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“The Emperor Has No Clothes:” The NCAA’s Last Chance as the Middle Man in College Athletics

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THE EMPEROR HAS NO CLOTHES: THE NCAA’S LAST CHANCE AS THE MIDDLE MAN IN
COLLEGE ATHLETICS

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I. INTRODUCTION

The Division I collegiate athlete is changing. Although they have always been
hardworking, dedicated and coachable, over the past few decades they have transformed into
something much more—a money making tycoon for the National Collegiate Athletic Association
(“NCAA”) and their respective universities. The NCAA now rakes in $10.6 billion dollars
annually, an increase of over 500% during the past twenty years. The industries success is a
direct result of the NCAA’s self-proclaimed entitlement to depress the value of college athletes’
names and images at zero. The NCAA’s “Best Business Model in the World” essentially reaps
the direct economic benefit of the student athletes’ success on the playing field without

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Economics, 2011. This Note is dedicated to the late Professor Gordon Finch, who served as an
important mentor throughout the writing and editing of this article.

1 See Statistic Brain, NCAA College Athletics Statistics, http://www.statisticbrain.com/ncaa-
college-athletics-statistics/ (last visited Mar. 3, 2013) (noting total annual revenue generated by
NCAA is $10.6 billion dollars annually). Additionally, each “revenue generating sport” (i.e.
men’s basketball and men’s football) earn an annual $13 million dollars for their respective
university on average. Id.

2 Id. See also Vladimir P. Belo, Note, “The Shirts off Their Backs: Colleges Getting Away With
Violating the Right of Publicity,” 19 HASTINGS COMM. & ENT. L.J. 133, 134 (2006) (discussing
rising trend of NCAA’s revenue which was only $1 billion annually in 1989, and reached $2.1
billion in 1993); Mark Schlabach, Commentary, NCAA: Where Does the Money Go?,
http://espn.go.com/college-sports/story/_/id/6756472/following-ncaa-money (explaining NCAA
spends $30.6 million dollars annually on “administrative expenses and staff salaries”).

3 For a full discussion of the NCCA’s policies and the NCAA’s contractual agreement with
incoming athletes, see infra notes 9-12 and accompanying text.
compensating their efforts in order to achieve the alleged purposes of protecting athletes from exploitation of outside commercial enterprises and preserving amateurism.\(^4\) This Note argues that neither purpose is effectively achieved under the NCAA’s current model because it is the NCAA itself, which is exploiting the value of their athletes.\(^5\)

Today’s college athlete is also different in one other significant way. No longer is a scholarship sufficient compensation for most of the revenue generating athletes because these athletes in particular are coming from families and situations of significantly more modest means.\(^6\) As a result, there exists a substantial demand for illegal recruiting, agents, and boosters to get involved in order to compensate the athletes enough to sustain themselves through their college years and, in some cases, to assist their families in paying off existing debt.\(^7\) More importantly, because the NCAA doesn’t allow compensation of the athlete outside the realm of


\(^5\) See *The Fab Five* (ESPN Films 2011) (depicting story of five freshmen all-stars playing for University of Michigan in early 1990’s, known as the Fab Five). “The year after Michigan won their only title in 1989, merchandise royalties totaled $1.6 million dollars. Following the Fab Five’s freshmen season [in 1992, that total] would climb to $10.5 million dollars. It was amateur athletics but business was booming, for everyone except the Fab Five themselves.” *Id.* (explaining financial struggles of Fab Five). For a full discussion of the how the NCAA is exploiting the value of their players, see infra notes 26-33 and accompanying text.

\(^6\) See Michelle Hill, *3 Points for Paying College Athletes*, SPORTS NETWORKER, (last visited March 13, 2013) http://www.sportsnetworker.com/2010/03/22/3-points-for-paying-college-athletes/ (explaining student-athletes often do not have access to enough funds to purchase new jeans or order pizza on weekends).

\(^7\) See Charles Robinson & Jason Cole, *Settlement Reached in Bush Civil Case*, (Apr. 21, 2010) http://rivals.yahoo.com/ncaa/football/news?slug=ys-bushcase042110 (recognizing third party contributions to Reggie Bush often were for the aid of his family who were in dire financial difficulties from previously accumulated debt).
an athletic scholarship, many players drop out of school as soon as they have the chance to earn a living playing the sport professionally—leaving their team and their education behind.  

Part II of this note illustrates the current model of the NCAA, the adhesion contract signed by all players who wish to participate in a collegiate sport, and the justifications the NCAA alleges for doing so. Part III notes the significant history of the NCAA. Part IV proposes three equitable solutions, and part V concludes by explaining the most efficient of these three solutions.

II. SIGN HERE: THE POLICY JUSTIFICATIONS OF THE NCAA AND THE HISTORY BEHIND THEM

In seeking to preserve amateurism and prevent exploitation of student-athletes, the NCAA prohibits student-athletes from receiving any remuneration or compensation for their athletic success in their respective sport in its bylaws. The NCAA, however, retains the exclusive right to use the athlete’s “name or picture to generally promote NCAA championships or other NCAA events, activities, or programs” through Form 08-3a (the “Student-Athlete

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8 See THE FAB FIVE, supra note 5. After Chris Webber’s sophomore season, Mitch Albom, a Detroit columnist, recounts: “I was with him and we walked past a store in Ann Arbor and he saw his jersey hanging in the window for 75 dollars. He had previously asked me if I could loan him money for gas and pizza, which he knew I couldn’t but he asked anyhow, and when he saw his jersey in the window for 75 dollars he said, ‘They are selling that for 75 dollars and that goes to somebody, and I have to borrow money to put gas in my car?’ I remember thinking to myself; he’s not coming back here.” Id. For a discussion of the rate at which collegiate athletes leave their institution, see infra notes 128-132, and accompanying text.

Statement”), which is a mandatory condition for eligibility. In other words, the NCAA forces “student-athletes to relinquish in perpetuity all rights in the NCAA’s licensing of their images and likeness.” These NCAA bylaws assert the power to impose amateurism on college athletes, even if the preservation of their amateurism status is not in the student-athlete’s best interest. The following history may help to understand where the NCAA derived their alleged power from, and to what extent, it actually exists.

A. Power on the Basis of Consent: The History of the NCAA

The NCAA was originally established to reform college football in hopes to curtail the violence that took the lives of twenty-five collegiate athletes in 1905. President Roosevelt sought to “civilize or destroy” the game, and through the reformation established the NCAA with 68 representatives from colleges across the nation, emphasizing amateurism and higher-education. A mere thirty years later, of the 112 member schools in the association, 81 confessed to inducing players with open payrolls and disguised booster funds. Embarrassed, the NCAA enacted the “Sanity Code” which prohibited all concealed and indirect benefits to

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14 See Branch, supra note 12, at 6.
15 Id. (recounting schools’ practice of paying players for their performance and inducing them to enroll at their respective universities).
college athletes with the exception of “scholarships awarded for financial need.” and imposing expulsion from the NCAA on violators.\textsuperscript{16} The efforts to impose penalties for compensating players was an overwhelming failure, as colleges refused to impose such harsh penalties on each other.\textsuperscript{17}

A few years later, in 1951, the NCAA was faced with another opportunity to assert its control over collegiate athletics, even though it had no real authority to do so.\textsuperscript{18} The University of Kentucky and five New York colleges were involved in a “point-shaving conspiracy” in which their players would perform poorly and were later compensated by local gamblers.\textsuperscript{19} Walter Byers, executive director of the NCAA, lobbied Kentucky Dean A.D. Kirwan, not to challenge the NCAA’s “dubious legal position” and lack of authority because college sports must do something to “restore public support.”\textsuperscript{20} Byers’ plea was surprisingly effective as Dean Kirwan accepted the NCAA’s suspension of its baseball team for the entire 1952-53 season.\textsuperscript{21}

With a notch under its belt, the NCAA attempted to expand its vague authority by prohibiting televised games except those licensed by the NCAA. Unlike the other member schools, The University of Pennsylvania and the University of Notre Dame refused to comply, asserting their right to televise and advertise their own games.\textsuperscript{22} Byers immediately issued a notice which stated any team that showed up to play the two holdout schools would be penalized,

\begin{itemize}
  \item \textsuperscript{16} See id.
  \item \textsuperscript{17} See Id. “The University of Virginia went so far as to call a press conference to say that if its athletes were ever accused of being paid, they should be forgiven, because their studies at Thomas Jefferson’s University were so rigorous.” Id.
  \item \textsuperscript{18} See Id. (noting NCAA had “no actual authority to penalize the universit[ies]”).
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Id. (explaining how NCAA originally obtained college’s consent to be governed, thus, consented to NCAA imposing penalties on violators).
  \item \textsuperscript{21} See Id. at 7 (recounting NCAA’s lack of legal and political authority to suspend college sports teams).
  \item \textsuperscript{22} See Id.
\end{itemize}
attempting to isolate Pennsylvania and Notre Dame. What has been later known as the “big bluff” worked—both schools folded in fear of suspension or expulsion and the NCAA went on to negotiate exclusive rights to televise college games with the television networks on behalf of every team. A short year later, NBC signed a one-year, $1.14 million dollar deal with the NCAA for the exclusive license to televise collegiate football games. Television contracts have since grown exponentially, and are one of the primary sources of revenue for the NCAA and their member institutions.

III. THE NCAA ON THE BRINK: TIME FOR CHANGE

The NCAA’s justification for forcing athletes to relinquish their right to realize the value of their image is to protect the athlete from exploitation, and preserve the sanctity of higher education. The NCAA, however, fails to protect the athlete in any meaningful way under its current model. As recognized in the early years of the NCAA, the institution completely lacks the authority to impose such restrictions on athletes without the consent of its athletes and

23 See Id.
24 See Id. (noting impact of “big bluff”).
25 Id. (illustrating impact of first license deal with television network).
27 For a discussion explaining why the NCAA’s bylaws fail to protect student-athletes from exploitation, see infra notes 32-44. The NCAA’s other justification for imposing amateurism—preserving higher education—is also severely undermined by policies and practices implemented by the NCAA’s member institutions. See Kristine Mueller, No Control Over Their Rights of Publicity: College Athletes Left Sitting the Bench, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70, 84-87 (2004) (explaining student-athletes are often treated differently by professors). For athlete’s that are in danger of failing, some Division I schools offer “Mickey Mouse” classes which seem to be “just a cover for making it easier for student-athletes to get by and retain their eligibility.” Id. at 85. Additionally, studies have shown that teachers will often hold off on failing a student if he or she is a student athlete, and issue them an “incomplete” during their athletic season in order for them to retain eligibility. Id. at 84.
member institutions.\textsuperscript{28} Furthermore, such policies will soon be challenged in federal court for violating antitrust laws.\textsuperscript{29} Whether it is the athletes that revoke their consent or a court order abolishing some of the restricting bylaws, the NCAA is on the brink of a major overhaul that is likely to destroy their perfect business model.\textsuperscript{30}

A. Amateurism as a Sham: Players Take Back Their Rights

The NCAA imposes amateurism on collegiate athletes as a means to justify the “contradictory nature of its mission” which purports to preserve the ideals of amateurism while still trying to make as much money out of the lucrative “multi-billion dollar industry” as possible.\textsuperscript{31} Similar to colonialism, “college sports, as overseen by the NCAA, is a system imposed by well-meaning paternalists and rationalized with hoary sentiments about caring for the well-being of the colonized.”\textsuperscript{32} This, however, does not make the colonized any less injured by the injustice. The ideal to preserve amateurism is a compelling interest for those who wish to remain amateurs; however, to impose amateurism on a group of individuals with no bargaining power while depriving them due process of law is to “catch an unmistakable whiff of the plantation.”\textsuperscript{33}

\textsuperscript{28} For a full discussion of the lack of the NCAA’s authority without consent, see supra notes 15-25 and accompanying text.


\textsuperscript{30} See Thompson, supra note 4 (explaining unfavorable result in court would lead to NCAA’s demise).


\textsuperscript{32} See Branch, supra note 12, at 4.

\textsuperscript{33} See id. (explaining NCAA and corporations are enriching themselves on the efforts of men who are not eligible for pay solely because of their status as a “student-athlete”). Student-athletes also do not have a claim for due-process under the constitution because the individual challenger must allege a “substantive property [right] or liberty interest.” Id. at 20 (noting that right to play collegiate sports is neither of these). In other words, “student-athletes” have no
The NCAA continues to assert its dominion over college athletics by punishing trivial violations. In 2011, five Ohio State football players admitted to receiving discounts on tattoos in exchange for memorabilia and autographs. The NCAA suspended the players for five games and suspended the team from postseason play through the 2012 season because the coach was aware of the discounts received. As noted by one author, “to punish players who weren’t even on the team at the time for transgressions committed by a coach they’ve never met…doesn’t much seem like a good way to ‘protect student-athletes.’” A similar violation was reported in 2010 at the University of Georgia, where standout receiver A.J. Green admitted to selling his own game-worn jersey in order to raise cash for a spring-break vacation. Green was later suspended for a total of four games because the NCAA defined the buyer of the jersey as an “agent.” Ironically, the University of Georgia sold “no less than six versions of this jersey” on constitutional right to protect an interest in their own athletic effort; thus, “have no stake to seek their rights...because they have no rights at stake.” (demonstrating circular logic that prevents collegiate athletes from recognizing a share of their worth). See id. at 13 (describing trivial violations that were harshly punished). Allan Brulett, Ohio State Football: Buckeyes Victimized by Broken System, Bleacher Report (2012) http://bleacherreport.com/articles/1418930-ohio-state-football-buckeyes-victimized-by-a-broken-system See id. See id.; see also Trevor LaFauci, Hypocrisy and the NCAA: What the March Madness Commercials Don’t Tell You, (Mar. 25, 2013), http://sports.politicususa.com/hypocrisy-and-the-ncaa-what-the-march-madness-commercials-dont-tell-you.html (explaining hypocrisy of NCAA commercials that say “Just know that we’re always there for our student-athletes). “The NCAA, an organization that makes billions of dollars a year selling tickets, merchandise, marketing, and advertising does not allow a student-athlete to profit from their own original work.” They can market Michigan quarterback Denard Robinson on the cover of EA Sports College Football 2014 all day long, but when Joel Bauman, second string wrestler from the University of Minnesota, wants to sell a song for 99 cents, that’s where they draw the line.” Id. Ty Duffy, A.J. Green Suspended Four Games for Selling his Jersey to “Agent,” U.S.A. Today Sports (Sept. 8, 2010) http://www.thebiglead.com/index.php/2010/09/08/a-j-green-suspended-four-games-for-selling-his-jersey-to-agent/ See id.
its own website and was never questioned by the NCAA for conducting such sales.\(^{40}\) Thus, it was not the act of selling Green’s jersey that violated NCAA policy; rather, it was the mere fact that neither the NCAA nor one its member institutions was the party benefiting from the sale that induced penalization. Another illustration of this very principle is that the NCAA bans personal messages on the bodies of players but “codifies precisely how and where commercial insignia from multinational corporations can be displayed on college players for the [financial] benefit of the colleges.”\(^{41}\) Cam Newton wore fifteen corporate Under Armor logos during his National Championship game pursuant to a multi-million dollar contract signed by his University of Auburn.\(^ {42}\) The NCAA alleges that preserving amateurism will protect student-athletes from exploitation, but such a goal is severely undermined by the narrow definition that only permits the NCAA and its beneficiaries to reap the benefits of the athletes’ effort, while penalizing all other parties—creating nothing less than an impenetrable monopoly over the billion dollar industry of college sports.\(^ {43}\)

The success of the entire college sports industry literally rests on the backs of its players, and assumes the NCAA’s intentionally vague definition of a “student-athlete” coupled with the blurred distinction of amateurism will be enough to keep reaping the benefits of free labor. Neither is the definition of amateurism nor the ability to impose it anywhere in law or reason.\(^ {44}\)

\(^{40}\) Id.

\(^{41}\) See Branch, supra note 12, at 13.

\(^{42}\) See id.


\(^{44}\) See Branch, supra note 12, at 25 (explaining that “[n]o legal definition of amateurism exists, and any attempt to create one in enforceable law would expose its repulsive and unconstitutional nature—a bill of attainder, stripping from college athletes the rights of American citizenship”).
Thus, once the eyes of the deprived are open, the NCAA’s perfect business model will surely crumble.\footnote{See id. (explaining “[t]he whole edifice depends on the players’ willingness to perform what is effectively volunteer work”). Players at North Carolina had once planned a “refuse to play” strike had they made it to the National Championship; however, such a plan never came to fruition because they were eliminated before the National Championship game. \textit{Id.} At Michigan, the Fab Five engaged in silent protests after recognizing the value of their efforts were being exploited by Nike, Michigan, and the NCAA. \textit{The Fab Five, supra} note 5. Whatever Nike wanted to sell they threw on the Fab Five, including the rise of black socks and baggy shorts. \textit{Id.} Jalen Rose, one of the star Fab Five players recounted, “[w]hen we started to realize that anything we wore people were selling, we started to protest, and one of our silent protests was warming up in plain blue shirts. They didn’t say Michigan, they didn’t say Nike, they didn’t say anything.” \textit{Id.}}

B. Legal Claims against the NCAA

Despite the NCAA facing a lot of heat from critics and scholars regarding the policy justifications for fixing the worth of a college athlete’s image and likeness at zero, an even stronger argument is challenging the legality of such practices.\footnote{See Berkowitz, \textit{Judge Lets Class-Action Efforts in O’Bannon Case go on}, USA TODAY SPORTS (Jan. 30, 2013) http://www.usatoday.com/story/sports/ncaaf/2013/01/30/ncaa-obannon-players-lawsuit-name-and-likeness/1877031/} The NCAA exploits the success of their star players’ persona through its corporate licensees by preventing players from recognizing any of their financial success.\footnote{See Hanlon & Yasser, \textit{supra} note 31, at 243 (explaining NCAA is “trampling upon” legal rights of student-athletes by barring any type of remuneration).} Both former and current athletes, however, may have valid claims against the NCAA which would ultimately lead to its demise.\footnote{See Tom Farrey, \textit{NCAA Athletes Can Pursue TV Money}, ESPN Outside the Lines (Jan. 30, 2013) http://espn.go.com/espn/otl/story/_/id/8895337/judge-rules-ncaa-athletes-legally-pursue-television-money (acknowledging that it was great NCAA and its member institutions could economically capitalize on “publicity rights of their athletes, but there is no justification to deny them a portion of the benefits”).}

1. The Right of Publicity

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\footnote{See id. (explaining “[t]he whole edifice depends on the players’ willingness to perform what is effectively volunteer work”). Players at North Carolina had once planned a “refuse to play” strike had they made it to the National Championship; however, such a plan never came to fruition because they were eliminated before the National Championship game. \textit{Id.} At Michigan, the Fab Five engaged in silent protests after recognizing the value of their efforts were being exploited by Nike, Michigan, and the NCAA. \textit{The Fab Five, supra} note 5. Whatever Nike wanted to sell they threw on the Fab Five, including the rise of black socks and baggy shorts. \textit{Id.} Jalen Rose, one of the star Fab Five players recounted, “[w]hen we started to realize that anything we wore people were selling, we started to protest, and one of our silent protests was warming up in plain blue shirts. They didn’t say Michigan, they didn’t say Nike, they didn’t say anything.” \textit{Id.}}
The right of publicity is often a state common law doctrine that predominately focuses on the economic value of a person’s own name and likeness. These rights primarily “center on the ‘the right of an individual, [usually] a public figure or celebrity, to control the commercial use of his or her name or likeness.” Courts will consider the following four elements to determine whether an individual’s right of publicity has been violated: 1) the use of plaintiff’s identity; 2) the appropriation of the plaintiff’s name or likeness to the defendant’s advantage, commercially or otherwise; 3) lack of consent by the plaintiff and 4) resulting injury.

There is no doubting the NCAA and its member institutions make millions of dollars annually from the licenses to sell their star players’ jerseys, t-shirts, accessories, photographs, and video footage. They also reap the benefits of an exclusive license with Electronic Arts that publish an NCAA video game depicting the players as accurately as possible including their proper skill attributes, jersey number, and accessories. However, the NCAA prohibits their

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49 See Matzkin, supra note 13, at 229 (explaining “the right of publicity” generally).
50 Id. (quoting Thomas Glenn Martin, Jr., Comment, Rebirth and Rejuvenation in a Digital Hollywood: The Challenge Computer-Simulated Celebrities Present for California’s Antiquated Right of Publicity, 4 UCLA ENT. L. REV. 99, 110 (1996). A majority of courts and commentators have further noted that the right of publicity is not contingent on a plaintiff reaching ‘celebrity status,’ because “non-celebrities should also be permitted to recover upon proof that the appropriated identity possessed commercial value.” ETW Corp. v. Jireh Pub, Inc., 332 F.3d 915, 953 (6th Cir. 2003) (quoting Restatement (Third) of Unfair Competition § 46 cmt. d, 538 (1995)).
51 Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 413-14 (9th Cir. 1996); White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992). In general, a defendant has violated plaintiff’s right to publicity if they appropriate the commercial value of a person’s identity by virtue of his “name, likeness, or other indicia of identity” without the person’s consent. See Restatement (Third) of Unfair Competition § 46 (1995). As the Supreme Court noted, “No social purpose is served by having the defendant [in a right of publicity case] get free some aspect of the plaintiff that would have market value and for which he would normally pay.” Zacchini v. Scripps–Howard Broadcasting Co., 433 U.S. 562, 576 (1977).
52 See Hanlon & Yesser, supra note 31, at 245 (explaining sales of star players jerseys have “skyrocketed” over the last decade).
53 See Matzkin, supra note 13 at 227, at n.1 (explaining expected video game sales to reach $1 billion dollars during the 1999 holiday season).
licensees from using the players’ actual names; thus, the first inquiry is whether such commercial gain is at the expense of the players’ “identity.”

In determining what constitutes the plaintiff’s “identity,” courts have gone beyond one’s name and likeness and included distinctive characteristics that allow the general public to readily identify the plaintiff, such as an individual’s “distinctive voice.” In *Midler v. Ford Motor Company*, the defendant hired a backup singer to sound exactly like the “nationally known actress and singer[s]” recording of her own song. The Ninth Circuit held that a “voice [was] as distinctive and personal as a face,” thus, when the defendant’s impersonated her voice they fundamentally “pirate[d] her identity.” In *White v. Samsung Electronics America Inc.*, defendant’s advertisement depicted the “Wheel of Fortune” stage and a robot, dressed in a blonde wig and evening gown that turned over letters on a big board. Vanna White alleged that the defendant’s had violated her right of publicity and the Ninth Circuit agreed, holding the defendant had indeed “appropriated the plaintiff’s identity” and her “persona on the game show” to reap commercial gain.

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54 See *NCAA Division I Manual*, supra note 9, at § 12.5.1.1(h). “[i]tems that include an individual student-athlete’s name...may not be sold...” *Id.*
55 See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).
56 *Id.* at 461.
57 *Id.* at 463.
58 971 F.2d 1395, 1398 (9th Cir. 1992)
59 See *Id.* at 1396.
60 *Id.* at 1399. The opinion also offers this interesting hypothetical to buttress its position:

Consider an advertisement that depicts a mechanical robot with male features, an African-American complexion, and a bald head. The robot is wearing black high-top Air Jordan basketball sneakers, and a red basketball uniform with black trim, baggy shorts, and the number 23 (though not reveling “Bulls” or “Jordan” lettering). The ad depicts the robot dunking a basketball one-handed, stiff-armed, legs extended like open scissors, and tongue hanging out. Now envision that this ad is run on television during professional basketball games. Considered individually, the robot’s physical attributes, its dress, and its stance tell us little. Taken together, they lead to the only conclusion that any sports viewer who has
Consumers and fans across the country readily identify star players with the jersey number they wear. Many universities sell their star players’ jerseys at their online campus store, and while the name of the player is not sewn on the jersey, some schools have gone as far as putting the athlete’s name above a picture of his jersey or acknowledging the “NCAA rules prohibit the use of the player’s name, but we all know who wears this one!” For some schools, overall sales and increased revenue have been a direct result of the success of their basketball teams and the marketability of their star players. Likewise, although the EA Sports video games do not depict the players’ names, the inclusion of their precise physical attributes, skill set, and jersey number taken together can only lead to the conclusion: that the “athletes’ identities are being appropriated.”

Secondly, plaintiffs must show that the defendants gained an advantage commercially or otherwise, by use of the plaintiffs’ identity. A plaintiff’s identity is used for the commercial

registered a discernible pulse in the last fifty years would reach: the ad is about Michael Jordan.

Id.

61 See Leslie E. Wong, Our Blood, Our Sweat, Their Profit: Ed O’Bannon Takes on the NCAA for Infringing on the Former Student-Athletes Right of Publicity, 42 TEX. TECH L. REV. 1069, 1082 (2010) (explaining consumers, fans, and commentators will often refer to players by numbers because of its unique characteristic, thus, players’ numbers are “inextricably linked” with their identities).


63 See Melodie Little, Zags in Fashion: Sales of GU Merchandise Take Off, Both at Campus Store and Online, Spokesman Review (Nov. 4, 2006) (noting Gonzaga’s “online sales have risen by roughly 400 percent” over the past five years and attributing “the growing interest in Zags-wear to the success of the men’s basketball team and interest in former forward Adam Morrison”).

64 See Matzkin, supra note 13, at 247 (explaining video games depictions of players more closely resemble their persona than the White case above).

advantage of the defendant when “it is ‘used in advertising the user’s goods . . . or . . . placed on merchandise marketed by the user.’”

In Hoffman v. Capital Cities/ABC Inc., Los Angeles Magazine featured a photo spread that digitally altered famous actors and actresses’ clothing to make it appear as though they were endorsing certain fashion designers. The court held that Dustin Hoffman’s right of publicity was violated because the magazine used his persona which was both recognizable and valuable to further a commercial purpose.

There is little doubt that the NCAA is commercially advantaged by collegiate athletes as a whole through their licensing deals with EA Sports, Nike, Adidas, CBS, etc. However, each individual plaintiff will have to prove their persona was individually valuable at the time of the exploitation in order to recover for a right of publicity violation. This will not be a problem for the collegiate athletes who “reach celebrity status long before they leave the university setting,” but less-known student athletes may not be able to recover under the right of publicity because their persona was not “recognizable in the sense that a defendant could use their images for financial gain.”

Although this is certainly the case for jersey sales, photographs, and accessories, this would not preclude the lesser-known athletes from recovering royalties from the video games in which they are depicted simply because the success of selling the product...

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66 See Hanlon & Yesser, supra note 31, at 275 (alteration in original) (quoting Restatement (Third) of Unfair Competition § 47 (1995)).
67 33 F.Supp.2d 867 (C.D. Cal.), rev’d on other grounds, 255 F.3d 1180 (9th Cir. 1999).
68 See Id. at 873-74
69 See Id. But see Pesina v. Midway Mfg. Co., 948 F. Supp. 40 (N.D. Ill. 1996) (holding that plaintiff must have a commercial interest in his identity). The court recognized that a plaintiff must demonstrate that he was “a ‘celebrity’ when [the defendant] used his persona, name, and likeness; otherwise, his identity does not constitute an economic interest protectable....” Id. at 43
70 See Wong, supra note 61, at 1086-87 (describing NCAA’s billion dollar television contract with CBS granting them exclusive rights). Member institutions also enter into multi-million dollar deals with Nike, Adidas, etc. to bear their corporate logo on their respective uniforms. See Id. at 1087.
71 See Pesina, 948 F. Supp. at 40?
72 See Wong, supra note 61, at 1087.
depends on the defendant’s ability to exploit the personas of athletes on the entire team.\textsuperscript{73} No consumer would want to play a video game that only contained the personas of only a few players on each team.\textsuperscript{74}

Thirdly, in order for a defendant to violate plaintiff’s right of publicity, they must exploit their persona without the plaintiff’s consent.\textsuperscript{75} Athletic scholarships, in general, are signed contracts where the athlete agrees to participate in his respective sport and receives a scholarship including room and board in return.\textsuperscript{76} The NCAA and their licensees may “use the name and picture of the student-athlete…but if the student exploits his own image for similar purposes, he risks losing eligibility.”\textsuperscript{77} Although the NCAA will argue that each student athlete consented by relinquishing all of their rights to market their persona exclusively to the NCAA, the court may find such an adhesion contract unconscionable and not validly enforceable.\textsuperscript{78}

Athletic scholarship agreements between the university and the athlete are contracts of adhesion because it is a “standard-form contract prepared by one party, to be signed by the party in a weaker position . . . who adheres to the contract with little choice about the terms.”\textsuperscript{79} Although not all adhesion contracts are unconscionable, they will be more closely scrutinized

\textsuperscript{73} See Matzkin, supra note 13, at 247 (advocating group of student athletes should be considered “as a whole”).

\textsuperscript{74} See Id. at 227 (describing NCAA video game captures whole “spirit of college athletics...available on demand”).

\textsuperscript{75} Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 413-14 (9th Cir. 1996).

\textsuperscript{76} See Taylor v. Wake Forest, 191 S.E.2d 379, 382 (N.C. Ct. App. 1972) (holding that refusal to participate in sport was breach of contractual duties).

\textsuperscript{77} See Wong, supra note 61, at 1090.

\textsuperscript{78} See generally Brian Welch, Comment, Unconscionable Amateurism: How the NCAA Violates Antitrust by Forcing Athletes to Sign Away their Image Rights, 44 J. MARSHALL L. REV. 533 (2011).

due to their “standardized nature and the lack of bargaining power it affords the other party.”

More specifically, courts will generally void any agreement or contract if its terms are so unfair and one-sided that they “shock the conscience.” Courts will find the terms of a contract unconscionable if there was (1) an absence of meaningful choice for one of the parties (procedural unconscionability), and (2) the terms of the contract were unreasonably favorable to the drafting party (substantive unconscionability). Upon finding a contract unconscionable, the contract may be void in its entirety or “the court may refuse to enforce the particular term or terms that it deems unconscionable.”

A court may find the Student-Athlete Statement, in which the athlete relinquishes all rights to his persona, procedurally unconscionable because there “is no meaningful choice” to negotiate the terms of the contract, change, or delete any of the provisions. Athletes are given little opportunity to fully understand all of the terms of the contract primarily because of the

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80 See Hanlon & Yesser, supra note 31, at 286-87 (noting fact that contract is one of adhesion gives “substantial weight” to unconscionability claim). Thus, the inquiry into whether the contract is unconscionable “begins with an inquiry into whether the contract is one of adhesion.” Armendariz v. Found. Health Psychcare Servs., Inc., 113, 6 P.3d 669, 689 (Cali. 2000).

81 Rochin v. California, 342 U.S. 165, 209 (1952). See also Richard L. Barnes, Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability, 66 La. L. Rev. 123, 187 (2005) (“Adhesion should be a complement to unconscionability, but used with recognition that gross unfairness and shock-the-conscience foulness are not required to void a contract term on account of adhesiveness. Adhesion should encourage us to look behind the appearance of bargaining, even when presented in an objective form if that form overrides the basic sense of justice inherent in contract law.”)

82 Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003) (explaining procedural and substantive unconscionability); see also Hanlon & Yesser, supra note 31, at 289 (explaining it is well accepted rule “that if more of one of the categories is present, than less of the other is required”). A finding of unconscionability requires “a ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.” AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (internal citations omitted).

83 See Wong, supra note 61, at 1092 (explaining court would not void entire athletic scholarship agreement).

84 See Id. at 291
“vast imbalance of knowledge” between the NCAA and the incoming student-athlete who is usually an 18 year-old recent high school graduate.85 The student-athlete also does not have any reasonable alternatives to accepting the “take it or leave it” contract if he wishes to continue to play his sport against decent competition, unless he chooses to move overseas.86 The Student-Athlete Statement may also be substantively unconscionable because the terms dictate that the NCAA has the exclusive right to commercially exploit the athlete, and rely on the need to preserve amateurism for their justification.87 Even if amateurism was seen as such a compelling interest as to justify the exclusive exploitation of student-athletes, the NCAA could still set up a trust fund that could only be accessed after graduation—successfully preserving the ideal of amateurism while the athlete remains eligible while also “alleviat[ing] the egregious commercial injuries to star student-athletes under the current substantive provisions . . . .”88 Thus, the provisions requiring athletes to relinquish their rights to their image and persona exclusively to the NCAA are most likely procedurally and substantively unconscionable because a lack of meaningful choice exists and the terms themselves are unfairly oppressive.89

Finally, the plaintiff must prove that the defendant’s use of his persona resulted in economic injury to the individual.90 The economic loss would be equal to the “market value of

85 See Id. at 292 (explaining athletes’ lack of bargaining power).
86 See Id. But see Kendall K. Johnson, Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts, 19 SPORTS LAW. J. 1 (2012) (referencing American Basketball League (ABA), World Basketball Association (WBA), and International Basketball League (IBL) as meaningful alternatives to participating in collegiate sports run by NCAA). However, the ABA, WBA, and IBL have all been disband since 1992. WIKIPEDIA, http://en.wikipedia.org/wiki/World_Basketball_League (explaining when league was in existence, players over 6 feet 5 inches were not allowed to play).
87 For a full discussion of amateurism as an invalid justification for exploiting the free labor of student-athletes, see supra notes 31-33 and accompanying text.
89 See Id. at 296.
the license between the NCAA and the licensee."\textsuperscript{91} Over 100 years ago when the NCAA formed its bylaws, the economic disparity between the athletes and the NCAA did not exist; however, current athletes’ scholarships (that are often no more than $30,000/year) cannot compare to the billion dollar license deals that give corporations exclusive rights to the athletes’ persona.\textsuperscript{92}

2. Former Athletes’ Claim under the Sherman Act: Ed O’Bannon’s Day in Court

Ed O’Bannon, former collegiate athlete who led the University of California to a NCAA national championship in 1995, filed suit in the Northern District of California alleging that the NCAA and its licensees have conspired to artificially depress payments to former athletes for use of their persona to zero, thus, resulting in unjust enrichment and a violation of the Sherman Act.\textsuperscript{93} Specifically, the violation is particularly egregious in the case of former athletes because the NCAA and its business partners are still licensed to sell DVDs featuring classic games, video games featuring classic teams, photos, and apparel—all of which exploit the former athletes’ persona after their eligibility ends.\textsuperscript{94} Essentially, the 17 year-old incoming college student releases the right to his image in perpetuity, even after the NCAA’s alleged justifications to preserve amateurism and education cease.\textsuperscript{95}

The Sherman Act provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”\textsuperscript{96} The Act prohibits unreasonable restraints on trade, and the court will balance the anticompetitive

\textsuperscript{91} Wong, \textit{supra} note 61, at 1093.
\textsuperscript{92} See \textit{Id.} at 1094 (suggesting NCAA’s ability to use athlete’s names and likeness to promote college athletics generally may have been justified decades ago before the value of the industry and the value of the players had astronomically increased).
\textsuperscript{93} See William D. Holthaus, Jr., \textit{Ed O’Bannon v. NCAA: Do Former NCAA Athletes Have a Case Against The NCAA For its Use of Their Likeness?}, 55 ST. LOUIS U.L.J. 369, 376-77 (2010)
\textsuperscript{94} See \textit{id.} at 376
\textsuperscript{95} See Welch, \textit{supra} note 78, at 538 n.25 (explaining difficulty in justifying policy after students are no longer in college).
effect of the restriction against the defendant’s pro-competitive justification which is known as the “rule of reason.” Courts will evaluate the effects of the restraint on trade primarily from the prospective of the consumer.

In *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court shot down an NCAA policy which restricted the number of games that could be televised for the alleged purpose of maintaining “a competitive balance among amateur athletic teams.” The Court reasoned that the anti-competitive effect outweighed the pro-competitive justification because the NCAA’s policy did not serve its purported goal and that other restrictions in its bylaws already preserved competitive balance. Despite its holding that seemingly limited the NCAA’s power over its member institutions, the court stressed the importance of preserving amateurism as one of the essential factors that “distinguishes [the NCAA] from its professional competition.” The Fifth Circuit later expanded on the Court’s dicta and reasoned that the


98 See Holthaus, supra note 93, at 378. In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest. *Leegin Creative Leather Products*, 551 U.S. at 886 (explaining primary concern of rule of reason).


100 Id. at 117.

101 See Holthaus, supra note 93, at 379 (citing *Regents*, 468 U.S. at 199).

102 See Welch, supra note 78, at 539 (explaining important dicta in *Regents* decision). The court went on to say:

[T]he NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice not
NCAA’s eligibility requirements were meant to distinguish the college game from professional athletics, thus, were a legitimate pro-competitive justification for some anticompetitive effects it may have.\textsuperscript{103}

Former athletes, however, are no longer eligible for NCAA participation, thus, any pro-competitive justification resting on the necessity to preserve amateurism or higher education would likely be seen as an unreasonable restraint on trade.\textsuperscript{104} Allowing collegiate athletes to license their own image after graduation would “increase supply, and theoretically, create a more competitive market for those licenses.”\textsuperscript{105} From the consumers prospective, such a policy would also enhance products such as jerseys, apparel, and video games: no longer would these products be restricted from bearing the names of fans favorite collegiate athletes.\textsuperscript{106} For these reasons, a court would likely find that the anticompetitive effects of reserving exclusive rights of former college athletes’ persona in perpetuity outweigh the weak pro-competitive justifications for doing so.\textsuperscript{107} Thus, Ed O’Bannon will probably be entitled to royalties from replica jerseys, apparel bearing his persona, and video game sales at the very least.\textsuperscript{108}

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\textsuperscript{103} See McCormack v. NCAA, 845 F.2d 1338, 1344-45 (5th Cir. 1988).
\textsuperscript{104} See Holthaus, supra note 93, at 386; see also Pete Thamel, NCAA Sued Over Licensing Practices, N.Y. TIMES (July 21, 2009) (noting that the Student-Athlete Statement is “a one year contract that ends when the student is no longer an athlete”). Reserving exclusive rights to exploit the persona of a student-athlete is illegitimate and also an unintended result of the Student-Athlete Statement, which athletes are required to sign every two years of participation. Id.
\textsuperscript{105} See Holthaus, supra note 93, at 380-81 (explaining such policy would also, theoretically, drive down cost to consumers).
\textsuperscript{106} See id. at 383-84.
\textsuperscript{107} See Welch, supra note 78, at 553.
\textsuperscript{108} See Holthaus, supra note 93, at 386 (noting that O’Bannon would probably not be entitled to all of his requested relief which include royalties for sales of “far more than video games and replica jerseys”).
IV. PROPOSED SOLUTIONS

Facing substantial political and legal pressure, the NCAA is on the brink of a major overhaul—one that they may be able to avoid if they choose to amend their bylaws to comply with legal regulations and notions of justice and fairness.109 The following proposed solutions to the restructuring of the NCAA bylaws primarily focuses on revenue generating teams, and players on those teams who are earning millions of dollars for their school and the NCAA.110 The proposals attempt to take into account the effects of the restructuring on current athletes, former athletes, the preservation of the NCAA, the unique ‘product’ that is collegiate athletics, and the future success of the member institutions along with any effects on non-revenue generating sports.

A. Establishing a Trust Fund for Current Collegiate Athletes

One suggested approach is to establish a trust fund that only becomes available to athletes upon graduation, which could be used for further educational training or professional training for collegiate athletes that do not have the opportunity to sustain a career playing their sport at the

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109 See NCAA Battling Lawsuit Filed by Former Players Seeking to Compensate Student Athletes, Fox News, (Apr. 1, 2013), http://www.foxnews.com/sports/2013/04/01/ncaa-battling-lawsuit-filed-by-former-players-seeking-to-compensate-student/ (explaining Ed O’Bannon lawsuit “has the potential to fundamentally alter the NCAA’s business model in a dramatic way,” and that this is the most “significant legal threat the NCAA is facing”); see also Jonathan Mahler, How Ed O’Bannon’s Lawsuit Would Dismantle the NCAA, Deadspin (May 5, 2013) (explaining the Ed O’Bannon case is a “storm that’s slowly rolling toward Indianapolis quietly gain[ing] strength this week with the filing of several devastating documents in a federal court in California. If it stays on course, it’s going to hit with biblical force, reducing the National Collegiate Athletic Association to a heap of rubble”).

110 See Branch, supra note 12, at 21 (“Ninety percent of the NCAA revenue is produced by 1 percent of the athletes . . . .”).
professional level.\textsuperscript{111} Such an approach would be similar to the approach taken by the International Olympic Committee (“IOC”) which collects monies from endorsements and the use of athletes’ persona while keeping them in a trust fund until the athlete leaves competition, at which time he may personally withdraw the funds.\textsuperscript{112} The trust fund approach would effectively preserve amateurism because the funds would be unavailable to the eligible collegiate athlete while also alleviating the problem of unjust enrichment by the NCAA, its business partners, and the member institutions which make billions of dollars off the backs of the uncompensated student athlete.\textsuperscript{113}

The individual trust fund approach, however, raises several practical concerns. The first is that creating individual trust funds available to players after they leave NCAA competition does not encourage kids to stay in school longer, nor does it help diminish the demand for illegal recruiting.\textsuperscript{114} In fact, it may encourage players to leave their schools even earlier, especially if they have accumulated wealth in their trust fund, as a result of their need to provide for themselves and their families outside the realm of a scholarship.\textsuperscript{115} Secondly, it would be practically difficult, and potentially disadvantageous to create a fund for each individual athlete,

\textsuperscript{111} See Wong, supra note 61, at 1104 (explaining Ed O’Bannon’s suggestion to remedy injustice in college athletics). This approach would give student-athletes a legitimate chance to make a decent living in a profession other than sports. \textit{Id.} at 1107 (“It is not be about personal gain . . . but a matter of basic fairness.”).
\textsuperscript{112} See Kristine Mueller, \textit{supra} note 27 at 87-88.
\textsuperscript{113} See Wong, \textit{supra} note 61, at 1105 (advocating that trust fund is “the most equitable solution” for former, and current, student-athletes). The author also suggests that the establishment of a trust could be expanded to athletes in non-revenue generating sports as well. \textit{See Id.}
\textsuperscript{114} For a discussion of why athletes are choosing to drop out at a higher rate, see \textit{supra} notes 6-8 and accompanying text.
\textsuperscript{115} See Hill, \textit{supra} note 6 (noting that most revenue generating athletes are products of low-income families).
that continues to accumulate after the athlete leaves school. This approach would also strain the final product of collegiate athletics because it would encourage athletes to concern themselves more with individual monetary gain and personal success on the playing field rather than that of the team (an issue that is inapplicable to the majority of Olympic sports). Courts have been hesitant, as noted in *Regents* and *McCormack*, to allow regulations that have the potential to destroy the unique atmosphere and final product of collegiate athletics—a product certainly distinguishable from professional sports. Furthermore, allocating funds in an individual trust may also not be the most efficient way to spread the wealth, because the players with the most personal success in collegiate sports are the players whom are more likely to sign the multi-billion dollar deal after leaving the NCAA. Although the trust fund approach undoubtedly solves some of the issues the NCAA faces concerning claims of unjust enrichment and unconscionable contracts, it creates a plethora of practical issues and also fails to address most of the realistic injustices present today.

B. Teams Acting as Unions: Implementation of Group Licensing

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116 *See* Wong, *supra* note 61, at 1105 (explaining trust fund approach may also “filter to athletes other than those who participate in revenue sports”). Trust fund approach may lead to a “nine-figure verdict for former college-athletes [and] would impose an enormous burden on the NCAA and its member schools, resulting in university budget cuts and higher tuition bills that would ultimately impact students.” Holthaus, *supra* note 93, at 393.

117 *See* Stephanie Vedral, *A Senior Urges: Let’s Keep College Basketball a Team Sport* (last visited March 13, 2013) (http://www.thesetonian.com/opinion/a-senior-urges-let-s-keep-college-basketball-a-team-sport-1.2960741) (“Compared to the NBA, college basketball is much more of a team game and that is one of the major reasons why many people love and prefer NCAA play.”).

118 For a full discussion of *Regents* and *McCormack*, see *supra* notes 99-103 and accompanying text.

119 WIKIPEDIA, 2012 *NCAA Men’s Basketball All-Americans*, http://en.wikipedia.org/wiki/2012_NCAA_Men's_Basketball_All-Americans (last visited March 13, 2013) (noting that 4 out of 5 first team college basketball All-Americans went pro the following year and only one that chose not to is currently still in school at Creighton University).
Another possibility that redresses unjust enrichment by the NCAA and its business partners is allowing each collegiate team to act as a union for its players. Much like the Major League Baseball Player’s Association (MLBPA), the union/college team would have exclusive rights to market the publicity rights of their team as a group to television corporations, Nike or another apparel corporation, and EA Sports for use of the team and its players in their video game.\textsuperscript{120} In \textit{Fleer Corp. v. Topps Chewing Gum, Inc.}, the court recognized that such a union “did receive the licensing income, [but it primarily acted] merely as a conduit that distributed all of the licensing revenue to the players.”\textsuperscript{121} Although professional athletes have an individual right to control the use of their image, this proposal assumes that each player on the team grants the university the exclusive right to market their image while they are playing college athletics.\textsuperscript{122} If the NCAA amended its bylaws to allow athletes to realize the proceeds of their labor at the end of each athletic year through this group-license, it would have the potential to alleviate most of the legal and political tension in college sports today. Although athletes would effectively lose their “amateur” status, the same was true for Olympic athletes in 1986, when the committee “expunged the word \textit{amateur} from its charter.”\textsuperscript{123}

As a result, the NCAA would no longer be operating as a monopoly over the entire field of college athletes, as each team would be responsible for marketing their own players’ publicity rights in their best interest—theoretically opening up the market and driving prices down for

\textsuperscript{120} \textit{See} Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 142 (1981) (holding that group-licensing is not unreasonable restraint on trade under anti-trust law).

\textsuperscript{121} \textit{Id.} at 144

\textsuperscript{122} David Johansen, \textit{A Superstar Exception to Professional Baseball Licensing Logic?}, \textit{Willamette Sports L.J.} 1, 8 (2007) (explaining that players have option to join group-licensing union or can opt to market the use of their image individually).

\textsuperscript{123} \textit{See} Branch, \textit{supra} note 12, at 26 (explaining policy change as huge success for growth of Olympic sports).
consumers. Secondly, consumers would be able to experience products that bear the athletes names, as the “amateurism” justification would no longer hold water, thereby increasing the value and utility of these products for consumers. Thirdly, unlike the individualized trust funds, the group-license controlled by the team would not induce athletes to be more concerned with personal success rather than team success—the more successful the team, the more compensation is given to each through the group-license. Preserving the “product” of college athletics has less to do with preserving amateurism, but more to do with preserving the selflessness of the team game, unlike the court in Regents suggested decades ago. Finally, compensating athletes at the end of each academic year would diminish the demand of illegal recruiting and boosters, while also incentivizing collegiate athletes to stay in school, and earn a college degree. In 2010, all five starters on the University of Kentucky basketball team declared for the draft early and never graduated college. Likewise, that same year only 20% of collegiate all-stars spent more than two years in college—a drop-off from the 86% of all-stars that spent three of four years at their universities in 1996. Collegiate athletes today, especially those playing in revenue generating sports, come from lesser means than they did decades ago which creates an overriding belief that they cannot afford to “waste one second of their earning

124 See RADLEY, supra note 43.
125 See Holthaus, supra note 93, at 392 (explaining if athletes were compensated than products bearing their persona would be “more authentic”).
126 For a full discussion of how the individualistic trust approach may diminish the team game, see supra note 117 and accompanying text.
127 For a full discussion of the Regents decision and the dicta suggesting amateurism is necessary, see supra notes 99-102 and accompanying text.
128 For a full discussion of how compensating athletes during their collegiate career would encourage them to stay in school, see infra notes 129-131 and accompanying text.
129 Chris Bernucca, Stop Complaining; Early Draft Entry has been Good for the NBA, http://www.sheridanhoops.com/2012/04/18/stop-complaining-early-draft-entry-has-been-good-for-the-nba/
130 See id.
power by remaining in school.”131 For the same reason, illegal recruiting by compensating athletes and their families in hopes they sign with a given team has distorted all notions of amateurism in its own sense, while also stripping awards, championships, and the dignity of some of the NCAA’s most hallowed players.132

While this proposal does alleviate much of the injustice in the collegiate sports market today, it comes with its own host of practical difficulties and new challenges. If the NCAA permitted schools to negotiate licensing deals for their athletes as a union, it is more likely that they would meet the definition of an “employee” under the National Labor Relations Act (“NLRA”) because they would be represented and unionized wage earners.133 Assuming they would be classified as “employees,” this proposal would open up myriad of difficulties such as rules that govern the frequency and duration of practice, as well as the option for athletes to strike.134 Entitlement to workman’s compensation is another possibility, all of which add up to huge expenses for the universities that may then have to drop several non-revenue sports programs in order to stay afloat.135 Furthermore, if the schools themselves decide which of their

131 See id.
132 See Robinson & Cole, supra note 7. USC running back Reggie Bush and his family were compensated over $100,000 by two marketing agents while Bush was at USC for hotel stays, rental cars, payments on pre-existing debt and rent. Id. The Bush family was indeed financially unstable, and most reparations were made so that his family was able to see him play, or to pay off pre-existing debt. Id. When Bush won the Heisman trophy in 2005, he was later asked to surrender it due to his involvement in illegal benefits in which he and his family had received. In 2005, Bush also forfeited the SN Player of the Year Award, the Walter Camp Award, Doak Walker Award, and his All-American selection. See WIKIPEDIA, Reggie Bush, http://en.wikipedia.org/wiki/Reggie_Bush (explaining Bush’s collegiate career was tarnished as a result of his family’s financial insecurity).
134 See id. (explaining practical difficulties of student-athletes also being “employees”).
teams are worthy of group-licensing negotiations, the policy may face a multitude of Title IX concerns because only the revenue generating sports (usually men’s basketball and football) have a substantial interest in their right of publicity. Title IX requires “not only equal opportunities for participation, but also equal treatment and benefits for athletes within collegiate programs.” Therefore, schools who only seek group-licensing contracts for their revenue generating men’s teams will probably run afoul to Title IX requirements as well.

C. Restructuring the Student-Athlete Statement: A Contractual Compromise in light of Public Policy and Preserving the Integrity College Athletics

It is in the NCAA’s best interest to restructure their bylaws to allow for some type of compensation to be realized by the collegiate athletes who earn it. Currently, the athlete essentially sells his right of publicity to the NCAA for zero by waiving it in a non-negotiable contract, while the NCAA turns right around and makes billions of dollars by selling that precise right to the largest television networks, apparel and video game corporations. Such gross unfairness has not gone unnoticed, as explained above, and if the NCAA were to reformulate their bylaws to redistribute some of the wealth to the teams that earn it, they face a much better

(Explaining that “if colleges were to pay athletes, any surplus created by those programs would be used to compensate the athletes. Consequentially, many of the non-revenue generating programs would not have adequate funding to continue”).


137 See id.

138 See Hurst & Pressly III, supra note 133, at 72 (explaining Title IX remains “a sizable hurdle” if schools, themselves, attempt to compensate their revenue generating athletes or athletic teams).

139 See Mueller, supra note 27, at 87 (“Like millions of fans, I’m more than willing to drink beer and eat bowls of nachos as I watch college ball...[but] [m]aybe it’s time to pay the entertainers—and not just the schools that exploit them.”’ (quoting Larry Elder, The Exploitation of the Student-Athlete, CAPITALISM MAGAZINE (May 2000), available at http://en.wikipedia.org/wiki/Reggie_Bush (last visited March 13, 2013)).

140 See Holthaus, supra note 93, at 376 (referencing O’Bannon’s complaint that advocates unfairness of NCAA’s bylaws).
chance of continuing to control the market for college athletes—even though this power is predominantly illusory.141

A proposed solution would be to allow collegiate athletes to receive a portion of the revenue they generate through the use of their persona. This could be accomplished in the Student-Athlete Statement: instead of requiring the athlete to relinquish the exclusive right to market their persona for nothing, they could allow the athlete to realize an apportioned amount of revenue generated through the NCAA’s use of their persona, and spread that amount evenly throughout the athlete’s respective team.142 In other words, revenue generated from each individual player’s name and likeness (through jersey sales, video games, etc.) would be aggregated and dispersed to his team evenly. Every athlete on the team would receive the same remuneration for the use of their personas at the end of each school year, even if the few star players’ names ended up being more valuable.143 Players would then be more likely to compromise the use of their image after their playing career, and such proceeds generated from the use of their image at that time could go directly to the alumni’s university.144

Such a solution would be nothing more than a compromised, contractual endorsement deal, and one that is grossly more equitable than requiring incoming 17 year-olds to “waive” the right to control their likeness in perpetuity as a condition to play their sport and therefore, in

141 For a discussion of the true power behind the NCAA regulations and the history of the NCAA, see supra notes 13-25 and accompanying text.
142 For a full discussion of the current policy which requires athletes to waive the right to market their image, see supra notes 9-12 and accompanying text.
143 See Hill, supra note 6 (advocating for compensating athletes on a even rate throughout their prospective team).
144 See Mahler, supra note 109 (explaining that Ed O’Bannon is seeking monetary damages for the use of his image because he was never compensated for it in the first place).
most cases, attend their university.\textsuperscript{145} While fairly compensating revenue generating players and teams for exclusive use of their image, the proposal would also not substantially change the “product” of collegiate athletics—keeping the focus on the success of the team rather than individual, statistical accomplishments.\textsuperscript{146} The hypothetical compromise would also improve consumer products such as replica jerseys and video games because no longer would the name of the athlete be prohibited on these products.\textsuperscript{147} Fans would finally be able to more readily identify with their favorite college athletes and teams and, theoretically, would be willing to spend more for these improved products.

As noted in the section B proposal above, compensating athletes for the use of their image at the end of the academic year would also diminish the demand for illegal recruiting and encourage kids to stay in school longer.\textsuperscript{148} Unlike the proposal announced in section B, however, the amendment to the bylaws as proposed here would not likely categorize athletes as “employees,” because standard endorsement deals regarding the right to market an individual’s persona often provide clauses that explicitly state the relationship does not amount to

\textsuperscript{145} See Michael McCann, \textit{NCAA Daces Unspecified Damages, Changes in Latest Anti-Trust Case}, SI.com (July 22, 2009). It is also important to note that the requirement to relinquish their right to market their persona is, in fact, not only a condition to play a sport but to go to school because so many of collegiate athletes’ educations depend on them participating in the sport that the school recruits them for. See Taylor v. Wake Forest, 191 S.E.2d 379, 381 (N.C. 1972) (explaining university promptly terminated student’s scholarship when he refused to participate in football his sophomore year).

\textsuperscript{146} For a full discussion of preserving the product of collegiate athletics by virtue of preserving the “team atmosphere,” see \textit{supra} notes 126-27 and accompanying text.

\textsuperscript{147} See \textit{supra} note 125 and accompanying text.

\textsuperscript{148} For a further discussion of how compensating athlete’s would diminish the demand for illegal recruiting and encourage kids to stay in school, see \textit{supra} notes 128-132 and accompanying text. \textit{See also} Mahler, \textit{supra} note 109 (explaining that if athletes were compensated, “[m]ore student-athletes might decide to stay in school rather than gambling on the draft”).
“employment.” The chief concern for defining an “employee” under the National Labor Relations Act is the “employer’s ability to control the purported employee.” This includes “whether the employer provides benefits; who provides the tools and other materials to perform the work; who designates where work is done and whether the relationship is temporary or permanent.” Current athletes do receive benefits—scholarships in exchange for their participation, thus, additional benefits in order to fairly compensate the athlete for the use of his image would probably not alter the outcome of the analysis. Other than redefining the amount of compensation, the other factors that determine the relationship between the athlete and the university/NCAA would stay virtually identical. Under these facts, courts have overwhelmingly concluded that student-athletes do not amount to “employees” because of the lack of intent between the athlete and the university to establish this relationship. Courts would likely be unwilling to distinguish this precedent due to the existence of a compromised endorsement deal that explicitly states the agreement “shall [not] be construed to establish an employer/employee

149 See OneCLE, Sample Endorsement Agreement, http://contracts.onecle.com/ritz/norman.endorse.2003.12.01.shtml (last visited March 12, 2013) (stating that “[n]othing in this [a]greement shall be construed as establishing an employer/employee relationship between [the parties]”); see also Wong, supra note 61, at 1070 (explaining Tiger Woods took home $100 million in 2008 alone, most of which resulting directly from endorsement deals). This included selling his image to “promote brand names, video games, products, and events.” Id. (implying these profits were not directly resulted from any “employment,” rather, selling his marketable image).


151 Id. (defining word “control”).

152 See id.

relationship.” The proposed contractual compromise probably would not classify student-athletes as “employees” under the NLRA, thus, would not raise issues of workman’s compensation and the right to strike against the students’ respective university.\textsuperscript{155}

The proposed solution would also probably not implicate Title IX issues, because neither the universities nor the NCAA are impeding any team’s ability to generate revenue by discouraging third parties from marketing their persona.\textsuperscript{156} Although it is more likely that a given university men’s basketball or football teams will generate more revenue from the use of their image, it is entirely possible that if a women’s team has an outstanding year a third party marketing corporation would decide to use the women’s image and persona to endorse their product. More appropriately, however, decisions regarding which player or team a marketing corporation wishes to use as an endorsement are decisions that are left to the free market—outside of Title IX’s “equality of opportunity” realm.\textsuperscript{157} In short, this compromised endorsement deal alleviates many of the injustices inherent in the NCAA’s perfect business model, without implicating more issues such as an employer/employee relationship, or Title IX concerns.

\V. CONCLUSION

\textsuperscript{154} For a full discussion of endorsement deals that sell the rights to an individual’s image, see \textit{supra }note 149 and accompanying text. \textit{But see }Hurst & Pressly III, \textit{supra }note 133, at 70 (explaining if school paid “monthly stipend” directly to student in exchange for his participation in athletics, such compensation would likely classify him as “employee” under NLRA). \textsuperscript{155} \textit{See }Hurst and Pressly III, \textit{supra }note 133, at 71 (noting that if athletes are categorized as “employees,” they would have ability to strike against employer, i.e. university, under NLRA). \textsuperscript{156} 20 U.S.C. § 1681(a) (“No person in the United States shall...be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity . . . .”). \textsuperscript{157} \textit{See }Hurst and Pressly III, \textit{supra }note 133, at 72; \textit{see also }Blair v. Wash. State Univ., 740 P.2d 1379, 1383-84 (Wash. 1987) (en banc) (holding each sports team may keep revenue that they generated and may be excluded from calculations of university financial support).
The compromised endorsement contract outlined in section C is less than perfect. It is less than perfect from the athlete’s perspective because some of the star-athletes will not be recognizing the full value of their image and persona, and it is less than perfect from the NCAA’s and their member institutions’ perspective because under the current bylaws they are able to reap the benefit of the athletes labor without having to sacrifice a dime. However, as mentioned above, the student-athlete is on the brink of overthrowing the NCAA’s very existence by requiring the NCAA to set up trust funds for current players, and theoretically compensate all former players.\textsuperscript{158} A compromise from both sides is likely the most efficient way to preserve the integrity of the game while recognizing the legitimate value of the labor rendered.

“You ‘see everybody getting richer and richer,’ Desmond Howard, who won the 1991 Heisman Trophy while playing for the Michigan Wolverines, told USA Today . . . . ‘And you walk around and you can’t put gas in your car? You can’t even fly home to see your parents?’”\textsuperscript{159} For Ed O’Bannon and former uncompensated athletes everywhere, “[i]t’s not about the money. It’s about what’s right.”\textsuperscript{160} The class action suit represents much more than the possibility of a landmark payday, rather a way to evoke change in a broken system that has been taking advantage of free labor and legitimizing it as being in the best interest of those producing the

\textsuperscript{158} See Mahler, supra note 109 (explaining the Ed O’Bannon litigation is a “storm that’s slowly rolling toward Indianapolis quietly gain[ing] strength this week with the filing of several devastating documents in a federal court in California. If it stays on course, it’s going to hit with biblical force, reducing the National Collegiate Athletic Association to a heap of rubble”).

\textsuperscript{159} See Branch, supra note 12, at 11-12 (quoting Desmond Howard).

\textsuperscript{160} Dave Zirin, Root for Ed O’Bannon to Upset the NCAA, EDGE OF SPORTS, (last visited March 12, 2013) http://www.edgeofsports.com/2010-03-18-510/index.html (quoting Ed O’Bannon). Sales of school apparel and merchandise have skyrocketed over the past decade such as “baggy shorts, t-shirts, trading cards.” See THE FAB FIVE, supra note 5 (noting that as “freshmen [the Fab Five] felt excited, as sophomores--exploited”). Jalen Rose remembered “one night walking downtown to a shoe store department and we saw [an advertisement which read] ‘Fab Five Nike’s.’ That’s when I realized having your own shoe apparently doesn’t always put money in your pocket.” Id. Rose added, “I didn’t feel like a college kid anymore, I felt like a professional athlete who wasn’t getting paid.” Id.
labor. The proposed solution outlined in section C has the possibility to remedy this injustice, and such a remedy may be sufficient for current athletes to waive the use of their image to the NCAA after their playing days—essentially “giving back” to their universities in order for them to continue providing Division I athletics to non-revenue generating teams. In other words, current athletes would receive an apportioned amount of compensation for the use of their image while their image is valuable, then subsequently waive the right to that image during their enrollment in the university when they are no longer in school. This would allow the NCAA and respective universities to continue selling the rights to “classic” games on television, and “classic” teams in video games without having to worry about maintaining trust funds for all former players.

The proposed contractual endorsement compromise would only sustain as long as both parties agreed to be governed by it. This is no different, however, from the current bylaws that require the athlete to relinquish the right to market their image for nothing, because as noted previously, the NCAA only has the power to impose amateurism, or any law, on those who

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161 See Mueller, supra note 27 at 87 (noting, as one commentator put it, “Like millions of fans, I’m more than willing to drink a beer and eat bowls of nachos as I watch college ball. It’s great entertainment. Maybe it’s time to pay the entertainers--and not just the schools that exploit them” (citation omitted)). The perception of the star student-athlete’s lifestyle is also inconsistent with the reality, especially because most star athletes today come from more modest means. THE FAB FIVE, supra note 5 (“The perception of our lifestyle is that we were living like rock stars. But we weren’t living that lifestyle, that’s just not how it was. We were eating cereal, cooking hot dogs, living like every other college student….the only difference was that we had to go to practice.” (quoting Ray Jackson, member of the Fab Five)). “I drove a green Dodge Shadow my Mom gave me, that’s why it kills me when everyone was acting like we had it big, when that wasn’t the case.” Id. (quoting Jalen Rose); see also Mahler, supra note 109 (explaining that “[p]laying athletes wouldn’t result in schools spending additional money on sports. They would just spend less of it on coaches and facilities and more on students”).

162 For a discussion of the implications of non-revenue generating teams, see supra note 135.

163 See id.

164 See Wong, supra note 61, at 1106 (suggesting establishing trust funds for all current, former, and future student athletes would be extremely costly). “There are over 400,000 NCAA student-athletes, not to mention the hundreds of thousands of former student athletes.” Id.
consent to be governed. That being said, it is in the interest of both parties to reach a compromise such as one proposed in section C in order to maintain the integrity of the game, preserve a governing body, and treat collegiate athletes with the respect and dignity they have been longing for.

\[\text{\textsuperscript{165}}\text{ For a full discussion of the transparent power of the NCAA, see supra notes 13-25 and accompanying text.} \]

\[\text{\textsuperscript{166} See In re NCAA Student Athlete Name & Likeness Licensing Litigation, 2013 WL 361229 (N.D. Cali. Jan. 29, 2013) (denying NCAA’s motion to dismiss and setting jury trial for June, 2014).} \]

\[\text{\textsuperscript{167} See Wong, supra note 61, at 1107 (advocating NCAA should “create a realistic opportunity for former NCAA athletes to transition to a professional life--in something other than sports”); see also Mauler, supra note 109 (explaining that O’Bannon litigation “has already performed a valuable service: It has exposed a system whose sole purpose is to deny the value of talented athletes. The system and its overlord--The NCAA--both deserve to die”).} \]