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Ed O'Bannon v. NCAA: Do Former NCAA Athletes Have a Case Against the NCAA for Its Use of Their Likenesses?

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ED O'BANNON v. NCAA: DO FORMER NCAA ATHLETES HAVE A CASE AGAINST THE NCAA FOR ITS USE OF THEIR LIKENESSES?

INTRODUCTION

Tim Tebow, former quarterback for the Florida Gators¹ and the first sophomore to win the Heisman Trophy,² was arguably the most popular college athlete of 2009.³ Accordingly, any merchandise with his jersey number is a top seller for the University of Florida and its authorized merchants.⁴ Licensed collegiate merchandise is a multi-billion dollar industry⁵ that provides a significant revenue stream for the National Collegiate Athletic Association (NCAA) and its member universities.⁶ Consumer demand for a university's merchandise is heavily influenced by the success of its athletic programs.⁷ For example, Louisiana State University's merchandise royalties

1. *Tim Tebow*, UNIV. OF FLA. ATHLETICS GATORZONE, <http://www.gatorzone.com/football/misc.php?p=tebow/bio> (last visited Nov. 4, 2010).

2. *Id.*

3. Ben Volin, *Tebow Surprised by Ad Backlash*, PALM BEACH POST, Jan. 28, 2010, at 1C (characterizing Tim Tebow as “one of the most popular college athletes of all time”); *see also* Peter Kerasotis, *The Tebow Effect: A Look into the Phenomenon of Florida's Quarterback*, FLA. TODAY, Nov. 26, 2009, at 1A (“No player in college football history has been more scrutinized, more written about, more filmed, more photographed, more celebrated or had more spotlights shined his way than Tebow has.”); Danny O'Neil, *The Tim Tebow Show: This is Tim Tebow, Cultural Icon. A Phenomenon Even. To Call Florida's Quarterback a Rock Star Doesn't Quite Capture It. He is a Beatle in Cleats*, SEATTLE TIMES, Jan. 29, 2010, at C1 (characterizing Tim Tebow as a cultural icon).

4. *See* Jeremy Fowler, *Tim Tebow's Return Good for Gators Economics*, ORLANDO SENTINEL BLOGS (Jan. 16, 2009, 1:38 PM), http://blogs.orlandosentinel.com/sports_college_uf/2009/01/tim-tebows-retu.html (providing retail manager's statement that apparel labeled with Tim Tebow's jersey number “15” is flying off the shelves).

5. *Retailers*, COLLEGIATE LICENSING CO., <http://www.clc.com/clcweb/publishing.nsf/Content/retailers.html> (last visited Nov. 4, 2010) (“It is estimated that more than 50,000 stores across the U.S. carry collegiate product and generate an estimated \$3.5 billion in collegiate licensed retail sales.”).

6. Joey Johnston, *Sports Generate Millions of Dollars for UF*, TAMPA TRIB. (June 5, 2009), <http://www2.tbo.com/content/2009/jun/05/sports-make-millions-dollars-uf/> (noting that licensing and marketing was a top revenue stream for the University of Florida's athletic department, which generated more than \$106 million in revenue during the 2007–2008 fiscal year).

7. *Id.* (“The Gators' college football national championships in 2006 and 2008 . . . created windfalls from merchandise sales . . . UF's merchandise sales and licensing income enjoyed a \$4.1 million spike after the 2006 football title.”).

nearly tripled after it won its first Bowl Championship Series title in 2003.⁸ Although student-athletes play a large role in the success of collegiate athletic programs, the universities—not the student-athletes—cash in on the profits.⁹ Universities also capitalize on the popularity of individual players,¹⁰ some of whom gain national recognition and celebrity status.¹¹ Despite the revenues and profits universities derive from the acclaim of star players, the NCAA prohibits student-athletes from receiving any of the financial benefits derived from their fame or the use of their likenesses.¹²

Some former student-athletes decided that this prohibition was not only unfair, but also illegal. On May 5, 2009, Sam Keller, former starting quarterback for the Arizona State University and University of Nebraska football teams, filed a class action lawsuit in the Northern District of California against the NCAA, the Collegiate Licensing Company (CLC), and Electronic Arts for the use of student-athletes' likenesses in video games.¹³ In June 2009, Ryan Hart, a former Rutgers University quarterback, brought a similar action in New Jersey state court.¹⁴ One month later, Ed O'Bannon, who led the University of California-Los Angeles Bruins to the 1995 NCAA basketball tournament championship, filed another class action lawsuit in the Northern District of California against the NCAA and the CLC, its business partner, for their use of athletes' likenesses in various products.¹⁵

8. See Chris Gautreau, *LSU, Vendors Cash in on Win*, THE ADVOCATE (Baton Rouge), Jan. 9, 2008, at 1D (noting LSU's share of NCAA merchandise royalties rose to almost \$3 million for 2003–2004 from just \$962,000 in 2002–2003).

9. See Wayne T. Price, *The Gator Stimulus*, FLA. TODAY, Jan. 7, 2009, at 8C (noting the University of Florida collects 10% royalty fees on wholesale sales of standard Gator products and 12% royalty fees on Gator championship products).

10. Vladimir P. Belo, Note, *The Shirts Off Their Backs: Colleges Getting Away With Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133, 134 (1996) (“The universities have begun licensing products that seek to capitalize on the popularity of actual players in addition to the popularity of the schools and their athletic teams.”).

11. See Kerasotis, *supra* note 3, at 1A (discussing the fame and notoriety of the University of Florida's quarterback, Tim Tebow); see also Bery Tramel, *BCS National Championship: The Rock Star QB's – OU's Sam Bradford vs. Florida's Tim Tebow*, NEWSOK (Jan. 7, 2009), http://newsok.com/rock-star-qbs-bradford-vs.-tebow/article/3335858?custom_click=lead_story_title (discussing Tim Tebow's rock star status).

12. NAT'L COLLEGIATE ATHLETIC ASS'N., 2009–2010 NCAA DIVISION I MANUAL § 12.5.2.1 (2009), available at <http://www.ncaapublications.com/p-3934-2009-2010-ncaa-division-i-manual.aspx> [hereinafter NCAA DIVISION I MANUAL].

13. Class Action Complaint at 1–2, *Keller v. Elec. Arts, Inc.*, 2010 U.S. Dist. LEXIS 1079 (N.D. Cal. May 5, 2009) (No. CV 09-1967) [hereinafter Keller Complaint].

14. Jennifer Golson, *Former Rutgers, N.Y. Jets Quarterback Suing Videogame Maker for Using Likeness*, N.J. REAL-TIME NEWS (June 30, 2009, 7:41 PM), http://www.nj.com/news/index.ssf/2009/06/former_rutgers_ny_jets_quarter.html.

15. Class Action Complaint at 2, 10, *O'Bannon v. NCAA*, 2010 U.S. Dist. LEXIS 19170 (N.D. Cal. July 9, 2009) (No. CV 09-3329) [hereinafter O'Bannon Complaint].

Keller, who brought suit on behalf of all NCAA student-athletes whose likenesses have been used without their permission, chose the right of publicity, a creature of state law, as one of the major legal theories of his case.¹⁶ O'Bannon, who represents *former* student-athletes, grounds his claim in antitrust law, arguing that the NCAA and its business partners illegally colluded to depress prices paid to former student-athletes.¹⁷ Both cases also claim unjust enrichment.¹⁸

O'Bannon's case has gained momentum in recent months. In February 2010, United States District Court Judge Claudia Wilken denied the NCAA's attempt to dismiss the lawsuit.¹⁹ Judge Wilken also combined O'Bannon's case with Sam Keller's.²⁰ In March 2010, Ed O'Bannon received additional company as more former athletes, some of whom played as far back as the 1960s, joined as plaintiffs in the class-action suit.²¹

Previous scholars have projected the outcome of Keller's lawsuit.²² Likewise, the issue of unconscionability, which relates to O'Bannon's allegations that the NCAA used duress and unfair bargaining tactics to coerce collegiate athletes into signing away their rights, has also been addressed in previous articles.²³ O'Bannon's antitrust claim as applied to former student-athletes, however, has not been previously discussed in the scholarship.

Professor Michael McCann has noted the high stakes of *O'Bannon v. NCAA*:

If O'Bannon and former student-athletes . . . receive a favorable settlement, the NCAA, along with its member conferences and schools, could be required to pay tens of millions, if not hundreds of millions, of dollars in damages—particularly since damages are trebled under federal antitrust law. The

16. Keller Complaint, *supra* note 13, at 2, 17–18.

17. O'Bannon Complaint, *supra* note 15, at 2, 62–67.

18. Keller Complaint, *supra* note 13, at 20; O'Bannon Complaint, *supra* note 15, at 67.

19. ASSOCIATED PRESS, *U.S. Federal Judge OK's Former UCLA Player's Lawsuit Against NCAA*, 660 NEWS (Feb. 8, 2010), available at <http://www.660news.com/sports/article/25130--u-s-federal-judge-ok-s-former-ucla-player-s-lawsuit-against-ncaa>.

20. *Id.*

21. Jon Solomon, *Prothro Joins Class-Action Suit Against NCAA*, BIRMINGHAM NEWS, Mar. 12, 2010, at 7C (noting a number of former athletes added their names to the suit, including former Alabama football star Tyrone Prothro; Alex Gilbert, who played with Larry Bird at Indiana State in 1979; Eric Riley, a member of the early 1990s "Fab Five" Michigan teams, and four players from Texas Western's historic 1966 NCAA championship basketball team).

22. See Anastasios Kaburakis et al., *NCAA Student-Athletes' Rights of Publicity*, *EA Sports, and the Video Game Industry: The Keller Forecast*, ENT. & SPORTS LAW., Summer 2009, at 1, 23–31 (analyzing the issues of Keller v. Electronic Arts, Inc.).

23. See Sean Hanlon & Ray Yasser, "*J.J. Morrison*" and His Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L.J. 241, 277 (2008) (arguing the NCAA agreement with student athletes constitutes an unconscionable adhesion contract).

marketplace for goods may change as well, with potentially more competition over the identities and likenesses of former college stars.²⁴

Additionally, a victory would drastically change the student-athlete experience, creating a more litigious environment for both student-athletes and athletic department officials.²⁵

This comment forecasts that O'Bannon's antitrust claim will succeed and predicts the impact that a favorable judgment would have on the collegiate licensing market. Part I provides an overview of the NCAA's current practices with respect to its use of former athletes' likenesses, Part II provides the details of O'Bannon's complaint, and Part III discusses the law of antitrust and the history of antitrust cases brought against the NCAA. Part IV analyzes O'Bannon's antitrust claim, and Part V projects how licensed merchandise will be impacted by O'Bannon's success. The conclusion then estimates the magnitude of the damages that will be awarded and projects the impact on the collegiate merchandise and video game markets.

I. OVERVIEW OF THE NCAA'S PRACTICES AND ITS USE OF FORMER ATHLETES' LIKENESSES

A. *NCAA Licensing Practices*

The NCAA sells and licenses a wide variety of products that contain the images of former NCAA athletes—including DVDs of past championship games, replica jerseys, television broadcasts of "classic" NCAA games, and video games.²⁶ The NCAA's primary licensing partners include the CLC and Thought Equity Motion, Inc.²⁷ CLC, a for-profit corporation,²⁸ is a subsidiary of IMG Worldwide, Inc. (IMG).²⁹ CLC oversees all licensing, marketing, and distribution of royalties for the NCAA.³⁰ It also manages all of the rights for the more than 200 NCAA institutions that represent nearly an 85% share of the

24. Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Anti-Trust Case*, SI.COM (July 22, 2009, 9:51 AM), http://sportsillustrated.cnn.com/2009/writers/michael_mccann/07/21/ncaa/index.html.

25. *Id.*

26. O'Bannon Complaint, *supra* note 15, at 4.

27. *About CLC*, COLLEGIATE LICENSING CO., <http://www.clc.com/clcweb/publishing.nsf/Content/aboutclc.html> (last visited Nov. 4, 2010); *NCAA Collection Overview*, THOUGHT EQUITY MOTION, <http://www.thoughtequity.com/video/home/article/ncaa.do> (last visited Nov. 4, 2010).

28. *See About CLC*, *supra* note 27.

29. *See College Sports*, IMG, http://www.imgworld.com/sports/college_sports/default.sps (last visited Nov. 4, 2010) (describing CLC as IMG's licensing agency).

30. Marcia Chambers, *Sales of College Stars' Jerseys Raise Ethics Concerns*, N.Y. TIMES, Mar. 31, 2004, at D1.

collegiate licensing market with over \$4 billion in retail sales.³¹ Thought Equity Motion is also a for-profit corporation.³²

The NCAA and its member schools license college-themed video games featuring the images of former and current student athletes.³³ The NCAA issued an exclusive license to Electronic Arts, permitting them to publish games such as *NCAA Football* and *NCAA March Madness*.³⁴ Although these games do not use the names of any players, the images and statistics of the virtual players model their real-world counterparts so well that “even casual fans of college sports would recognize the athletes depicted in them.”³⁵ The players in these games mimic the corresponding college athlete’s jersey, number, height, weight, skin tone, hair color, home state, and playing style.³⁶ Gamers “can download player rosters from other users via an online feature set up by Electronic Arts” that facilitates internet connectivity.³⁷ Upon downloading these files, the names of the players are automatically displayed on the backs of the players’ jerseys.³⁸ These games are sold for a price of \$59.95 per unit.³⁹

31. *About CLC*, *supra* note 27.

32. *See About Thought Equity Motion*, THOUGHT EQUITY MOTION, <http://www.thoughtequity.com/video/shell/txp/about-us-home.do?title=About+Us> (last visited Nov. 4, 2010). Thought Equity Motion, Inc. markets itself as the “world leader in digitizing, delivering and monetizing high-quality video content. . . . The company’s media partners include . . . the NCAA” *Id.*

33. Rodney McKissic, *If It’s in the Game, It’s in the Game*, BUFFALO NEWS BLOG (July 5, 2009, 12:06 PM), <http://blogs.buffalonews.com/campus/2009/07/if-its-in-the-game-its-in-the-game.html>; Julia Pine, *Two Teams Featured in EA Sports Game, The 1990 Lions Picked as a Classic Team in NCAA Basketball 2009*, L.A. LOYOLAN (Nov. 23, 2008) (noting NCAA Basketball 2009 features classic teams that utilize the likeness of former NCAA student-athletes), <http://www.laloyolan.com/sports/two-lmu-teams-featured-in-ea-sports-game-1.930935>.

34. McKissic, *supra* note 33.

35. Katie Thomas, *College Stars See Themselves in Video Games, and Pause to Sue*, N.Y. TIMES, July 4, 2009, at A1 (“In NCAA Football 2009, the quarterback for the University of Florida is left-handed, stands 6 feet 3 inches, and wears No. 15, just like the Gators’ Tim Tebow. . . . While the electronic player’s hometown is different—Tebow is from Jacksonville, not Brandon—each is from Florida.”). *See also* Andy Latack, *Quarterback Sneak: With Its College Football Video Game, EA Sports is Making an End Run Around the NCAA’s Rules*, LEGAL AFF., Jan./Feb. 2006, at 69 (stating gamers “don’t have to know a PlayStation from a train station” to recognize who the virtual players are intended to resemble).

36. Thomas, *supra* note 35 (noting EA’s 2005 edition of NCAA Football mimicked the playing style of former Arizona State quarterback, Sam Keller, a pocket passer, and noting EA’s virtual player shared Keller’s jersey number, height, weight, skin tone, hair color, and home state).

37. *Id.*

38. *Id.*

39. *Electronic Arts EA Store*, ELEC. ARTS, <http://eastore.ea.com/store/ea/DisplayHomePage/ThemeID.718200> (search for “NCAA Basketball 09”) (last visited Nov. 4, 2010).

The NCAA also sells DVDs of championship games dating back to the 1940s, featuring college athletes who graduated decades ago.⁴⁰ These DVDs sell for between \$24.95 and \$150.00 each⁴¹ and feature a wide range of men's and women's sports, such as basketball, baseball, lacrosse, golf, water polo, ice hockey, and volleyball.⁴² Though currently only championship and playoff games are offered, the NCAA has expressly stated its intent to add regular season games to its collection of available DVDs, thereby escalating its use of former athletes' images.⁴³

Additionally, photographs sold commercially feature the images of former student-athletes. Replay Photos, LLC, operates the "Official Photo Site of National Collegiate Athletic Association,"⁴⁴ which sells photographs of various championship games featuring former student-athletes.⁴⁵ The Men's Division I Basketball photos date back to the 1970s.⁴⁶ The list of NCAA sports for which photos are available include basketball, baseball, football, golf, water polo, soccer, volleyball, and others.⁴⁷

Rebroadcasts of classic college football and basketball games on *ESPN Classic* also feature the images of former student-athletes.⁴⁸ Likewise, replica jerseys featuring the numbers of former players are sold under agreements with

40. See *1962 Men's Basketball DVDs*, NCAA ON DEMAND, <http://www.ncaaondemand.com> (click on "Basketball" under "Men's"; then click "years" to browse) (last visited Nov. 4, 2010) (offering DVD's featuring championship basketball games from 1962 and other championship games of that decade).

41. See *Men's Basketball DVDs*, NCAA ON DEMAND, http://www.ncaaondemand.com/composite_sports/men-s-basketball (last visited Nov. 4, 2010).

42. *Browse by Sport*, NCAA ON DEMAND, http://www.ncaaondemand.com/composite_sports (last visited Nov. 4, 2010). At least the following numbers of games are available in various Men's sports: Basketball-2,494; Baseball-535, Football-507, Ice Hockey-214. *Id.*

43. *About Us*, NCAA ON DEMAND, <http://www.ncaaondemand.com/pages/about-us> (last visited Nov. 4, 2010) ("NCAA On Demand will initially focus on NCAA championships, but will expand into the premier site for college athletics video with content from games and events from regular season and conference championships as well as unique content that has never been seen before.").

44. *NCAA Photo Store*, REPLAY PHOTOS, <http://www.replayphotos.com/ncaaphotostore/> (last visited Nov. 4, 2010).

45. See, e.g., *Arkansas Razorback Photos*, REPLAY PHOTOS, http://www.replayphotos.com/Arkansasphotos/basketball-m-pictures/_MBK__0001024.cfm (last visited Nov. 4, 2010) (selling photos depicting athletes from the 1994 Men's Basketball National Championship). Framed photos start at \$69.95 in price. *Id.*

46. *1970-79 Pictures to Buy*, REPLAY PHOTOS, http://www.replayphotos.com/ncaaphotostore/mens-division-i-pictures/basketball-1970-79_MD1_B_720_0001024.cfm (last visited Nov. 4, 2010) (selling photos of Earvin (Magic) Johnson playing for Michigan State and Bill Walton playing for UCLA. A custom framed photo starts at \$69.95 in price).

47. *Arkansas Razorback Photos*, *supra* note 44.

48. See *ESPN Classic*, ESPN, <http://sports.espn.go.com/espnNetwork?networkID=18> (last visited Nov. 4, 2010) ("In addition, the network airs . . . legendary college football and basketball.").

manufacturers and CLC,⁴⁹ despite the ethical concerns of leading NCAA officers.⁵⁰

B. The NCAA Division I Bylaws

The NCAA's primary mission is to integrate intercollegiate athletics into higher education and promote student-athletes' educational experiences.⁵¹ The NCAA bylaws are published in the NCAA Division I Manual.⁵² One of the NCAA's core principles expressed therein is preserving amateurism and protecting student-athletes from exploitation by professional and commercial enterprises.⁵³ The NCAA, therefore, prohibits student-athletes from receiving any remuneration in any form for their athletic skill in their respective sports.⁵⁴ It also prohibits athletes from accepting any promises of future remuneration to be received after graduation.⁵⁵

The NCAA does, however, permit limited use of the likenesses and images of student-athletes.⁵⁶ NCAA-member universities, recognized entities thereof, and nonprofit agencies are permitted to "use a student-athlete's name, picture, or appearance to support its charitable or educational activities," provided, among other requirements, it is not used to promote commercial ventures of a non-profit agency.⁵⁷ Additionally, the NCAA permits NCAA member universities to sell items with names, likenesses, or pictures of multiple student-athletes.⁵⁸ However, "[i]tems that include an individual student-athlete's name, picture, or likeness (e.g., name on a jersey, name or likeness on a bobble-head doll) . . . may not be sold . . ."⁵⁹ Currently, the NCAA policy does not address the use of student-athletes' likenesses in Electronic Arts's

49. Chambers, *supra* note 30 (noting a replica jersey featuring the jersey number of Ben Gordon was on sale at the University of Connecticut bookstore for \$49.99).

50. *Id.* ("Even Myles Brand, the president of the N.C.A.A., said he had ethical concerns about the marketing of star players' numbers, although he ruled out permitting athletes to make money from the sale of replicas of their uniforms.").

51. McCann, *supra* note 24. See also NCAA DIVISION I MANUAL, *supra* note 12, § 1.3.1.

52. NCAA DIVISION I MANUAL, *supra* note 12, at viii. "The NCAA has three divisions: Division I, Division II and Division III; membership in a particular division depends on a variety of factors, including the number of sports the individual school offers, and whether athletic scholarships are available." Ray Yasser & Clay Fees, *Attacking the NCAA's Anti-Transfer Rules as Covenants not to Compete*, 15 SETON HALL J. SPORTS & ENT. L. 221, 223 (2005). This comment will focus on Division I, which includes the major collegiate athletic powers. See *id.*

53. NCAA DIVISION I MANUAL, *supra* note 12, § 2.9.

54. *Id.* § 12.1.2.

55. *Id.*

56. See, e.g., *id.* § 12.5.1.1.

57. *Id.*

58. NCAA DIVISION I MANUAL, *supra* note 12, § 12.5.1.1(h).

59. *Id.*

video games.⁶⁰ Although the NCAA is aware of this loophole, it has yet to create new policy addressing this problem.⁶¹

C. Form 08-3a – The Student-Athlete Statement

In addition to requiring student-athletes to follow the bylaws enumerated in the NCAA Division I Manual, the NCAA requires Division I student-athletes to sign a series of documents in order to be eligible for intercollegiate athletic competition.⁶² Among these documents is Form 08-3a, which states, “You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g. host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.”⁶³ The NCAA believes that, although not expressly stated in the form, this document forces “students-athletes [to] relinquish in perpetuity all rights in the NCAA’s licensing of their images and likenesses.”⁶⁴

II. O’BANNON’S COMPLAINT

Ed O’Bannon takes issue with nearly every use by the NCAA of former players’ images, including sales of DVDs featuring classic games, video clips sold to corporate advertisers, photo sales, video game sales, rebroadcasts of classic games, and sales of apparel.⁶⁵ O’Bannon claims the NCAA and its business partners, most notably CLC, have conspired to artificially depress payments to former student-athletes for the use and sale of their likenesses to zero.⁶⁶ He argues this agreement among the NCAA and its business partners constitutes an unreasonable restraint on trade because the anti-competitive

60. Kaburakis et al., *supra* note 22, at 15.

[A] confirmation of the apparent loophole with respect to use of [student-athletes’] likenesses in video games is found in a staff interpretation from January 7, 2006. Therein, the NCAA staff addressed a member institution question: Would this legislation preclude companies from using [a student-athlete’s] likeness in sports video games? Sadly, the interpretation did not provide significant clarification, as it merely recited Bylaw 12.5.2.2.

Id. (citations omitted).

61. *Id.* (noting NCAA governing bodies are attempting to find solutions to this loophole).

62. McCann, *supra* note 24.

63. *Form 08-3a Academic Year 2008–09: NCAA Student-Athlete Statement–Division I*, NAT’L COLLEGIATE ATHLETIC ASS’N (2008), http://www.ukathletics.com/doc_lib/compliance/0809_sa_statement.pdf. See also McCann, *supra* note 24.

64. McCann, *supra* note 24. O’Bannon claims, however, that no reasonable person would understand this form “to specifically grant a license in perpetuity for former players’ images to be used for profit, over many years, in DVDs, on-demand video, video games, photographs for sale, ‘stock footage’ sold to corporate advertisers, ‘classic games’ for re-broadcast television, jersey and apparel sales, and other items.” O’Bannon Complaint, *supra* note 15, at 23–24.

65. O’Bannon Complaint, *supra* note 15, at 37–58.

66. *Id.* at 61.

effects substantially outweigh the pro-competitive benefit of preserving amateurism.⁶⁷

O'Bannon also claims the NCAA's receipt of royalties for its licensing practices constitutes unjust enrichment and requests an accounting of the licensing revenues that the NCAA and its business partners allegedly wrongfully diverted to themselves.⁶⁸ His requested relief includes disgorgement of all profits earned via the allegedly wrongful use and sale of former student-athletes' images plus interest, as well as a declaration that the NCAA's existing licensing agreements for the use of former student-athletes' images are void and unenforceable.⁶⁹

III. ANTI-TRUST LAW AND THE HISTORY OF ANTI-TRUST CASES AGAINST THE NCAA

A. *A Recognizable Market*

According to Section 1 of the Sherman Act, “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”⁷⁰ While this broad language could be construed to include every contract,⁷¹ the United States Supreme Court has interpreted this statute to preclude only *unreasonable* restraints on trade.⁷² The challenged conduct must “restrain commercial competition in the marketing of goods or services” or restrain “trade or commerce” as recognized under Section 1.⁷³ The plaintiff, therefore, must establish that a legally cognizable market exists for the restrained competition.⁷⁴

This requirement has frustrated previous antitrust claims against the NCAA, including the student-athlete's claim in *Jones v. NCAA*, where Steven Jones sought to compete in Northeastern University's intercollegiate ice hockey program.⁷⁵ Jones was deemed ineligible by the NCAA because he had accepted compensation for playing hockey in an amateur league prior to his

67. *Id.* at 64.

68. *Id.* at 67–68.

69. *Id.* at 68–69.

70. 15 U.S.C. § 1 (2006).

71. *NCAA v. Bd. of Regents*, 468 U.S. 85, 98 (1984) (noting that “every contract is a restraint of trade”).

72. *Id.*

73. *In re NCAA 1-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1148 (W.D. Wash. 2005) (citations omitted).

74. *See id.* at 1148, 1150 (“Normally, market definition is ‘essential’ to claims under § 1 . . . in which the rule of reason is applied.” (citation omitted)). *See also* *United States v. Brown Univ.*, 5 F.3d 658, 665 (3d Cir. 1993).

75. *Jones v. NCAA*, 392 F. Supp. 295, 303–04 (D. Mass. 1975).

matriculation.⁷⁶ Jones claimed that by prohibiting his participation in collegiate competition, the NCAA unlawfully restrained trade in violation of Section 1 of the Sherman Act.⁷⁷ The district court noted, however, that Jones was not a “‘competitor’ within the contemplation of the antitrust laws” because the “‘competition’ he sought to protect was on a hockey rink as part of an education program and thus had no “‘nexus to commercial or business activities.’”⁷⁸ Thus, no cognizable market existed for the competition Jones sought to protect, and therefore, his ban from competition was not a “‘restraint of trade.’”⁷⁹

B. *The Rule of Reason*

Where a cognizable market exists, the plaintiff must prove that the defendant “(1) participated in an agreement that (2) unreasonably restrained trade in the relevant market.”⁸⁰ In determining reasonableness, courts have weighed the anticompetitive effect of the restriction against the pro-competitive justification.⁸¹ First, the plaintiff must show the challenged action has had an adverse effect on competition as a whole.⁸² If the plaintiff succeeds, the defendant then has the burden to establish sufficient pro-competitive “redeeming virtues” of the action.⁸³ If the defendant shows sufficient redeeming virtues, the plaintiff must show that the same pro-competitive effect could be achieved through less restrictive means.⁸⁴ This test has been called the rule of reason analysis.⁸⁵ Courts evaluate the pro-competitive and anti-competitive effects primarily from the consumer’s perspective.⁸⁶

76. *Id.* at 296–98.

77. *Id.* at 303.

78. *Id.*

79. *See id.*

80. *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

81. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997). *See also NCAA v. Bd. of Regents*, 468 U.S. 85, 103 (1984) (noting the Court must consider the NCAA’s pro-competitive justifications for its restraint on the number of games a university can broadcast via network television).

82. *Clorox Co.*, 117 F.3d at 56.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* (“Ultimately, the goal is to determine whether restrictions in an agreement among competitors potentially harm consumers.”); *see also Bd. of Regents*, 468 U.S. at 107 (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)) (“Congress designed the Sherman Act as a ‘consumer welfare prescription.’”); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994) (citing *Stamatakis Indus., Inc. v. King*, 965 F.2d 469 (7th Cir. 1992)) (“To be judged anticompetitive, the agreement must actually or potentially harm consumers.”).

The Supreme Court applied the rule of reason analysis in *NCAA v. Board of Regents of the University of Oklahoma*.⁸⁷ In that case, two schools challenged the NCAA's plan for televising college football games for the 1982–1985 seasons.⁸⁸ This plan limited the number of games that could be televised by individual member schools and established fees that member schools could charge.⁸⁹ These fees differentiated only between national and regional broadcasts and did not vary with the size of the viewing audience, the particular characteristics of the game, or the participating teams.⁹⁰

In evaluating the anti-competitive effect, the Court noted that more games would be televised absent the NCAA's plan.⁹¹ This output restriction raised the price charged to broadcasters for television rights and created a price structure that was "unresponsive to viewer demand."⁹² In its defense, the NCAA argued that the plan maintained "a competitive balance among amateur athletic teams."⁹³ Although the Court acknowledged that NCAA's member schools must cooperate to preserve competitive balance, it concluded that limiting the number of televised games did not serve the goal of equalizing the strength of competing teams.⁹⁴ The Court also noted that the NCAA's other restrictions on player eligibility already achieved the goal of preserving competitive balance, and therefore, alternative and less restrictive means existed.⁹⁵ The Court ultimately held that the anti-competitive effect outweighed the pro-competitive justification and declared the NCAA's plan to be a violation of antitrust law.⁹⁶

IV. ANTI-TRUST LAW APPLIED TO THE NCAA'S USE OF THE LIKENESSES OF FORMER NCAA ATHLETES

A. *A Legally Cognizable Market for Licensing the Likenesses of Former NCAA Players*

O'Bannon can establish a recognizable market exists for the use of former student-athletes' likenesses.⁹⁷ The pending case is unlike *Jones*, where the

87. *Bd. of Regents*, 468 U.S. at 88.

88. *Id.* at 91.

89. *Id.* at 92–93.

90. *Id.* at 93.

91. *Id.* at 104–05.

92. *Bd. of Regents*, 468 U.S. at 105 n.29, 106.

93. *Id.* at 117.

94. *Id.* at 117–18.

95. *Id.* at 119.

96. *Id.* at 119–20.

97. For examples of products in the market, see O'Bannon Complaint, *supra* note 15, at 10–13.

district court held there was no legally cognizable market⁹⁸ and Jones's participation in intercollegiate athletics was not a commodity that could be traded in any recognizable marketplace.⁹⁹ In this case, student-athletes' images and likenesses are commodities that have market value, as evidenced by the commercial use of former student athletes' images in video games, sales of replica jerseys featuring the numbers of former star players, and photographs of former student-athletes.¹⁰⁰ Thus, the market for licensing the images and likenesses of former student-athletes is already well-established, and therefore, prohibiting former student-athletes from negotiating and entering their own contracts for the use of their images and likenesses constitutes restraint of trade.¹⁰¹

B. Is the Restraint on Trade Reasonable?

To present a successful claim, O'Bannon must show that this "restraint of trade" is unreasonable.¹⁰² O'Bannon must, therefore, demonstrate that the anti-competitive effects of prohibiting former student-athletes from licensing their images and likenesses outweigh the pro-competitive justifications.¹⁰³

1. The Anti-competitive Effects of Restricting Former Players' Rights to Their Likenesses

With respect to the market for video games, Professor Michael McCann has posited that permitting former athletes to license their images may benefit consumers.¹⁰⁴ Under the current licensing regime, only video publishers with strong financial resources are able to bid on the publicity rights covering the entire NCAA, limiting the number of potential bidders to only a handful.¹⁰⁵ If the NCAA's restriction on former players' abilities to license their images was stricken, more former athletes would negotiate individual licensing deals after college.¹⁰⁶ If college athletes could license their own images after graduation,

98. *Jones v. NCAA*, 392 F. Supp. 295, 303 (1975).

99. *See id.* ("The 'competition' which the plaintiff seeks to protect does not originate in the marketplace or as a sector of the economy but in the hockey rink as part of the educational program of a major university.").

100. *See supra* Part I.A.

101. *See Bd. of Regents*, 468 U.S. at 98 ("There can be no doubt that the challenged practices of the NCAA [limiting the number of games an NCAA university can televise] constitute a 'restraint of trade' in the sense that they limit members' freedom to negotiate and enter into their own television contracts.").

102. *Id.* (noting the Sherman Act only prohibits "unreasonable restraints of trade").

103. *See supra* notes 80–86 and accompanying text.

104. McCann, *supra* note 24.

105. *See id.*; Lirin Offir, *Monopolistic Sleeper: How the Video Gaming Industry Awoke to Realize that Electronic Arts was Already in Charge*, 8 DUQ. BUS. L.J. 91, 111 (2006).

106. McCann, *supra* note 24.

more licenses would be sold, increasing supply, and theoretically, creating a more competitive market for those licenses.¹⁰⁷ “Permitting former athletes to negotiate their own deals,” “multiple video game publishers could publish games featuring ex-players.”¹⁰⁸ Competition among video game publishers could “enhance technological innovation and lower prices for video game consumers.”¹⁰⁹

While increased competition among video game publishers is possible, it is not inevitable. Video game publishers seek group licenses because the games feature an entire team of players, rather than just a few individuals.¹¹⁰ Permitting former college athletes to license their likenesses would likely compel the creation of a commercial entity with the authority to grant group licenses on behalf of all former college athletes and facilitate video game publishers’ demand for group licenses.¹¹¹ Such an entity would be a “one-stop shop” for video game publishers and would model the entities of the professional athletic associations that facilitate group licensing for active and retired professional athletes.¹¹²

This group licensing entity would likely offer former student-athletes tiered rates of compensation for the use of their likenesses.¹¹³ Players would fall into tiered categories according to their level of popularity, which in turn would hinge on their amount of playing time during their collegiate career and level of skill as perceived by fans.¹¹⁴ This collegiate licensing group would make take-it-or-leave-it offers to former players based on their respective popularity tier. Some players would likely opt out of such agreements, either

107. *Id.*

108. *Id.*

109. *Id.*

110. EA negotiates exclusive group licenses with professional athletes for its video games featuring NFL teams. See Tim Surrette & Curt Feldman, *Big Deal: EA and NFL Ink Exclusive Rights to Licensing Agreement*, GAMESPOT (Dec. 13, 2004, 2:53 PM), http://www.gamespot.com/news/2004/12/13/news_6114977.html (discussing EA’s exclusive group license with the NFL Players, Inc.).

111. Kaburakis, *supra* note 22, at 33.

112. Keven J. Davis & Pamela R. Lester, *Exclusivity in Endorsement Contracts—The Athlete’s View*, in ALI-ABA COURSE OF STUDY: ENTERTAINMENT, ARTS, AND SPORTS LAW, JANUARY 25–27, 2007 (Am. Law Inst. & Am. Bar Ass’n 2007) (“All of the major league team sports have group licensing programs for active players.”). See also Parrish v. Nat’l Football League Players, Inc., No. C07-00943(WHA), 2007 WL 1624601, at *1, *2 (N.D. Cal. 2007) (explaining the National Football League Players Association has an arm that “negotiates and facilitates group licensing and marketing opportunities for active and some retired NFL players”).

113. NCAA member universities are offered tiered rates for the use of their trademark items in EA’s video games. Andrew Carter, *Colleges Profit From Video Game’s Success*, ORLANDO SENTINEL, Aug. 7, 2006, at D1.

114. This outcome would be similar to the NCAA’s current licensing agreement with NCAA member universities, which are categorized into royalty tiers based on the success of each school’s real-world athletic program. *Id.*

believing they could obtain a better offer on their own or refusing to license their image at any price.¹¹⁵ One theory posits that there would still be an opportunity for other video game publishers to acquire licenses from former players who refrain from participating in the group license, leaving open the possibility for increased competition among video game publishers, as Professor McCann has projected.¹¹⁶

This theory, however, fails to consider that such licenses from former players are not worth much without a complementary license from the NCAA. Video game publishers seek to illustrate former players in their collegiate uniforms, which display their respective school's name and logo.¹¹⁷ These are trademarked items that belong to the schools themselves, not to the former student-athletes.¹¹⁸ If former players were permitted to license the rights to their likenesses, publishers would need two licenses: one from the NCAA for the use of the school's name, jersey, and logo, and another from the former student-athlete for the use of his or her likeness. Video game publishers with strong financial resources, such as Electronic Arts,¹¹⁹ would still be able to negotiate exclusive rights for a license from the NCAA and from any entity created to negotiate group licenses for former players.¹²⁰ This negotiating power would effectively preserve Electronic Arts's monopoly over the use of former athletes' images in video games, since competitors who acquire rights from former players not participating in an exclusive group license would only be able to display the individual former player without his or her school jersey.

115. This is exactly what has happened in professional sports with Major League Baseball, where, for example, Barry Bonds has refused to participate in any group licensing. See Darren Rovell, *Bonds Will Be Individually Licensed*, ESPN.COM (Nov. 27, 2003, 12:09 AM), <http://sports.espn.go.com/mlb/news/story?id=1661883>.

116. See *supra* notes 104–09 and accompanying text.

117. See Hanlon & Yasser, *supra* note 23, at 247 (noting EA's NCAA March Madness "depicts stadiums, school uniforms, [and] mascots . . . with remarkable accuracy").

118. See, e.g., *Razorback Licensing and Trademark Guidelines*, ARKANSASRAZORBACKS.COM, http://www.arkansasrazorbacks.com/ViewArticle.dbml?DB_OEM_ID=6100 &ATCLID=212438 (last visited Nov. 4, 2010).

119. See *About Us*, ELEC. ARTS, <http://aboutus.ea.com/home.action> (last visited Nov. 4, 2010) ("In fiscal 2010, EA had 27 titles that sold more than one million copies, and five titles that each sold more than four million copies . . ." EA also has 8,000 employees worldwide as of March 31, 2010).

120. Electronic Arts has done exactly this with the NCAA already. See Carter, *supra* note 113. Additionally, Electronic Arts would likely negotiate an exclusive group license with the licensing arm representing former student-athletes, as Electronic Arts has done exactly this for its Madden NFL product, negotiating an exclusive license with the NFL Players Association that endures until 2012. Tor Thorsen, *EA Sports Extends NFL Deal through 2012 Season*, GAMESPOT (Feb. 12, 2008, 6:15 AM), <http://www.gamespot.com/news/6185880.html?tag=other-user-related-content%3B1>.

The complementary relationship between the former players' rights to their likenesses and the NCAA's remaining rights to university logos and jerseys would likewise inhibit increased competition in the replica jersey market. Even if former student-athletes were permitted to individually license their likenesses, enabling jersey manufacturers to place the name of the former student-athlete on the jersey, manufacturers would still need a license from the NCAA to replicate the university's jersey with its name and logo. Competition, therefore, would still be limited to jersey manufacturers that negotiate a license agreement with the NCAA, leaving the ultimate output unaffected.

While restricting former athletes' rights to their likenesses has no impact to consumers, O'Bannon asserts that it certainly has an anti-competitive effect on producers or former student-athletes.¹²¹ Absent the NCAA's current ban, former athletes would inarguably receive higher royalties for the use of their images than they currently receive.¹²² The NCAA's licensing practice, therefore, has the anti-competitive effect of transferring wealth from former college athletes to the NCAA.¹²³ Although this smacks of unfairness, the NCAA's policy transfers wealth from producers to the NCAA, not from consumers to producers. The purpose of the Sherman Act is to protect consumers, not producers.¹²⁴ From the consumer's perspective, the anti-competitive effect is minimal: The NCAA would still be able to limit competition due to the complementary relationship between the former student-athletes' rights to their likenesses and the NCAA's remaining rights to university logos and jerseys.

Limiting competition, however, is only one type of anti-competitive effect on consumers. Another anti-competitive effect is the diminution of the quality of products available to consumers,¹²⁵ an effect that certainly results from the NCAA's current practices. The NCAA's policy diminishes the quality of replica jerseys and video games because video publishers and jersey manufacturers are prohibited from featuring the names of the individual athletes in their products.¹²⁶ This policy diminishes the realism of the product

121. O'Bannon Complaint, *supra* note 15, at 64.

122. *Id.*

123. *See id.* at 63–64.

124. *See supra* note 86 and accompanying text.

125. *Virgin Atl. Airways Ltd. v. British Airways Plc.*, 257 F.3d 256, 264 (2d Cir. 2001) (“[O]ur precedents suggest that whether an actual adverse effect has occurred is determined by examining factors like reduced output, increased prices and *decreased quality*.”) (emphasis added).

126. *See supra* note 59 and accompanying text. In the case of video games, although after-market downloads are available to add player names on the jerseys, Thomas, *supra* note 35, at A3, this step would be unnecessary if the NCAA did not require that student-athletes relinquish their rights in perpetuity.

available to the consumer, thereby diminishing its quality. By showing this anti-competitive effect, O'Bannon would likely carry his "initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole"¹²⁷ The burden would then shift to the NCAA to establish the "pro-competitive 'redeeming virtues'" of its policy.¹²⁸

2. Consideration of Pro-competitive Justifications for Current NCAA Licensing Practices

Courts have recognized preserving amateurism as a pro-competitive effect of prohibiting student-athlete compensation and as a primary justification for the NCAA's licensing practices.¹²⁹ This justification in the O'Bannon case, however, would be far less persuasive, as former student-athletes are no longer members of amateur athletic teams under the NCAA's control. Although the prospect of future remunerative endeavors may impact athletes while they are still enrolled as students, particularly during the twilight of their collegiate careers,¹³⁰ the creation of group licensing entities to negotiate with licensees and the former student-athletes would marginalize such pressures. Upon graduation, a former student-athlete's decision to participate in a group licensing agreement would be limited to accepting or rejecting the licensing entity's take-it-or-leave-it offer.¹³¹ Alternatively, such pressures imposed by future remunerative endeavors already exist to some degree and are caused by the prospects of participating in major league drafts and playing at the professional level thereafter.¹³² Enabling student-athletes to collect royalties for the continued use of their likenesses, therefore, would not further compromise amateurism.

Other pro-competitive arguments are likewise weak. The NCAA will argue its current licensing policy promotes competitive balance.¹³³ Its analysis will likely proceed as follows: Strong NCAA teams are more likely to generate

127. *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) (emphasis in original).

128. *Id.*

129. Garry R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2658-61 (1996). See also *NCAA v. Bd. of Regents*, 468 U.S. 85, 102 (1984) (noting that not paying student-athletes is necessary to preserve the "character and quality of the 'product'" that is amateur sports and to preserve the distinction between collegiate and minor league athletics).

130. McCann, *supra* note 24 (projecting that such prospects may lead to exploitation by unsavory business persons).

131. See *supra* Part IV.B.1.

132. See Rachel Bachman, *Her Influence Knows No Bounds*, THE OREGONIAN, Jan. 23, 2005, at D1 (noting the pressure college athletes face when turning pro, as evidenced by college football players leaving school to attend pre-NFL draft workouts, and by women's basketball players preferring playing on professional teams overseas than graduating from college).

133. The NCAA has argued this defense in previous antitrust litigation. *Bd. of Regents*, 468 U.S. at 118.

publicity for student-athletes than weak or mediocre teams, due to the larger crowds and increased media exposure garnered by strong teams.¹³⁴ Permitting future student-athletes to profit from the use of their images after graduation would reinforce student-athletes' incentives to play for strong teams due to this increased exposure. This dynamic would strengthen athletic programs that are currently successful and hinder athletic programs that are currently weak, ultimately compromising the competitive balance among NCAA member schools.

This analysis, however, is flawed. Although currently strong teams generate more publicity for the team as a whole,¹³⁵ they do not necessarily generate more publicity for each individual student-athlete. Mediocre players on strong teams are eclipsed by the star-studded starting line-up, and they would receive more playing time and more exposure if they were to play for a weaker team. This reality undermines the argument that student-athletes' incentives to play for a weak team would be diminished. Alternatively, the competitive balance the NCAA seeks to preserve has already been compromised by the NCAA's current rules and regulations.¹³⁶ Teams that historically produce far more wins than losses regularly defeat teams with less impressive historical win-loss records by large margins.¹³⁷ Current NCAA rules and practices, moreover, appear to be ineffective to enable schools with weak athletic programs to improve their relative performance from year to year.¹³⁸ Given this existing lack of competitive balance, jurors will not likely

134. Strong teams receive greater publicity and media coverage due, in part, to their regular appearances in tournaments and championship games. For example, The University of Florida's men's football team has appeared in a bowl game nearly every season over the last twenty years. *Florida Bowl History*, COLL. FOOTBALL DATA WAREHOUSE, http://cfbdatawarehouse.com/data/div_ia/sec/florida/bowl_history.php (last visited Nov. 4, 2010). Conversely, Vanderbilt's football team has appeared in only four bowl games since 1955. *Vanderbilt Bowl History*, COLL. FOOTBALL DATA WAREHOUSE, http://cfbdatawarehouse.com/data/div_ia/sec/vanderbilt/bowl_history.php (last visited Nov. 4, 2010).

135. See *supra* note 134 and accompanying text.

136. See Roberts, *supra* note 129, at 2665.

137. *Id.* For example, the University of Florida's football team (Florida Gators) has defeated the Kentucky Wildcats every year since 1987. *Florida vs Kentucky*, COLL. FOOTBALL DATA WAREHOUSE, http://cfbdatawarehouse.com/data/div_ia/sec/florida/opponents_records.php?teamid=1628 (last visited Nov. 4, 2010). Additionally, the Gators have defeated the Vanderbilt Commodores every year since 1992. *Florida vs Vanderbilt*, COLL. FOOTBALL DATA WAREHOUSE, http://cfbdatawarehouse.com/data/div_ia/sec/florida/opponents_records.php?teamid=3363 (last visited Nov. 4, 2010).

138. Roberts, *supra* note 129, at 2665. For example, Duke University's football team has been the perennial doormat of the ACC, not producing a winning season since 1994. *Duke Yearly Totals*, COLL. FOOTBALL DATA WAREHOUSE, http://cfbdatawarehouse.com/data/div_ia/acc/duke/yearly_totals.php (last visited Nov. 4, 2010). Likewise, Vanderbilt University's 7-6 record during the 2008 season is its only winning season since 1982. *Vanderbilt Yearly Totals*, COLL.

be persuaded that “any one of the NCAA’s rules, or even its rules as a whole,” promote competitive balance.¹³⁹

Permitting former student-athletes to license their likenesses may actually improve the NCAA’s core product—the games played in the real-world arenas. Current student-athletes, motivated by the prospect of earning a higher licensing fee after graduation, may increase their efforts on the practice field in an attempt to earn more playing time during games. This dynamic ultimately would elevate the performance level on the playing field and improve the entertainment value delivered to consumers.

3. Balancing the Pro-competitive Effects Against the Anti-competitive Effects

Restricting former student-athletes’ rights to their own likenesses has the anti-competitive effect of diminishing the quality of products available to consumers.¹⁴⁰ Conversely, limiting the class of plaintiffs to former student-athletes who no longer compete in collegiate sports undermines the NCAA’s classic defense—preserving amateurism.¹⁴¹ Strong evidence of current competitive imbalance likewise undermines the NCAA’s argument that its restriction preserves competitive balance.¹⁴² Accordingly, the trial court will likely hold that the anti-competitive effects outweigh the pro-competitive effects and will strike the NCAA’s prohibition against former student-athletes receiving remuneration for use of their likenesses. This victory, however, would not entitle O’Bannon to all of his requested relief, which includes royalties for sales of far more than video games and replica jerseys.¹⁴³

V. THE RAMIFICATIONS OF A FAVORABLE JUDGMENT FOR O’BANNON

The O’Bannon complaint takes issue with nearly every product featuring the image or likeness of any former student-athlete, including the sales of DVDs of past NCAA games,¹⁴⁴ video clips to corporate advertisers,¹⁴⁵ photos featuring former student-athletes,¹⁴⁶ action figures, trading cards, posters,¹⁴⁷ video games,¹⁴⁸ jerseys, t-shirts and apparel,¹⁴⁹ and television rebroadcasts of

FOOTBALL DATA WAREHOUSE, http://cfbdatawarehouse.com/data/div_ia/sec/vanderbilt/yearly_totals.php (last visited Nov. 4, 2010).

139. Roberts, *supra* note 129, at 2667.

140. *See supra* Part IV.B.1.

141. *See supra* notes 129–32 and accompanying text.

142. *See supra* notes 133–39 and accompanying text.

143. *See supra* Part II.

144. O’Bannon Complaint, *supra* note 15, at 38–41.

145. *Id.* at 41–44.

146. *Id.* at 44–45.

147. *Id.* at 46–47.

148. *Id.* at 47–54.

classic games.¹⁵⁰ O'Bannon's legal team would have the court believe that every product featuring the use of a former athlete's image appropriates his or her right of publicity. However, this assertion contradicts prior case law.

A. *Right of Publicity Case Law*

Not all uses of another's name are tortious. In *CBC Distribution and Marketing, Inc. v. MLB Advanced Media*, the court addressed whether CBC's use of Major League Baseball players' names and playing records in fantasy baseball sports products violated the players' rights of publicity.¹⁵¹ "Fantasy games allow fans to draft a personal 'dream team' of players that earns points based on the real performances of chosen players."¹⁵² CBC's customers would play the role of managers and owners of fictitious teams created for a fantasy season.¹⁵³ Customers would select players for their teams from a list of Major League Baseball players.¹⁵⁴ The success of a customer's team over the course of a fantasy season would depend on the chosen players' real-life performances on their real-life major league teams.¹⁵⁵ Advanced Media and the Players' Association alleged that this use of players' names and playing records amounted to a violation of their publicity rights.¹⁵⁶

"[T]he elements of 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."¹⁵⁷ Factors relevant to determining whether a public personality's name is used as a symbol of his or her identity include "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."¹⁵⁸ Additionally, how the players' names are used, rather than the mere fact that they are used, is significant.¹⁵⁹

149. O'Bannon Complaint, *supra* note 15, at 56–58.

150. *Id.* at 54–56.

151. *CBC Distrib. & Mktg., Inc. v. MLB Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1082–83 (E.D. Mo. 2006).

152. William E. Kirwin & R. Gerald Turner, *Tackling Fantasy Leagues*, L.A. TIMES, Aug. 30, 2008, at A31.

153. *CBC*, 443 F. Supp. 2d at 1080.

154. *Id.*

155. *Id.*

156. *Id.* at 1084.

157. *Doe v. TCI Cablevision*, 110 S.W.3d 363, 369 (Mo. 2003) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995)).

158. *Id.* at 370 (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995)).

159. *See id.* at 369.

In *CBC*, the court noted the use of baseball players' names and playing records did not involve the character, personality, or reputation of the players.¹⁶⁰ The court, therefore, held *CBC*'s use of players' names, in conjunction with the players' playing records, did not involve the persona or identity of any player.¹⁶¹

Turning to the commercial advantage element, the *CBC* Court held that *CBC*'s fantasy games did not suggest "that any Major League baseball player [was] associated with *CBC*'s games or that any player endors[ed] or sponsor[ed] the games in any way."¹⁶² The court inferred that *CBC* was not using the players' identities to publicize their product because their names and athletic statistics were necessary elements of *CBC*'s product.¹⁶³

Although there is no bright-line rule to determine exactly what constitutes appropriation of another's likeness, courts have exercised prudence in protecting celebrities' personas and examine whether the casual observer would associate the defendant's protested image with the plaintiff.¹⁶⁴ In *Newcombe v. Adolf Coors Co.*, former major league baseball all-star and Brooklyn Dodgers great, Don Newcombe sued Coors alleging that its magazine advertisement appropriated his right of publicity.¹⁶⁵ Coors admitted the drawing in the advertisement, which featured a pitcher in the wind-up position, was "based on a newspaper photograph of Newcombe pitching in the 1949 World Series."¹⁶⁶ The pitcher was faceless, however, and Newcombe's number had been changed from 36 to 39.¹⁶⁷ Likewise, the bill of the hat in the drawing was a different color from Newcombe's hat in the photograph.¹⁶⁸ Nonetheless, the court noted the stance of the faceless pitcher strongly resembled Newcombe's signature stance, and that the skin color of the faceless pitcher was similar to Newcombe's skin color.¹⁶⁹ The court also observed that, although the second digit of the uniform number in the advertisement was inverted, it was still similar enough to Newcombe's actual number to conjure images of Newcombe "either consciously or subconsciously."¹⁷⁰ The court,

160. *CBC*, 443 F. Supp. 2d at 1089.

161. *Id.*

162. *Id.* at 1086.

163. *Id.* (noting that all fantasy game providers use names and playing records by necessity).

164. Michael Gerton, Note, *Kids' Play: Examining the Impact of the CBC Distribution Decision on College Fantasy Sports*, 11 TEX. REV. ENT. & SPORTS L. 153, 161 (2009). See also *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692-93 (9th Cir. 1998) (comparing the proportions, shape, skin color, and other details of the alleged infringing advertisement image with that of the plaintiff).

165. *Newcombe*, 157 F.3d at 689.

166. *Id.* at 690.

167. *Id.*

168. *Id.*

169. *Id.* at 692-93.

170. *Newcombe*, 157 F.3d at 693.

therefore, determined that even absent the express use of Newcombe's name and the omission of his facial features in the drawing, a reasonable juror could still find the advertisement appropriated Newcombe's likeness.¹⁷¹

B. Right of Publicity Law Applied to O'Bannon's Claims

Applying these legal precepts to O'Bannon's claims, the sale of several products featuring the images of former student-athletes would be unaffected by a favorable judgment for O'Bannon because they do not misappropriate former student-athletes' rights of publicity. For example, the NCAA's use of former student-athletes' images in the sale of DVDs and television rebroadcasts featuring "classic games" is similar to CBC's use of player names in that neither use involves the character, personality, or reputation of the players.¹⁷² Video showing the former student-athletes playing basketball does not suggest that any player endorsed or sponsored the games. The NCAA is not marketing the image of any particular player but rather the actions of a group of players (e.g., playing basketball). The NCAA, therefore, is not using the student-athletes' individual images for commercial advantage. DVDs and television broadcasts of classic games feature the game itself and the athletic performances of the players; the use of the players' names and visual images is a necessary, incidental element of those games.¹⁷³ The sale of DVDs and rebroadcasts of "classic games," therefore, does not misappropriate former student-athletes' rights of publicity.

A ruling that the NCAA's restrictions violate antitrust law would, however, have some impact on the collegiate photography market, which includes photos of collegiate basketball games, teams, and players.¹⁷⁴ Some of the photos sold contain images of a single former player, often one who has gained notoriety playing at the professional level.¹⁷⁵ These photos misappropriate the former player's right of publicity because their marketability depends heavily on the fame and notoriety of the individual player, his or her reputation, character, and personality. These photos, therefore, use the former player's name and image as a symbol of his or her identity with the intent of gaining a commercial advantage.

171. *Id.*

172. *CBC Distribution & Mktg., Inc. v. MLB Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1086 (E.D. Mo. 2006).

173. Use of a player's image must be more than incidental to violate the right of publicity. *Id.* at 1085 n.9 (citing *Doe v. TCI Cablevision*, 110 S.W.3d 363, 375 (Mo. 2003)).

174. *See NCAA Photo Store*, *supra* note 44.

175. *See, e.g., 1970-79 Pictures to Buy*, *supra* note 46 (selling photos of NBA greats such as Magic Johnson and Bill Walton playing for Michigan State and ULCA, respectively).

Conversely, many of the photos sold capture images of multiple players on the court during game time,¹⁷⁶ and the sale of these photos would not violate the former players' publicity rights because they feature the athletic event itself, rather than the images of the players as symbols of their identities. Team photos, likewise, would not violate former players' publicity rights. Although the inclusion of star former athletes of particular notoriety in these photos may motivate consumers' purchases, the primary focus of the photo—at least from an objective perspective—is the team as a whole, not any single former player.

Analyzing the sale of replica jerseys yields a conclusion similar to that regarding photographs featuring individual athletes. Although NCAA bylaws prohibit labeling merchandise with players' names,¹⁷⁷ universities and retailers know that consumers associate the jersey numbers of star student-athletes with the personas and identities of the athletes themselves.¹⁷⁸ Television networks broadcast images of collegiate athletes in their jerseys—which clearly illustrate their numbers—to fans nationwide, enabling fans to attach identity meaning to their jersey numbers.¹⁷⁹ Retailers, therefore, substitute the player's name with his or her jersey number in attempt to use the star student-athlete's persona and popularity for “commercial advantage.”¹⁸⁰ Although there is no bright-line rule indicating to what degree the student-athlete must be identifiable from the alleged likeness,¹⁸¹ the high sales volumes of merchandise labeled with the

176. See, e.g., *Sasha Kaun*, REPLAY PHOTOS, http://www.replayphotos.com/ncaaphotostore/mens-division-i-print/sasha-kaun_33063.cfm (last visited Nov. 4, 2010) (selling photo of Kansas's Sasha Kaun dunking over Memphis's Antonio Anderson, Joey Dorsey, and Chris Douglas-Roberts during the first half of the championship game at the NCAA college basketball Final Four, Monday, Apr. 7, 2008).

177. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 12, § 12.5.1.1(g).

178. See, *Fowler*, *supra* note 4 (retail manager noting her employer's business receives requests for “Tim Tebow” stuff labeled with the number “15”); see also *Chambers*, *supra* note 30 (characterizing the substitution of jersey numbers for names as “meaningful”); *Hanlon & Yasser*, *supra* note 23, at 267 (discussing the inextricable link between a star player's jersey and his or her identity).

179. *Hanlon & Yasser*, *supra* note 23, at 267. *Hanlon* and *Yasser* persuasively note that: Jersey numbers differentiate players. The greatest players are occasionally honored by having their jersey number retired as ‘a symbolic gesture’ providing that no other player will ever wear a particular number again. This act memorializes the player's identity with that specific team and jersey number. There is no doubt that placing a star player's number on a jersey for sale enhances its popularity, demand and, consequently, its value. While it may be true that people purchase college sports merchandise simply because of the school or athletic team, it cannot be overlooked that merchandise featuring star-players' jersey numbers are best-selling items.

Id. (internal citations omitted).

180. See *Fowler*, *supra* note 4 (retail manager noting his employer “put #15 on things and they will sell really well”). See also *Hanlon* and *Yasser*, *supra* note 23, at 267.

181. See *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998).

jersey numbers of popular athletes¹⁸² is evidence that consumers “readily identify” student-athletes from their jersey numbers.¹⁸³ This actual recognition in the minds of consumers proves that a jersey number represents a star athlete’s persona. Moreover, the *Newcombe* Court believed the jersey number of the faceless pitcher in Coors’ advertisement (“39”) could conjure images of Newcombe even though the second digit of Newcombe’s number (“36”) was inverted.¹⁸⁴ If a similar but different jersey number could conjure images of the real-world athlete, an exact match of the player’s jersey number would certainly do the same. Affixing a jersey number to merchandise sold in commerce, therefore, could constitute appropriation of the student-athlete’s likeness.¹⁸⁵ Sales of replica jerseys of former student-athletes would therefore be prohibited without the former student-athletes’ expressed permission.

The use of former student-athletes’ images in video games would also violate publicity rights. Although these games do not use the names of any players, the physical appearances, statistics, and playing styles of the virtual players model their real-world counterparts so well that gamers “don’t have to know a PlayStation from a train station” to recognize who the players are intended to resemble.¹⁸⁶ In *Newcombe v. Adolf Coors*, omitting the face of the pitcher, changing Newcombe’s number from “36” to “39,” and omitting the pitcher’s name was not enough to escape liability because a rational jury could find that Newcombe was “readily identifiable.”¹⁸⁷ Here, game makers have done even less to disconnect the virtual players from their real-world counterparts, omitting only their names and copying everything else, even the student-athletes’ hairstyles and signature accessories, such as arm sleeves.¹⁸⁸ Similar to *Newcombe*, student-athletes are “readily identifiable” by their skin tone, jersey number, and playing style, and therefore, the video games

182. See Fowler, *supra* note 4 (retail manager noting that apparel labeled with Tim Tebow’s jersey number “15” are flying off the shelves).

183. See CAL. CIV. CODE § 3344(b)(1) (West 2009) (providing that, for photos, “[a] person shall be deemed readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.”). By analogy, athletes are “readily identifiable” from their jersey numbers when consumers can reasonably determine who the number and team illustrated on the jersey represent.

184. *Newcombe*, 157 F.3d at 693.

185. See *id.* at 692 (holding that if the pitcher in the advertisement was readily identifiable as Newcombe, then a jury could reasonably find that Newcombe’s likeness had been appropriated).

186. Latack, *supra* note 35, at 69; see also Thomas, *supra* note 35 (“[E]ven casual fans of college sports would recognize the athletes depicted in [the video games].”).

187. *Newcombe*, 157 F.3d at 693.

188. Brian Christopherson, *Football Players Sue NCAA, EA*, LINCOLN J. STAR, May 8, 2009, at A1, available at <http://msn.foxsports.com/cbk/story/Football-players-sue-NCAA,-EA> (noting that a K-State player wearing No. 1 in an EA video game wears an arm sleeve just like the real-world counterpart did).

appropriate their likenesses. Further, video publishers use these likenesses for “commercial advantage” because they are intended to add realism and authenticity to the game, distinguishing Electronic Arts’s product from those of competitors. Additionally, consumers would likely presume the players are endorsing or sponsoring the game because using their images is not a necessary element of the game—video game publishers could use fictitious characters to create fictitious games.¹⁸⁹ Should O’Bannon’s antitrust claim succeed, Electronic Arts would no longer be able to use former student-athletes’ images without licenses from the former student-athletes.

Of all the merchandise with which O’Bannon takes issue, a court will likely issue an injunction only for the NCAA’s licensure of replica jerseys, photos featuring solo shots of former student-athletes, and video games that copy former student-athletes’ likenesses. O’Bannon cannot stop the NCAA’s licensure of “classic game” broadcasts, group photos, or its sale of DVDs because the inclusion of a former student-athlete’s image in such products is a necessary, incidental element of the product that does not involve the character, persona, or reputation of the student-athlete.¹⁹⁰

CONCLUSION

O’Bannon will likely establish that the NCAA’s restriction of former athletes’ licensing their likenesses for pay violates antitrust law due to the lack of pro-competitive effects achieved by this restriction, and the attenuated connection between imposing restrictions on former student-athletes and preserving amateurism. If O’Bannon prevails on his antitrust claim, Defendant CLC¹⁹¹ will likely develop a subsidiary exclusively dedicated to negotiating group licenses for former NCAA players and make take-it-or-leave-it offers to former student-athletes for the use of their likenesses in Electronic Arts’s video games, the use of their names on replica jerseys, and the use of their images in solo photographs. Some star former student-athletes will likely refrain from appearing in video games or on replica jerseys.¹⁹² The result for consumers will be mostly positive, as they will no longer need to download rosters from third parties to enable the names of players to be displayed in the video games, and their replica jerseys will be more authentic.

189. This hint of sponsorship distinguishes this case from *CBC*, where the court held CBC’s use of the player’s statistics did not suggest an association between the players and CBC’s games because CBC’s use of those statistics was a necessary element of its product. *CBC Distribution & Mktg., Inc. v. MLB Advanced Media, L.P.*, 443 F. Supp. 2d 1077, 1086 (E.D. Mo. 2006).

190. *See id.* at 1086–89 (holding that incidental use contradicts use for commercial advantage and that use not involving character, personality, or reputation contradicts use of identity).

191. NCAA’s primary business partner. *See supra* Part I.A.

192. *See supra* note 115 and accompanying text.

A favorable result for O'Bannon, however, will not result in sweeping changes to the college-themed video game market, in light of the complementary nature between the former-student athletes' images and the collegiate jerseys. The trademark rights for the school jerseys belong to the NCAA and its member institutions, and Electronic Arts can negotiate an exclusive license for the use of the jersey designs, effectively preserving its monopoly. The market for college sports-themed video games would more closely resemble that for professional sports-themed games, where video publishers create monopolies by negotiating exclusive group licenses.¹⁹³ Likewise, a favorable judgment for O'Bannon will not entitle him to all of his requested relief. The NCAA's licensure of "classic game" broadcasts, group photos, and sales of DVDs featuring former student-athletes will continue unabated.¹⁹⁴

Although courts award treble damages for antitrust violations,¹⁹⁵ the NCAA's member institutions are philanthropic entities striving to educate the minds of tomorrow, an admirable objective. A nine-figure verdict for former college-athletes would impose an enormous burden on the NCAA and its member schools, resulting in university budget cuts and higher tuition bills that would ultimately impact students. The philanthropic purpose of these member universities and the ultimate side effects on the students would likely elicit sympathy from jurors. Accordingly, jurors will likely find a reason to limit the prejudgment damages and interest damages to a figure reasonably affordable by the NCAA and its member institutions.

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193. *See supra* notes 110–12 and accompanying text.

194. *See supra* Part V.

195. 15 U.S.C. § 15(a) (2006).

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