

Note

Deconstructing the Façade of Amateurism:
Antitrust and Intellectual Property
Arguments in Favor of Compensating
Athletes

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Anyone who has visited Chapel Hill, North Carolina in recent years could easily come to the conclusion that two numbers are crucial to the school: 23 and 50. The number 23 is an easy connection for sports fans of all ages. Michael Jordan, a University of North Carolina graduate, immortalized the number during his stellar professional career. Arguably the best professional basketball player of all time, Jordan is known by many monikers: Mike, MJ, but also simply his jersey number, 23. The number 50 requires a more recent Carolina sports knowledge. To these fans, the number does not need a name, it represents the hard working and well-loved Tyler Hansbrough. While Jordan is the top professional player, Hansbrough makes a strong case for best recent college basketball player, especially at UNC. Even three years after he graduated (and has yet to make a name nationally as an Indiana Pacer), his jersey can be seen all over campus on any given day.

This kind of devotion to a mere number is not exclusive to North Carolina. The number 15 in Gainesville, Florida signals the Gators' much-debated former quarterback, Tim Tebow. No. 15 jerseys are a top seller, bringing in \$77,000 in sales in 2008.¹ Tebow's fans frequently incorporated the number in signs, like ones opining that he should win the "HE15MAN."

On the University of Oklahoma athletics website, a No. 14 jersey is prominently featured for sale; on the University of Texas athletics site, it is a No. 12 jersey.² Neither have names, but both are priced at a level beyond that of a generic number. Sam Bradford and Colt McCoy, respectively, proudly wore those numbers through successful seasons. Fans buy those specific jerseys to pay homage to their athletic heroes.³

This association between jersey numbers and the players who once wore them represents two fundamental, yet conflicting, collegiate athletics tenets. Individual athletes are the faces of their respective universities. Those universities and the NCAA are allowed to profit off of them nearly without bounds. So while they are a main revenue source, they are forbidden from receiving any compensation for this role.

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¹ Nathan Crabbe, Profiting off the Gators: a fine line between what's OK and not, Gainesville.com (Sept. 26, 2009), <http://www.gainesville.com/article/20090926/ARTICLES/909259893>.

² Mike Fish, What price glory? The star's value, ESPN, (Dec. 11, 2009), <http://sports.espn.go.com/espn/otl/news/story?page=fish/091211>.

³ Id.

I. INTRODUCTION

College sports have reached a pivotal moment in history. Many individual schools' practices have come under fire by critics. The laundry list of athletic programs with some type of scandal just in the last few years includes: the University of Oklahoma,⁴ Boise State University,⁵ the University of Nebraska,⁶ the University of Miami,⁷ Lamar University,⁸ Georgia Institute of Technology,⁹ the University of North Carolina,¹⁰ Syracuse University,¹¹ and most notably, Pennsylvania State University.¹² The so-called "arms race" for football-oriented schools pressures teams to build better facilities and hire top-name coaches to recruit new players. Alarming high alumni donations must be solicited to finance these expenses, particularly since football revenues sustain the rest of the athletic department at these football-oriented schools.¹³ In this historic recession, however, donations across the country have plummeted.¹⁴ Schools have had to make numerous changes to stay afloat. On the academic side, this includes higher tuitions,¹⁵ while many athletic programs have been forced to make cuts in non-revenue sports, even eliminating whole programs at times. The University of Maryland is a recent example, as it cut eight of its non-revenue-producing sports.¹⁶ The school later left the Atlantic Coast Conference for the Big Ten conference in an attempt to increase revenue.¹⁷

⁴ Oklahoma placed on three years' probation, ESPN (Nov. 12 2011), http://espn.go.com/mens-college-basketball/story/_/id/7220727/oklahoma-sooners-ncaa-finds-major-violations-men-basketball.

⁵ Boise State cited for major violations, NCAA News (Sept. 27, 2011), <http://www.ncaa.com/news/ncaa/article/2011-09-13/boise-state-cited-major-violations>.

⁶ Nebraska self-reports NCAA violations, NCAA News (July 6, 2011), <http://www.ncaa.com/news/ncaa/2011-07-05/nebraska-self-reports-ncaa-violations>.

⁷ Pete Thamel, Hurricane Players and Recruits Accused of N.C.A.A. Violations, N.Y. Times, Aug. 16, 2011, <http://www.nytimes.com/2011/08/17/sports/ncaafotball/miami-hurricanes-accused-of-ncaa-violations.html>.

⁸ Matt Norlander, Bob Knight commits secondary recruiting violation, CBS Sports (Oct. 19, 2011), <http://www.cbssports.com/mcc/blogs/entry/26283066/32814989>.

⁹ Ga. Tech notified of alleged violations, NCAA News (July 14, 2011), <http://www.ncaa.com/news/football/2011-07-14/ga-tech-notified-alleged-violations>.

¹⁰ See UNC admits to NCAA violations, NBC 17 (Sept. 19, 2011), <http://www.wncn.com/story/20911766/unc-admits-to-ncaa-violations>.

¹¹ See Michael Hill, Unlike Penn State, Syracuse scandal just unfolding, Huffington Post (Dec. 4, 2011), <http://www.huffingtonpost.com/huff-wires/2011/12/04/bkc-syracuse-fine-investigation/>.

¹² See Penn State cuts ties with Paterno, ABC 6 (Dec. 10, 2011), <http://abclocal.go.com/wpvi/story?section=news/local&id=8462582>.

¹³ See Brian Bennett, Arms race proves recession proof, ESPN (June 14, 2012), http://espn.go.com/college-football/story/_/id/8047787/college-football-facilities-arms-race-proves-recession-proof.

¹⁴ Recession hits US private fundraising, but others do better, Times Higher Education, (Sept. 4, 2010), <http://www.timeshighereducation.co.uk/story.asp?storyCode=413322§ioncode=26>.

¹⁵ Larry Gordon, Recession drives up college tuition nationwide, L.A. Times, (Oct. 21, 2009), <http://articles.latimes.com/2009/oct/21/nation/na-college-cost21>.

¹⁶ David Steele, More? Better? No, just blues, Sporting News (Nov. 22, 2011), <http://aol.sportingnews.com/ncaa-football/story/2011-11-22/college-athletics-more-better-no-just-blues>.

¹⁷ Maryland's Big Ten deal includes multimillion-dollar subsidy, Sports Illustrated, (March 16, 2013), <http://tracking.si.com/2013/03/16/maryland-big-ten-travel-subsidy/>.

The National Collegiate Athletic Association (NCAA) is the governing body for collegiate sports.¹⁸ As an organization, it has not fared much better. Between the alleged arbitrary nature of the BCS football bowls,¹⁹ seemingly inconsistent infraction punishments,²⁰ and the questioning of amateurism -- the underlying premise of many of the NCAA's rules, the NCAA has much to defend.

The negative publicity spreads over a multitude of platforms and personalities. Pulitzer-Prize-winning author Taylor Branch is best known for his trilogy on the civil rights era and his comprehensive oral history of President Bill Clinton.²¹ Branch was so intrigued by the NCAA practices that he penned *The Cartel: Inside the Rise and Imminent Fall of the NCAA*. In it, he goes so far as to compare college athletes to slaves on a plantation, NCAA property that plays for nominal pay while the NCAA profits off of their successes and discards them if they become injured or do not live up to their expectations.²²

Jay Bilas is an ESPN commentator, a former collegiate athlete, and a lawyer with Moore & Van Allen, PLLC.²³ His Twitter account, @JayBilas, is most frequently used²⁴ to articulate his negative opinion on amateurism. He has consistently noted that amateurism is simply exploiting student athletes. He points out that other student leaders, such as student newspaper editors, get paid for their positions without criticism. Coaches are not getting accused of not "loving the game" even while receiving astronomically high salaries. College athletes are the only group in the hugely successful amateur sport world that do not get the free market benefits.²⁵

Charlie Pierce, a frequent contributor to Grantland, Esquire, and NPR, wrote an article denouncing the NCAA as well.²⁶ He predicted its demise by

¹⁸ NCAA, Who We Are, NCAA.com, <http://www.ncaa.org/wps/connect/public/ncaa/about+the+ncaa/who+we+are+landing+page> (last accessed Jan. 8, 2012).

¹⁹ See Richard H. Thaler, Kiss the BCS Goodbye, *The Chronicle of Higher Education*, (Dec. 11, 2011), <http://chronicle.com/article/Kiss-the-BCS-Goodbye/130057/>; Edna Thomas, BCS Bowl Games: 2012 National Championship Will Spell the End of the BCS Era, *Bleacher Report* (Dec. 10, 2011), <http://bleacherreport.com/articles/976823-2011-national-championship-will-spell-the-end-of-the-bcs-era>; Chris Siers, BCS draws criticism for title showdown, *Shelbyville Times-Gazette*, (Dec. 6, 2011), <http://www.t-g.com/story/1791550.html>; Why does BCS Suck?, *RipBCS*, <http://ripbcs.com/contactus.aspx>; But see Mark McCarter, The BCS is wise beyond its jeers, *The Huntsville Times*, (Dec. 6, 2011), http://www.al.com/sports/index.ssf/2011/12/the_bcs_is_wise_beyond_its_jees.html; Tim Daniels, BCS Rankings: System Got Title Game Right Despite Constant Negativity, *The Bleacher Report*, (Dec. 6, 2011), <http://bleacherreport.com/articles/971576-bcs-rankings-system-got-title-game-right-despite-constant-negativity>; Jonathan Hull, College Football Week 13 Review, *Fantasy Football Jungle*, (Nov. 28, 2011), http://fantasyfootballjungle.com/article/1510/College_Football_Week_13_Review/ (arguing the BCS has a net positive benefit, despite criticisms and imperfection).

²⁰ See, e.g., Aidan Middlemiss McCormack, Seeking Procedural Due Process in NCAA Infraction Procedures: States Take Action, 2 *Marq. Sports L. Rev.* 261 (1992), <http://scholarship.law.marquette.edu/sportslaw/vol2/iss2/7>.

²¹ Taylor Branch: Biography, *TaylorBranch.com*, <http://taylorbranch.com/about-taylor-branch/> (last visited Dec. 11, 2011).

²² Taylor Branch, *The Cartel*, *By-liner Originals*, <http://byliner.com/originals/the-cartel> (last accessed Dec. 11, 2011).

²³ About Jay, *JayBilas.com*, <http://jaybilas.com/aboutjay.html> (last accessed Dec. 11, 2011).

²⁴ Excluding Young Jeezy lyrics, see generally http://en.wikipedia.org/wiki/Young_Jeezy.

²⁵ See, e.g., tweet from Nov. 10, 2011 ("How does the principle of amateurism benefit the athlete? Why are athletes the only students or employees restricted in this way? #DukeLive"), accessible at <https://twitter.com/#!/JayBilas>.

²⁶ Charles S. Pierce, *The Beginning of the End for the NCAA*, *Grantland* (Nov. 1, 2011), http://www.grantland.com/story/_id/7177921/the-beginning-end-ncaa.

citing the recent stipend allowed by the NCAA as demolishing amateurism and announcing the new pay-for-play era in college athletics.²⁷

The Chronicle of Higher Education is a well-respected source for college news and job postings. It recently published a series of articles entitled: *What the Hell Has Happened To College Sports And What Should We Do About It?*²⁸ The strongly-named series contains articles from former athletes, one of the Knight Commission for College Athletics founders, the former National Basketball Player Association President, professors, and authors. The varied backgrounds and topics featured in the series are united by a common theme: the NCAA is in trouble, and it will take serious reform to put it back on the right track.²⁹

Even Congress has gotten involved in the criticism, with Illinois Representative Bobby Rush analogizing the NCAA to the mafia, saying the organization “would make the mob look like choirboys,” based on the myriad problems that Congress discovered in planning to discuss college sports in upcoming sessions.³⁰

Yet written criticism is probably the least of the NCAA’s problems. A recent self-investigation revealed “major missteps” during the organization’s University of Miami investigation.³¹ The NCAA fired their enforcement vice-president, but doubts still remain if more unethical behavior will emerge.³²

Lawsuits have also recently been filed against the governing body: one by former University of Nebraska quarterback Sam Keller³³ and former basketball stars Bill Russell, Oscar Robertson and Ed O’Bannon³⁴ (combined in United States District Court for the Northern District of California),³⁵ one class-action suit relating to scholarship termination before graduation,³⁶ one suit regarding the NCAA’s concussion treatment,³⁷ and one from Pennsylvania Governor Tom Corbett regarding Penn State sanctions.³⁸ The *Keller/O’Bannon* case brings up interesting issues of both antitrust and the right of publicity, which this paper will discuss.

²⁷ Id.

²⁸ What the Hell Has Happened To College Sports? And What Should We Do About It?, The Chronicle of Higher Education (Dec. 11, 2011), <http://chronicle.com/article/What-Happened-to-College-Sports/130071>.

²⁹ Id.

³⁰ David Cassilo, Rep. Bobby Rush: NCAA is dirty, ‘would make the mob look like choirboys’, The Daily Caller (Nov. 1, 2011), <http://dailycaller.com/2011/11/01/rep-bobby-rush-ncaa-is-dirty-would-make-the-mob-look-like-choirboys/>.

³¹ Rodger Sherman, NCAA botched Miami investigation in more ways than previously thought, SB Nation (Mar. 27, 2013), <http://www.sbnation.com/college-football/2013/3/27/4154708/ncaa-botched-miami-investigation-mark-emmert-donna-shalala>.

³² Id.

³³ Keller sues EA Sports over images, ESPN, (May 8, 2009, 3:52 AM), <http://sports.espn.go.com/nfl/news/story?id=4151071>.

³⁴ Shannon Owens, Celtics great Bill Russell sues NCAA for antitrust violations, The Orlando Sentinel (Oct. 6, 2011), http://articles.orlandosentinel.com/2011-10-06/sports/os-bill-russell-sues-ncaa_1_ncaa-athletes-lawsuit.

³⁵ Julia Brighton, Note: The NCAA and the Right of Publicity: How the O’Bannon/Keller Case May Finally Level the Playing Field, 33 Hastings Comm. & Ent. L.J. 275, 276 (2011).

³⁶ Lester Munson, Challenges for change in the NCAA, ESPN Courtside Seat (Dec. 2, 2011), http://espn.go.com/espn/commentary/story/_/page/munson-111202/three-separate-lawsuits-force-reforms-ncaa.

³⁷ Id.

³⁸ Steve Eder, Gov. Tom Corbett of Pennsylvania Sues N.C.A.A. Over Penn State Penalties, N.Y. Times, (Jan. 2, 2013), http://www.nytimes.com/2013/01/03/sports/ncaafball/governor-announces-lawsuit-against-ncaa-over-penn-state-penalties.html?_r=0.

II. ANTITRUST ISSUES

The NCAA has been the subject of numerous antitrust suits since its inception. While most fail, there have been a few notable successes where the organization has been judged in violation of antitrust laws. In *NCAA v. Board of Regents of the University of Oklahoma*,³⁹ the court ruled the NCAA's limit on television broadcasts per school and fixed prices for such broadcasts were unacceptable under these laws.

In *Law v. NCAA*,⁴⁰ the court did a quick-look rule of reason analysis of a rule limiting assistant coach compensation, in which the market control analysis is eliminated due to the intentional price lowering in a horizontal agreement. The NCAA's intent in enacting the challenged rule was to "reduce the high costs of part-time coaches' salaries."⁴¹ The NCAA did not prove sufficient pro-competitive benefits to offset the rule's anti-competitive nature, and thus were permanently enjoined from reenacting compensation limits.⁴²

In two other cases, the court denied the NCAA's motion for summary judgment. These judgments led commentators to believe there may have been successful antitrust claims, but both cases were resolved prior to final disposition on the merits, leaving the antitrust claims open for speculation. In *Metropolitan Intercollegiate Basketball Ass'n v. NCAA*,⁴³ the MIBA wanted the court to declare the NCAA's postseason basketball rules as an antitrust violation because the organization prevented member colleges from competing in the National Invitational Tournament (at the time owned by the MIBA). The court denied the NCAA's motion for summary judgment stating that MIBA had established that the rule was commercial, that there was an agreement among the NCAA members, that the NCAA was not acting as a single entity, and that the NCAA had market power in the relevant market.⁴⁴ After this ruling came down, the NCAA decided to end the litigation by buying the NIT outright and "unified postseason basketball."⁴⁵

Similarly in *In re NCAA I-A Walk-on Football Players Litigation*,⁴⁶ the court denied the NCAA's motion for judgment on the pleadings because the players had demonstrated an injury, a relevant market, monopoly power, and that the rule on scholarships was related to trade or commerce.⁴⁷ However, once the plaintiffs' motion for class certification⁴⁸ and motion to amend complaint⁴⁹ were denied, the case was abandoned.⁵⁰

³⁹ 468 U.S. 85 (1984).

⁴⁰ 134 F.3d 1010 (10th Cir. 1998).

⁴¹ *Id.* at 1020.

⁴² *Id.* at 1024; See also Richard J. Hunter Jr. & Ann M. Mayo, Issues in Antitrust, the NCAA, and Sports Management, 10 Marq. Sports L. Rev. 69, 83-4 (1999), <http://scholarship.law.marquette.edu/sportslaw/vol10/iss1/5>.

⁴³ 339 F.Supp.2d 545 (S.D.N.Y. 2004).

⁴⁴ *Id.* at 548-549.

⁴⁵ Andy Katz, NCAA buys tournaments, ends NIT litigation, ESPN.Com (Aug. 17, 2005, 6:24 PM), <http://sports.espn.go.com/ncb/news/story?id=2136724>.

⁴⁶ *In re NCAA I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144 (W.D. Wash. 2005).

⁴⁷ *Id.* at 1152.

⁴⁸ *In re NCAA I-A Walk-On Football Players Litig.*, C04-1254C, 2006 WL 1207915 (W.D. Wash. May 3, 2006).

⁴⁹ *In re NCAA I-A Walk-On Football Players Litig.*, C04-1254C, 2007 WL 951504 (W.D. Wash. Mar. 26, 2007).

⁵⁰ Roger D. Blair and Jeffrey L. Harrison, *Monopsony in Law and Economics 197-198* (Cambridge University Press, 2010).

However, courts have ruled in favor of the NCAA on most alleged antitrust violations. In both amateur and professional sport antitrust cases, courts have been quick to point out that some horizontal agreements are necessary for competition. As the court in *NCAA v. Board of Regents* put it,

What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete.⁵¹

Beyond just the nature of sports, courts have also given special latitude to the NCAA regarding its non-professional nature. It is now settled law that eligibility rules will not be subject to antitrust regulations. As it has been reasoned,

[T]he NCAA seeks to market a particular brand of football—college football. The identification of this “product” with an academic tradition differentiates college football . . . In order to preserve the character and quality of the “product,” athletes must not be paid, must be required to attend class, and the like. And the integrity of the “product” cannot be preserved except by mutual agreement . . . Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable.⁵²

The courts have allowed numerous eligibility rules relating to amateurism, such as an eligibility denial to a player who participated in the NFL draft,⁵³ an eligibility denial to a former professional hockey player⁵⁴ (even one that was not paid),⁵⁵ rules restricting players based on age,⁵⁶ an eligibility denial to athletes that used scholarship-finding services,⁵⁷ rules limiting compensation per scholarship,⁵⁸ requirements for academic eligibility standards such as grades⁵⁹ and class prerequisites,⁶⁰ and rules that restricted transfer⁶¹ and graduate⁶² students' eligibility.

⁵¹ 468 U.S. 85, 101 (1984).

⁵² *Id.* at 101-02.

⁵³ *Gaines v. NCAA*, 746 F. Supp. 738 (M.D. Tenn. 1990).

⁵⁴ *Jones v. NCAA*, 392 F. Supp. 295 (D. Mass. 1971).

⁵⁵ *Karmanos v. Baker*, 617 F. Supp. 809 (6th Cir. 1987); but see *Buckton v. NCAA* 366 F. Supp. 1152 (D. Mass. 1977) (granting former amateur league hockey players an exception from the NCAA rule prohibiting them from receiving eligibility).

⁵⁶ *Butts v. NCAA*, 751 F.2d 609 (3d Cir. 1984).

⁵⁷ *Coll. Athletic Placement Serv. v. NCAA*, No. 74-1144 1974 WL 998, at *6 (D.N.J. Aug. 22, 1974).

⁵⁸ *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988).

⁵⁹ *Ganden v. NCAA*, No. 96 Civ. 6953, 1996 WL 680000, (N.D. Ill. Nov. 21, 1996).

⁶⁰ *Hall v. NCAA*, 985 F. Supp. 782 (N.D. Ill. 1997).

⁶¹ *Collier v. NCAA*, 783 F. Supp. 1576 (D.R.I. 1992); see also *Weiss v. E. Coll. Athletic Conference*, 563 F. Supp. 192 (E.D. Pa. 1983); *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059 (9th Cir. 2001).

⁶² *Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998) (vacated on other grounds).

It is not merely eligibility requirements, but all non-commercial NCAA rules that are exempt from antitrust rules. Courts have upheld such widespread regulations as restrictions on manufacturers' logos on uniforms,⁶³ certain prohibitions for an assistant coach⁶⁴ and a hockey team⁶⁵ that violated rules, rules limiting the number of assistant coaches per team,⁶⁶ recruiting rules,⁶⁷ and rules limiting the number of games allowed to be played per year.⁶⁸

The defining distinction for all of these cases is whether the NCAA activity's goal is to "provide the NCAA with a commercial advantage" or instead eligibility rules which "seek to ensure fair competition in intercollegiate athletics."⁶⁹ While the NCAA will argue that not paying players for their appearances in video games, posters, and other memorabilia is to protect amateurism's virtues, this argument is merely a front for what is an outstanding economic benefit.

The NCAA reported revenues for 2009-2010 of \$749.8 million.⁷⁰ Most of that revenue was from television and marketing rights (86%) and championships (primarily ticket sales, 9% totals), which would of course be worthless without the athletes' participation.⁷¹ Less than 1% of the revenues, which still amounts to a hefty \$4 million, comes from "sales and services."⁷² The revenues include the licensing cut from the six-year EA Sports deal that allowed the game producer to market college football and basketball. The NCAA earned a portion of the \$500 million EA Sports generated in sales over the contract's span.⁷³

The individual schools, too, get their fair share of revenue. Not only do they receive a cut of the NCAA profits, the schools sell tickets, collect student fees, and sell their own licensed materials. In 2008, the top revenue earner was the University of Alabama, with total revenues of over \$123 million.⁷⁴ The revenue category most relevant here is "branding" which ESPN defines as "sales of branded novelties, sponsorships, ads."⁷⁵ The top ten revenue earners⁷⁶ brought in an estimated average of \$7 million in branding revenue just in that year. The University of Texas at Austin brought in over \$16 million exclusively from branding.⁷⁷

⁶³ Adidas Am., Inc., v. NCAA, 40 F. Supp.2d 1275 (D. Kan. 1999); see also Warrior Sports v. NCAA, 623 F.3d 281 (6th Cir. 2010) (upholding rules on approved lacrosse heads did not reasonably restrain trade); Baum Research & Dev. Co. v. Hillerich & Bradsby Co., 31 F. Supp.2d 1016 (E.D. Mich. 1998) (ruling that aluminum bat rule did not have anti-competitive effects).

⁶⁴ Bassett v. NCAA, 528 F.3d 426 (6th Cir. 2008).

⁶⁵ Colo. Seminary v. NCAA, 570 F.2d 320 (10th Cir. 1978).

⁶⁶ Hennessy v. NCAA, 564 F.2d 1136 (5th Cir. 2011).

⁶⁷ Pocono Invitational Sports Camp v. NCAA, 317 F. Supp.2d 569 (E.D. Pa. 2004); see also U.S. v. Walters, 711 F. Supp 1435 (N.D. Ill. 1989).

⁶⁸ Hispanic Coll. Fund v. NCAA, 826 N.E.2d 652 (Ind. Ct. App. 2005); see also Worldwide Basketball and Sports Tours v. NCAA, 2002 WL 32137511 (S.D. Ohio 2002).

⁶⁹ Smith v. NCAA, 139 F.3d 180, 185 (3d Cir. 1998).

⁷⁰ NCAA, 2009-10 Membership Report, NCAA, <http://catalog.proemags.com/publication/0affe96d#/0affe96d/10> (last accessed Nov. 30, 2011).

⁷¹ Id.

⁷² Id.

⁷³ Mark Fainaru-Wada, NCAA Basketball Game in Jeopardy, ESPN (Feb. 10, 2010), <http://sports.espn.go.com/ncb/news/story?id=4904393>.

⁷⁴ College Athletics Revenues and Expenses 2008, ESPN, http://espn.go.com/ncaa/revenue/_/year/2008 (last visited Nov. 30, 2011).

⁷⁵ Id.

⁷⁶ Id. Excluding Penn State at #10, who did not report how their revenues broke down, and substituting Auburn, the 11th top revenue earner in lieu.

⁷⁷ Id.

It is true that it is not simply the individuals' fame that markets these items, but also the school's status. Yet the six percent of apparel revenue (up to \$1 million for some schools) from jersey sales alone are almost solely motivated by the athlete's fame.⁷⁸ In 2001, Duke student-athlete Jay Williams did his senior thesis on how *his* jersey alone garnered \$1 million in profits, which went to private companies and his university. At the time, he was living on \$600 a month.⁷⁹

This does not include many other items sold that have a direct reference to players' names, jersey numbers, or even player images. A quick visit to the University of North Carolina's athletic website displays auctions for signed merchandise such as game balls and posters, as high as \$160 for a "Late Night with Roy" poster, that prominently displays a team picture.⁸⁰ A further look into the school store shows DVD sales from important games as early as 1982, books on the storied basketball program's history (complete with player pictures and interviews), and a link to a site where numerous game and player pictures can be purchased.⁸¹ To allege that profiting from this merchandise is not an economic activity is completely inconsistent with the term's common usage. As one analyst phrased the antitrust case,

O'Bannon is alleging that if the NCAA didn't force him to sign this contract, then he could have gotten money from someone else (say, an EA competitor) to use his likeness. Thus, it essentially fixed the price of using his image at zero. Even if you consider players' scholarships adequate payment for their services, this still artificially depresses how much they're paid. If a judge agrees, the waiver would be considered an illegal restraint of trade under the act.⁸²

If a court recognizes that the economic dealings in this instance should not be exempt from antitrust violations, it will most likely decide to judge the rule on a quick-look rule of reason analysis, as opposed to holding it is a *per se* violation.⁸³ Under this analysis, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."⁸⁴ In this analysis, courts typically define the relevant market for the product or service from which the alleged antitrust violation stems, look for market power in that market, and then determine the challenged action's nature and its anticompetitive effect.⁸⁵ Put

⁷⁸ Carter Strickland, NCAA Athletes Missing Out on Jersey Profits, OrangePower.com (Apr. 20, 2004), <http://www.orangepower.com/threads/do-ncaa-athletes-missing-out-on-jersey-profits.3302/>.

⁷⁹ Jay Soloman, Athletes as Salesmen: Proposal Allowing Companies to Use Player Images and Schools Profit, Birmingham News (Oct. 23, 2011), http://www.al.com/sports/index.ssf/2011/04/athletes_as_salesmen_proposal.html.

⁸⁰ University of North Carolina Official Athletic Site, GoHeels.com, <http://www.goheels.com/> (last visited Nov. 30, 2011).

⁸¹ GoHeels.com Official Online Store, GoHeels.com, http://www.goheels.com/sellnew/SellHome.dbml?SITE=UNC&DB_OEM_ID=3350 (last visited Nov. 30, 2011).

⁷⁵ Robert Wheel, Ed O'Bannon vs. the NCAA: the Antitrust Lawsuit Explained, SB Nation (January 31, 2013), <http://www.sbnation.com/college-football/2013/1/31/3934886/ncaa-lawsuit-ed-obannon>.

⁸³ *Smith v. NCAA*, 139 F.3d 180, 186 (3d Cir. 1998) ("Consequently, if the eligibility requirements were subject to the Sherman Act, we would analyze them under the rule of reason.")

⁸⁴ *Bd. of Trade of City of Chi. v. U.S.*, 246 U.S. 231, 244 (1917).

⁸⁵ Holmes, *Antitrust Law Handbook* § 2:10.

simply, “[a] rule of reason analysis first requires a determination of whether the challenged restraint has a substantially adverse effect on competition . . . [t]he inquiry then shifts to an evaluation of whether the alleged wrongful conduct’s procompetitive values justify the otherwise anticompetitive impacts.”⁸⁶

In *NCAA v. Board of Regents*,⁸⁷ the court did this rule of reason analysis on the limitations assigned to schools regarding television rights. The court here found it beyond question that the NCAA held market power in regards to college football, holding that “intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience.”⁸⁸ Although a less explicit statement regarding college sport’s uniqueness, the recent *In Re NCAA I-A Walk-on Football Players Litigation* extended that market power to the rest of NCAA athletics.⁸⁹ Courts will likely not argue with the precedent and move on to the test’s second part.

There are definitely pro-competitive benefits to the rule. Many schools are already suffering from economic woes. The most recent NCAA report pointed out that only football and basketball programs were profitable at any school and only fourteen out of 120 FBS schools, or 12%, were profitable overall.⁹⁰ By preventing all non-scholarship compensation, the NCAA helps to “stop the bleeding” and keeps lower-income schools from dropping out of competition completely. It is unclear whether a change in policy would force schools to find more creative solutions to their money issues, or whether those fourteen schools would be the only schools able to recruit athletes with any type of skill and the rest would be engrained in a losing battle.

However, the rule’s anti-competitive effects prohibiting player profit from proceeds based on image rights are clear. If schools are allowed to use licensing moneys to attract players, they will try to maximize both the revenue from these sources and the deals offered to the players they wish to entice. Further, the competition among recruits will heighten. Both school prices and players will respond to market pressures by lowering or raising their price, depending on demand. Athletes could negotiate individually with colleges and both the business-savvy schools and players would distinguish them as elite. As one NCAA scholar put it, the current system is flawed because,

The expected and actual market consequences of the NCAA’s rules are a reduction in the wages of student-athletes, greater profits for colleges, a transfer of income from low-income athletes to higher income coaches, particularly talented recruiters, inefficient forms of nonprice competition among member institutions, and a misallocation of resources that harms consumer welfare.⁹¹

⁸⁶ *Law v. NCAA*, 134 F.3d 1010, 1017 (10th Cir. 1998) (citing references removed).

⁸⁷ *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 103 (1984).

⁸⁸ *Id.* at 111.

⁸⁹ *In Re NCAA I-A Walk-on Football Players Litig.*, 398 F.Supp.2d 1144, 1151 (W.D. Wash. 2005). (citing *Board of Regents*, 468 U.S. at 99, *Law II*, 134 F.3d at 1012, *Hennessey*, 564 F.2d at 1147, *Gaines*, 746 F.Supp. at 745).

⁹⁰ Christopher Lee, NCAA Athletic Departments: College Football, Men’s Basketball and Revenue, Sportsologist.com, <http://sportsologist.com/college-athletics-by-the-number/> (last visited Dec. 5, 2011).

⁹¹ Lee Goldman, Sports and Antitrust: Should College Students Be Paid to Play?, 65 *Notre Dame L. Rev.* 206, 211 (1990).

By changing the rule to allow more competition, these negative effects would be neutralized. Rectifying the financial disparity presented here may also increase competition between the professional leagues and amateur sports (since a more fair compensation on the college level will reduce the appeal of the paying leagues) and will discourage other NCAA rule violations. These benefits, or at least the possibility of these benefits, should be enough for courts to rule in the athletes' favor in an antitrust suit of this nature. Sports writer Frank Deford commented that universities should be able to find ways to pay athletes, and the rest of their reasons are merely excuses,

Colleges protest they can't afford to pay the performers. If so, they should abandon the business of sports—or, anyway, downgrade to Division III or only finance intramurals. Certainly, athletics is a valuable discipline, and a sound mind in a sound body is devoutly to be wished for, but having traveling sports teams is not a requisite for higher education. Either make the economic model work fairly, or get out of the business. To claim that you make millions of dollars but can't pay the performers is sophistry—no less than saying that you are operating a wonderful restaurant except for the incidental fact that you can't pay the cooks and the waiters (although the entrée prices are sky-high and the maitre d' is magnificently recompensed).⁹²

III. INTELLECTUAL PROPERTY ISSUES

The second claim that athletes had against the NCAA rule is one of intellectual property rights. Judge Claudia Wilken has dismissed the plaintiffs' right to publicity claims under Indiana law but ruled that the California law claims would not be dismissed.⁹³ Thus, exploring the right to publicity is important to understand this case.

Each athlete can be seen as his or her own "brand" and a valuable one at that. As discussed earlier, athletes are crucial to both the school's and the NCAA's profit. Robert Brown, a professor at Cal State-San Marcos, determined that if there were a free market for college athletic talent, an elite football player would be worth between \$1.3 million and \$1.36 million per season, while a top-named player like Tebow could have garnered close to \$3 million a season if athletes were fairly compensated.⁹⁴ In another study, the National College Players Association determined that the fair market value for the "average" college football player would be around \$121,048 and the average basketball player would be about \$265,027. However, with simply the money from a so-called "full" scholarship offer to live off of, a large percentage of athletes are

⁹² Frank Deford, *Bust the Amateur Myth*, *The Chronicle of Higher Education* (Dec. 11 2011), <http://chronicle.com/article/NCAA-Frank-Deford/130058/>.

⁹³ *Keller v. Electronics Arts, Inc.*, C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010).

⁹⁴ Mike Fish, *What Price Glory? The Star's Value*, *ESPN* (Dec. 11, 2011), <http://sports.espn.go.com/espn/otl/news/story?page=fish/091211>.

living below the poverty line: 85% for on-campus dweller and 86% for off-campus dwellers.⁹⁵

The NCAA will go to extensive measures to ensure that it is only their approved members that are making money off of the athletes' names and likenesses. In just one month in 2011, there were two incidents of warnings or punishment for illegal use of players' images for profit. The Louisiana State University compliance office had to send cease and desist letters to third party manufacturers who were selling t-shirts that LSU was concerned would endanger star cornerback Tyrann Mathieu's eligibility. The shirts did not have Mathieu's image, or even his full name. The shirts simply featured a generic football player with a badger head, Mathieu's nickname (the honey badger) and his initials and jersey number in smaller print. Even the shirts that omit the initials and number have been challenged by LSU as an NCAA rule violation.⁹⁶ Unlike nature's fearless honey badger, Mathieu and his fans *can* be stopped, at least from using this nickname or Mathieu's jersey number to make a profit.⁹⁷

In another confusing amateurism rule exercise, Dwight Jones, a UNC football player, was declared ineligible to play in his school's bowl game by the NCAA. The reason for the suspension: he used his own image to promote a for-profit event that would occur *after* his eligibility expired, five days after his senior bowl game. After issuing an apology to his coaches and teammates, Jones appealed to the NCAA for reinstatement and was allowed to play in his final game.⁹⁸

It is clear that the players themselves or third parties are not allowed to profit off of the players in any way. However, the question of whether the NCAA and individual schools infringe on athletes' rights is unsettled. Typically, it is assumed that the NCAA holds all intellectual property rights to the players, because the players sign them away along with their agreement to play for a certain school and follow school and NCAA rules. Yet out of 300 football and basketball players surveyed by researchers, only about half realized that they were signing away the rights to their likeness. Furthermore, 54% of respondents thought that when schools put player images on video games or other products, it sufficed as an endorsement by the players.⁹⁹ With such an unfair system, an argument that these contracts should be voided by unconscionability is easily raised.

Unconscionability is separated into two prongs: procedural and substantive. Procedural refers to the contract formation, most often looking to whether the lesser-powered party had "meaningful choice" about the contract.¹⁰⁰

⁹⁵ National College Players Association, *The Price of Poverty in Big Time College Sports*, <http://assets.usw.org/ncpa/The-Price-of-Poverty-in-Big-Time-College-Sport.pdf> (last visited Dec. 15, 2011).

⁹⁶ Honey Badger Do Care About Eligibility, *Lowering The Bar* (Dec. 14, 2011), http://www.loweringthebar.net/2011/12/honey-badger-do-care-about-eligibility.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+LoweringTheBar+%28Lowering+the+Bar%29&utm_content=Google+Reader.

⁹⁷ See Randall, *The Crazy Nastyass Honey Badger*, YouTube, <http://www.youtube.com/watch?v=4r7wHMg5Yjg>.

⁹⁸ Dwight Jones Reinstated by NCAA After Violation, *The Daily Tar Heel*, (January 9, 2012), http://www.dailytarheel.com/index.php/article/2011/12/dwight_jones_reinstated_by_ncaa_after_violation.

⁹⁹ Brad Wolverton, *Many Athletes Unknowingly Sign Away Rights to Profit From Their Images*, *The Chronicle of Higher Education*, (Apr. 20, 2011), <http://chronicle.com/blogs/players/many-athletes-unknowingly-sign-away-rights-to-profit-from-their-images/28512>.

¹⁰⁰ 8 Williston on Contracts § 18:10 (4th ed.).

Since the NCAA has a corner on the college athletics market, and both the NFL and the NBA have age requirements,¹⁰¹ athletes wishing to continue their careers practically have no choice but to sign the agreements that the NCAA gives them, resulting in clear procedural unconscionability.

Substantive unconscionability refers to the contract terms once formed, and “whether those terms are unreasonably favorable to the more powerful party.”¹⁰² The NCAA induces the collegiate athletes to sign away any right they have to profit, and forces them to submit to the rest of the NCAA rules that they did not have a vote in enacting, so this prong is likely also fulfilled. Although a court is unlikely to void the contract, due to public perception of the virtues of amateurism, it is clear that there could be a legal basis for doing so.

It also would not be shocking if a court factored in the average athlete’s unequal bargaining power in making a decision regarding a contract that the athlete has signed. In *Los Angeles Rams Football Club v. Cannon*,¹⁰³ the court considered the athlete’s inexperience in the contract signing that ended his eligibility. The court said that while deliberating on the outcome, “it should be borne in mind that Cannon, while having been a highly publicized college ball player, was, in fact, and still is, it would appear, a provincial lad of 21 or 22, untutored and unwise, I am convinced, in the way of the business world.”¹⁰⁴ Conversely, the court in *Sample v. Gotham Football Club*¹⁰⁵ showed little sympathy for what the athlete thought he was signing, only giving deference to the team with whom he was signing’s clear “contractual intent.”¹⁰⁶

There are two ways, once the athlete gets beyond this contractual assignment, to enjoin the schools from profiting off of the athletes: the Lanham Act and the common law right of publicity. Although the two have been evaluated similarly, there are slight differences that are important to keep in mind.

The states typically enforce the property interest called the right of publicity. It has long been recognized that celebrities have the right to use their own image for profit, under certain general guidelines. The idea stemmed from the right of privacy, first established specifically for athletes in *Ali v. Playgirl*.¹⁰⁷ In this case, it was recognized that Muhammad Ali, as a public figure, had the right to prevent some parties from using his image without his authorization if the purpose of the use was to attract business or attention.¹⁰⁸ The privacy right was extended to one of publicity in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, where it was determined that athletes had the exclusive, assignable rights to their for-profit publicity.¹⁰⁹ Although states have their own statutes defining the requirements for this right, the basic tenet is clear: that someone else is profiting from a plaintiff’s identity unfairly.¹¹⁰

¹⁰¹ Greg Bianchi, Age Requirement in Professional Sport, *The Sport Journal*, <http://www.thesportjournal.org/article/age-requirement-professional-sport>, (last visited Dec. 11, 2011).

¹⁰² 8 Williston, supra note 100.

¹⁰³ 185 F. Supp. 717 (S.D. Cal. 1960).

¹⁰⁴ Id. at 726.

¹⁰⁵ 59 F.R.D. 160 (S.D.N.Y. 1973).

¹⁰⁶ Id. at 165.

¹⁰⁷ 447 F. Supp. 723 (S.D.N.Y. 1978).

¹⁰⁸ Id. at 727; see also James S. Thompson, University Trading Cards: Do College Athletes Have a Common Law Right to Publicity?, 4 *Seton Hall J. Sport L.* 143 (1994).

¹⁰⁹ 202 F.2d 866, 868 (2d Cir. 1953).

¹¹⁰ Julia Brighton, The NCAA and the Right of Publicity: How the O’Bannon/Keller Case May Finally Level the Playing Field, 33 *Hastings Comm. & Ent. L.J.* 275 (2011).

The right is not absolute, however. The First Amendment to the United States Constitution states, “Congress shall make no law . . . abridging the freedom of speech, or of the press.”¹¹¹ This obviously preempts any state law or common law principle that may arise, under certain requirements. If a third party is using the athlete’s name or likeness, it may fall under First Amendment protection if it is for a non-commercial purpose and/or it has a substantial amount of transformation, or artistic license, added to the image to make it a new artistic work. There are plenty of sports and entertainment examples to elucidate the difference. Parody works will be exempted from rights of publicity, such as in *Cardtoons, L.C. v. Major League Baseball Players’ Association*.¹¹² In this case, Cardtoons was manufacturing fake baseball cards, with player caricatures and humorous text. The court ruled this non-commercial satire was a First Amendment right, which trumped the right of publicity.¹¹³ In multiple cases, the courts have determined that news items were also non-commercial speech and were thus more important to the First Amendment right of publicity. One of these, *Gionfriddo v. Major League Baseball*,¹¹⁴ protected the use of former players’ names, photographs, statistics, and video footage on the official MLB website because it was non-commercial and did not have a substantive effect on the players’ use of their own images for profit.¹¹⁵ However if the speech is found to be commercial,¹¹⁶ without substantive transformation,¹¹⁷ confusingly similar to an endorsement, misidentified,¹¹⁸ and was unauthorized,¹¹⁹ the right to publicity will override the defendants’ First Amendment rights. This can extend to not only the use of images or full names, but also the other aspects of a celebrity’s fame, such as Johnny Carson’s typical introduction, “Here’s Johnny.”¹²⁰

The second avenue for intellectual property rights is the federally enacted Lanham Act. The act provides a civil action for those who believe their “brand” is being diminished by a confusing competitor. It states,

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any

¹¹¹ U.S. Const. amend. I.

¹¹² 95 F.3d 959 (10th Cir. 1996).

¹¹³ *Id.* at 971.

¹¹⁴ 94 Cal. App. 4th 400 (2001).

¹¹⁵ *Id.* at 415.

¹¹⁶ See *Pooley v. Hole-in-One Ass’n*, 89 F. Supp. 2d 1108 (D. Ariz. 2000).

¹¹⁷ See *Comedy III Prod., Inc. v. Gary Saderup*, 25 Cal. 4th 387 (Cal. 2001).

¹¹⁸ See *Downing v. Abercrombie and Fitch*, 265 F.3d 994 (Cal. 2001).

¹¹⁹ See *Ventura v. Titan Sports Inc.*, 65 F.3d 725 (8th Cir. 1995).

¹²⁰ *Carson v. Here’s Johnny Portable Toilets*, 698 F.2d 831 (6th Cir. 1983).

person who believes that he or she is or is likely to be damaged by such act.¹²¹

It, too, can be preempted by the First Amendment, but the statute is distinct from the common law right of publicity not only because it is interpreted uniformly by the federal government, but also because the focus of many of the interpretations is the alleged infringing work's confusing nature, as opposed to its commercial nature.¹²²

Using these two frameworks, certain NCAA player image use seems more protected than others. It is clear that the universities should be able to use player photos and statistics in news stories. It is less clear that the sale of these photographs, video games, and DVDs should pass the "confusingly similar" test of either the common law or the Lanham Act. If the players themselves believe that they are endorsing these products,¹²³ what is the average customer supposed to believe? Even the iconic jersey numbers may fall under this test if the combination of college and number are so associated with that player (as the catchphrase was in *Here's Johnny*) as to confuse customers. If a player's number is retired at a certain university, this strengthens the player's case as to the identity of that number with their brand. Yet certain schools like the University of Florida do not retire jersey numbers,¹²⁴ so this should be just one of a number of considerations in determining the possible confusion.

One court has already considered right of publicity in video games. In *Hart v. EA Sports*,¹²⁵ the court ruled that the transformative aspects of the video game developer combined with the insignificance of the usage of the plaintiff player's photograph during the game was enough to put it under this First Amendment rule. It ruled this instead of creating an assumption that the player was endorsing the game under common law right of publicity or the Lanham Act.¹²⁶

The EA Sports video game challenged in the Keller case includes much more than a photograph in a montage. A recent journal article points out that the players in the EA game are almost physically identical to all of the players, even down to their accessories. The game players include very similar, if not exact, hometowns to those players whose numbers the "imaginary" players represent.¹²⁷ The players possess the same skill set as in "real life." The game can also be programmed to have the announcers use the players' names, but only if those names correspond to the actual player that the game is supposedly not representing.¹²⁸ In the *O'Bannon* case, Judge Wilken denied EA's motion to dismiss the California right of publicity claims because she determined the video game was not sufficiently transformative to warrant such an early motion.¹²⁹

¹²¹ The Lanham Act, 15 U.S.C. § 1125 (2006).

¹²² Stephanie Dotson Zimdahl, A Celebrity Balancing Act: An Analysis of Trademark Protection Under the Lanham Act and the First Amendment Artistic Expression Defense, 99 Nw. U. L. Rev. 1817, 1825 (2005).

¹²³ Wolverson, supra note 99.

¹²⁴ Pat Dooley, Who will be the next Gator that wants to wear No. 15?, Gator Sports (Apr. 24, 2010), <http://www.gatorsports.com/article/20100424/COLUMNISTS/100429609>.

¹²⁵ 808 F.Supp. 2d 757, 783-84 (D.N.J. 2011).

¹²⁶ Id. at 789-93.

¹²⁷ Beth A. Cianfrone and Thomas A. Baker, The Use of Student-Athlete Likenesses in Sport Video Games: An Application of the Right of Publicity, 20 J. Legal Aspects Sport 35, 40-42 (2010).

¹²⁸ Id. at 43-44.

¹²⁹ Keller v. Electronics Arts, Inc., C 09-1967 CW, 2010 WL 530108, at *5 (N.D. Cal. Feb. 8, 2010).

It is interesting to note that the NCAA has repeatedly acknowledged both that the players have a right to publicity, and that the NCAA does not own it.¹³⁰ NCAA president Myles Brand said in 2008, “in the case of intercollegiate athletics, the right of publicity is held by the student-athletes, not the NCAA. We would find it difficult to bring suit over the abuse of a right we don't own.”¹³¹ If the players own this right, why do both the NCAA and EA sports get to profit off of it, but not the players themselves?

EA is trying to argue that the game falls under one of the First Amendment exceptions. The most believable of these is the idea that the game's transformative aspects make it a derivative work instead of a pure commercial use of the player's likeness. However, the multiple ways that they imitate the players, from hair color to passing ability, greatly diminishes this argument.

IV. REMEDIES

Scholars have proposed a number of different solutions to bridge the gap between what athletes are earning for the schools and what they are allowed to take home. The first has been attempted recently, despite much controversy. The NCAA approved an optional \$2000 stipend in October 2012 to approach the cost of tuition, but the idea was struck down due to widespread opposition. Some schools believed that the stipend defied amateurism rules, while others worried that the stipend would conflict with Title IX, the requirement that men and women's sports be funded equally.¹³² NCAA President Mark Emmert still plans to reformulate this idea for use in the near future.¹³³ Even if the prior stipend had lasted, it would have not scratched the surface of the problem. Reports say that many college athletes spend \$3,000 to \$4,000 out of pocket to cover their typical expenses.¹³⁴ A stipend may start alleviating the athletes' woes but will not fix the problem forever.

Another proposal has been put forth that would be modeled after the Olympic system. The United States Olympic Committee (USOC) handles the outside corporate sponsorships for the athletes and disburses the funds brought in to pay for the athletes' expenses. The athlete can then receive the remainder of the funds once their amateurism has expired.¹³⁵ This would present its own unique challenges. Corporate sponsors will only be interested in sponsoring big-name athletes, leading to a solution only for a small percentage of student-athletes.

Another option would be to put a profit percentage from the EA Sports video game, and possibly other merchandise, into the Student Athlete Opportunity Fund. This fund currently houses part of the ESPN and CBS income from the media rights, and is intended to be distributed to athletes who demonstrate financial need or to cover bona fide educational expenses.¹³⁶

¹³⁰ Brighton, *supra* note 35, at 281.

¹³¹ Class Action Complaint at 4, *O'Bannon v. N.C.A.A.*, No. CV-09 3329 (N.D. Cal. July 29, 2009).

¹³² NCAA Shelves \$2,000 Athlete Stipend, ESPN (Dec. 16, 2011), http://espn.go.com/college-sports/story/_/id/7357868/ncaa-puts-2000-stipend-athletes-hold.

¹³³ Jeremy Fowler, NCAA president Mark Emmert hopes to unveil new stipend plan in April, CBS Sports (January 1, 2013), <http://www.cbssports.com/collegefootball/blog/jeremy-fowler/2148321/ncaa-president-mark-emmert-hopes-to-unveil-new-stipend-plan-in-april>.

¹³⁴ NCAA Shelves \$2,000 Athlete Stipend, ESPN (Dec. 16, 2011), http://espn.go.com/college-sports/story/_/id/7357868/ncaa-puts-2000-stipend-athletes-hold.

¹³⁵ Brighton, *supra* note 35, at 289.

¹³⁶ Cianfrone and Baker, *supra* note 127, at 66.

The athletes could alternatively be analogous to professional athletes, where the players themselves would negotiate with those people who want to use their likeness to determine their own profit cut. This money could then be put in escrow for the athletes for after they graduate,¹³⁷ although even this may be a violation.¹³⁸ However, a good first step toward this solution would be to simply allow more opportunities for a student athlete to be represented by a lawyer, leveling the playing field for all negotiations, to inform the players of what they are signing before they do so.¹³⁹

Even reforming the system for part time jobs would be a good start for the NCAA. Players received the right to have outside employment in 1998.¹⁴⁰ But extensive regulations are placed on these jobs and severely limit the monetary amount that athletes can garner from these jobs.¹⁴¹

Of course the main obstacle for these athletes to receive any type of extra compensation is the well-settled rule that athletes *cannot* get paid for competing in sports.¹⁴² Most courts accept this as a settled proposition.¹⁴³ There may be two ways to get around this limitation. First, one writer argues that with the stipend that was recently granted, amateurism has already been destroyed; thus, the NCAA should consider this an affirmation that it is time for reform.¹⁴⁴ Alternatively, the rule specifically prohibits pay *for competition*. But the proposed options are about being paid for usage of players' names, images, and jersey numbers; they frequently propose to pay for expenses, not be given directly to the player. The NCAA could read these options as a loophole to the amateur rule, in order to merely ensure that players had enough money to pay their expenses and thus attempt to prevent the athletes from accepting illegal money from outside sources.

V. CONCLUSION

While this paper attempts to delve into ways that athletes could challenge the well-established NCAA rules, it is understood that these ideas are improbable at best. Courts are typically unwilling to go against the large body of precedent that exists, and the NCAA is well funded to oppose the legal challenges that face it. It is clear that something needs to change, and this paper is simply a proposal of a few methods of affecting this change. Hopefully, the recent lawsuits against the NCAA will spark some much-needed reform in college athletics. Until then, college sport fans will remain fans while hoping for the best for our favorite players.

¹³⁷ Thompson, *supra* note 108, at 179.

¹³⁸ Clay Travis, EA, NCAA Lawsuit Could Be Huge, AOL News (May 12, 2009), <http://www.aolnews.com/2009/05/12/examining-the-ncaa-and-ea-lawsuit-head-down-the-rabbit-hole/>.

¹³⁹ Tom McMillen, End the chattel system for student-athletes, The Baltimore Sun (May, 13, 2011), http://articles.baltimoresun.com/2011-05-13/news/bs-ed-basketball-20110513_1_student-athletes-chattel-system-negotiations.

¹⁴⁰ PLUS: AMATEUR ATHLETICS -- N.C.A.A.; Athletes Get Right To Part-Time Jobs, New York Times (Apr. 23, 1998), <http://www.nytimes.com/1998/04/23/sports/plus-amateur-athletics-ncaa-athletes-get-right-to-part-time-jobs.html>.

¹⁴¹ NCAA, Summary of NCAA Regulations, pg. 3-4 (2011), http://fs.ncaa.org/Docs/AMA/compliance_forms/DI/DI%20Summary%20of%20NCAA%20Regulations.pdf.

¹⁴² *Id.*

¹⁴³ See, e.g. McCormack v. NCAA, 845 F.2d 1338, 1340-1345 (5th Cir. 1988); Banks v. NCAA, 977 F.2d 1081, 1087-90 (7th Cir. 1992).

¹⁴⁴ Pierce, *supra* note 26.

