⁵³ See Erin Cronk, Note, *Unlawful Encroachment: Why the NCAA Must Compensate Student-Athletes for the Use of Their Names, Images, and Likenesses*, 34 U. LA VERNE L. REV. 135, 146 (2013) (commenting that the “NCAA’s use of student-athletes’ identities to sell jerseys capitalizes on the hard work of individual student-athletes without providing the student-athletes compensation.”).

⁵⁴ NCAA *Licensing Program FAQs*, NCAA, <http://www.ncaa.org/championships/marketing/ncaa-licensing-program-faqs> (last visited Apr. 6, 2014).

⁵⁵ Mike Schlabach, *NCAA Puts End to Jersey Sales*, ESPN (Aug. 9, 2013, 1:10 PM), 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.*

⁵⁶ Raphielle Johnson, *NCAA Will No Longer Sell Jerseys, Memorabilia Associated with Individual Players*, NBC SPORTS (Aug. 8 2013, 9:19 PM), <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>.

3. Video Games, DVDs, and Online Streaming

The NCAA also expanded its media licenses to sell rebroadcasts, DVDs, and other multimedia forms of NCAA games and championships.⁵⁷ Since 1993, the NCAA had an exclusive licensing agreement with Electronic Arts (EA), which annually produces highly successful, interactive video game series, including NCAA Football, NCAA Basketball, and NCAA: March Madness Basketball, under the label of EA Sports.⁵⁸ The video games feature teams from a majority of the Division I schools, simulating intercollegiate competition. The video avatars are anonymous. Player names were not used, but the avatars were easily identifiable and designed using the likenesses of actual student-athletes, providing the user with a more realistic experience.⁵⁹ Game users are able to purchase separate online programs, which allowed for actual team rosters, including player names, which could be uploaded into the game. A picture of the Most Valuable Player of the year appeared on the cover of the EA video game packaging and in advertisements for the game. Reportedly the NCAA, EA, and CLC met annually regarding the video game product approval process.⁶⁰ In July 2013, the NCAA announced it would not renew its video game contract with EA Sports, which was set to expire at the end of 2013.⁶¹ Two days later, more than 150 colleges, conferences, and bowl games

⁵⁷ Cronk, *supra* note 53, at 148 (“The NCAA licenses DVDs that document anything from a team’s football season, era, or playoff series and sell for approximately \$29.99. The NCAA website also provides a variety of downloadable videos featuring the accolades of student-athletes including game highlights and championship celebrations.”).

⁵⁸ Third Consolidated Amended Class Action Complaint, In re NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 WL 3772677, at ¶ 483-84 (N.D. Cal. July 18, 2013) (noting that EA’s annual sales of NCAA Football are in excess of two million units).

⁵⁹ Hart v. Elect. Arts, Inc., 717 F.3d 141, 146 (noting that the game’s avatars use real player names, stats, hometowns, jersey numbers, height, weight, and even facial features).

⁶⁰ Third Consolidated Amended Class Action Complaint, In re NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 WL 3772677, at ¶ 482 (N.D. Cal. July 18, 2013).

⁶¹ 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/>.

individually signed-on to extend the contract with EA Sports for another three years.⁶²

C. Where NCAA Money Goes: Revenue Distributions and Non-Revenue Receipts

The NCAA distributes nearly ninety six percent of its revenue to member conferences and institutions.⁶³ Despite these massive revenues, only twenty-three of the top athletic programs actually produce a profit.⁶⁴ In the arms race of college sports, expenditures exceed revenue in most Division I athletic programs. In fact, revenues from men's basketball and football are used to support women's and men's non-revenue generating sport programs.⁶⁵ The NCAA distributes money to the respective conferences, who in turn distribute the revenue to individual institutions based on formulas and policies specific to each conference.

⁶² 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/>.

⁶³ *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Apr. 6, 2014). See Zimbalist & Sack, *supra* note 2, at 12 for a discussion of NCAA revenue distribution within the FBS ("Approximately 95 percent of the NCAA's revenue comes from the March Madness Division I basketball tournament. Of the \$467 million, \$184.1 (40 percent) was distributed to schools according to their success in the basketball tournament over the previous six years . . . \$368.2 million, or 78.8 percent of the total NCAA distribution, is allocated according either to success in the March basketball tournament or to the size of the athletic program and its scholarships . . . \$122.7 million [is] allocated to the scholarship fund, which strongly favors FBS programs where 85 full football grants-in-aid are allowed. This distribution means that money generated in the sport of basketball is going to support football programs, which appears to make neither logical nor educational sense.").

⁶⁴ Steve Berkowitz, *Most NCAA Division I Athletic Departments Take Subsidies*, USA TODAY (July 1, 2013), <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/>.

⁶⁵ Jonathan Chait, *Fixing College Sports: Why Paying Student Athletes Won't Work*, N.Y. MAGAZINE (Nov. 29, 2011, 11:36 AM), <http://nymag.com/daily/sports/2011/11/chait-why-paying-student-athletes-wont-work.html>.

II. *IN RE LIKENESS* PROGENY

A. *Case Chronology (aka The O'Bannon Litigation)*

What is now known as *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* originally began as a series of individual lawsuits across the country. This putative class-wide litigation is considered a game changer that could disrupt the NCAA business model for financing Division I intercollegiate athletics. The litigation has been ongoing since 2009 and has involved thirty-eight court orders and 174 filings as of March 2014—a veritable litigation quagmire.⁶⁶ The following summarizes a timeline of the litigation and claims leading up to the pending class litigation.

1. Right of Publicity Claims

The first lawsuit was initiated in 2009 by former Rutgers football player, Ryan Hart, in a putative class action suit in New Jersey federal court.⁶⁷ Hart alleged that EA Sports misappropriated his identity and right of publicity under state law by using his likeness to enhance the commercial value of the popular NCAA Football video game.⁶⁸ Specifically, the 2004-2006 versions of the video game series had a Rutgers quarterback who—like Hart—wore number thirteen, was 6 feet 2 inches tall, weighed 197 pounds, matched Hart's skin tone and facial features, and hailed from Hart's home state.⁶⁹ EA argued that, whether or not it violated Hart's right of publicity, it was entitled to summary

⁶⁶ See Notice of Motion and Motion of National Collegiate Athletic Association to Strike Antitrust Plaintiffs' Motion for Class Certification, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2012 WL 6867990 (N.D. Cal. Oct. 17, 2012); Joint Case Management Conference Statement, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2011 WL 1357399 (N.D. Cal. Mar. 31, 2011).

⁶⁷ See *Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757 (D. N.J. 2011) *rev'd*, 717 F.3d 141 (3d Cir. 2013). The case was initially filed in state court, but the defendants removed it to federal court where all claims except for one were dismissed. *Id.*

⁶⁸ *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 145-47 (3d Cir. 2013). The right of publicity is a form of unauthorized misappropriation of the commercial value of a person's identity. See RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). This right ordinarily does not extend to use in news reporting, commentary, entertainment, creative works, or other transformative uses. *Id.* at cmt.c.

⁶⁹ *Hart*, 717 F.3d at 146-47.

judgment on First Amendment grounds.⁷⁰ The district court agreed, holding that EA's First Amendment right to free expression outweighed the former Rutgers quarterback's publicity claims under the "transformative use" test, which permits the use of one's likeness as "raw material" in a creative work, such as a video game.⁷¹ This ruling was reversed, however, by a split panel of the Third Circuit, which held that although video games enjoy First Amendment protections, those free speech rights could be trumped by an individual's intellectual property rights in some circumstances.⁷² Applying the transformative use test, the Court determined that Hart's identity—both his physical identity and his identity within the game context—was not sufficiently transformed to allow EA to escape a right of publicity claim.⁷³ Finding that realistic depictions of the players were the "sum and substance" of the game,⁷⁴ the Court was unconvinced that the user's ability to change the avatar's appearance—or other elements—was sufficient to garner EA First Amendment protection.⁷⁵

In a factually similar suit filed in federal court in California against EA, the NCAA, and CLC, former Arizona State University ("ASU") quarterback Sam Keller asserted claims—including violation of rights of publicity, civil conspiracy, unfair competition, breach of contract, and unjust enrichment—based on the defendants' use of the likenesses of former student-athletes in archival footage, as avatars (in video games), in photographs, and in promotions.⁷⁶ Keller sought class certification, requested that the defendants disgorge all profits earned from the sale of the video games, cease future use of his and other class members'

⁷⁰ *Hart*, 808 F. Supp. 2d at 766.

⁷¹ *Id.* at 787. The district court noted that, under the transformative use test, "the inquiry is whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question." *Id.* at 779 (quoting *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 406, 21 P.3d 797, 809 (2001)).

⁷² *Hart*, 717 F.3d at 170.

⁷³ *Id.* at 165–70.

⁷⁴ *Id.* at 168.

⁷⁵ *Id.*

⁷⁶ *Keller v. Elec. Arts, Inc.*, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010). The *Hart* court stated that, "*Keller* is simply [*Hart*] incarnated in California." *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, n. 28.

names or likenesses in video games, and demanded the invalidation of NCAA rules that limit student-athletes' rights to receive compensation.⁷⁷ EA again sought summary judgment, maintaining that NCAA Football was protected speech under the First Amendment. Judge Wilken, however, determined that EA's use fell short of the standard for transformative use.⁷⁸ In July 2013, the Ninth Circuit affirmed the ruling 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."⁷⁹

2. Sherman Act Antitrust Claims

In 2009 Edward O'Bannon, a former University of California, Los Angeles ("UCLA") basketball player and former ASU football player Craig Newsome also brought separate antitrust complaints against the NCAA, its licensing arm CLC, and EA.⁸⁰ The complaints allege that the NCAA engages in anticompetitive activity by restricting college players' publicity rights and by authorizing the use of their likeness in game footage—including in television broadcasts, rebroadcasts, DVDs, streaming media, etc.—video games, and merchandise without compensating those student-athletes. The plaintiffs liken this to a conspiracy to fix the amount of compensation paid to student-athletes at \$0 and to deny them access to the same group licensing markets.⁸¹

⁷⁷ *Keller*, 2010 WL 530108, at *2.

⁷⁸ *Id.* at *5.

⁷⁹ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013). Circuit Judge Bybee noted that "[i]n the 2005 edition of the game, the virtual starting quarterback for Arizona State wears number 9, as did Keller, and has the same height, weight, skin tone, hair color, hair style, handedness, home state, play style (pocket passer), visor preference, facial features, and school year as Keller." *Id.* at 1272. The NCAA's petition for certiorari review at the U.S. Supreme Court remains pending as of March 2014. *In re NCAA Student-Athlete Likeness Litigation*, 82 U.S.L.W. 3137 (Sept. 23, 2013).

⁸⁰ *See Order on NCAA's and CLC's Motion to Dismiss*, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 2010 WL 445190, at *2 (N.D. Cal. Feb. 8, 2010).

⁸¹ *Id.* at *5. A contract, combination, or conspiracy that unreasonably restrains trade under either a per se rule of illegality or a rule of reason analysis and that affects interstate commerce violates Sherman Antitrust Act, 15 U.S.C. § 1. *See Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001). *See also Babette Boliek, Antitrust, Regulation, and the "New" Rules of Sports Telecasts*, 65 HASTINGS L.J. 501, 521 (2014)

According to the plaintiffs, this practice constitutes a restraint of trade in violation of the Sherman Antitrust Act. The NCAA counters, however, that its amateurism rules are presumptively pro-competitive and essential to its core activity of administering intercollegiate athletics.

3. Pending: *In re Likeness* Consolidated Class Action Claims

In January 2010, Presiding Judge Claudia Wilken, of the Northern District of California, consolidated the several cases making similar claims against the NCAA, CLC, and EA.⁸² A number of high-profile former athletes also joined the suit.⁸³ As consolidated, the “[p]laintiffs are twenty-five current and former student-athletes who played for NCAA men’s football or basketball teams between 1953 and the present.”⁸⁴ The plaintiffs moved for class certification, alleging that the NCAA violates state publicity rights law through unauthorized use of the college players’ NIL, as well as federal antitrust law by conspiring with EA and CLC to restrain competition in the market for the

(analyzing sport league telecast contracts liability under antitrust law, and suggesting immunity where the restraint is part of the core activity or purpose of the league).

⁸² See Order Granting in Part and Denying in Part EA’s Motion to Stay, In re NCAA Student-Athlete Name & Likeness Litig., 2010 WL 5644656, at *1 (N.D. Cal. Dec. 17, 2010).

⁸³ In January 2011, former University of Cincinnati basketball student-athlete Oscar Robertson, former University of Connecticut basketball student-athlete Tate George, and former Ohio State University football student-athlete Ray Ellis joined the suit. Former University of San Francisco basketball student-athlete Bill Russell joined the lawsuit as well. Nancy Kerchival, *Oscar Robertson Among Former Athletes Suing NCAA*, *Electronic Arts*, BLOOMBERG (Jan. 26, 2011), <http://www.bloomberg.com/news/2011-01-27/oscar-robertson-among-former-college-athletes-suing-ncaa-electronic-arts.html>; see also Third Consolidated Amended Class Action Complaint, In re NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 WL 3772677, at ¶¶ 44–67 (N.D. Cal. July 18, 2013).

⁸⁴ Order Denying Motion to Dismiss, In re NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 WL 5778233, at *1 (N.D. Cal. Oct. 25, 2013). See also Third Consolidated Amended Class Action Complaint, In re NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 WL 3772677, at ¶¶ 25–236 (N.D. Cal. July 18, 2013) (noting four publicity plaintiffs and twenty-one antitrust plaintiffs). Although the case is officially styled as *In re Likeness*, it is commonly referred to as “the O’ Bannon case.”

commercial use of their names, images, and likenesses.⁸⁵ The plaintiffs also filed both a 109-page expert report by Stanford University economist Roger G. Noll supporting the request for class certification, as well as a valuation expert report by Larry Garbrandt. Unions from the entertainment industry and professional sports have filed amici curiae briefs in favor of the student-athletes. United Steelworkers and the National College Players Association (NCPA) have also voiced their support for the student-athletes.⁸⁶

In August 2012, O'Bannon's attorneys filed a motion to include current student-athletes in the class and sought to create temporary trusts for current student-athletes, which would be available at the conclusion of a student-athlete's eligibility and funded with proceeds from football and basketball games. According to the NCAA, the plaintiffs' class potentially spans

[H]undreds of thousands of current and former Division I football and men's basketball student-athletes ("SAs"), who attended more than 300 schools over the course of 60 years, on the theory that NCAA amateurism rules illegally 'restrained' every one of those SAs from selling his school the 'broadcast license' supposedly needed to legally broadcast the football or basketball games in which he played.⁸⁷

A hearing on class certification petition was held in June 2013⁸⁸ and in July 2013 the plaintiffs filed a 106-page Third

⁸⁵ Third Consolidated Amended Class Action Complaint, In re NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 WL 3772677, at ¶¶ 248-95, 553-58 (N.D. Cal. July 18, 2013).

⁸⁶ See Huma & Staurowsky, *supra* note 2. See also Tom Farrey, *NCAA Motion Denied in Player Suit*, ESPN (Nov. 5, 2013, 6:01 PM), http://espn.go.com/espn/otl/story/_id/9879455/judge-denies-motion-dismiss-ed-obannon-ncaa-lawsuit (noting the NCPA is supported by United Steelworkers).

⁸⁷ NCAA's Opposition to Motion for Class Certification, In re NCAA Student-Athlete Likeness Antitrust Litig., 2013 WL 1005475, at *1 (N.D. Cal. Mar. 14, 2013).

⁸⁸ See, e.g., Supplemental Brief of Antitrust Plaintiffs in Support of Class Certification, In re Student-Athlete Name & Likeness Licensing Litig., 2013 WL 2458332 (N.D. Cal. June 6, 2013).

Consolidated Amended Class Action Complaint (3CAC),⁸⁹ with fifty-eight law firms listed as counsel, representing all current and former Division I college men's basketball and football players whose images may be or could have been included in video games, game footage, or on memorabilia.⁹⁰ The 3CAC proposes two antitrust classes: 1) an Antitrust Declaratory and Injunctive Relief Class of former and current college athletes; and 2) an Antitrust Damages class comprised of only former college athletes.⁹¹ The 3CAC also sets forth a Right of Publicity Class consisting of all players photographed or included in EA video games.⁹²

The NCAA moved to oppose class certification, reiterating its positions that, 1) plaintiffs should not be expanded to include current student-athletes; 2) NIL rights during live broadcasts should not factor into the litigation; and 3) the plaintiffs lacked evidence to support assertions of class-wide claims of publicity rights and antitrust violations, or actual injury thereof.⁹³ The NCAA also moved to dismiss the entire lawsuit, asserting that "as a matter of law" its amateurism rules do not violate the Sherman Act and that NCAA forms and amateurism rules do not restrict former student-athletes from receiving or being promised compensation for playing college sports.⁹⁴

⁸⁹ Third Consolidated Amended Class Action Complaint, 2013 WL 3772677.

⁹⁰ *Id.* at ¶ 16.

⁹¹ *Id.*

⁹² *Id.* at ¶ 330.

⁹³ NCAA's Opposition to Motion for Class Certification, In re NCAA Student-Athlete Likeness Antitrust Litig., 2013 WL 1005475, at *1 (N.D. Cal. Mar. 14, 2013) ("There is no classwide evidence that APs' hypothetical 'broadcast licenses' exist, that NCAA schools would be interested in buying them, or that SAs are in a position to sell them, nor could there be: many state publicity rights laws, and federal Copyright law, deny sporting event participants the legal right to interfere with sports broadcasts. There is no classwide evidence how APs' hypothetical 'group licensing' transactions would be carried out, which of the putative class members might have benefited from those transactions, or how much they might have received. There is no evidence of any kind that the NCAA does anything to restrain former SAs from selling what APs call their 'name, image or likeness' ('NIL') after graduation.")

⁹⁴ NCAA's Motion to Dismiss Third Consolidated Class Action Complaint, In re NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 WL 5402523 (N.D. Cal. Sept. 17, 2013).

In September 2013, EA and CLC appeared to have settled the lawsuit with the named plaintiffs for a reported \$40 million.⁹⁵ EA also announced that it would not produce a 2014 version of the football video game, perhaps to the dismay of the plaintiffs' counsel.⁹⁶ Yet, as of March 2014, the EA settlement has not been filed with, or received the requisite approval by, the court.⁹⁷

The NCAA—an obvious target—has been virtually raked through the coals in the court of public opinion and in the federal courts in California.⁹⁸ The NCAA's attempt to dismiss the right of publicity claims on First Amendment grounds failed (yet it has petitioned the U.S. Supreme Court for review)⁹⁹ and the antitrust claims survived, as the district court ruled that the plaintiffs sufficiently alleged anti-competitive effects for “deprivation of use of images . . . in collegiate licensing market.”¹⁰⁰ As the lone defendant, the NCAA vowed to take the case to the Supreme Court and hired two additional law firms for trial and appellate representation.¹⁰¹ Lead plaintiff's attorney, Michael Hausfeld, has stated that any potential settlement with the NCAA would have to

⁹⁵ See Samit Sarkar, *Lawyers Never Intended for EA to Stop Making NCAA Football Games*, POLYGON (Oct. 5, 2013, 10:00 AM), <http://www.polygon.com/2013/10/5/4803216/ea-sports-ncaa-football-cancellation-lawyers-never-intended>. Details regarding how the settlement funds will be allocated and delivered among the varied groups of student-athletes remain in question. See *id.*

⁹⁶ See Steve Berkowitz, *EA Drops Football in '14, Settles Cases as NCAA Fights*, USA TODAY (Sept. 26, 2013, 10:37 PM), <http://www.usatoday.com/story/sports/college/2013/09/26/ea-sports-ncaa-13-video-game-keller-obannon/2878307/>. See also Sarkar, *supra* note 95.

⁹⁷ Order Resolving Cross-Motions for Summary Judgment; Granting Motion to Amend Class Definition; Denying Motion for Leave to File motion for Reconsideration, In re NCAA Student-Athlete Name & Likeness Licensing Litigation, 2014 WL 1410451, at * 2 (N.D. Cal. April 11, 2014).

⁹⁸ See, e.g., Richard Levick, *The O'Bannon Case: A Golden Opportunity for College Sports Programs*, FORBES (Aug. 8, 2013, 9:30 AM), <http://www.forbes.com/sites/richardlevick/2013/08/08/the-obannon-case-a-golden-opportunity-for-college-sports-programs/> (“[I]t seems that of late the NCAA cannot do anything right.”).

⁹⁹ In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1284 (9th Cir. 2013). The NCAA has sought certiorari review of this decision. In re NCAA Student-Athlete Likeness Litigation, 82 U.S.L.W. 3137 (Sept. 23, 2013).

¹⁰⁰ Order Denying Motions to Dismiss, In re NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 WL 5778233, at *6 (N.D. Cal. Oct. 25, 2013).

¹⁰¹ 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/>.

involve both a monetary payout as well as changes in NCAA rules regarding student-athlete compensation.¹⁰² Lawyers eyeing a new market for representing college athletes in potential endorsement deals have begun to swarm.¹⁰³

B. *Rulings on Motions to Dismiss and Class Certification*

1. NCAA's Motion to Dismiss Denied

On October 25, 2013, Judge Wilken denied the NCAA's motion to dismiss the antitrust claims.¹⁰⁴ The NCAA sought dismissal of the plaintiffs' antitrust claims on three grounds: 1) that the plaintiffs' claims are "nothing more than a challenge to the NCAA's rules on amateurism;" 2) that "under both state and federal law, student-athletes 'have no protectable name, image or likeness right in sports broadcasts;" and 3) that "the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, preempts any rights of publicity that [the plaintiffs] would otherwise enjoy."¹⁰⁵

The court rejected the NCAA's mantra that its amateurism rules were immune from antitrust scrutiny based on one dictum sentence in *NCAA v. Board of Regents*, distinguishing that case as a challenge by universities against the NCAA's television plan that did not address NCAA amateurism rules.¹⁰⁶ The court noted that while *Board of Regents* "gives the NCAA 'ample latitude' to adopt rules preserving 'the revered tradition of amateurism in

¹⁰² Steve Berkowitz, *O'Bannon Lawyer: Settlement Would Require NCAA Payment*, USA TODAY (Oct. 8, 2013, 7:24 PM), <http://www.usatoday.com/story/sports/college/2013/10/08/ncaa-ed-obannon-sam-keller-possible-settlement-talks/2947889/>.

¹⁰³ *See, e.g., Winston & Strawn Launches College Sports Practice Group*, WINSTON & STRAWN LLP (October 2, 2013), <http://www.winston.com/en/thought-leadership/winston-strawn-launches-college-sports-practice-group.html> (announcing that the New York City-based firm and Partner Jeff Kessler will spearhead a division of representation for college athletes). Winston & Strawn, along with Kessler, filed an antitrust lawsuit in New Jersey federal court, challenging the NCAA's "cap" on player compensation and scholarship limits, naming not only the NCAA but also the five "powerhouse" conferences (SEC, Pac-10, Big 10, Big 12, and ACC). Complaint and Jury Demand – Class Action Seeking Injunction and Individual Damages, *Jenkins v. NCAA*, No. 33:3-av-00001 (March 17, 2014).

¹⁰⁴ Order Denying Motions to Dismiss, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 5778233 (N.D. Cal. Oct. 25, 2013).

¹⁰⁵ *Id.* at *4.

¹⁰⁶ *Id.* at *5-6.

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."¹⁰⁷ The Court cited recent judicial decisions recognizing the viability of antitrust claims by student-athletes and suggested that all NCAA rules are subject to antitrust scrutiny.¹⁰⁸

The court ruled that the plaintiffs' allegation that "the NCAA's rules prohibiting monetary compensation for student-athletes ultimately restrain competition among Division I schools in the market for football and basketball players—the 'college education' market" was sufficient to state a claim under the Sherman Antitrust Act.¹⁰⁹

Regarding the NCAA's argument that the First Amendment and the California Civil Code precluded student-athletes' publicity rights in sports broadcasts, the court instead found that student-athletes' publicity rights in sports broadcasts were integral to their antitrust claims. The court stated that the plaintiffs' "antitrust claims depend in part on the existence of a 'group licensing' market where, absent NCAA rules, student-athletes

¹⁰⁷ Order Denying Motions to Dismiss, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 5778233, at *6. At the summary judgment hearing, Judge Wilken appeared to continue to find the amateurism defense spurious. Summary Judgment Hearing Transcript, *supra* note, at 59 (stating "I have to say I don't think amateurism is going to be a useful word here . . . I have a problem with the competitive balance question, the integration of athletics in education . . . that the restraint helps with competitive balance."); Order Resolving Cross-Motions for Summary Judgment, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014 WL 1410451, at *12-13 (N.D. Cal. April 11, 2014) (denying NCAA's request for summary judgment based on pro-competitive justification rationales).

¹⁰⁸ *Id.* at *5. Among the cases cited were *Rock v. NCAA*, 2013 WL 4479815 (S.D. Ind. Aug. 16, 2013) (finding that NCAA limits on Division I football scholarships injure student-athletes in the market for their labor); *White v. NCAA*, CV 06-999-RGK (C.D. Cal. Sept. 20, 2006) (holding that NCAA limits on financial aid for student-athletes restrained competition in the markets for recruiting student-athletes); and *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (attacking NCAA Division I restrictions on the number of full scholarships on the grounds that they restrain competition in the "market in which NCAA member schools compete for skilled amateur football players.").

¹⁰⁹ Order Denying Motions to Dismiss, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 5778233, at *6 (N.D. Cal. Oct. 25, 2013).

would be able to sell their publicity rights in ‘broadcasts or rebroadcasts of claims in this action’¹¹⁰

The court acknowledged that a higher court has not ruled on the question of whether the First Amendment precludes athletes from asserting a right of publicity against the use of their identity during a sports broadcast (as newsworthy), but it suggested that an athlete’s right of publicity may trump First Amendment rights where the broadcasts are primarily commercial.¹¹¹

The court also ruled that the Copyright Act does not preempt the plaintiffs’ claims, which are based principally on an injury to competition, not simply misappropriation by stating, “[w]hatever preemptive effect the Copyright Act has on right of publicity claims, federal courts have made clear that ‘[i]ntellectual property rights do not confer a privilege to violate the *antitrust* laws.’”¹¹²

As Judge Wilken stated, none of the NCAA’s three arguments “provide[d] grounds for dismissing [the plaintiffs’] claims at this stage.”¹¹³ The standard on a motion to dismiss tests only whether a plaintiff alleges sufficient facts, assumed to be true, to state a claim for relief. At a hearing on the parties’ respective motions for summary judgment, the court probed counsel to set forth precisely how the claims fit into a standard antitrust paradigm in terms of defining the restraint, the product or market, the seller, the consumer, the anticompetitive injury and any procompetitive justifications. Although the June 2014 jury trial is to address the antitrust claims only, the court stated that the case has “serious case management issues,” as it became apparent that the right of publicity claims are intertwined with antitrust claims subject to trial. The court questioned whether student-athletes have a right of publicity in the broadcast of the games the NCAA licenses to various networks and how that weighs against the NCAA’s

¹¹⁰ *Id.* at *7. California Civil Code § 3344(d) provides that individuals do not have a right of publicity in the use of their image in, *inter alia*, sports broadcasts. CAL. CIV. CODE § 3344(d) (West 2014). But the district court said that, while this would preclude the plaintiffs from selling or licensing their publicity rights in California, they would not necessarily be precluded from selling their rights on the national market. *Order Denying Motions to Dismiss*, 2013 WL 5778233, at *7.

¹¹¹ *Order Denying Motions to Dismiss*, 2013 WL 5778233, at *8.

¹¹² *Id.* at *9 (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Cir. 2001) (emphasis added)).

¹¹³ *Order Denying Motions to Dismiss*, 2013 WL 5778233, at *4.

defenses of Copyright and First Amendment protection, as producers, to broadcast such events.¹¹⁴

2. Partial Class Certification Ruling for Antitrust Injunctive Relief

Judge Wilken issued the highly anticipated ruling on class certification in November 2013. Applying the standards for class certification under Federal Rules of Civil Procedure, Rule 23, the court found that the plaintiffs' putative class satisfied the requirements of numerosity, common questions of law and fact, and adequate representation. Although the NCAA argued that class members had widely varying values and publicity rights, which created a conflict of interest within the class, the court noted that the plaintiffs' alleged harm to competition was within a group licensing market—rather than individual ones—and proposed a model of equal sharing among team members within the group.

The court then authorized the certification of a class of all current and former NCAA Division I men's basketball or FBS football players "whose images, likenesses and/or names may be, or have been, included in game footage or in videogames . . ." ¹¹⁵ The certification, however, pertained only to potential injunctive relief for antitrust claims against NCAA rules that allegedly barred current and former student-athletes from entering into group licensing deals to sell or license the rights to their names, images, and likenesses in video games and game broadcasts.¹¹⁶

¹¹⁴ See Reporter's Transcript of Proceedings, Keller, et. al., v. Electronic Arts, et. al., No. 4:09CV01967, at *26-39 (N.D. Cal. Feb. 20, 2014), available at <http://www.scribd.com/doc/208937293/O-Bannon-Summary-Judgment-Hearing-Transcript> (inquiring about application of *Zachinni v. Scripps Howard Broadcasting*, 433 U.S. 562 (1977), which held that the performer had a right of publicity in his entire "Human Cannonball" performance sufficient to preclude an entire unauthorized broadcast of the performance, against the NCAA's defenses of Copyright and First Amendment protection, as producers, to broadcast such events. A ruling on summary judgment should address the legal impact of Form 08-3a waiver, the role of the First Amendment, the application of antitrust defenses, as well as whether there are genuine issues of fact for trial.)

¹¹⁵ In re NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 WL 5979327, at *10 (N.D. Cal. Nov. 8, 2013) (order granting in part and denying in part motion for class certification).

¹¹⁶ *Id.* at *7-10. In re NCAA Student-Athlete Name & Likeness Licensing Litig.

To the surprise of the plaintiff camp, the Court denied the certification of a class to pursue monetary damages.¹¹⁷ The court pointed to the lack of proof that a damages class was manageable, in particular because the plaintiffs did not identify a feasible way to determine which players were actually harmed by the NCAA's alleged anticompetitive conduct or which players were actually depicted in the video games.¹¹⁸ Wilken noted the difficulty of measuring the actual harm to scholarship athletes who stayed in college rather than going into professional play and to student-athletes who would have been displaced had the star athletes stayed. The plaintiffs could pursue damages on an individual basis or even opt-out of the injunctive class and proceed in court. A trial on the merits is slated for June 2014.

III. IS THE NCAA'S GOLDEN GOOSE DEAD? OUTCOMES AND ALTERNATIVES POST-*IN RE LIKENESS*

Although the court declined to certify a damages class, sports law experts contend that the case is “a significant development toward college athletes’ ‘being paid’” in some form and that should the Antitrust plaintiffs prevail, networks and corporate entities would need to enter into separate licensing contracts with the NCAA and student-athletes.¹¹⁹ This potential outcome is certainly broader than the NCAA or the networks anticipated upon the initial attack on video games. The following considers the impact of *In re Likeness* and analyzes options for resolving the dispute.

¹¹⁷ See McCann, *supra* note 20 (stating “[t]o the surprise of O’Bannon’s attorneys, Wilken denied certification on a key purpose of the lawsuit: that college athletes be compensated for the past use of their image and likeness on television and in video games.”).

¹¹⁸ *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 5979327, at *8-9 (N.D. Cal. Nov. 8, 2013) (order granting in part and denying in part motion for class certification) (noting that rosters in the video games contained fewer players than actual rosters, and thus that not all players were depicted in the video games).

¹¹⁹ McCann, *supra* note 20. Success on the antitrust claims would have substantial financial impact as the Sherman Act provides for treble damages, and the plaintiffs additionally seek the disgorgement of all NCAA profits relating to the alleged unauthorized use of student-athlete images.

A. Impact on Athletic Programs If NCAA Must Pay

Although the NCAA in recent years has attempted to expand its commercial operations, most of the NCAA's revenue comes from a fourteen-year, \$10.8 billion agreement with Turner Broadcasting and CBS Sports for rights to the Division I Men's Basketball Championship.¹²⁰ Despite the billions of dollars in television and licensing revenue, the NCAA is technically a non-profit and it redistributes the majority of the revenues back to its member institutions.¹²¹ The NCAA also financially supports eighty-nine national championships, including the cost of travel for all teams.¹²² The revenues also support NCAA administration and enforcement of regulations governing eligibility, recruitment, financial aid, health, safety, and rules of play.¹²³

A verdict for the plaintiffs in *In re Likeness* would impact athletic departments, who could lose nearly half their budgets as well as their non-revenue-generating (mostly women's) sports. According to Donald Remy, the NCAA's vice president for legal affairs:

[T]he plaintiffs' lawyers in the likeness case now want to make this about professionalizing a few current student-athletes to the detriment of all others . . . In particular, we would lose the very real opportunity for at least 96% of NCAA male and female student-athletes who do not compete in

¹²⁰ *Revenue*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Apr. 6, 2014). Of the \$797 million in projected NCAA revenue for 2012-13, \$702 million—almost ninety percent—is projected to come from the media rights deal with CBS Sports and Turner Broadcasting.

¹²¹ *See About: Finances*, NCAA, <http://www.ncaa.org/about/resources/finances> (last visited Apr. 6, 2014) (stating that “in the end, more than 90 cents of every dollar the NCAA generates goes to our member institutions to support student-athletes”). *But see* Stephen F. Ross, *Radical Reform of Intercollegiate Athletics: Antitrust and Public Policy Implications*, 86 TULSA L. REV. 933, 943 (2012) (criticizing the practice of subsidizing non-revenue sports that cannot meet their own expenses).

¹²² *Id.*

¹²³ *See id.* Educational benefits include a post-graduate scholarship program, now in its fifth decade, degree-completion grants, and internships.

Division I men's basketball or FBS football to play a sport and get an education, as they do today.¹²⁴

Others predict that non-football Division I schools would be forced to switch to Division II or III and eliminate athletic scholarship funding, whereas the power football conferences, who also receive significant shares of NCAA distribution based on their high rates of participation in the basketball tournament, could leave the NCAA in order to avoid sharing revenue.

B. Cancelled Deals and Leaving Money on the Table

In response to *In re Likeness*, the NCAA has discontinued some of its commercial ventures, such as the sale of jerseys on its website and the video game series with EA Sports.¹²⁵ Although the NCAA is out, more than 150 colleges, conferences, and bowl games have since approved a three-year contract extension with EA, which will alter the game title from "NCAA Football" to "College Football."¹²⁶ Whether the new contracts avoid the same publicity rights concerns is unclear.¹²⁷ Frankly, revenue opportunities are vast and foregone with the parties' respective adversarial positions. Settlement talks could explore ways to capture these opportunities for mutual benefit.

IV. ALTERNATIVES FOR SETTLEMENT AND PROPOSED CHANGES

Criticism of the amateurism rules in today's highly commercialized athletic environment has long been pervasive. Even if the NCAA were to prevail at trial, the *O'Bannon* litigation has so rattled the already skeptical public's sentiment, student-athletes' morale, and practical justifications for the conventional amateur college sports model that changes to NCAA practices are

¹²⁴ Rachel Axon & Steve Berkowitz, *NCAA Spokesman: 'Suit Threatens College Sports as We Know It'*, USA TODAY (July 19, 2013, 7:28 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/07/19/ncaa-ea-lawsuit-jake-fischer-jake-smith-darius-robinson-chase-garnham-moses-alipate-victor-keise/2569615/>.

¹²⁵ See Levick, *supra* note 98.

¹²⁶ Berkowitz, *supra* note 96. EA Sports will not produce a college football game in 2014, however. See also Sarkar, *supra* note 95.

¹²⁷ See Berkowitz, *supra* note 96. EA Sports settled three different class action lawsuits with the student-athletes for an estimated \$40 million. CLC was also included in the settlements.

inevitable. *In re Likeness* compels a concerted effort among constituents to explore viable alternatives for constructive changes to the NCAA's amateurism policies and practices.

A. Take Pay-for-Play Off the Table

An outright unrestricted pay-for-play system—administered by the NCAA or its member institutions—in collegiate sports has numerous complications. It not only changes the nature, and perhaps the “product” of college sports, but it is also legally and practically problematic. Paying student-athletes would potentially change the status of college athletes to employees, triggering a body of state and federal employment laws and regulations, such as Social Security, Medicare, unemployment, and workers' compensation. The tax-exempt status of athletic departments would also be in jeopardy.¹²⁸ Moreover, unless all student-athletes were paid, a pay-for-play system would conflict with Title IX, which prohibits schools from providing preferential benefits to men's teams, whether revenue-producing or not.¹²⁹

As Judge Wilken noted, a pay-for-play system involves manageability issues, such as how to determine the payment rates to various players and question of the equity of paying certain players more than others (or all the same). Clearly this would create a further divide among the big sports programs and other member institutions, some of whom reportedly could not afford to pay a proposed \$2,000 per year stipend to student-athletes.¹³⁰ Rules to monitor agents and protect student-athletes from exploitation would also need to be developed. A National Collegiate Players Association (NCPA) report described the current environment in the NCAA as one “that too often make college athletes easy targets for coaches, agents, advisors, and runners that have significant potential financial rewards

¹²⁸ Kristi Dosh, *Why College Athletes Will Never Be Paid*, THE BUS. OF COLLEGE SPORTS (Aug. 10, 2011), <http://businessofcollegesports.com/2011/08/10/why-college-athletes-will-never-be-paid/>. See also Dennie, *supra* note 39, at 44 (noting that legal requirements such as tax filings and workers' compensation insurance would be triggered if student-athletes were compensated in excess of full grant-in-aid).

¹²⁹ 20 U.S.C. §§ 1681-87 (West 2014).

¹³⁰ See Huma & Staurowsky, *supra* note 2, at 7.

associated with securing talented players.”¹³¹ The new market for representing college athletes must be accompanied by a system for ensuring qualified representation, similar to the rules in the professional leagues. In short, the continued rant to outright pay current players is not productive or practical within the existing regulatory environment, but other options are available.

B. Unionize Student Athletes

A number of college player groups have advocated the proposed solution of allowing college athletes to unionize. Unionization could help to balance power similar to the labor-management relationships in professional sports, enabling a player association to represent students on issues such as salary, healthcare, and other terms and conditions of play.¹³² The antitrust objections to NCAA rules would be exempted under the non-statutory exemption for terms negotiated by collective bargaining.¹³³ In March 2014, the NLRB Regional Director ruled that Northwestern scholarship football players perform services for, and are subject to the control of, the universities and are therefore “employees” of the school within the meaning of the National Labor Relations Act.¹³⁴ Accordingly, the Director directed an election for those players to vote whether to unionize with the College Athlete Players Association (CAPA) as their exclusive collective bargaining representative. As of this writing, the University has appealed the decision to the NLRB headquarters in Washington D.C.¹³⁵

Notwithstanding, a union of student-athletes would not necessarily receive protection under the National Labor Relations

¹³¹ Ramogi Huma & Ellen J. Staurowsky, *The Price of Poverty in Big Time College Sport*, NAT'L COLLEGE PLAYERS ASS'N, at 21 (2011), available at <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf>.

¹³² Fram & Frampton, *supra* note 30, at 1075.

¹³³ *Id.*

¹³⁴ See *Northwestern University and College Athlete Players Association, (CAPA)*, 13-RC-121359, at *11 (NLRB-Reg. 13, March 26, 2014), <http://online.wsj.com/public/resources/documents/Decision032614.pdf> (last visited April 10, 2014).

¹³⁵ See *Northwestern's Request for Review of Regional Director's Decision and Direction of Election*, 13-RC-121359 (NLRB-Reg. 13) (April 9, 2014), available at <http://www.nlr.gov/case/13-RC-121359>.

Act (NLRA), which governs only the private sectors—most of the top football and basketball programs are found at public universities, and therefore state labor laws would govern.¹³⁶ Public employees are not permitted to unionize in at least thirteen states and the varied patchwork of state labor laws would be untenable for regulation in a national association. Courts are generally unwilling to recognize scholarship athletes as employees.¹³⁷ Because of the varying state and federal laws that would govern unionization at the member institutions, unionization of student athletes is complicated and not the most practical solution.¹³⁸

Rather than a union, others have suggested that a trade association be formed to represent college players in-group licensing deals with broadcast networks and corporate entities, chiefly because such associations will not trigger the intricate employment law issues.¹³⁹ Former defendant CLC has proposed organizing into an entity called the “College Vault Players Association” to act as a licensing agent for former players.¹⁴⁰ In order to be effective, such a trade association or “workers council” would need to have substantive rights, such as veto power over health and safety rules or a permanent seat on the NCAA executive committee.

Sports Illustrated reporter Michael McCann noted that the *O’Bannon* lawsuit, as currently certified, is more a victory for future college athletes than to O’Bannon and the former student-athletes who pressed the lawsuit. He also questioned whether the antitrust plaintiffs have standing to settle with the NCAA on behalf of future college athletes, noting that “[w]hile players’ associations in professional sports can lawfully negotiate on behalf

¹³⁶ Fram & Frampton, *supra* note 30, at 1010 (noting that 55 of the 66 schools in the six major Division I BCS football conferences, and 38 of the 56 top-rated NCAA Division I basketball schools from 2007-11, are public universities). *See also* National Labor Relations Act, 29 U.S.C. §§ 151-169 (West 2013)

¹³⁷ Dennie, *supra* note 39, at 46.

¹³⁸ See Michael H. LeRoy, An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect, 2012 WIS. L. REV. 1077 (2012); John D. Colombo, The NCAA, Tax Exemption, and College Athletics, 2010 U. ILL. L. REV. 109 (2010).

¹³⁹ *See, e.g.*, McCann, *supra* note 20.

¹⁴⁰ Tom Farrey, ‘Student-athlete’ Term in Question, ESPN (Sep. 19, 2012, 8:31 PM), http://espn.com/espn/otl/story/_id/8396753/ncaa-policy-chief-proposes-dropping-student-athlete-term.

of future players, there is no such association for college athletes. It is possible a settlement could trigger a new round of litigation or swift efforts to unionize college athletes.”¹⁴¹

C. Money in Trust: Educational Lockbox and Post-Eligibility Graduation Success Rates

In connection with their claims for a fifty percent split in revenue, the *In re Likeness* plaintiffs propose that a Student Athlete Fund be established, in which revenue from television and licensing contracts would be set aside for student-athletes to access upon completion of their eligibility.¹⁴² Under this model, student-athletes would be compensated for the use of their likenesses—as opposed to compensation for their labor—and revenues from a group-licensing contract would be split equally among the members of the group.¹⁴³ The NCPA similarly advances the concept of an educational fund, or “lockbox” that could be accessed upon completion of a degree, and it recommends giving educational assistance to student-athletes after their term of eligibility has expired.¹⁴⁴

The fund and lockbox concepts help address several concerns. The NCPA reported that among college football and basketball players, forty-five percent and fifty-two percent, respectively, do not graduate.¹⁴⁵ Authors of the Drake Group report conclude that “[i]n revenue sports, especially football and men’s basketball, athletes’ lives [become] routinized by coaches, leaving little time for other interests or extracurricular activities.”¹⁴⁶ They spend nearly eighty hours a week devoted to sport in full season, leaving

¹⁴¹ McCann, *supra* note 20. See e.g., *Clarett v. National Football League*, 369 F.3d 124 (2nd Cir. 20014), *cert. denied*, 544 U.S. 961 (2005).

¹⁴² See Notice of Motion and Motion by Antitrust Plaintiffs for Class Certification and Memorandum of Points and Authorities in Support Thereof, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2012 WL 4043912 (N.D. Cal. Aug. 31, 2012). See also Jason Chung, *The NCAA and the Student-Athlete Trust Fund: Is Compromise Possible?* (Apr. 26, 2013) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318909.

¹⁴³ See Chung, *supra* note 142, at 45.

¹⁴⁴ Huma & Staurowsky, *supra* note 2, at 27.

¹⁴⁵ *Id.*

¹⁴⁶ Zimbalist & Sack, *supra* note 2, at 5.

little time for studies.¹⁴⁷ Moreover, the current scholarship system does not regularly cover the full costs of attendance, nor does it cover walk-on players.¹⁴⁸ Access to the trust fund could help college athletes complete their degrees and promote accountability for graduation success rates. An increase in incentives to boost the graduation rates of student-athletes aligns with the NCAA's stated mission. This approach does not compromise amateurism but instead provides student-athletes additional security and opportunity for education and life beyond sports. Details about the administration of a proposed trust fund must still be worked out, but the model is viable if available to all.¹⁴⁹

D. Individual Endorsement Deals

Another alternative to the pay-for-play system is amending NCAA rules to allow student-athletes to accept individual sponsorship deals similar to the Olympic model used in international sports.¹⁵⁰ The NCAA would not be paying the athletes and would thereby avoid an employer-employee relationship; however, the best players—the Johnny Manziels—would be rewarded in the open market, potentially allowing elite, popular players to rival the salaries of their professional counterparts.¹⁵¹ Individual endorsement deals could help

¹⁴⁷ See *See Northwestern University and College Athlete Players Association, (CAPA)*, 13-RC-121359 (NLRB-Reg. 13, Mar. 26, 2014), <http://online.wsj.com/public/resources/documents/Decision032614.pdf> (last visited April 10, 2014).

¹⁴⁸ See Chung, *supra* note 142, at 47.

¹⁴⁹ *Id.* at 45.

¹⁵⁰ Athletes are precluded by IOC Rule 40 from personal sponsorship deals during the Olympic Games to protect official Olympic sponsors, but otherwise free to enter endorsement arrangements. See *Olympic Charter: Rule 40*, INTERNATIONAL OLYMPIC COMMITTEE (Sept. 9, 2013) available at http://www.olympic.org/documents/olympic_charter_en.pdf; *Rule 40 of the Olympic Charter – What you need to know as an athlete*, INTERNATIONAL SKI FEDERATION, available at http://www.fis-ski.com/mm/Document/document/General/04/60/00/Rule40AthleteQA_Neutral.pdf (last visited Apr. 6, 2014).

¹⁵¹ See e.g., Michael A. Corgan, *Permitting Student-Athletes to Accept Endorsement Deals: A Solution to the Financial Corruption of College Athletics Created by Unethical Sports Agents and the NCAA's Revenue-Generating Scheme*, 19 *Vill. Sports & Ent. L. J.* 371, 396 (2012).

significantly diminish the economic gap between full athletic scholarships and the full cost of college attendance. Former student-athletes would be, and presumably already are, free to license their images individually or as a group.

The main critique of a system of individual endorsements is that sponsors would favor elite athletes in the two most popular sports, leaving lower-level athletes and non-revenue-generating sports, particularly women's sports, with disparate resources. Endorsements could also create significant logistical problems in terms of monitoring. Student-athletes are not allowed to have agents and they would need professional assistance to help them negotiate endorsement deals. Title IX is also implicated if more publicity is given to men's sports and there are disparate endorsement opportunities.¹⁵² In addition, this approach does not address broadcast rights deals and raises a host of questions about with whom broadcasters need to contract—each player individually, the team, or just the star players?

E. Power Conference Exit: Leave the NCAA Behind

Another consequence of the dilemma facing the NCAA and its members might be for the elite and most wealthy “power” conferences and member schools to exit the NCAA or at least operate independently in a super-conference structure. These power conferences and institutions could then negotiate with the players, broadcasters, and other business entities an acceptable business deal satisfying each of their objectives without the need for approval by the NCAA and the remaining 1,200 plus institutions. This approach would free those schools from rules governing amateurism and generally free them from revenue sharing and amateurism rules challenged by this litigation. A proposed shift towards a governance structure providing for more big-conference autonomy from the NCAA was discussed at the NCAA's 2014 Annual Conference.¹⁵³ The departure of the breadwinner conferences would be a harsh reality for the NCAA

¹⁵² See Chung, *supra* note 142, at 36 (“Title IX remains the greatest obstacle to a pay-for-play system.”).

¹⁵³ See Brad Wolverton, *NCAA Members Support Big Conference Autonomy*, CHRON. HIGHER ED. (Jan 17, 2014), <http://chronicle.com/blogs/players/ncaa-members-support-big-conference-autonomy/34189>.

schools left behind, as they would begin paying NCAA dues instead of receiving distributions and would have to shoulder the substantial burdens of administering sports and attending championships. At that point schools may question whether membership in the NCAA is worth the costs and revert to conference affiliations only, avoiding the cost of travel to far-flung championships.

F. Congressional NCAA Antitrust Exemption

The onslaught of litigation against the NCAA and the threat of intercollegiate sports programs on the financial brink could provide the NCAA with the leverage to seek assistance from Congress.

The NCAA itself could nullify *In re Likeness* and future student-athlete antitrust litigation with a congressionally approved antitrust exemption. Professor Matthew Mitten has advocated for a form of qualified antitrust immunity for the NCAA if certain conditions were required, such as student-athletes being given the opportunity to complete their education; compliance with Title IX; and coverage for health, safety, and injuries.¹⁵⁴ Members of the Drake Group have similarly proposed a “College Athlete Protection Act” as an amendment to the Higher Education Act.¹⁵⁵ An antitrust exemption could enable the NCAA to rein in

¹⁵⁴ See Matthew J. Mitten, *Applying Antitrust Law to NCAA Regulation of “Big Time” College Athletics: The Need to Shift from Nostalgic 19th and 20th Century Ideals of Amateurism to the Economic Realities of the 21st Century*, 11 MARQ. SPORTS L. REV. 1 (2000); Matthew J. Mitten, James L. Musselman, & Bruce W. Burton, *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779, 784 (2010).

¹⁵⁵ See Brad Wolverton, *Watchdog Group’s Proposal Calls for Antitrust Exemption for NCAA*, CHRON. HIGHER EDUC. (Oct. 11, 2013), <http://chronicle.com/blogs/players/watchdog-groups-proposal-calls-for-antitrust-exemption-for-ncaa/33711>; Allie Grasgreen, *Antitrust for the NCAA?*, INSIDE HIGHER ED (Oct. 11, 2013), <http://www.insidehighered.com/news/2013/10/11/academics-propose-federal-legislation-restructuring-ncaa>. See also Len Elmore, *Exempt the NCAA From Antitrust*, CHRON. HIGHER EDUC. (Dec. 11, 2011), <http://chronicle.com/article/Exempt-the-NCAA-From-Antitrust/130073/> (arguing that “[a]n antitrust exemption would allow the NCAA to mandate, as a condition of membership, that revenues derived from NCAA-brokered television, licensing, and marketing deals; bowl-game participation; and other NCAA championship events be deposited in individual institutional budgets that benefit the college or university as a whole and not simply the athletic department.”). A bill styled the “College Student Athlete Protection Act” was introduced in November 2013. See Len Elmore, *Exempt the NCAA from Antitrust*,

the escalating financial arms race, limit coaches' salaries and other aspects of athletic department budgets, limit weekday night game schedules, and distribute revenues equitably among athletic programs. Without antitrust liability, the NCAA should also consider requiring allocation of revenues to educational programs, as well as enact a form of the Student-Athlete Fund and other student-athlete health, safety, and educational protections. NCAA member institutions are already required to comply with the gender equity mandates regulated under Title IX; perhaps the time for financial equity is next.

CONCLUSION

Hailed as an “uneasy marriage,”¹⁵⁶ the relationship between big-time college sports and amateurism may be headed toward divorce.¹⁵⁷ *In re Likeness* has rocked the business-as-usual operations of intercollegiate sports, and an answer to the call for fundamental reform is warranted. This Article concludes that while fights over student-athletes' rights and support payments threaten to overshadow the best interests of intercollegiate athletics, reconciliation appears unlikely, but it is not impossible. Several alternatives or compromises, through which the interests of all parties involved may be satisfied—short of paying players—are available. Change may be good. But can we, please, keep March Madness and Saturday game day tailgates?

CHRON. HIGHER EDUC. (Dec. 11, 2011), <http://www.ncpanow.org/news/releases-advisories/all-players-united-reaches-congress-bill-to-protect-athletes-introduced>

¹⁵⁶ Michael McCann, *Ed O'Bannon v. NCAA Class Certification Hearing Primer*, SPORTS ILLUSTRATED (June 19, 2013 12:20 PM), <http://sportsillustrated.cnn.com/college-football/news/20130619/ncaa-ed-obannon-hearing-primer/#ixzz2h5SASa90>.

¹⁵⁷ See *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2013 WL 3810438 (N.D. Cal. July 18, 2013).