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## **NCAA STUDENT-ATHLETES: FOREVER AMATEURS**

**By: Jordan M. Gertler**

Each season college students, alumni, and respected fans around the world prepare for what they hope to be a championship season. Purchasing season tickets, team clothing, and expensive broadcast packages from television providers is considered the new norm.

### **THESIS**

While schools provide a gamut of sports, the sports and fan base with respect to football and basketball are the most profitable. The high volume revenue streams that form from each athletic season leave those to wonder, who profits from this success? If asking the National Collegiate Athletic Association (“NCAA”), the response would most likely claim everyone. Taking a look at the numbers and facts, one would be left without having to ask this question, but ponder its results.

### **NCAA GUIDELINES**

To fully understand the magnitude of this notion of student-athletes as amateurs, it is important to understand the basis for NCAA in intercollegiate competition. In order for students to be granted eligibility as an athlete, student-athletes must be certified as amateurs. All student-athletes, including international students, are required to adhere to NCAA amateurism requirements to remain eligible for intercollegiate competition<sup>1</sup>. An individual loses amateur status and thus shall not be eligible for Intercollegiate Competition in a particular sport if the individual:

- (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;

- (b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- (c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received;
- (d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations;
- (e) Competes on any professional athletics team even if no pay or remuneration for expenses was received;
- (f) After initial full-time collegiate enrollment, enters into a professional draft; or
- (g) Enters into an agreement with an agent.<sup>2</sup>

By signing this form, it not only permits eligibility, but it can be argued that each student-athlete essentially waives many personal right such as “Likeness” and “Right of Publicity.” It authorizes the NCAA (or a third party acting on behalf of the NCAA) to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs and the NCAA (or a third party acting on behalf of the NCAA) may use the name or picture of an enrolled student-athlete to generally promote NCAA championships or other NCAA events, activities or programs.<sup>3</sup>

What is this notion of “amateurism” and does it really exist? Does simply participating in a skill or art as a non-professional allow for others to profit from your

skill? This was a pressing issue in the past that recently has come to light due to the profits universities and business make each year. It appears that student-athletes are handcuffed once they become enrolled with the university. Is the integrity of college athletes truly compromised if each of these eligibility rules is compromised?

### **FAB FIVE**

In 1993-94, the University of Michigan's Men's Basketball Team took the collegiate game to another level. Comprising of highly talented and recruiting players in Chris Webber, Juwan Howard, Jalen Rose, Jimmy King, and Ray Jackson, the team was given the nickname "Fab Five." Michigan, aside from reaching the championship game for two consecutive seasons, mixed the game of basketball with the urban style of music and clothing to give off a type of swagger that had never been brought to the national level.<sup>4</sup> While the team was later vacated from its achievements, it was the first big example of the synergy between athletics and business. The Fab Five made the Michigan brand red-hot, and the school cashed in. Annual athletic royalties more than tripled, from \$2 million in the pre-Fab year of 1990-91 to a peak of \$6.2 million in '93-94. That windfall, according to then-athletic director Jack Weidenbach, helped the school accelerate upgrades in the women's athletic program, from coaches' salaries to facilities to travel.<sup>5</sup> Derek Eiler who was associated with Collegiate Licensing Company (CLC), the company in charge of the exclusive licensing of university clothing expressed how "Kids could relate to the Fab Five and wanted to emulate them, wearing Michigan merchandise became a way that you could transform yourself into being as 'cool' as the Fab Five."<sup>6</sup> Players began to grow angry about the idea that their jerseys were being sold at such a high price and yet were unable to share in the profits from the image they created.

One can understand why Chris Webber decided to enter the 1993 NBA Draft and forgo his eligibility in hopes of cashing in on the likeness that he had created. The bylaws of the NCAA governed the inability for players to receive cash and thus forgoing their amateur status, the very principle that NCAA stands by. Specifically, in NCAA Bylaw 12.1.1.1.4.3, it is permissible for an individual to receive expenses from an outside amateur sports team or organization not to exceed actual and necessary travel, room and board, and apparel and equipment to represent the sports team or organization in competition and any practice held in preparation for such competition.<sup>7</sup> Further, pursuant to 12.1.1.1.5, an individual who receives any payment, including actual and necessary expenses, conditioned on the individual's or team's place finish or performance or given on an incentive basis, would jeopardize his or her intercollegiate eligibility in a particular sport.<sup>8</sup>

With an increase in every season, specifically more than \$4,000,000 in the final season of the Fab Five, it raises the issue to whom is profiting from student-athletes and what does the athlete get in return.

### **REVENUE STREAM**

There are a variety of ways that revenue is generated to each school and conference. It is common knowledge that the success of each program will help individual school profits, but the conference that a school is associated with also brings a different level of revenue that some schools cannot obtain. This is evident in the sudden shift of conferences in 2012-13, which resulted in the Big East Conference no longer continuing its formation and conferences such as Atlantic Coastal Conference (ACC) or the Big Ten Conference (Big Ten) gaining more recognition as schools associated as

being part of a “power conference.” A power conferences is a term in college sports that has been adopted in referring to conferences that have ranked teams and/or consistent national champions. Power conferences in turn have the ability to gain more revenue in their athletic department.

### ***Television Rights***

Television deals are the most lucrative way for universities to generate money for their programs. The deals are based on the quality of the teams in the conference, the success that schools achieve during the season, and in the Bowl Championship Series (BCS). The BCS is a five-game showcase of college football designed to ensure that the two top-rated teams in the country meet in the national championship game, while creating exciting and competitive matchups among eight other highly regarded teams in four other games.<sup>9</sup>

One example is former Florida Gator Quarterback Tim Tebow. In four years, Tebow had never played in front of anything less than a home sellout; a total of 2,401,532 people allowed Florida football revenues to total \$132 million. During his four-year career at Florida, the buzz from Tebow helped land a new 15-year TV contract for the Southeastern Conference (SEC) -- a \$2.25 billion contract with ESPN and another \$825 million deal with CBS that was executed before Tebow's junior season.<sup>10</sup> Tebow provided his school with a BCS National Championship in 2007 and the BCS paid \$14 million to \$17 million per school for the title game.<sup>11</sup> This money was divided evenly amongst the other members of the conference to help fund various departments of the school. If a conference does not have a team playing in a BCS game, a school cannot benefit from the money that a competing conference teams are receiving. Should the

players who have helped earn the school added profits based on their level of skill be compensated due to the athlete's performance being the catalyst for reward?

### ***Merchandise Deals***

Another extremely lucrative financial gain for schools is through selling merchandise. Most of the collegiate licensing is performed through Collegiate Licensing Company (CLC). CLC is the trademark licensing Affiliate Company of IMG College and has been the leader in connecting passionate college fans to their favorite college brands.<sup>12</sup> The retail marketplace for college-licensed merchandise in 2012 was estimated at \$4.62 billion with royalties being generated from the sale of officially licensed collegiate products going back to the institutions.<sup>13</sup>

It is estimated that retail sales of licensed team merchandise during the Division I Men's Basketball Championship tournament exceeds \$10 million.<sup>14</sup> As related to football, an example can be shown in 2007 and during the career of Tebow as mentioned earlier. The University of Florida generated tens of millions of dollars in sales of clothing and merchandise for winning a NCAA Division I BCS Football Championship.<sup>15</sup> The University Athletic Association can expect \$1 million to \$2 million in royalties from gear licensed by the CLC that season. Specifically, for every \$10 championship T-shirt sold, about 60 cents goes back to the University of Florida. This is based on a 12 percent royalty paid on wholesale costs to the University of Florida for BCS championship gear.<sup>16</sup>

### ***Video Games***

Video games are regarded as the closest way for fans to feel part of the live action. The thrill of controlling you favorite player, winning with a specific team, and

feeling the team atmosphere are some of the reasons why the video game industry is so marketable. A report from an industry analyst told Sports Illustrated the "NCAA Football" franchise likely accounts for just 5 percent, or \$125 million, of EA Sports' total revenue per year.<sup>17</sup> EA Sports used Tim Tebow's name in a play call in its NCAA Football 10 game, which was released in July 2009, prior to Tebow's senior season at Florida.<sup>18</sup> The use of Tebow's name comes in a handful of plays out of a formation called Shotgun Twin QB Tebow that are exclusive to Florida's playbook (the player in question was using Florida's playbook at West Virginia).<sup>19</sup> While the full formation name is shortened during gameplay, the full title is revealed in the Game Prep feature in Dynasty mode, which has the name of the play also showing up on the left side of the screen during gameplay in this mode.<sup>20</sup> A spokesman for the NCAA even stated "Our agreement with EA Sports clearly prohibits the use of names and pictures of current student-athletes in their electronic games and we are confident that no such use has occurred."<sup>21</sup> Eight days after the game debuted, the NCAA "categorically denied any infringement on former or current student-athlete likeness rights."<sup>22</sup>

The notion of an athlete's likeness and image, which produces an exuberant amount of money for video game manufacturers, has recently been decided to breach the right of publicity.

### **WHO PROFITS THE MOST**

From the specific data expressed before, it is understandable for an individual to wonder how the money that is generated each year by a schools athletic success is being allocated and how much a school really gains off student-athletes. Are schools really

putting the money back into the university for expanded education purposes? Is the money spent within the university spread evenly throughout the entire institution?

Taking another look at Tebow's 2007 season, the salaries of the head football coach and the athletic director doubled. Head Coach Urban Meyer's salary spiked from an original \$2 million deal to \$4 million a year.<sup>23</sup> Athletic Director Jeremy Foley, who has also overseen two national titles in basketball as well as the Gators' football successes, was earning about \$500,000 when Tebow first set foot on campus and currently makes nearly \$1.3 million.<sup>24</sup>

It is clear that athletic success directly equates to significant bonuses for the executives associated with the program rather than with faculty members who are associated with the university education. Below is a breakdown of the revenue generated during the 2012-13 football and basketball seasons and the profit generated.

**2012-13 Football Revenue<sup>25</sup>**

<b>School</b>	<b>Profit</b>	<b>Head Coach</b>	<b>Salary</b>
Texas	\$77.9 M	Mack Brown	\$5,353,750
Michigan	\$61.9 M	Brady Hoke	\$3,046,120
Georgia	\$52.3 M	Mark Richt	\$2,925,340
Florida	\$51.1 M	Will Muschamp	\$2,474,500
Alabama	\$45.1 M	Nick Saban	\$5,476,738
LSU	\$44.8 M	Les Miles	\$3,856,417
Auburn	\$43.8 M	Gene Chizik	\$3,577,500
Notre Dame	\$43.2 M	Brian Kelly	\$2,424,301
Arkansas	\$39.9 M	John L. Smith	\$850,000
Nebraska	\$36.4 M	Bo Pelini	\$2,925,340

**2012-13 Basketball Revenue<sup>26</sup>**

<b>School</b>	<b>Profit</b>	<b>Head Coach</b>	<b>Salary</b>
Louisville	\$23.2 M	Rick Pitino	\$4,973,343
North Carolina	\$17.9 M	Roy Williams	\$1,773,938
Kansas	\$17.7 M	Bill Self	\$4,960,763
Indiana	\$15.6 M	Tom Crean	\$2,886,250
Kentucky	\$15.4 M	John Calipari	\$5,300,000
Duke	\$15.1 M	Mike Krzyzewski	\$7,233,976
Ohio State	\$13.8 M	Thad Matta	\$3,194,000

Syracuse	\$11.5 M	Jim Boeheim	\$1,905,576
Arizona	\$11.3 M	Sean Miller	\$2,518,506
Wisconsin	\$10.0 M	Bo Ryan	\$2,357,000

The money generated from these programs directly pays for the salaries of these coaches and the incentives that can be achieved through the success of their athletes. How does a coach get rewarded with salaries of over a million dollars when student-athletes who are responsible for this success do not share in the programs' success?

The \$31.65 million deal signed by John Calipari at the University of Kentucky (UK) made him highest-paid coach in college basketball.<sup>27</sup> What people fail to recognize is the amount of perks and incentives that are packed into these deals. Aside from the base salary for Calipari, his contract also provided two "late model, quality automobiles," plus mileage, a membership in a country club of his choice, including monthly dues and initiation fees, 20 prime "lower-level" season tickets to UK home games, eight tickets for each UK home football game, right to income from conducting basketball camps using UK facilities, and incentives for reaching certain milestones, such as a 75 percent graduation rate or better (\$50,000), winning the Southeastern Conference (\$50,000), winning the SEC tournament (\$50,000), making the NCAA tournament round of 16 (\$100,000), making the Final Four (\$175,000), or winning the national title (\$375,000).<sup>28</sup> It is clear that these added perks are being paid from the program's profit, which stem directly from the players' success on the court.

NCAA officials and university executives will express that student-athletes are rewarded through an academic scholarship. This sounds great in theory, but are people really to assume that with programs relying heavily on the success of the athletic programs, student-athletes are offered the same flexibility in class schedules and majors?

Do university executives think people are so naïve to assume that a student's main goal is an education. It would not be fair to generalize that all student-athletes act as if athletics is their first priority, but when a student has the ability to make millions of dollars competing at the next level, essentially a student's main area of study is in excelling at sport.

A great example of this is Kevin Durant. Durant was a standout freshman at the University of Texas on the men's basketball team. After performing at such an exceptional level, Durant decided to forgo his final three years of school and enter the NBA Draft after his freshman year. Does this sound like an individual who is more focused on academics than athletics? Is it fair to assume more people would have decided to cash in on the dream of making millions of dollars as a professional athlete instead of getting a four-year degree? Would things have been different had Durant shared in the profits from the team's success, sales from his jersey, and tickets for the fans coming to watch him play? One could certainly accept that others would certainly have followed in Durant's footsteps because there is no upside to building a program that you can't directly benefit from. Was the scholarship really equivalent to Durant's worth at the university? Durant was selected by the Seattle SuperSonics (now the Oklahoma City Thunder) and agreed to a contract paying \$3.5 million in the first year.<sup>29</sup> By contrast, his yearly compensation (in the form of room, board, books and tuition fees at Texas) amounted to about \$33,120, less than 1% of what was offered by the SuperSonics.<sup>30</sup>

Another example can be understood by looking at Reggie Bush. Bush was the starting running back for University of Southern California, a school with a rich fan base and tradition that provided millions of dollars to the university. In 2006, Heisman

Trophy winner Reggie Bush skipped his senior year and entered the NFL draft. Bush was selected by the New Orleans Saints and agreed to a six-year contract guaranteeing \$26.3 million with the possibility of huge performance bonuses. The compensation package of about \$44,000 offered by USC paled in comparison to Mr. Bush's true market value.<sup>31</sup>

If schools can continue to see returns on scholarships at such a significant level, what incentivizes these athletes from going to school? In recent history, former athletes have begun to take legal action to prevent the exploitation by the universities for their personal likeness, brand, and image in order to gain lucrative deals.

If it is accepted that players waive their rights of likeness and publicity while enrolled in the university, how does this still hold true once a student-athlete is no longer a student? A change needs to take place to allow athletes and non-athletes to regain their identity once their time with the university has lapsed. After all, the tradeoff for competing in college athletics is compensation in the form of a scholarship, yet a university continues to gain a commercial advantage well beyond a scholarship's lifetime.

It is important to look at how different jurisdictions have interpreted when the right of publicity has been breached. Only by understanding prior case law will it allow for more changes to be made across multiple platforms to prevent a student-athletes right of publicity and likeness to enrich those who truly are not supposed to be profiting.

### **C.B.C DISTRIBUTION v. MLB ADVANCED MEDIA**

One of the first legal cases dealing with an athlete's right of publicity and likeness was seen when C.B.C. Distribution and Marketing, Inc. (C.B.C.), brought an action against Major League Baseball Advanced Media, L.P., to establish its right to use, without license, the names of and information about major league baseball players in

connection with its fantasy baseball products.<sup>32</sup> C.B.C. license granted the use of names, nicknames, likenesses, signatures, pictures, playing records, and/or biographical data of each player to be used in association with C.B.C.'s fantasy baseball products.<sup>33</sup>

The district court reasoned that C.B.C.'s fantasy baseball products did not use the names of major league baseball players as symbols of their identities and with an intent to obtain a commercial advantage, as required to establish an infringement of a publicity right under Missouri law.<sup>34</sup>

On appeal, the court re-evaluated the right of publicity in Missouri. Missouri's elements for a right of publicity action include: (1) That defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage.<sup>35</sup> Although the court was not in disagreement with respect to the consent element, the first and third elements was addressed in detail.

Addressing to the symbol-of-identity element, the court reasoned that the "name used by the defendant must be understood by the audience as referring to the plaintiff".<sup>36</sup> This entails the fact-finder to consider evidence including the nature and extent of the identifying characteristics used by the defendant, the defendant's intent, the fame of the plaintiff, evidence of actual identification made by third persons, and surveys or other evidence indicating the perceptions of the audience.<sup>37</sup> With respect to the student-athletes, one would assume that the university or third persons granted the licenses from the universities are using the identity of the athlete. Whether it is a jersey, images, commercials, or voice-overs, a court could connect the intent of the party using the likeness of the athlete and the athlete they are trying to portray in order to connect with the market they are selling to.

Understanding the intent to obtain a commercial advantage, the court sided with the Restatement that shows exploitation for commercial advantage when the name is used in connection with services rendered by the prospective purchasers and those services are likely to make others believe that the plaintiff endorsed the product or service.<sup>38</sup> While the current issue discussed throughout this paper does not directly deal with confusion between prospective purchasers and plaintiff's identity, the same analysis can apply to a commercial advantage between the universities and companies who are using the images. For instance, if a tournament is showcasing Team X and Team Y, the production company who is hosting the event may use billboards or images on tickets from players on either team. This would cause a domino effect because it would be paying a specific amount of money to Team X and Team Y to play in the tournament and from that, would base prices for tickets, advertising, merchandising, etc., to make even more money than they had paid the institutions.

The factual data presented earlier showcases how universities are gaining a commercial advantage. Merchandise deals, ticket sales, and television revenue are all possible due to people paying to watch, wear, and be apart of all the encompass a player both on and off the field. It is probable that Missouri law will pertain to the commercial advantage seen in our situation by showing how schools are exploiting a commercial advantage through player's identities, likeness, and images.

#### **KELLER v. ELECTRONIC ARTS, INC.**

Another profitable industry for universities is through licensing their players to companies to make video games. Electronic Arts (EA) is at the forefront of this practice and has been the biggest provider in this area.

Plaintiff Samuel Keller is a former starting quarterback for the Arizona State University and University of Nebraska football teams.<sup>39</sup> EA, a Delaware corporation with a principal place of business in California, develops interactive entertainment software. It produces, among other things, the “NCAA Football” series of video games.<sup>40</sup> He claims that these virtual players are nearly identical to their real-life counterparts: they share the same jersey numbers, have similar physical characteristics, and come from the same home state.<sup>41</sup> Keller also claims that the NCAA violated its duty to honor its own rules prohibiting the use of student likeness by granting approval to EA’s games.<sup>42</sup>

Since the NCAA headquarters is located in Indiana and the claims against Electronic Arts is being brought in California, this case showcases difference amongst the right of publicity claims. As it pertains to the right of publicity claims against the NCAA, personalities have a property interest in, among other things, their images and likenesses.<sup>43</sup> According to Indiana Code, a person may not use an aspect of a personality’s right of publicity for a commercial purpose during the personality’s lifetime or for one hundred (100) years after the date of the personality’s death with having obtained a previous written consent from that person.<sup>44</sup> The court ultimately dismissed this claim for the sheer fact that there was no proof that the NCAA was a co-conspirator to EA’s games, but nonetheless the Indiana law recognizes that an individual has property interest in their own use and likeness as it pertains to a party directly infringing upon it.

The crux of the right of publicity claim in this case stems from California’s statute which provides:

Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products,

merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, product, merchandise, goods or services, without such person's prior consent shall be liable for any damages sustained by the person or persons injured as a result thereof.<sup>45</sup>

In order to sustain a claim under California common law, the plaintiff must alleged four key elements: (1) The defendant's use of the plaintiff's identity; (2) the appropriation of plaintiffs name or likeness to defendants advantage, commercially or others; (3) lack of consent; and (4) resulting injury.<sup>46</sup> While EA never contested these claims, it countered with a defense that if granted could become a common defense used by infringing parties.

A defendant may raise an affirmative defense that the challenged work is "protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame."<sup>47</sup> Here, EA raised the Transformative Use Defense which a court must inquire into:

Whether the celebrity likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitations of the celebrity is the very sum and substance of the work in questions. In other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness. And when we use the word "expression," we mean expression of something other than the likeness of the celebrity.<sup>48</sup>

Here, the court found the depiction of Keller in the game to be insufficient in regards to its transformative use and denies EA's dismissal. In the game, the quarterback for Arizona State University shares many of plaintiff's characteristics, same jersey number, same height and weight, and does not depict the plaintiffs in a different form, rather represented as exactly what he was: the starting quarterback for Arizona State University.<sup>49</sup> This case and the following case was ultimately settled, marking a major change in the use of collegiate likeness as will be explained below.

### **O'BANNON V. ELECTRONIC ARTS, INC.**

Ed O'Bannon was a member of the 1995 UCLA NCAA Championship team. After completion of his profession basketball career, he became the forefront of the lawsuit against Electronic Arts for the company's use of collegiate athletes likeness and images. O'Bannon alleges that the waiver the NCAA requires athletes to sign forking over their names and images for use by the organization is a "contract of adhesion," or a contract signed without negotiation. When the NCAA and EA Sports create a game with O'Bannon's likeness, the former player alleges, they are conspiring to set the value of his likeness at zero, when that likeness could potentially draw more from another game developer on the open market.<sup>50</sup> The court decided that the depiction in the game was identical to the real-life actions of Keller and disregarded the defense as applicable.

U.S. District Judge Claudia Wilken, who presided over this case, partially certified a class action. This class action joined both O'Bannon and Keller. As a result, the case recently reached a monumental verdict. EA Sports agreed to pay \$40 million to settle a lawsuit by former college athletes over use of their images in video games, after it canceled its college football title for next year because of legal issues.<sup>51</sup>

This verdict was the first time former student-athletes have won a decision on the grounds of a right of publicity claim. This case has now begun to shape the mold for student-athletes as it pertains to their use in video game entertainment. This could be a new model that is used amongst the states as more right of publicity claims are being brought in different jurisdictions. Schools such as the University of Florida, University of Texas, Syracuse University, and other universities with high volume revenue streams could potentially be the next in line to have cases heard in the respective jurisdictions.

### **HART V. ELECTRONIC ARTS, INC.**

Similar to O'Bannon and Keller, this case was originally viewed differently than the other decisions discussed. While the settlement to the prior case was decided in California, this current litigation takes places in New Jersey.

Ryan Hart was a quarterback for Rutgers University from 2002 to 2005. In 2005, as starting quarterback, he led the team to its first bowl game since 1978. Hart sued EA in state court, alleging a violation of his right of publicity. The case was removed to the District Court of New Jersey, where EA filed for a motion to dismiss, or in the alternative, summary judgment. EA conceded for purposes of the motion that it had violated Hart's right of publicity, but that NCAA Football was protected under the First Amendment.<sup>52</sup> The district court agreed with EA and granted summary judgment in its favor.<sup>53</sup>

On appeal the court addressed New Jersey's right of publicity. New Jersey recognizes that the right to exploit the value of an individuals notoriety or fame belongs to the individual with whom it is associated, for an individuals name, likeness, and endorsement carry value and an unauthorized use harms the person both by diluting the

value of the name and depriving that individual of compensations.<sup>54</sup>

Since this case was of first impression, the court looked at three tests to validate protection under the First Amendment. The court assessed the Predominant Use Test, Rogers Test, and the Transformative Use Test, which was ultimately the test used in deciding O'Bannon and Keller. The court ultimately decided the Transformative Use Test is most consistent with other courts' ad hoc approaches to right of publicity cases.<sup>55</sup> The Appeals court found that the digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football team; therefore this is not transformative because the various digitizes sights and sounds in the video game do not alter or transform Hart's identity in a significant way.<sup>56</sup> This case has thus been remanded and is awaiting further proceedings.

It would be another victory for student-athletes if New Jersey follows the platform set in California. Each state that begins to recognize the rights of these individuals in the same medium will certainly become to put a tough precedent for other manufacturers who attempt to continue the practice of exploitation an individual's intellectual property.

#### **JABBAR v. GENERAL MOTORS CORPORATION**

Former basketball star Kareem Abdul-Jabbar appealed the district court's summary judgment in favor of General Motors Corporation ("GMC") and its advertising agency, Leo Burnett Co., in his action alleging violations of California's statutory and common law right of publicity.<sup>57</sup>

This dispute concerns a GMC television commercial aired during the 1993 NCAA men's basketball tournament. The record includes a videotape of the spot, which plays as follows:

A disembodied voice asks, "How 'bout some trivia?" This question is followed by the appearance of a screen bearing the printed words, "You're Talking to the Champ." The voice then asks, "Who holds the record for being voted the most outstanding player of this tournament?" In the screen appear the printed words, "Lew Alcindor, UCLA, '67, '68, '69." Next, the voice asks, "Has any car made the 'Consumer Digest's Best Buy' list more than once? [and responds:] The Oldsmobile Eighty-Eight has." A seven-second-film clip of the automobile, with its price, follows. During the clip, the voice says, "In fact, it's made that list three years in a row. And now you can get this Eighty-Eight special edition for just \$18,995." At the end of the clip, a message appears in print on the screen: "A Definite First Round Pick," accompanied by the voice saying, "it's your money." A final printed message appears: "Demand Better, 88 by Oldsmobile."<sup>58</sup>

GMC did not obtain Abdul-Jabbar's consent, nor did it pay him, to use his former name in the commercial described above and when Abdul-Jabbar complained to GMC about the commercial, the company promptly withdrew the ad which aired about five or six times in March 1993 prior to its withdrawal.<sup>59</sup>

Since Kareem Abdul-Jabbar's former name was Lew Alcindor, General Motors attempted to use an abandonment defense, which has never been pursued, let alone pursued successfully. The district court's "common, present use" analysis appears to be a variation on its abandonment theme.<sup>60</sup>

As we already addressed the elements in California to show a claim for a right of publicity, this case is affixed on two more elements. In addition to the common law elements, the statute requires two further allegations: 1) knowing use; and 2) a "direct connection between the use and the commercial purpose."<sup>61</sup> The Court of Appeals decided that the statute's reference to "name or likeness" is not limited to present or current use. To the extent GMC's use of the plaintiff's birth name attracted television viewers' attention, GMC gained a commercial advantage.<sup>62</sup>

The decision in the case is another strength in the argument for student-athletes. As seen before, the use of name or likeness in the form of a video game is now forbidden because the transformative use defense threshold is very strict. This case, which features the use of a voice and name rather than the personal attributes and physical appearance, seems to solidify the intellectual property that each person possesses. This decision will certainly prevent others from side-stepping a student-athletes image for another unique quality that signifies a person's identity without properly being consented or compensated.

#### **SOMERSON v. WORLD WRESTLING ENTERTAINMENT, INC.**

Plaintiff, Douglas Duane Somerson brought a claim for a violation of a right of publicity alleging that he is a highly successful professional wrestler and entertainer who began working as a professional wrestler in 1967 under the name and persona " 'Pretty

Boy’ Doug Somers,” which is now known and loved world wide by professional wrestling fans.<sup>63</sup> Plaintiff asserts that defendant's, World Wrestling Entertainment (WWE), website features his name and persona as part of its marketing and publicity efforts in nine website addresses and that WWE has placed his image on the cover of at least one DVD.<sup>64</sup> WWE argues that plaintiff's claim for a violation of a right to publicity fails because the references to plaintiff's name on the websites are protected by the First Amendment because the textual references to plaintiff's name on the website either (a) describe plaintiff's participation in particular matches that were aired on WWE's 24/7 television network; or (b) plaintiff's role in a tag team with another wrestler in the context of historical narratives of notable WWE performers and events.<sup>65</sup>

WWE’s defense claim of newsworthy information provided this court with a different analysis than prior cases mentioned. There are several factors that a Georgia court may consider in determining whether a particular fact qualifies as newsworthy: (1) “the depth of the intrusion into the plaintiffs private affairs”; (2) “the extent to which the plaintiff voluntarily pushed himself into a position of public notoriety”; and (3) “whether the information is a matter of public record.”<sup>66</sup>

The court analyzed the first and third factors held the information on the websites did not intrude into plaintiff's private affairs and is a matter of public record.<sup>67</sup> As it pertains to the second factor, it was decided that the use of the term professional implies that plaintiff was wrestling for profit and for a living, versus as a hobby or an amateur and plaintiff voluntarily pushed himself into a position of public notoriety by investing years of his life in developing and maintaining the “Pretty Boy” persona.<sup>68</sup> Thus, the facts

about the wrestling activities of “Pretty Boy” Doug Somers are part of plaintiff's public image and matters of public interest.<sup>69</sup>

Taking this courts decision and relating it to the use of a student-athletes likeness on television broadcasts, DVD's, and video games, there seems to be a strong distinction. Student-athletes are not considered professionals and moreover sign a contract agreement with the NCAA that showcases them as an amateur. It could even be suggested that student-athletes are performing as a mere hobby since this term was used above to parallel being an amateur. Since video games depicting student-athletes in their current form are not currently protected under the First Amendment, how can this framework not be carried over in other aspects of the NCAA's exploited works? Would the DVD's sold and broadcasts agreements signed on behalf of these universities not fall under the same umbrella?

As it relates to the first element, intrusion into private affairs, much of the information provided to companies who purchases the license to use content regarding the student-athletes are extremely in-depth. This can range from footage of personal workouts, information pertaining to family life, and other all-access information involving the athletes. To allow individuals to know all that encompasses a student-athlete could be viewed as intrusive.

Looking at the second element, voluntarily pushing themselves into a position of public notoriety, it seems that this is not the choice of the student-athlete. The agreement these individuals sign does not provide them with the decision into how they would like to be showcased, used, or captured in the public spotlight. Student-athletes are merely there to compete on behalf of the university and not as entertainers for the public.

Lastly, the element of information being of public record, may seem to be the toughest here to prove for student-athletes. Sports have been a national pastime and an obsession to people since their inception. It would seem hard for a court to decide that collegiate athletics would be the one sport exempt from this practice. The difference here is in the content being reported versus the content being broadcasted. No one is arguing that highlights, footage used to inform, or even documentaries made to inform the public of historical games should be exempt. The problem lies with the live streaming content on the networks that have paid excessive amounts of money to broadcast them. It would seem that the live broadcasted games are forms of entertainment rather than newsworthy reporting, therefore the newsworthy defense should not be valid, and thus a right to publicity is being breached.

#### **NO DOUBT v. ACTIVISION PUBLISHING, INC.**

Having looked at how courts have handled the right of publicity in the sports industry, it is important to see how, even on an entertainment platform, courts have decided to handle the issue.

The rock band No Doubt brought suit against the videogame publisher Activision Publishing, Inc. (Activision) based on Activision's release of the *Band Hero* videogame featuring computer-generated images of the members of No Doubt.<sup>70</sup> No Doubt licensed the likenesses of its members for use in *Band Hero*, but contends that Activision used them in objectionable ways outside the scope of the parties' licensing agreement.<sup>71</sup>

The Agreement specifically provides that “Artists grant to Activision the non-exclusive, worldwide right and license to use the Licensed Property (including Artist's likeness as provided by or approved by Artist) solely in the one (1) Game for all gaming

platforms and formats, on the packaging for the Game, and in advertising, marketing, promotional and PR materials for the Game.”<sup>72</sup> The court concluded that the creative elements of the *Band Hero* videogame do not transform the images of No Doubt's band members into anything more than literal, fungible reproductions of their likenesses.<sup>73</sup>

In applying the transformative use analysis similar to the other cases mentioned, the appeal was denied on the same rationale that was associated with EA's decision. The court concluded that in *Band Hero*, no matter what else occurs in the game during the depiction of the No Doubt avatars, the avatars perform rock songs, the same activity by which the band achieved and maintains its fame.<sup>74</sup> The court also explains that the avatars can be manipulated to perform at fanciful venues including outer space or to sing songs the real band would object to singing, or that the avatars appear in the context of a videogame that contains many other creative elements, does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities.<sup>75</sup>

This case shows that in the entertainment sphere, the same logic that is applied to sports holds true to the entertainment industry. Since the case law in the sports realm is still developing, the above example illustrates a movement that may be shifted amongst multiple platforms.

### **CONCLUSION**

After discussing the cases above, it is clear to see that this is an issue affecting athletes nationwide, yet there is no affirmative answer in relation to sports. However, after analyzing the cases presented, courts in various jurisdictions are clearly beginning to

head towards greater protection for likeness and publicity rights of student-athletes in the public sphere.

A possible solution to a changing trend could be in the form of shared revenue once a student-athlete is no longer honoring the eligibility agreement that was signed in order to compete in collegiate sports. This could be shown from an athlete no longer playing for the team, graduating, turning professional, or another variation that would null and void the prior agreement.

To try and breakdown a specific student-athletes percentage of revenue generated to a university would not only be tedious, but also cause a problem with competition amongst the conferences. Imagine high school athletes choosing a university based off the revenue the school makes each season. Would this change the current competitive platform of competition to a platform for money?

One solution to this newly surfaced issue of a “pay for play” idea first needs to start with a revamp of the eligibility rules. This would need to be done in order to allow athletes the possibility to obtain payments but not lose the ability to play. After a change in the rules, the more intricate decision would embody how payment would be received.

A logical option would be to take a certain percentage (example: 35%) of all profits from each Division I football and basketball program and place it in a trust for each student who is on the roster. This would allow for students to be granted a certain amount of income after no longer being a student-athlete that is based on the amount of years a player has played for the program. It would also prevent competitive loss since a student-athlete from a lesser profited program would share equally with a student-athlete from a higher earning program. While the nuisances of ticket sales, merchandise sales,

concession sales, and other variations of revenues make this concept one that could be decided over a few years, the platform is set for the transition to begin.

Taking a look at the numbers and facts, there is money that is being placed in the hands of the wrong people. The high volume revenue streams from each athletic season leaves decision makers to decide not who profits from this success, but how all can profit from success.

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<sup>1</sup> Remaining Eligible, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Eligibility/Remaining+Eligible/A+ateurism> (last visited Nov. 10, 2013).

<sup>2</sup> NAT'L COLLEGIATE ATHLETIC ASS'N., 2009-2010 NCAA DIVISION I MANUAL §12.1.2 (2009), available at <http://www.ncaapublications.com/productdownloads/D110.pdf>.

<sup>3</sup> In re NCAA Student-Athlete Name & Likeness Litig., C 09-1967 CW, 2011 WL 1642256 (N.D. Cal. May 2, 2011).

<sup>4</sup> Steve Wieberg, Fab Five Anniversary Falls Short Of Fondness, USA TODAY, <http://usatoday30.usatoday.com/sports/college/basketball/men/02tourney/2002-03-27-cover-fab5.htm>, (Mar. 28, 2002).

<sup>5</sup> USA TODAY, *supra* note 4.

<sup>6</sup> USA TODAY, *supra* note 4.

<sup>7</sup> NCAA DIVISION I MANUAL, *supra* note 2, §12.1.1.1.4.3

<sup>8</sup> NCAA DIVISION I MANUAL, *supra* note 2, §12.1.1.1.5

<sup>9</sup> Bowl Championship Series FAQ, BCS FOOTBALL, <http://www.bcsfootball.org/news/story?id=4809793>, (Oct. 1, 2013).

<sup>10</sup> Mike Fish, What Price Glory? The Star's Value, ESPN, <http://sports.espn.go.com/espn/otl/news/story?page=fish/091211>, (Dec. 11, 2009).

<sup>11</sup> Anthony Clark, UF To Make Cool Cash Off Hot Sports Merchandise, THE GAINESVILLE SUN, <http://www.gainesville.com/article/20070110/LOCAL/701100333?tc=ar> (Jan. 9, 2007).

<sup>12</sup> About CLC, COLLEGIATE LICENSING COMPANY, <http://www.clc.com/About-CLC.aspx>, (last visited Nov. 15, 2013).

<sup>13</sup> Collegiate Licensing Company Names Top Selling Universities And Manufacturers For 2012-13, COLLEGIATE LICENSING COMPANY, <http://www.clc.com/News/Rankings-Annual-2012-13.aspx>, (last visited Nov. 17, 2013).

<sup>14</sup> The CLC and the NCAA partner to protect trademarks at the 2012 Men's Final Four, NCAA, <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2012/March/The+Collegiate+Licensing+Company+and+the+NCAA+partner+to+protect+trademarks+at+the+2012+Mens+Final+Four>, (Mar. 30, 2012).

<sup>15</sup> THE GAINESVILLE SUN, *supra* note 11.

<sup>16</sup> THE GAINESVILLE SUN, *supra* note 11.

<sup>17</sup> Brandon Larrabee, EA Sports, Licensing Company Settle Lawsuit Over NCAA Football Game, SB NATION, <http://www.teamspeedkills.com/2013/9/26/4775168/ea-sports-settles-lawsuit-ncaa-football-game>, (Sep. 26, 2013).

<sup>18</sup> Patrick Vint, EA Sports Used Tim Tebow's Name In NCAA Football 10, SB NATION, <http://www.sbnation.com/college-football/2013/5/23/4357530/ed-obannon-case-ncaa-tim-tebow-ncaa-football-10>, (May 23, 2013).

<sup>19</sup> SB NATION, *supra* note 18.

<sup>20</sup> SB NATION, *supra* note 18.

<sup>21</sup> SB NATION, *supra* note 18.

<sup>22</sup> SB NATION, *supra* note 18.

<sup>23</sup> ESPN, *supra* note 10.

<sup>24</sup> ESPN, *supra* note 10.

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- <sup>29</sup> Richard Vedder and Mathew Denhart, The Real March Madness, THE WALL STREET JOURNAL, <http://online.wsj.com/news/articles/SB123751289953291279>, (Mar. 20, 2009).
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- <sup>31</sup> THE WALL STREET JOURNAL, *supra* note 29.
- <sup>32</sup> C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 505 F.3d 818, 820 (8th Cir. 2007).
- <sup>33</sup> C.B.C. Distribution & Mktg., Inc., 505 F.3d at 819.
- <sup>34</sup> *Id.* at 821.
- <sup>35</sup> *Id.* at 822.
- <sup>36</sup> *Id.*
- <sup>37</sup> *Id.*
- <sup>38</sup> *Id.*
- <sup>39</sup> Keller v. Electronics Arts, Inc., C 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010) *aff'd sub nom. In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).
- <sup>40</sup> *Id.*
- <sup>41</sup> *Id.*
- <sup>42</sup> *Id.*
- <sup>43</sup> *Id.*
- <sup>44</sup> *Id.*
- <sup>45</sup> *Id.*
- <sup>46</sup> *Id.*
- <sup>47</sup> *Id.*
- <sup>48</sup> *Id.*
- <sup>49</sup> *Id.*
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- <sup>53</sup> *Id.*
- <sup>54</sup> *Id.* 717 F.3d at 151
- <sup>55</sup> *Id.* 717 F.3d at 164
- <sup>56</sup> *Id.* 717 F.3d at 166
- <sup>57</sup> Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 409 (9th Cir. 1996)

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Abdul-Jabbar, 85 F.3d at 415.

<sup>61</sup> Abdul-Jabbar, 85 F.3d at 414.

<sup>62</sup> Abdul-Jabbar, 85 F.3d at 415.

<sup>63</sup> Somerson v. World Wrestling Entm't, Inc., No. 12-CV-00043-MHS, 2013 U.S. Dist. WL 3863891 (N.D. Ga. Mar. 7, 2013).

<sup>64</sup> Somerson, 2013 WL 3863891, at \* 3.

<sup>65</sup> Somerson, 2013 WL 3863891, at \* 3.

<sup>66</sup> Somerson, 2013 WL 3863891, at \* 6.

<sup>67</sup> Somerson, 2013 WL 3863891, at \* 6.

<sup>68</sup> Somerson, 2013 WL 3863891, at \* 6.

<sup>69</sup> Somerson, 2013 WL 3863891, at \* 6.

<sup>70</sup> No Doubt v. Activision Publ'g, Inc., 192 Cal. App. 4th 1018, 1022, 122 Cal. Rptr. 3d 397, 400 (2011).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 401.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 411.

<sup>75</sup> *Id.*