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NCAA Videogames: How the Litigation That Cancelled NCAA Football Has Led to Its Comeback

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NCAA Videogames: How the Litigation that Cancelled *NCAA Football* has led to its Comeback

I. INTRODUCTION

Just over seven percent of people who play high school football will go on to play at the collegiate level in some form.¹ Around half of that seven percent will play college football at its highest level, NCAA Division I.² It is these people only who will ever truly know what it is like to play college football on the nation's biggest stage. Videogames, on the other hand, give people who never would have had the opportunity to play for their favorite college football team the chance to feel what it might be like.

a. History and Structure of Electronic Arts Sport's NCAA Football Series

The first college football videogame produced by Electronic Arts Sports ("EA Sports") was released in 1993 under the title *Bill Walsh College Football*.³ Unlike subsequent games, the first installment of EA Sports' college football line did not have much resemblance to real players or real teams.⁴ Because EA Sports did not yet have any licensing from either the NCAA or any member institutions, the game did not include any official NCAA or university logos.⁵ Rather, if one wanted to play as the LSU Tigers, one of twenty-four teams in the game, they would choose the purple and gold team called "Baton Rouge."⁶ Student-athletes on the limited teams in *Bill Walsh College Football* were identified solely by number.⁷

¹ *Estimated Probability of Competing in College Athletics*, NCAA, <https://www.ncaa.org/sports/2015/3/2/estimated-probability-of-competing-in-college-athletics.aspx> (last visited March 26, 2024).

² *Id.*

³ Steven Howard Roth, *Keller v. Electronic Arts: How Copyright Law Precludes Electronic Arts' First Amendment Defense*, 13 Tex. Rev. Ent. & Sports L. 1 (2011).

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.* at 4.

⁷ *Id.*

EA Sports released the next installment of *Bill Walsh College Football* the following year, this time holding a license from the NCAA, making it an official NCAA product.⁸ This game featured the inclusion of bowl games for the first time, although under fictitious names.⁹ The next big change for the series came in 1996 under a new title, *College Football USA*.¹⁰ This was the first game ever to include all current Division I-A teams.¹¹ The game also featured real bowl games including the Rose Bowl.¹² In 1998 EA switched the title of the series again when they released *NCAA Football 98*.¹³ The series would keep the “NCAA” title until its final installment in 2013.¹⁴

By the early 2010’s, the game was as technologically advanced as ever, bringing an experience that felt closer to the real thing than ever before. For example, besides fully authentic uniforms featuring logos and sponsorships, *NCAA Football 2011* featured pregame stadium entrances and school rituals.¹⁵ Players can watch as their Clemson Tigers run down the hill at “Death Valley” touching Howard’s Rock.¹⁶ By this point the game was also utilizing its license with ESPN to include a virtual broadcast of ESPN College Gameday and commentary from notable ESPN analysts such as Kirk Herbstreit and Erin Andrews.¹⁷

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 6.

¹⁴ Kevin Sweeney, *Why Did EA Sports Stop Making NCAA Football Video Games*, Sports Illustrated, <https://www.si.com/college/2021/02/02/ncaa-football-ea-sports-stopped-making-games> (last visited March 26, 2024).

¹⁵ Steven Howard Roth, *Keller v. Electronic Arts: How Copyright Law Precludes Electronic Arts’ First Amendment Defense*, 13 Tex. Rev. Ent. & Sports L. 1 (2011).

¹⁶ *Id.* at 8.

¹⁷ *Id.*

By this point, it was also much easier to identify the players on each team. Each student-athlete has a corresponding avatar in the game.¹⁸ The avatars include nearly every physical characteristic of the player apart from their name including jersey number, height, weight, skin tone, and home state.¹⁹ However, EA also gives players the options to both make their own manual rosters and download those created by others.²⁰ Therefore, players can create or download a roster that includes all of the accurate player names.²¹

In September 2013, after just over two decades of making the game, EA Sports announced it was cancelling its college football series for the foreseeable future.²² The announcement came shortly after news that EA had settled all claims against it by current and former college athletes.²³ Also prior to EA's statement, the NCAA terminated its licensing agreement with EA Sports citing "the current business climate and costs of litigation."²⁴

At first, EA vowed to continue its production of a college football game without the NCAA name by signing a three-year deal with the Collegiate Licensing Company ("CLC").²⁵ The CLC controls the licensing rights for many academic institutions as well as conferences and Bowl Games.²⁶ However, even with this deal in place EA needed the individual approval of the conferences and schools.²⁷ The month before EA announced the cancellation of the series, the

¹⁸ *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*, 724 F.3d 1268, 1271 (9th Cir. 2013).

¹⁹ *Id.*

²⁰ Steven Howard Roth, *Keller v. Electronic Arts: How Copyright Law Precludes Electronic Arts' First Amendment Defense*, 13 Tex. Rev. Ent. & Sports L. 1 (2011).

²¹ *Id.* at 11.

²² Ryan Fleming, *EA Sports Settles Student Athlete Lawsuits, Ends 20 Years of College Football Games*, Digital Trends, <https://www.digitaltrends.com/gaming/ea-settles-all-student-athlete-lawsuits-and-ends-two-decades-of-college-football-games/> (quoting statement from Cam Weber, General Manager of American Football for EA Sports) (last visited March 26, 2024).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

Big Ten, Pac-12, and SEC all chose not to allow EA Sports to use their name, image, and likeness (“NIL”).²⁸

However, it was ultimately the threat of additional litigation that forced EA to cancel the series.²⁹ EA addressed the settlement of claims against it, stating that they have been caught in the middle of a battle between student-athletes and the NCAA, and that they simply follow the rules the NCAA provides.³⁰ The videogame company compared itself to broadcasting networks, who also derive a substantial amount of income from student-athletes and aim to follow rules the NCAA provides.³¹

II. LITIGATION CREATED BY *NCAA FOOTBALL*

EA Sports’ *NCAA Football* gave rise to much litigation about its use of uncompensated student-athlete NIL. This section explores various litigation against both EA and the NCAA that were monumental in forming NIL rights for student-athletes. This section will show how the videogame was responsible for imploding the NCAA’s billion-dollar exploitive business model.

a. Keller v. EA

In 2003, Sam Keller graduated high school as the ninth-highest rated quarterback prospect in the nation.³² He originally committed to Arizona State, where he played for three seasons before transferring to the University of Nebraska.³³ At Nebraska, Keller was a star who

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Michael Schoeneberger, *Unnecessary Roughness: Reconciling Hart and Keller with a Fair Use Standard Befitting the Right of Publicity Note*, 45 Conn. L. Rev. 1875 (2013).

³³ *Id.*

set the school's single season record for completion percentage and passing yards per game.³⁴

After college, Keller had an NFL career that lasted less than a month.³⁵

In the 2005 edition of *NCAA Football*, the avatar representing the starting quarterback for Arizona State has physical attributes that match those of Keller.³⁶ Besides having the same jersey number, height, weight, home state, and skin tone, the avatar even matches his pocket passer playstyle.³⁷ In the 2008 edition of the game, the only thing missing from the avatar representing Keller, this time as the starting quarterback for Nebraska, was the right jersey number.³⁸ The reason for this was likely that Keller had changed his number shortly before the start of the season.³⁹

In May 2009, Keller filed a complaint in the Northern District of California against EA, the NCAA, and the CLC.⁴⁰ The basis of the complaint was the unlawful misappropriation of Keller's likeness in multiple *NCAA Football* videogames, resulting in increased profits for EA.⁴¹ It was also alleged that EA intentionally disregarded NCAA rules prohibiting the use of player names through their downloadable online rosters.⁴²

In defense, EA asserted that its use of Keller in *NCAA Football* videogames was protected by the First Amendment.⁴³ The theory was that the game contained various

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Keller*, 724 F.3d at 1272.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Christian Dennie, *Tebow Drops Back to Pass: Videogames Have Crossed the Line, But Does the Right of Publicity Protect a Student-Athlete's Likeness When Balanced Against the First Amendment?*, 62 Ark. L. Rev. 645 (2009).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Steven Howard Roth, *Keller v. Electronic Arts: How Copyright Law Precludes Electronic Arts' First Amendment Defense*, 13 Tex. Rev. Ent. & Sports L. 1 (2011).

transformative elements making it a protected expressive work.⁴⁴ A work is protected under the transformative use test of the First Amendment to the extent it contains significant transformative elements or that the value of the work is not based mostly on the celebrity's fame.⁴⁵ EA stated that the game comprised of "extraordinarily complex feats of computer engineering."⁴⁶ Additionally, EA argued that because the First Amendment protects works that are important to the public, NCAA videogames automatically deserve protection because of their high amount of public interest and the information into athletics they provide.⁴⁷ Examples were provided by counsel for EA of other works with less creative and expressive elements than the videogame that have been given First Amendment protection by courts such as a program from a baseball game and "fantasy sports" games.⁴⁸

The Northern District of California ruled that EA did not have a valid First Amendment defense to Keller's claims and EA appealed the decision.⁴⁹ Citing various cases for guidance, the Ninth Circuit affirmed the district court and rejected EA's transformative use defense.⁵⁰ The court reasoned that players manipulate the avatars in the game for the same purpose for which they are known in real life, playing football.⁵¹ The setting of the manipulation is also that in which the players have achieved their notoriety, football stadiums.⁵²

One case that the Ninth Circuit relied upon heavily in its ruling was *No Doubt v. Activision Publishing, Inc.*, in which the California Court of Appeal addressed a band

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Keller*, 724 F.3d at 1276.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

challenging the scope of their use in the popular *Band Hero* videogame.⁵³ The band had given the game permission to be in the game, but claimed the scope of its license was exceeded by users of the game being able to perform all the songs in the game with the band, as well as alter their voices.⁵⁴ The court in that case also rejected the video game manufacturer's transformative use defense.⁵⁵ The main reason was that the characters in the game were "literal recreations of the band members" doing what they did to achieve fame.⁵⁶ The expressive elements that the game had, the court noticed, came second to the primary purpose of recreating the characters so as to achieve commercial gain from their fame.⁵⁷

It was this reasoning that the court in *Keller* relied on to reject EA's argument that the court was overlooking the ability for players to alter the characteristics of avatars depicted in the game. Like the band members in *Band Hero*, whatever alterations players of *NCAA Football* make to the athletes, they are performing the activity by which they achieved fame, playing football. The court distinguished two other cases, *Winter* and *Kirby*, in which the court found a valid transformative use where public figures were transformed into "fanciful, creative characters" or "entirely new characters."⁵⁸

b. Hart v. EA

Ryan Hart was a football player for Rutgers University that played quarterback on the team from 2002 through 2005.⁵⁹ As a condition for participation on team, Hart, like all collegiate

⁵³ *No Doubt v. Activision Publishing, Inc.*, 192 Cal. App. 4th 1018 (Ct. App. 2011).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Keller*, 724 F.3d at 1277.

⁵⁹ *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

athletes had to agree to the NCAA's amateurism rules.⁶⁰ These rules state that only amateurs are eligible to participate in collegiate sports and that anyone who accepts money for their athletic talent is no longer an amateur.⁶¹ While at Rutgers, Hart wore number thirteen for the Scarlet Knights and also typically wore a visor and an armband on his left wrist.⁶² While at school, Hart made his mark by leading the team to their first bowl game since 1978 and is still the university's all-time leader in career completions.⁶³

In *NCAA Football 2006*, Rutgers' quarterback wears number thirteen, stands at 6'2 in height, and weighs 197 pounds, all matching exactly with the real-life Ryan Hart.⁶⁴ Additionally, the avatar representing Hart wears a left wristband and visor to match the ones he wears in real life.⁶⁵ The game also features player ratings for his avatar that reflect footage of him from the previous season.⁶⁶

Hart brought suit against EA in the District of New Jersey for the unauthorized use of his likeness in *NCAA Football 2004*, *2005*, *2006*, and *2009* in violation of his right of publicity.⁶⁷ In response, EA filed a motion for summary judgement claiming that the First Amendment barred the claim as the game was a protected expressive work.⁶⁸ The district court noted that this was an issue of first impression for the Third Circuit and chose to follow the transformative use test.⁶⁹ In the district court's view, EA's use of Hart's likeness in the *NCAA Football* videogame constituted

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 146.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Michael Schoeneberger, *Unnecessary Roughness: Reconciling Hart and Keller with a Fair Use Standard Befitting the Right of Publicity Note*, 45 Conn. L. Rev. 1875 (2013).

⁶⁸ *Id.*

⁶⁹ *Id.*

a valid transformative use entitled to First Amendment protection, and thus granted summary judgement to EA.⁷⁰ The district court relied heavily on the ability to alter the image of the players featured in the game.⁷¹ After the decision, Hart appealed.⁷²

In resolving the issue, the Third Circuit first explained that the critical inquiry was balancing the interests of freedom of expression protected by the First Amendment against the interests of protecting one's right of publicity.⁷³ The court then discussed three tests that courts have used in taking up this inquiry before following the district court's decision to use the transformative use test.⁷⁴

The first test, the Predominant Use Test, was the test that Hart urged the court to adopt.⁷⁵ Under this test, the question for the court to ask is what the product's predominant purpose is. If the product being sold predominately exploits the commercial value of an individual's identity, it is a violation of the right of publicity.⁷⁶ It would be irrelevant that the product has some expressive characteristics if this is its predominant purpose.⁷⁷ On the other hand, if the product has the predominant purpose of being an expressive comment of a celebrity, it tilt the scales more heavily in favor of a protected work.⁷⁸ The court rejected this test for being both too subjective and arbitrary.⁷⁹

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Hart*, 717 F.3d at 147 (citing *Zacchini v. Scripps-Howard Broadcasting, Co.*, 433 U.S. 562 (1977)).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

The next test that the court analyzed was the *Rodgers* Test, which EA argued in favor of.⁸⁰ As originally applied, the *Rodgers* Test applied only to titles where a celebrity's name was used in a title and such use was "wholly unrelated" to the product or simply a disguised advertisement, but EA argued the test covered a broader scope.⁸¹ The court rejected this test for fear that it would "immunize a broad swath of tortious activity."⁸² The court reasoned that the test was unfit for widespread application and was rather best kept for its narrow use.⁸³

The final test the court examined, and the one it ultimately chose to adopt was the Transformative Use Test.⁸⁴ In choosing to follow this test, the Third Circuit aligned with the Ninth Circuit in *Keller*. The *Hart* court thus had to determine whether the videogame sufficiently transformed Hart's identity, meaning both his likeness and biographical information.⁸⁵ Considering the context of the game, the court found that the "digital Ryan Hart" did what the "actual Ryan Hart" did while at Rutgers.⁸⁶ The court also noted that the ability to alter the players in the game was not enough, by itself, to make the game a transformative use.⁸⁷ The court provided an example that such a rule would leave the Pope with no legal recourse if he was misappropriated in a shooting game, so long as his features could be altered.⁸⁸ In *NCAA Football* the realism of the players included has a direct impact on the sales and revenue the game

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* (citing *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (Cal. 2001)).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

generates.⁸⁹ Additionally, while able to alter Ryan Hart, the avatar for the starting quarterback of Rutgers has default features that match his.⁹⁰

The court also disagreed with EA's argument that because the game featured so many creative elements in addition to Hart's likeness, the game as a whole should be considered transformative.⁹¹ The proper inquiry is not into the product as a whole, but rather how the celebrity's identity is transformed.⁹² Again the court reasoned that such a rule would permit blatant misappropriation where the larger work was sufficiently transformative.⁹³

In light of all the above analysis, the court held that EA's use of Hart's likeness in *NCAA Football 2004, 2005, and 2006* was not sufficiently transformative to warrant First Amendment protection.⁹⁴ Therefore, the Third Circuit reversed the District of New Jersey's grant of summary judgement and remanded the case.⁹⁵

c. O'Bannon v. NCAA

Ed O'Bannon was a college basketball player for UCLA.⁹⁶ In 2008, while at a friend's house, he discovered that he was depicted in EA's college basketball videogame, *NCAA Basketball*.⁹⁷ O'Bannon had both never consented to nor been compensated for the inclusion of an avatar that resembled his likeness.⁹⁸

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* (The court held EA's use of Hart in a trailer for *NCAA Football 2009* was sufficiently transformative.)

⁹⁵ *Id.*

⁹⁶ *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

⁹⁷ *Id.* at 1055.

⁹⁸ *Id.*

In 2009, O'Bannon sued the NCAA, EA, and the CLC in federal court.⁹⁹ The basis of O'Bannon's complaint was that the NCAA's amateurism rules preventing student-athletes from being compensated for their NIL were an illegal restraint of trade under the Sherman Antitrust Act.¹⁰⁰ The complaint further alleged that the NCAA engages in anticompetitive activity by authorizing and profiting off the use of players' likeness in videogames such as *NCAA Basketball* and *Football*.¹⁰¹

In November 2013, the district court granted the plaintiff's motion for class certification.¹⁰² The class included all current and former student-athletes who have been, or could have been, included in a videogame sold by the defendants. After class certification was granted, the plaintiffs reached a settlement with EA and the CLC.

The settlement that EA reached was for \$60 million to be shared among class members with a valid claim.¹⁰³ The settlement applied to student-athletes who appeared in an EA *NCAA* game from 2003 through 2013.¹⁰⁴ There were 24,819 claims that were determined to be valid, giving the average class member around \$1600. This total is taken after lawyers take a thirty percent cut of the total settlement.¹⁰⁵ This would leave around \$42 million as shareable amongst the class. The lead plaintiffs, Ed O'Bannon and Sam Keller got the highest allocation of the settlement, around \$15,000 each.¹⁰⁶

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Darren Rovell, *Athletes whose likeness appeared in Electronic Arts games will share a \$60 million settlement*, ESPN, https://www.espn.com/college-sports/story/_/id/14980599/college-football-basketball-players-receive-average-1600-settlement-electronic-arts (last visited April 1, 2024).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

After the case proceeded in the district court, judgement was entered for the plaintiffs after the court found the NCAA's rules violated the Sherman Act.¹⁰⁷ The court identified two markets in which the NCAA's rules restrict trade: the college education market and the group licensing market.¹⁰⁸ The court described the college education market as the market in which college sport programs, specifically football and basketball, compete to recruit the best players out of high school.¹⁰⁹ Colleges recruit these players by offering them "unique bundles of goods and services" that include things like high profile coaches and modern training facilities.¹¹⁰ The second market, group licensing, is the market in which student-athletes would be able to sell their likeness but for the NCAA's amateurism rules.¹¹¹ The court specifically mentioned three submarkets of group licensing that student-athletes could use to increase their profitability: (1) live game telecasts, (2) sports videogames, and (3) game rebroadcasts, advertisements, and other archival footage.¹¹² With respect to videogames specifically, the use of student-athletes NIL increased the attractiveness of the game and thus drove demand of such a market.¹¹³

Having identified these markets as potentially being restrained, the district court evaluated the NCAA's rules under the Rule of Reason.¹¹⁴ The court found that the NCAA's rules produced an anticompetitive effect in the college education market, but not the group licensing market. Furthermore, the court found that the NCAA had a procompetitive purpose for the rules, but that since there were less restrictive alternatives available, they were still unlawful.¹¹⁵

¹⁰⁷ *O'Bannon*, 802 F.3d at 1056.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 1057.

¹¹⁵ *Id.*

In finding an anticompetitive effect in the college education market, the court stated that colleges would compete with each other by offering recruits compensation that drive down the cost of attendance.¹¹⁶ In one view, colleges are purchasers of athletic services, and the NCAA acts as a monopsony in which member institutions agree not give any compensation for an athlete's NIL, thus harming competition.¹¹⁷ On the other hand, the district court concluded that there was no anticompetitive effect in the group licensing market because there would be no competition within the submarkets if the NCAA rules were abolished.¹¹⁸ For example, a videogame producer such as EA would want to acquire rights for all the athletes on teams it plans to include in the game.¹¹⁹ Therefore, student-athletes would not compete against each other in this market, but would rather cooperate to increase the value of their collective appearance in a videogame.¹²⁰

In support of a procompetitive purpose for its rules, the NCAA offered four alternative purposes for its rules: (1) preserving amateurism, (2) promoting competitive balance, (3) integrating academics and athletics, and (4) increasing output in the college education market. The district court rejected the second and fourth justifications.¹²¹ While the district court acknowledged that the NCAA's definition of amateurism is often changing, the current understanding of the term plays some role in the popularity of the NCAA's product, which preserves consumer demand.¹²² The court allowed integration of academics and athletics as a possible justification, but concluded that most of the benefits of this integration come from other

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 1058.

¹²² *Id.*

rules other than that prohibiting compensation for student-athletes.¹²³ The only way the restriction on compensation serves this integration is by preventing a gap between student-athletes and the rest of the student body.¹²⁴

After finding that the NCAA's rules contained two procompetitive justifications, increasing consumer demand and prevention of a gap between student-athletes and other students, the district court next considered whether the NCAA had less restrictive alternatives to achieve these goals.¹²⁵ Specifically, the court considered whether there were alternatives that were "substantially less restrictive" than a complete ban on student-athlete compensation.¹²⁶ Two alternatives that the plaintiffs recommended were allowing schools to award student-athletes stipends up to the full cost of attendance or permitting schools to hold student-athlete licensing revenue in trust to be distributed after they leave school.¹²⁷ The court determined that both of these alternatives presented less restrictive alternatives and that the NCAA would be capable of ensuring that players were only compensated for money derived from their NIL.¹²⁸

The district court then entered judgement for the plaintiffs and permanently enjoined the NCAA from prohibiting member institutions from compensating FBS football and Division I basketball players for the use of their NIL through grants-in-aid up to the full cost of attendance.¹²⁹ The court also enjoined the NCAA from prohibiting member institutions from

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 1060.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 1061.

¹²⁹ *Id.*

paying up to \$5,000 in deferred compensation to FBS football and Division I basketball players through trust funds distributable after they leave school.¹³⁰

On appeal, the Ninth Circuit first addressed three separate arguments raised by the NCAA that the court was precluded from reaching the antitrust claim on the merits.¹³¹ The arguments were: (1) that the Supreme Court in *NCAA v. Board of Regents* held that the NCAA's amateurism rules are "valid as a matter of law"; (2) the compensation rules at issue in the case are not covered by the Sherman Act because they do not regulate commercial activity; and (3) the plaintiffs have no standing under the Sherman Act because they have not suffered an injury in fact.¹³²

In disposing of the NCAA's first argument, the Ninth Circuit explained that the court in the *Board of Regents* case discussed the NCAA's amateurism rules simply to show why the rules should be analyzed under a Rule of Reason analysis.¹³³ Therefore, because many NCAA rules are integral to the entity's product, no rule should be invalidated without a Rule of Reason analysis.¹³⁴

The court rejected the NCAA's second argument by explaining that the concept of commerce is broad and includes nearly every activity in which the actor anticipates economic gain.¹³⁵ Such a definition would surely include the student-athlete exchanging his labor and NIL rights in exchange for a scholarship at a Division I school because both parties anticipate economic gain in such a transaction.¹³⁶ Also, the fact that the NCAA rules could be characterized

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* (citing *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984)).

¹³⁴ *O'Bannon*, 802 F.3d at 1062.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1065.

as “eligibility rules” rather than compensation rules does not change the fact that they restrain trade.¹³⁷

In deciding whether the plaintiffs suffered an antitrust injury in fact the court first explained that to satisfy the requirement the plaintiff must show “injury of the type the antitrust laws were intended to prevent.”¹³⁸ However, the NCAA does not allege the plaintiffs injuries are not of the type antitrust laws prevent, but rather that the rules do not bar them from compensation they would otherwise receive.¹³⁹ In the court’s view, the plaintiffs have shown injury in fact by showing that the NCAA rules have foreclosed the market for their NIL rights in a videogame like *NCAA Football*.¹⁴⁰ Without the NCAA’s compensation rules, EA would negotiate directly with players for their NIL rights in an effort to create a game that is more realistic.¹⁴¹ Specifically, the plaintiffs put into evidence a presentation from EA to the NCAA in which they told the NCAA that their inability to use player names was the “number one factor holding back NCAA videogame growth.”¹⁴²

Once the court reached the merits of O’Bannon’s antitrust claim, they disposed of three anticompetitive justifications raised by the NCAA for its rules.¹⁴³ Like the district court, the Ninth Circuit held that the rules had a significant anticompetitive effect on the college education market.¹⁴⁴

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 1067.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

In weighing the procompetitive justifications for the rules, the court focused on the NCAA's amateurism justification.¹⁴⁵ The NCAA argued that the district court did not give the amateurism justification enough weight by focusing solely on whether amateurism increases consumer demand and by being overly skeptical of the organization's historical commitment to amateurism.¹⁴⁶ Like the district court, the Ninth Circuit held that the NCAA rules serve procompetitive purposes of integrating athletics with academics and preserving the popularity of college sports by adhering to its current understanding of amateurism.¹⁴⁷

When the court considered alternative rules that were substantially less restrictive than the current NCAA rules, the substitutes were required to be "virtually as effective" as the rules in place and "without significantly increased cost."¹⁴⁸ In addition to plaintiffs bearing this burden, the court also must give the NCAA "ample latitude to superintend college athletics."¹⁴⁹ The court accepted one alternative raised in the district court, the NCAA allowing member schools to award grants-in-aid to student athletes up to the full cost of attendance, and rejected the other, allowing member institutions to pay deferred NIL compensation.¹⁵⁰

When it accepted the first alternative, the court pointed to testimony from the NCAA president at trial that giving student-athletes up to the full cost of attendance would not violate the principle of amateurism because all of the money would be used towards school purposes.¹⁵¹ There was also nothing to suggest that increasing the grants-in-aid to the full cost of attendance would hurt consumer demand for the NCAA's product or stifle the integration of student-athletes

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (citing *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)).

¹⁴⁹ *O'Bannon*, 802 F.3d at 1067 (citing *NCAA v. Bd. of Regents*, 468 U.S. 85, 120 (1984)).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

with other students.¹⁵² The NCAA's current restriction was "patently and inexplicably" stricter than necessary which allowed the court to step in, rather than if it was simply micromanaging the NCAA's rules.¹⁵³ Here, the proposed alternative was substantially less restrictive and there was no evidence it would lead to significantly increased costs.

On the other hand, the Ninth Circuit ruled that the district court erred in allowing student-athletes to receive NIL payments as a viable alternative because it could not be said that this was as effective in preserving amateurism as not allowing compensation.¹⁵⁴ In a win for the NCAA in what was otherwise a significant loss, the Ninth Circuit held that the district court ignored that not paying student-athletes was precisely what made them amateurs.¹⁵⁵ Such compensation would create the challenge of turning college football into "minor league football."¹⁵⁶

d. NCAA v. Alston

In *Alston*, another antitrust challenge to NCAA compensation rules this time reached the Supreme Court.¹⁵⁷ Like in *O'Bannon*, a class of plaintiffs consisting of current and former Division I football and basketball players sued the NCAA for the rules limiting compensation in exchange for athletic services.¹⁵⁸ The district court and appellate court both held for the plaintiff class.¹⁵⁹

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* (citing *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984)).

¹⁵⁷ *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

¹⁵⁸ *Id.* (EA Sports was not involved in this litigation as their partnership with the NCAA had terminated and the NCAA videogame series was discontinued).

¹⁵⁹ *Id.*

At the Supreme Court level, the NCAA's main argument was that the Rule of Reason analysis was improper to evaluate its rules.¹⁶⁰ Instead, the NCAA argues for an abbreviated review that the court has used in the past. The court acknowledges this review, but states that it is only appropriate in clear cases of anticompetitive use.¹⁶¹ For instance, rules that are necessary in order for athletic games to take place may be entitled to a quick review.¹⁶² In terms of student-athlete compensation, that is not the case because compensation does not affect the ability for games to go on.¹⁶³ The Supreme Court also agreed with the Ninth Circuit in *O'Bannon* in holding that the NCAA is a commercial enterprise subject to the Sherman Act, and any arguments for exemption should be given to Congress.¹⁶⁴

The Supreme Court affirmed the district court and Ninth Circuit's application of the Rule of Reason test to conclude that the NCAA rules prohibiting compensation were a violation.¹⁶⁵ While the court considered the NCAA's amateurism justifications, they ultimately decided they need not resolve the issue of what amateurism in collegiate sports means.¹⁶⁶ Rather, the role of the court is to review the lower courts judgement through the appropriate applications of antitrust law.¹⁶⁷

It is worth noting the concurrence of Justice Kavanaugh, who wrote to say that while only the NCAA's rules on educational-related benefits were at issue in the case, other rules prohibiting compensation raised concern under the court's holding.¹⁶⁸ Although the court

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2166.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* (Kavanaugh, J., concurring)

expressed that it was only ruling on the rules being challenged in the case, they laid out the foundation for how such rules should be analyzed going forward, a Rule of Reason analysis.¹⁶⁹ Under such an analysis, the NCAA may lack the required procompetitive justifications for its remaining compensation rules.¹⁷⁰ Specifically, Kavanaugh ridiculed the argument of the NCAA that the defining feature of college sports is unpaid athletes by stating how this would be clearly illegal in any other context.¹⁷¹ In other words, the NCAA cannot avoid clear price-fixing labor by making price-fixing labor a defining feature of the product.¹⁷² The attitude of Justice Kavanaugh as well as the unanimous court towards the case is perhaps best summed up by his final sentence: “The NCAA is not above the law.”¹⁷³

III. THE FUTURE OF EA’S *NCAA FOOTBALL*

Even though the court in *Alston* narrowed its holding to only education-related benefits, the NCAA could see that the court’s view of its rules opened itself up to future litigation on any of its amateurism rules.¹⁷⁴ Therefore, days after the court’s holding, the NCAA announced that it would not be promulgating new rules regarding student athlete monetization of their NIL.¹⁷⁵ The NCAA subsequently decided to overhaul its constitution to give greater power to member conferences and institutions.¹⁷⁶ Part of these overhauls was the decision to allow players to monetize their NIL for the first time.¹⁷⁷

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Nathaniel Grow, *The Future of College Sports After Alston: Reforming the NCAA via Conditional Antitrust Immunity*, 64 Wm. & Mary L. Rev. 385 (2022).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

Prior to the NCAA's overhaul response to *Alston*, EA Sports announced in 2021 that it would be releasing a new college football game for the first time since the discontinuation of *NCAA Football*.¹⁷⁸ While the game was in development, NIL rights started to form and in 2023 the game announced that it would feature the virtual likeness of real student-athletes in the game.¹⁷⁹ Because the NCAA terminated its relationship with EA Sports after the video game manufacturer settled all claims against it, the new game will not feature the NCAA's name or logo and will instead be titled *EA College Football*.¹⁸⁰ In February 2024, EA Sports announced that the first installment, *EA College Football 25* would arrive in the summer of 2024.¹⁸¹

While the changes to the NIL landscape and the announcement of a new college football game brought a great opportunity to EA Sports, it also brought new challenges and litigation. In June of 2023, Brandr, a company specializing in group NIL licensing sued EA for its use of an alternative company, OneTeam, to facilitate group licensing deals with all institutions to be featured in *EA College Football 25*, including Brandr clients.¹⁸² The question that the court in this case would have considered is what party gets to choose to the group licensing entity in a team-wide deal, the licensee, or the licensor's team.¹⁸³ The student-athlete licensor would choose in neither scenario.¹⁸⁴ However, Brandr withdrew its claims against EA before the case could

¹⁷⁸ *Electronic Arts & CLC to bring back college football games*, EA, <https://www.ea.com/games/anthem/news/ea-clc-bring-back-college-football-video-games> (last visited April 8, 2024).

¹⁷⁹ Mike McDaniel, *EA Sports Reaches Agreement to Have FBS Players in College Football Game*, Sports Illustrated, <https://www.si.com/college/2023/05/17/ea-sports-reaches-agreement-real-fbs-players-college-football-game-nil> (last visited April 8, 2024).

¹⁸⁰ Ben Wilson, *EA Sports College Football 25: Everything you need to know*, Gamesradar, <https://www.gamesradar.com/ea-sports-college-football-25-guide/> (last visited April 8, 2024).

¹⁸¹ Jordan Mendoza, *EA Sports drops teaser for College Football 25 video game, will release this summer*, USA Today, <https://www.usatoday.com/story/sports/ncaaf/2024/02/15/ea-sports-college-football-video-game-release-date/72156254007/> (last visited April 8, 2024).

¹⁸² Noah Henderson, *Brandr Drops EA Sports Suit, College Football Game in Sight*, Sports Illustrated, <https://www.si.com/fannation/name-image-likeness/news/brandr-drops-ea-sports-suit-college-football-video-game-in-sight-noah9> (last visited April 8, 2024).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

proceed.¹⁸⁵ The withdrawal came with no compensation paid to Brandr by EA, and plans of future collaboration between Brandr and OneTeam.¹⁸⁶

In February of 2024, EA Sports finalized its NIL plan to allow student-athletes to be featured in *College Football 25* and compensated.¹⁸⁷ EA is offering student-athletes the opportunity to opt-in to be featured in the game in exchange for a flat fee of \$600 plus a copy of the game.¹⁸⁸ To avoid a future litigation like *O'Bannon*, *Hart*, and *Keller*, the contract also states that student-athletes who opt-in waive their right to participate in any class or joint action with respect to the agreement.¹⁸⁹ Student-athletes with eligibility beyond the 2025 season who opt-in will remain in future installments of the game unless they opt-out and will be paid annually.¹⁹⁰ Also, if a student-athlete transfers, they will continue to be compensated if they are still on a roster.¹⁹¹ Sean O'Brien, the vice president of business development at EA sports, stated that the \$600 figure was decided by comparing deals from other EA Sports' titles such as *Madden* and the *NHL* series.¹⁹² O'Brien further stated that the company is proud to be a part of the largest and likely highest-spending NIL program.¹⁹³

In order to receive the opt-in notice, student-athletes must have a university email address.¹⁹⁴ Those who opt-in will be added to the game after the school verifies that the player is

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Kristi Dosh, *What's in the EA Sports College Football Contract?*, Business of College Sports, <https://businessofcollegesports.com/name-image-likeness/whats-in-the-ea-sports-college-football-contract/> (last visited April 8, 2024).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Michael Rothstein, *Players can start opting in to EA Sports College Football 25*, ESPN, https://www.espn.com/college-football/story/_/id/39574788/players-opting-ea-sports-college-football-25-get-600 (last visited April 8, 2024).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

on the roster.¹⁹⁵ In place of student-athletes who opt not to be featured in the game, EA Sports will create a generic avatar in their place with attributes that reflect the strength or weakness of the position over the past ten seasons.¹⁹⁶ Those playing the videogame will be unable to manually insert a student-athlete who has opted out, although it remains to be seen how this will be accomplished.¹⁹⁷

In addition to the opt-in program to get student-athletes in the game, EA Sports will also have NIL opportunities for student-athletes to promote the game.¹⁹⁸ This could be anything from social media posts to being featured on the game's cover and would mean additional compensation for the student-athlete past the \$600 and copy of the game.¹⁹⁹ These deals would not require a licensing company and could rather be negotiated between EA Sports and the student-athlete directly.²⁰⁰

Besides featuring student-athletes for the first time, *EA College Football 25* will also return other aspects of the previous *NCAA Football series*. For example, *College Football 25* will feature every FBS bowl game like the old series did as well.²⁰¹ Additionally, the Heisman trophy was featured in *NCAA Football 14* and has announced its inclusion in the upcoming game.²⁰² However, the Heisman is the only major award to be featured, with the National

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (For example, gamers will be unable to insert Arch Manning as the backup quarterback of the Texas Longhorns because of he has opted out of being featured in *EA College Football 25*).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Bowl games will reportedly be included in EA Sports 'College Football 25', Fox Sports, <https://www.foxsports.com/stories/college-football/bowl-games-will-reportedly-be-included-in-ea-sports-college-football-25> (last visited April 8, 2024).

²⁰² Scott Polacek, *Heisman Trophy Will Be in EA Sports' College Football 25; Other Awards Opt Out*, Bleacher Report, <https://bleacherreport.com/articles/10112236-heisman-trophy-will-be-in-ea-sports-college-football-25-other-awards-opt-out> (last visited April 8, 2024).

College Football Awards Association unable to reach an agreement with EA Sports for their awards' inclusion.²⁰³ These awards include the Bednarik, Biletnikoff, Davey O'Brien, Doak Walker, Grozo, Jim Thorpe, Maxwell, Outland, and Ray Guy awards.²⁰⁴ These awards were included in the previous *NCAA Football* series.

IV. CONCLUSION

The time EA Sports spent litigating challenges to its *NCAA* video game series and its subsequent discontinuation cost the company millions of dollars. By following rules that the NCAA created, EA Sports found itself in the middle of an antitrust crusade on the NCAA and a movement for NIL rights for student-athletes unlike any they have ever enjoyed. The creation of a college sports video game back in 1998 by EA Sports, while exploitive, gave student-athletes something to challenge in order to bring about modern NIL rights. *EA College Football 25* will be released this summer with a newfound respect for the NIL rights that the game itself helped create, and the product itself will be better because of it.

²⁰³ *Id.*

²⁰⁴ *Id.*