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STRANGE BEDFELLOWS: HOW THE NCAA AND EA SPORTS MAY HAVE VIOLATED ANTITRUST AND RIGHT OF PUBLICITY LAWS TO MAKE A PROFIT AT THE EXPLOITATION OF INTERCOLLEGIATE AMATEURISM

*Andrew B. Carrabis*¹

*A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports.²

*Fundamental Policy and Basic Purpose, NCAA Manual

I. INTRODUCTION

Historically, America is a land of capitalism and prosperity, with corporations and associations in business to make money. Make no mistake about it, college sports are big business, and business is booming. Today's market for National Collegiate Athletic Association (NCAA) licensed merchandise is a global industry that generates nearly three billion dollars per year in revenue.³ In addition, college athletic events are a multi-billion dollar industry. Yet, the revenues from these commercial transactions are not always divided up in a proportional manner.⁴

On May 5, 2009, concerned by the lack of disparity between the NCAA and private third party vendors such as Electronic Arts (EA Sports), former student athlete Sam Keller (Keller) filed a class action⁵ lawsuit (Complaint) in the United States District Court, Northern District of California, against the NCAA, EA

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2. NCAA, NCAA 2009-10 NCAA DIVISION I MANUAL, art 1.3.1, at 1 (2006), available at <http://www.ncaapublications.com/p-3934-2009-2010-ncaa-division-i-manual.aspx> (last visited Apr. 20, 2010) [hereinafter NCAA Manual].

3. Sean Hanlon & Ray Yasser, "J.J. Morrison" and his Right of Publicity Lawsuit Against the NCAA, 15 VILL. SPORTS & ENT. L.J. 241 (2008).

4. Hunter Howard, UNC.EDU, *The Explosion of the Business of Sports in the United States*, (1998), <http://www.unc.edu/~andrewsr/int092/howard.html>.

5. Class action status requires satisfaction of Rule 23 of the Federal Rules of Civil Procedure. One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of fact or law common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a).

Sports, and the NCAA's commercial licensing arm, the Collegiate Licensing Company (CLC) (collectively, the "Defendants"). The class action suit claimed that the Defendants and their co-conspirators restrained commercial trade by engaging in anti-competitive practices in violation of the Sherman Antitrust Act,⁶ (the Sherman Act), and engaged in unjust enrichment through the nonconsensual misappropriation of a student athlete's likeness which violated their right of publicity and was used in commercial transactions.⁷

In particular, the allegations giving rise to the Complaint stem from the eligibility requirements that the NCAA imposes upon student athletes before they are permitted to participate in intercollegiate athletics. Specifically, NCAA Form 08-3a (the Form)⁸, which all NCAA student athletes must sign before they are permitted to participate in NCAA sanctioned events, requires student athletes to relinquish the right of publicity of their names and images in perpetuity. Furthermore, the Complaint alleges that through the use of these tactics in commercial trade, the NCAA and the CLC, in violation of federal antitrust laws and state right of publicity law,⁹ have engaged with EA Sports in a concerted commercial action which inhibits competition in the marketplace of former student athletes' likenesses.

Since Keller's filing, former collegiate athletes from across the nation have joined the class action lawsuit; most notably, former University of California, Los Angeles (UCLA) star basketball player Edward C. O'Bannon, Jr. (O'Bannon) (collectively, Keller and O'Bannon will be referred to as the "Plaintiffs").¹⁰ On July 21, 2009, O'Bannon filed a complaint in federal court in the United States District Court, Northern District of California against the NCAA, CLC, and EA Sports claiming antitrust violations and misappropriation of his likeness in violation of right of publicity laws.¹¹ The suits brought by the Plaintiffs both speak similarly to the same issue – namely, NCAA and EA Sports violation of antitrust laws through concerted action in their exclusive licensing agreements pertaining to commercial trade and the misappropriation of collegiate student athletes' likeness by the NCAA and EA Sports in video games. In light of the similar questions of law and fact raised, on September 1, 2009, Plaintiffs filed a motion to consolidate their trials, which was ultimately granted.¹²

This paper discusses (1) the background information of the NCAA, CLC, EA Sports, Keller, and O'Bannon; (2) the federal law antitrust provisions that will likely come into play regarding this consolidated class action lawsuit; (3) publicity

6. 15 U.S.C. § 1; Passed by Congress in 1890 to promote fair trade.

7. Complaint at ¶ 14-15, O'Bannon v. NCAA, No. CV 09-3329, 2009 WL 2416720 (N.D. Cal. July 21, 2009) [hereinafter Motion to Dismiss].

8. Form 08-3a 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." NCAA Form 08-3a, pt. IV, (2008) available at http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf (last visited Apr. 19, 2010).

9. Motion to Dismiss at ¶ 15, *supra* note 7.

10. Motion to Dismiss, *supra* note 7.

11. *Id.*

12. Motion to Consolidate Actions, Keller v Elec. Arts, Inc., Nos. CV 09 1967, CV 09-3329, 2009 WL 2920919 (N.D. Cal. Sept. 1, 2009).

law as it applies to the misappropriation of student athletes' likenesses; (4) the NCAA and EA Sports' responses to the allegations in the Complaint; and (5) proposed resolutions of the case including an attempt to predict the future of the NCAA, and EA Sports video game industry, in a post Keller and O'Bannon era.

II. BACKGROUND

A. Keller

Keller played NCAA football at Arizona State University as a quarterback in 2003, and transferred to the University of Nebraska in 2006.¹³ Keller's class action, antitrust lawsuit claims that EA Sports' video games make illegal use of college football and basketball players' identities in violation of the Sherman Act, Section 1, through an exclusive licensing agreement that EA Sports secured with the NCAA and its licensing arm, the CLC. Keller argues that the NCAA condones the practice in violation of its own rules and in violation of antitrust laws in an effort to make a commercial profit.¹⁴

Additionally, through the ability to download rosters, coupled with the unidentified, but obvious likeness of the video game players that identically match their real life NCAA student athlete counterparts, Keller argues that there can be no misconception regarding the true identities of players in the EA Sports video games.¹⁵ *Inter alia*, the suit cites examples of actual college players' heights, weights, hometowns, positions, jersey numbers, and other distinguishable characteristics matching those of virtual players on the same teams in the video games.¹⁶

With [the] rare exception, virtually every real life Division I football or basketball player in the NCAA has a corresponding player in EA [Sports] games with the same jersey number and virtually identical height, weight, build, and home state. In addition, Electronic Arts matches the player's skin tone, hair color, and often even a player's hairstyle.¹⁷

Furthermore, Keller's suit alleges EA Sports' video games even match idiosyncratic preferences such as wristbands, headbands, facemasks, and visors.¹⁸

The suit goes on to state EA Sports, the second largest video game publisher in the world, also allows customers to upload players' names directly into the video games to further identify the collegiate players.¹⁹ Keller claims that because the NCAA has rights in perpetuity to images of him during his collegiate career, the

13. Steve Wieberg, *Ex-QB Sues NCAA, EA Sports Over Use of Athletes' Likenesses*, USATODAY.COM, May 7, 2009, available at http://www.usatoday.com/sports/college/2009-05-07-keller-ncaa-easports-law-suit_N.htm.

14. *Id.*

15. *Id.* It is worth noting that EA Sports only restriction in the likeness of the players in their video games is that they may not use their actual last names on the back of the jerseys. *Id.*

16. *Id.*

17. *Id.*

18. Wieberg, *supra* note 13.

19. *Id.*

NCAA, along with its co-conspirators, fix the price for the use of his image at “zero.”²⁰ Lastly, Keller seeks to represent all NCAA football and basketball players featured in EA Sports’ NCAA video games.²¹

B. O’Bannon

Another prominent former NCAA student athlete²² to file suit against the NCAA and EA Sports, and who has now consolidated lawsuit claims with Keller, is Edward C. O’Bannon, Jr. O’Bannon played NCAA collegiate basketball at UCLA from 1991 to 1995, and led UCLA to a national championship title in 1995.²³ As well as alleging antitrust violations under the Sherman Act pertaining to the NCAA and EA Sports’ exclusive licensing agreement, and violations of right of publicity laws through misappropriation of his likeness, O’Bannon is also suing the NCAA over the use of his image in reruns of basketball games on television networks.²⁴

Currently, the NCAA bars current and former student athletes from receiving compensation for NCAA licensed products. These products generate roughly three billion dollars per year.²⁵ While O’Bannon is suing on the same grounds as Keller, there is a distinct difference between these two lawsuits. Current NCAA players are *not* a part of O’Bannon’s class action lawsuit.²⁶ O’Bannon has stated, “[w]hen you’re in school you’re obligated to live up to your scholarship. But once you’re done, you physically, as well as your likeness, should leave the university and the NCAA.”²⁷

O’Bannon’s class action of plaintiffs only includes former NCAA football and basketball players whose images and likenesses have been commercially licensed under the exclusive licensing agreement between the NCAA and EA Sports.²⁸ If you are one of the few unlucky NCAA players whose likeness is not similar in the EA Sports video game to your real life statistics (such as height, weight, hometown), then you are not part of O’Bannon’s lawsuit. While O’Bannon’s lawsuit targets former NCAA student athletes and excludes current student

20. O’Bannon v. NCAA, Nos. C 09-1967 CW, 2010 WL 445190 slip op. at *2. (N.D. Cal. Feb. 8, 2010).

21. Complaint at ¶ 58, Keller v. Elec. Arts, Inc., No. CV 09-1967, 2009 WL 1270069 (N.D. Cal. May 5, 2009) [hereinafter Complaint]. It is worth noting that the NCAA prohibits the use of a student athlete’s name to appear on the back of a jersey, video games included, and also regards the jersey number as not being significantly linked to the individual student athlete. Hanlon & Yasser, *supra* note 3, at 268.

22. Craig Newsome, former NFL player and former Arizona State University standout has also joined the suit as lead plaintiff with Keller and O’Bannon. *O’Bannon*, 2010 WL 445190, at *2.

23. Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Antitrust Case*, SPORTSILLUSTRATED.COM, Jul. 21, 2009, available at: http://sportsillustrated.cnn.com/2009/writers/michael_mccann/07/21/ncaa/index.html.

24. Motion to Dismiss, *supra* note 7, at ¶ 149.

25. *Id.* at ¶ 36.

26. *Id.* at ¶ 43. The trial court agreed there was enough commonality among the complaints for class action status, but also retained the right to bifurcate the trials on certain issues.

27. Street & Smith, *Ed O’Bannon Files Lawsuit Against NCAA Over Use of His Likeness*, SPORTSBUSINESSDAILY.COM, July 22, 2009, <http://www.sportsbusinessdaily.com/article/131922> (last visited Mar. 1, 2010). Keller states the same claim as when NCAA student athletes are no longer subject to NCAA regulations. Complaint, *supra* note 21.

28. Motion to Dismiss, *supra* note 7 at ¶ 1.

athletes, O'Bannon has taken steps to protect today's current NCAA student athletes as well. O'Bannon has requested a constructive trust be made available for current NCAA student athletes for their disposal once they leave college.²⁹

In particular, Plaintiffs' consolidated lawsuit stems from NCAA Form 08-3a, titled Student Athlete Agreement and will be discussed in more detail below. Suffice for now, Form 08-3a authorizes the NCAA to use a student athlete's name or picture to generally promote the NCAA, and by signing this statement, the student athlete relinquishes in perpetuity all future rights in the NCAA's licensing agreements with third parties.³⁰ It would seem that O'Bannon is poised to take the position that Form 08-3a is a contract of adhesion with unconscionability at its core. Student athletes are ineligible to participate in NCAA athletics without signing the Form 08-3a. Additionally, Plaintiffs argue that by requiring student athletes to forgo their identity rights in perpetuity, the NCAA, through their exclusive licensing agreement with EA Sports, has restrained trade in violation of Section 1 of the Sherman Act and, consequently, the NCAA has deprived Plaintiffs of their right of publicity.³¹ Unlike professional sports,³² which enter into licensing agreements with the players' association for approximately \$35 million per year thereby allowing EA Sports to use the professional player's names, college sports video games use neither players' names nor specific facial features.³³ EA Sports is the single biggest licensee from the NCAA and the CLC and provides six figure paydays for some university member schools.³⁴

Lastly, Plaintiffs take on a public policy jurisprudence argument concerning the NCAA's determination to preserve amateurism. In their briefs to the court, Plaintiffs state that in the past the NCAA has not paid current student athletes to preserve amateurism. However, in Plaintiffs' rebuttal, they state that once the student athlete leaves the school, that particular issue is now moot and the question should now become whether amateurism should still be at issue, and additionally, questions whether former student athletes should still be within the scope of protecting the idea of amateurism by prohibiting them from reaping any benefits from sports licensing agreements long after they have left the collegiate sports ranks.

29. *Id.*

30. See generally Street & Smith, *supra* note 27; see also Darren Heitner, *2 on 2: Sam Keller and Ed O'Bannon vs. NCAA and CLC*, SPORTSAGENTBLOG.COM, July 24, 2009, <http://www.sportsagentblog.com/2009/07/24/2-on-2-sam-keller-and-ed-obannon-vs-ncaa-and-clc-with-ea-on-the-bench/>.

31. Wieberg, *supra* note 13.

32. While EA Sports is obligated to pay for the use of professional athletes likeness and images in their video games, "in which players are identifiable by name . . .," there is no such obligation to pay student athletes for the use of their likeness because there is no clear identifiable marker of the student athletes in the EA sports video games. Hanlon & Yasser, *supra* note 3, at 271-72.

33. Wieberg, *supra* note 13.

34. Hanlon & Yasser, *supra* note 3.

C. The National Collegiate Athletic Association

The NCAA is an organization run from the bottom up by its member schools and affiliates. Membership is open to any duly elected, accredited four-year college or university.³⁵ Active members have the right to participate in NCAA events, vote on legislation, and enjoy the privileges and benefits of membership as designated by the NCAA constitution.³⁶ However, the main purpose of the NCAA is to govern intercollegiate athletics in a fair and safe manner, while promoting the clear demarcation between professional and amateur athletics.³⁷ Today, the NCAA contains over 1200 educational institutions, athletic conferences, and other related organizations.³⁸

D. The Collegiate Licensing Company

The CLC facilitates licensing for NCAA events, including, but not limited to: 17 bowl games, conference championship games, four Bowl Championship Series (BCS) bowl games, the BCS National Championship game, and other events which promote the NCAA through third-party distributors.³⁹ In particular, the CLC performs two specific tasks for the NCAA: (1) protecting the amateur standing of its members' athletes; and (2) obtaining the most lucrative deals for its members.⁴⁰ Additionally, it is pertinent to note that the licensing rights contracted by the CLC are separate from the licensing rights granted by the individual colleges and universities.⁴¹ In sum, the CLC is the one-stop marketing and licensing shop for the marketing and licensing of NCAA products to third-party companies through exclusive licensing agreements. Exclusive licensing agreements are contracts in which one company contracts with another for the right to use the other company's assets.⁴²

In 2005, the CLC entered into an exclusive contract deal that effectively gave EA Sports the entire market for the development and distribution of interactive NCAA football and basketball video games.⁴³ This contract allows EA Sports to identically replicate NCAA teams, stadiums, uniforms, and mascots within their video games.⁴⁴ NCAA vice president Greg Shaheen's comments exemplify the

35. NCAA Manual, *supra* note 2, at art. 3.02., 3.1.

36. *Id.*

37. *Id.* at art. 12.01, 12.02; *see also* Aaron Brooks & David Davies, *Exploring Student-Athlete Compensation: Why the NCAA Cannot Afford to Leave Athletes Uncompensated*, 34 J.C. & U.L. 747 (2008).

38. Daniel E. Lazaroff, *The NCAA in its Second Century: Defender of Amateurism or Antitrust Recidivist?* 86 OR. L. REV. 329, 334 (2007).

39. The Collegiate Licensing Company, NCAA/Bowl/Conference Licensing, CLC.com, <http://www.clc.com/clcweb/publishing.nsf/Content/championship+licensing.html>.

40. Andy Latack, *Quarterback Sneak*, LEGAL AFF., January/February 2006, at 70, available at http://www.legalaffairs.org/issues/January-February-2006/review_latack_janfeb06.msp.

41. *Id.*

42. Liron Offir, *Monopolistic Sleeper: How the Video Game Industry Awoke to Realize that Electronic Arts was Already in Charge*, 8 DUQ. BUS. L. J. 91, 97 (Spring 2006).

43. *Id.*

44. *Id.*

nature of the deal with EA Sports when he stated that “[the deal with EA] gives us a unique branding platform and access to a wide demographic.”⁴⁵

In 2007, the sports marketing leader IMG Worldwide, bought the three billion dollar per year generating giant named CLC.⁴⁶ The revenue generated by the NCAA through the use of former athletes’ images and exclusive licensing agreements come from a variety of mediums such as player footage from television broadcasts, sales to corporate third-party companies, photos, trading cards, apparel, rebroadcasts of classic games, posters, and video games.

In sum, in exchange for a share of the profits from video games, the CLC has granted EA Sports the exclusive right to reproduce the stadiums, uniforms, and mascots of the NCAA member schools thereby shutting out any authentic competition to EA Sports in the collegiate video game industry.⁴⁷

E. EA Sports

The video game industry boasted over \$7.3 billion in sales in 2005 and sold over 248 million units of video games and accessories.⁴⁸ Headquartered in Redwood, California, EA Inc. is the world’s leading independent developer and publisher of interactive gaming entertainment software. EA Inc. publishes four logo brands and 33 product franchises.⁴⁹ In recent years, particularly as it relates to the CLC, EA Sports has risen to the top of the video game industry by obtaining exclusive licensing agreements for the development of NCAA based video games.⁵⁰ Consequently, EA Sports produced over three billion dollars in net revenues for the fiscal year of 2005.⁵¹ This figure represents almost half of the entire video gaming industry.⁵² With this exclusive contract with the CLC, EA Sports now has the opportunity to produce games with the actual players, something no other company is permitted to do. One could infer that the NCAA and CLC chose EA Sports because they are a global leader within the video game industry, capable of generating tremendous commercial revenue for the NCAA while also prohibiting any third-party competition.

45. Latack, *supra* note 40.

46. IMG Press Room, *IMG to Acquire Collegiate Licensing Company*, IMGWORLD.COM, May 1, 2007, http://www.imgworld.com/press_room/fullstory.sps?iType=13708&iNewsid=423758&iCategoryID= (last visited Apr. 20, 2010).

47. *See* Latack, *supra* note 40.

48. Offir, *supra* note 42, at 91.

49. *Id.*

50. *Id.*

51. *Id.* at 96.

52. *Id.*

III. ANTITRUST PROVISIONS

A. Sherman Antitrust Act, Section 1

Conventional jurisprudence informs us that NCAA regulations generally fall into two categories: (1) rules promulgated to preserve and promote amateurism; and (2) other regulations which serve more economic purposes.⁵³ Antitrust laws serve the policy purpose of preserving the notion that without competition, products will be inferior and will not develop to their full potential.⁵⁴ However, EA Sports is free to create NCAA football and basketball video games for the video game marketplace without any competition or interference from third-party competitors to help stimulate competition and fully develop programs.⁵⁵ Prior to the 1984 case of *NCAA v. Board of Regents of the University of Oklahoma (Regents)*,⁵⁶ courts usually took a hands-off approach when it came to the NCAA, and were dismissive of the alleged violations of antitrust laws pertaining to the NCAA's noncommercial objectives.⁵⁷ In particular, prior cases such as *Banks v. NCAA*⁵⁸ and *Regents*, established that the NCAA does not violate the Sherman Act by merely promulgating regulations that further the NCAA's purposes of promoting fair competition and amateurism. *Regents* is critically important because it changed the prior history of hands-off jurisprudence by federal courts and, through dicta, laid a new foundation for a dichotomous approach when applying antitrust law to the NCAA.

Regents dealt with a plan by the NCAA to limit the number of games each member school could televise, and further implemented a procedure in which no member of the NCAA was permitted to make any sale of television rights except in accordance with the NCAA plan. In *Regents*, the Supreme Court determined that the NCAA is not a single entity and antitrust laws apply to the collective actions of

53. Lazaroff, *supra* note 38, at 329; *see also* Justice v. NCAA, 577 F. Supp. 356, 379-83 (D. Ariz. 1983).

54. Offir, *supra* note 42, at 114.

55. *Id.*; *see also* Christopher L. Chin, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 LOY. L.A. L. REV. 1213 (Summer 1993).

56. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984); *see also* Kristin R. Muenzen, *Weakening it's own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L.J. 257 (Spring 2003).

57. *See* *Jones v. NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975) (holding that an NCAA hockey player who received improper compensation was not appropriate for antitrust analysis under the Sherman Act because the plaintiff is currently a student and not a businessman); *Gaines v. NCAA*, 746 F. Supp 738, 743 (M.D. Tenn. 1990) (holding "there is a clear difference between the NCAA's efforts to restrict the televising of college football games and the NCAA's efforts to maintain a discernable line between amateurism and professionalism and protect amateur objectives of NCAA college football by enforcing eligibility rules"); *Smith v. NCAA*, 139 F.3d 180, 185-86. (3d Cir. 1998), *vacated on other grounds*, 525 U.S. 459 (1999) (holding because NCAA eligibility rules are not related to the NCAA commercial or business activities, not intended to give the NCAA a commercial advantage in the marketplace, the amateurism rules are protected from antitrust scrutiny in order to preserve and promote fair competition); *McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1998) (holding the NCAA's goal is to integrate athletics with academics and promote public interest in intercollegiate athletics); *see also* *Pocono Invitational Sports Camp, Inc. v. NCAA*, 317 F. Supp. 2d 569, 584 (E.D. Pa. 2004) (holding that when the NCAA acts in a paternalistic capacity the rules are immune from antitrust scrutiny when promoting amateurism and education).

58. 977 F.2d 1081 (7th Cir.1992), cert. denied, 508 U.S. 908 (1992).

the NCAA and its member institutions.⁵⁹ While the Court in *Regents* determined that the television plan by the NCAA was not in violation of antitrust laws, it did, however, open the gates for future courts to apply the rule of reason analysis to NCAA commercial rules propagated by the NCAA for economic benefit.⁶⁰ In particular, the court noted that the joint action by the NCAA and its members on commercial economic matters should be dealt with under a rule of reason analysis under Section 1 of the Sherman Act, while other NCAA rules governing player eligibility and amateurism might be dealt with less scrutiny or may even be exempt from judicial review.⁶¹

B. Modern Day Antitrust Law

In the 1998 case, *Law v. NCAA (Law)*,⁶² the Tenth Circuit determined that NCAA coaches were engaged in a trade or business and competition for their services and their compensation had been unduly restrained through the concerted actions of their employers and the NCAA. In the 2004 case of *Worldwide Basketball and Sports Tours, Inc. v. NCAA (Worldwide)*⁶³, the court again noted, in using the rule of reason analysis, that the “dispositive inquiry . . . is whether the rule itself is commercial, not whether the entity promulgating the rule is commercial.”⁶⁴ *Law* and *Worldwide* demonstrate and stand for the proposition that when the NCAA implements rules for economic regulation (and economic gain), courts will tend to apply the rule of reason⁶⁵ in their antitrust analysis so long as the plaintiff demonstrates certain elements. First, the plaintiff must demonstrate the existence of a relevant market. Second, the plaintiff must demonstrate that the defendant has market power and actually has implemented anticompetitive effects within that market.⁶⁶ If the plaintiff succeeds in this, the defendant must then offer probative evidence and proof that their rules offer procompetitive justifications for their actions.⁶⁷ Thus, the common theme permeating through both *Law* and *Worldwide* is that when NCAA rules affect commercial trade and interstate commerce, and have a demonstrated effect on competition in cognizable industry markets, the NCAA rules will be subjected to federal antitrust litigation under the rule of reason analysis. In sum, *Regents*, coupled with *Law* and *Worldwide*, demonstrates that the NCAA commercial rules have promulgated into the marketplace. Therefore, if they depress precompetitive activity for commercial gain, they are ripe for reconsideration.

59. Lazaroff, *supra* note 38, at 338-39.

60. *Id.* at 339-40.

61. *Id.* at 340; see also Lee Goldman, *Sports and Antitrust: Should College Students be Paid to Play?*, 65 NOTRE DAME L. REV. 206 (1990).

62. 134 F.3d 1010 (10th Cir. 1998).

63. 388 F.3d 955 (6th Cir. 2004).

64. Lazaroff, *supra* note 38, at 342. (quoting *Worldwide*, *supra* note 63 at 959).

65. Courts will apply a “quick look” rule of reason when the anticompetitive effects are sufficiently obvious. *Id.* at 343.

66. *Id.* at 363.

67. *Id.* at 357; see also Matthew G. Matzkin, *Gettin’ Played: How the Video Game Industry Violates College Athletes’ Right of Publicity by not Paying for their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227 (2001).

While *Regents*, *Law*, and *Worldwide* deal with current student athletes, the current analysis of Plaintiff's case, discussed below, falls under a different umbrella as we now deal with former student athletes who have left the NCAA collegiate world. Thus, the regulations promulgated by the NCAA to protect amateurism are not applicable and should not apply.

C. Per se Violations and the Rule of Reason

The purpose of the Sherman Act is to prevent unwarranted and excessive restraints on interstate commerce and ensures that no single company will become a monopoly, controlling an entire industry or marketplace.⁶⁸ Specifically, Section 1 of the Sherman Act specially deals with anticompetitive practices within an industry. "Every contract, combination in the form of trust or otherwise, or, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."⁶⁹

A per se rule violation of Section 1 of the Sherman Act includes violations that meet the strict characterization of Section 1 ("agreements, conspiracies or trusts in restraint of trade").⁷⁰ Furthermore, a per se violation requires no further inquiry into the practice's actual effect on the market or the intentions of those individuals engaged in the practice because, on its face, the agreement appears to be one that would always threaten and restrict competition in the relevant market or industry. Conventionally, exclusive contract arrangements in the context of monopolization are not illegal per se under Section 1 of the Sherman Act, but instead are subject to scrutiny under the rule of reason.⁷¹ Courts have historically used the "rule of reason" as the standard applied to most anti-competitive practices to determine if the restraint in trade is severe enough to judge it to be illegal.⁷² Specifically, the rule of reason prohibits acts, contracts, and agreements which unreasonably operate to the prejudice of the public marketplace through burdensome restrictions on the rest of the competition within said marketplace and ultimately inhibit free competition.⁷³

In sum, exclusive dealing contracts are not per se illegal unless they constitute a violation of the law on their face. However, if it can be proven that the exclusive licensing agreements substantially inhibit and foreclose others from entering the marketplace to compete; then a violation of antitrust laws will be found.

D. Clayton Antitrust Act

While exclusive licensing agreements are addressed in the Sherman Act, these issues are also discussed under the Clayton Antitrust Act.⁷⁴ It is worth noting that

68. Offir, *supra* note 42, at 102.

69. 15 U.S.C. § 1 (2009).

70. *Id.*

71. Offir, *supra* note 42, at 92.

72. *Id.* at 103.

73. *Id.*

74. 15 U.S.C. § 12 (2009).

there is a lesser burden to show antitrust violations under the Clayton Act than under the Sherman Act.

[A] greater showing of anti-competitive effect is required to establish a Sherman Act violation than a Clayton Act violation in exclusive dealing or requirement contracts cases . . . The existence of this heavier burden is rooted in the language of the two statutes; the Sherman Act speaks of actual restraints of trade while [Section] 3 of the Clayton Act speaks of effect of arrangements which may substantially lessen competition or tend to create a monopoly.⁷⁵

In creating the Clayton Act, Congress's policy intent was to reach conduct that is outside the parameters of the Sherman Act, but which Congress still deemed to substantially threaten interstate commerce competition.⁷⁶ In order to bypass the rule of reason analysis in the Sherman Act, Congress specifically included the words "where the effect may be to substantially lessen competition or tend to create a monopoly," thereby establishing a lower threshold for violations of the Clayton Act as compared to the Sherman Act.⁷⁷ Procedurally, the Clayton Act empowers private parties injured by violations of the Act to sue for treble damages under Section 4 of the Act and injunctive relief under Section 16 of the Act. On March 10, 2010, Plaintiffs filed an amended class action complaint to allege federal law violations of the Clayton Act as well.⁷⁸

E. Plaintiff's Antitrust Prima Facie Case

1. Standing

A plaintiff must have Article III and antitrust standing to sue under the Sherman Act. In order to have Article III standing, a plaintiff must demonstrate that (1) he or she suffered a concrete particular injury; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury will likely be redressed by a favorable decision.⁷⁹ Additionally, a plaintiff asserting the antitrust claim must have antitrust standing separate from Article III standing. In order to have antitrust standing, the plaintiff must plead and allege an antitrust injury. An antitrust injury consists of "(1) unlawful conduct; (2) causing an injury to the plaintiff; (3) that flows from that which makes the conduct

75. Offir, *supra* note 42, at 107 (quoting *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1275 (9th Cir. 1975)).

76. *Id.* at 108.

77. *Id.* (quoting Clayton Antitrust Act). Plaintiffs also have the option to bring a cause of action under Section 43(a) Federal Lanham Act, but have not yet done so.

78. Consolidated Amended Class Action Complaint at 14, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, Case No. C 09-10967 CW *available at*: <http://www.scribd.com/doc/28209552/O-Bannon-v-NCAA-Amended-Class-Action-March-10-2010> (last visited Apr. 19, 2010).

79. *O'Bannon*, 2010 WL 445190, at *6.

unlawful; and (4) that is one of the type that antitrust laws were developed to prevent.”⁸⁰

Plaintiffs have Article III and antitrust standing. Plaintiffs allege that Defendants’ actions, in violation of Section 1 of the Sherman Act, have caused them the deprivation of compensation through direct anticompetitive acts traceable to the conduct of Defendants in the collegiate licensing market by entering into an exclusive licensing agreement to monopolize the collegiate video game market. Arguably, by doing so, Defendants have decreased competition and Plaintiffs’ injuries may be redressed by a court of law.

2. Violation of Sherman Antitrust Act, Section 1

Under the rule of reason, the Plaintiffs must demonstrate that the Defendants have enough power within the industry to restrain commercial trade. As previously mentioned, EA Inc. is a multibillion-dollar company whose products account for over half of the share of the video game industry.⁸¹ Furthermore, they have the sole right to exercise the exclusive licensing agreement with the NCAA and CLC.

Under the next step, if market power is found, as it will be found in Plaintiffs’ case, the court may then proceed under the rule of reason analysis to assess the anti-competitive practices of the defendant.⁸² Additionally, a defendant is deemed to have monopoly power in the relevant industry if the defendant has the power to control the prices of the product within the cognizable industry.⁸³ Intent may be inferred if the defendant maintains their anticompetitive business practices in a way that inhibits potential competition.⁸⁴

In the Plaintiff’s case, regardless of whether or not EA Sports is aware of the market power they wield within the video game industry, their ability to control the prices in the industry, by exercising their exclusive licensing agreement with the NCAA, makes them a formidable power in the industry. Consequently, market power and a monopoly will be found to exist.

In order to state a cause of action under Section 1 of the Sherman Act, the plaintiffs “must demonstrate: (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reasoning analysis; and (3) that the restrain(t) affected interstate commerce.”⁸⁵

With regard to element one, Plaintiffs allege that the NCAA is a bottom up organization run by its members under the rules and constitution of the NCAA.

80. *Id.* (quoting *Glen Holly Entm’t v. Tektronix Inc.*, 352 F.3d 367, 372 (9th Cir. 2003)).

81. Motion to Dismiss, *supra* note 7.

82. *Offir*, *supra* note 42, at 104.

83. *Id.* See ELECTRONIC ARTS INC., NOTICE OF 2005 ANNUAL MEETING PROXY STATEMENT AND 2005 ANNUAL REPORT 3 (2005) (during the fiscal year of 2005, EA Sports controlled 63 percent of the sports video game market).

84. *Id.* at 106. See also Michael Gerton, *Kids’ Play: Examining the Impact of the CBC Distribution Decision on College Fantasy Sports*, 11 TEX. REV. ENT. & SPORTS L. 153 (2009).

85. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001) (quoting *Hairston v. Pac 10 Conference*, 101 F.3d 1315, 1318 (9th Cir. 1996)).

Additionally, Form 08-3a and Article 3.2.4.6 of the NCAA constitution mandate that each member will annually have student athletes sign Form 08-3a.⁸⁶ These allegations adequately support an inference that there is an agreement among the NCAA and its members to administer the same rules on an annual basis.⁸⁷

As to element two, the Sherman Act prevents only unreasonable restraints on trade. To determine whether an alleged restraint is unreasonable, a court may employ a rule of reasoning analysis, or a per se rule of illegality if the facts are so clear and anticompetitive on their face that no further inquiry is needed.⁸⁸ Under a rule of reason analysis, a restraint is unreasonable “if the restraint’s harm to competition outweighs its procompetitive effects.”⁸⁹ The rule of reason imposes an initial burden on the plaintiffs to show that restraint produces significant and unreasonable anticompetitive effects in the relevant marketplace.⁹⁰ Plaintiffs identify the relevant market as the collegiate licensing market and that the Defendants, specifically the CLC, manage more than seventy-five percent of the relevant marketplace.⁹¹ Additionally, Plaintiffs plead that because of monopolization and anticompetitive acts by Defendants, Plaintiffs are excluded from the market by the Defendants and overall, decrease the number of competitors in the market in violation of federal antitrust law.

Accordingly, under a rule of reason analysis, Plaintiffs plead sufficient facts mentioned above to establish a prima facie case that Defendants violated Section 1 of the Sherman Antitrust Act by unreasonably restraining commercial trade in the collegiate video game industry.

IV. RIGHT OF PUBLICITY

A. Background

In 1878, Judge Thomas M. Cooley first discussed the tort of right of publicity, and coined the phrase the “right to be let alone.”⁹² In 1890, Samuel D. Warren and Louis D. Brandeis took Judge Cooley’s lead and produced the first extensive law review article discussing the tort law called the right of publicity.⁹³ Warren and Brandeis’ article dealt with an individual’s right to be left alone, as opposed to the commercial exploitation of a person’s likeness, which today we think of as the “right of publicity.” However, as time progressed and commercial transactions became more prevalent in society, consequentially involving the use of

86. NCAA Manual, *supra* note 2, at 9.

87. Plaintiffs also plead agreements among the NCAA, CLC, and EA Sports were made in an effort to control the licenses and distribution of college athletes’ images and these agreements were brokered by the CLC for the benefit of the NCAA and exclusive distributors that do not compensate the plaintiffs.

88. *O’Banion*, 2010 WL 445190, at *4.

89. *Tanaka*, 252. F.3d at 1063.

90. *Id.*

91. *O’Banion*, 2010 WL 445190 at *5.

92. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT, 192 (Callaghan & Co. 1878).

93. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

professional and collegiate athletes' likenesses, so did the right of publicity transform and evolve to cover new areas of protections.⁹⁴

B. Modern Day Misappropriation of Likeness

In 1960, William L. Prosser wrote an influential article that would cement the law of the right of publicity into legal jurisprudence.⁹⁵ Prosser described the tort of right of publicity not just as a single tort, collectively named the right of publicity, but rather as a set of four different, complex torts, which combined collectively to make up the tort of the right of publicity as we know it today.⁹⁶

Prosser defined these four distinct invasions of the right of publicity under the following umbrella:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
2. Public disclosure of embarrassing private facts about the plaintiff;
3. Publicity which places the plaintiff in a false light in the public eye;
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.⁹⁷

Regarding the first three privacy torts, the torts of intrusion upon plaintiff's seclusion, public disclosure of embarrassing facts, and publicity, which places the

94. The history and transformation of the right of publicity law is beyond the scope of this article. However, in an effort to practice brevity, while also exercising thoroughness, the seminal cases evolving the right of publicity from a tort law of privacy to include a tort of misappropriation of likeness can be seen from the following cases: (1) *Halean Laboratories v. Topps Chewing Gum*, 202 F.2d 866 (2d. Cir. 1953) (holding public figures could receive money from authorized advertisements, and from other advertisements not authorized as well); (2) *Motschenbacher v. RJ Reynolds*, 498 F.2d 821 (9th Cir. 1974) (holding that even though defendant's significantly altered plaintiff's images, the images were still identifiable and hence misappropriated); (3) *Ali v. Playgirl*, 447 F. Supp 723 (SDNY 1978) (holding a nude drawing that resembled the facial characteristics of boxer Muhammad Ali amounted to wrongful appropriation of his likeness for commercial value); (4) *Carson v. Here's Johnny Portable Toilets*, 698 F.2d 831 (6th Cir. 1983) (holding that a public figure or celebrity's right of publicity is invaded wherever his identity is intentionally appropriated for commercial purposes, even by using identifying characteristics of the plaintiff, such as a catch phrase); (5) *White v. Samsung Elec. Am.*, 989 F.2d 1512 (9th Cir. 1993) (holding that a robot that resembled Vanna White, under the totality of the circumstances, infringed upon her right to publicity); (6) *Montana v. San Jose Mercury News*, 34 Cal. App. 4th 790 (2001) (holding that news worthy articles or pictures are protected under the protection of the First Amendment); and (7) *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (2001) (holding Major League Baseball's posting of pictures of Major League Baseball players was protected speech as the MLB did not sell a product).

95. Anastasios Kaburakis ET AL, *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry*, 27 ENT. & SPORTS LAW. 1, 20 (Summer, 2009) [hereinafter Kaburakis].

96. *Id.*; see also Michael P. Acain, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307 (1998).

97. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

plaintiff in a false light, the damage is largely mental and personal to the victim.⁹⁸ However, the fourth tort of appropriation, appropriation of the plaintiff's name or likeness for the defendant's advantage, involves a plaintiff's interest in property and is the commercial tort of the right of publicity which has taken the secluded right of publicity out of the private arena and into the arena of commercial transactions. This fourth tort is the right of publicity tort in which the Plaintiffs have brought their cause of action upon.

Today, the right of publicity has become accepted as the inherent right of a person to control the commercial value, sale and use of one's likeness and identity in the commercial marketplace.⁹⁹ The first and only right of publicity case to make it to the United States Supreme Court was *Zachini v. Scripps-Howard Broad Co.*¹⁰⁰ In *Zachini*, the Court held that the rationale for protecting the right of publicity is the straightforward rationale of preventing unjust enrichment by the theft of one's likeness.¹⁰¹ The court went on to state, in dicta, that no public policy or goodwill would be served by allowing the defendant to freely obtain some aspect of the plaintiff that would have commercial market value and for which consumers would ordinarily pay for the rights to own.¹⁰²

Additionally, the right of publicity may be found in the Restatement (Third) of Unfair Competition within Section 46. In said section, the right of publicity is defined as:

One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules state(d) in [sections] 48 and 49.¹⁰³

It is worth noting the broad interpretation under Section 46 of the Restatement (Third) of Unfair Competition allows plaintiffs to sue if the defendant's use encompassed a variety of indicia of the plaintiffs' identities, thus violating the plaintiffs' right of publicity.¹⁰⁴ Accordingly, Plaintiffs only have to show that their overall identities had been misappropriated in EA Sports' video games, and do not need to prove that their names (which is not a factor) or likenesses were used without their permission.

98. Hanlon & Yasser, *supra* note 3, at 259 (citing Prosser, *supra* note 97, at 406).

99. Kaburakis, *supra* note 95, at 21.

100. 433 U.S. 562, 576 (1977) (quoting Harry Kalven, Jr., *Privacy in Tort Law – Were Warren and Brandeis Wrong?* 31 LAW & CONTEMP. PROBS. 326, 331 (1966)).

101. *Id.*

102. *Id.*; see also Peter C. Carstensen & Paul Olszowka, *Antitrust Law, Student-Athletes, and the NCAA: Limiting the Scope and Conduct of Private Economic Regulation*, 1995 WIS. L. REV. 545 (1995).

103. Kaburakis, *supra* note 95, at 20.

104. See *Haelan Laboratories, Inc. v. Topps Chewing Gum*, 202 F.2d 866, 868 (2d Cir. 1953) (holding that the right of publicity gives a celebrity the right to damages and other relief for unauthorized commercial appropriation of that celebrity's photograph, independent of a common law or statutory right of privacy).

C. Plaintiffs' Prima Facie Case Under State Law Right of Publicity

Applying the Plaintiffs' facts to the Restatement (Third) of Unfair Competition elements, the Plaintiffs must prove the following:

1. The NCAA and EA Sports used the Plaintiffs' identity or likeness;
2. The Plaintiffs' identities have commercial value;¹⁰⁵
3. There was an appropriation of commercial value by the NCAA and EA Sports for the purposes of commercial trade;
4. There was no consent given by the Plaintiffs; and
5. Plaintiffs have been damaged resulting in commercial injury.¹⁰⁶

Based upon the above elements, the Plaintiffs have a cause of action against the NCAA and EA Sports for violation of their right of publicity. First, there is no dispute that EA Sports has manufactured NCAA football and basketball video games. Whether the video games portrayal of Keller and O'Bannon are substantial enough to warrant infringement of the right of publicity is a question of fact for a jury to decide, but nonetheless strong enough to get to trial on the issue. However, in the complaints filed by Plaintiffs state EA Sports video games identically depict them on their corresponding school teams with the same numbers, and other identifiable indicia that they wore during their playing days.¹⁰⁷

Secondly, Plaintiffs played for national universities in the two sports that generate the highest amount of revenue and the most publicity for their respective schools. A quick search on the internet brings up a picture of O'Bannon cutting down the basketball net in UCLA's 1995 national championship game.¹⁰⁸

Thirdly, as mentioned *supra*, NCAA collegiate sports is a multi-billion dollar a year business and EA Sports has arguably misappropriated Plaintiffs' commercial value for purposes of trade. Included in this accounting are the millions of dollars that EA Sports generates yearly selling its video games.¹⁰⁹

Fourthly, as the suit makes clear, there was no *implicit* consent given by Plaintiffs for the use of their images. Form 08-3a 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

105. The identity must have value before the contested litigation and its association with the manufacturer. *Pesina v. Midway Mfg. Co.*, 948 F. Supp. 40 (N.D. Ill. 1996).

106. Kaburakis, *supra* note 95, at 24.

107. *O'Bannon*, 2010 WL 445190, at *6.

108. See McCann *supra* note 23.

109. In 2005, EA Sports had a stock market value of over 16 billion dollars. David Whelan, *Name Recognition*, FORBES.COM, June 20, 2005, <http://www.forbes.com/forbes/2005/0620/113.html>.

NCAA championships or other NCAA events, activities, or programs.”¹¹⁰ Looking to the text of the form, Form 08-3a must be signed by the student athlete each year. Additionally, the Form’s ambiguous wording does not state that the NCAA student athlete releases his image or likeness for perpetuity. In light of this, Plaintiffs should argue that even if Form 08-3a is not unconscionable as a contract of adhesion, Form 08-3a only applies on an annual basis, as it requires a student athlete’s signature annually. Accordingly, once the student athlete leaves the NCAA, it does not follow that the student athlete’s image or likeness is still owned by the NCAA. The former student athlete never signed another annual Form 08-3a after leaving college, and hence, should now own any use of his or her likeness by the NCAA once the student athlete has left NCAA jurisdiction. However, this element of consent will be a passionately contested issue, and will be discussed, *infra*, with regard to the NCAA’s response under contract law.

Lastly, it is quite clear Plaintiffs (and all former collegiate student athletes) are missing out on their piece of the pie of a commercial sales industry worth billions of dollars per year. One of the main NCAA principles is “student athletes . . . should be protected from exploitation by professional and commercial enterprises.”¹¹¹ Ironically, in this regard, the NCAA receives a windfall and unjustly enriches themselves at the cost of student athletes by allowing the identity of nationally recognized schools, and their players, to be imputatively exploited in the commercial marketplace without implicit consent, resulting in pecuniary injury to the collegiate athlete.

V. THE NCAA AND EA SPORTS RESPOND

A. Law of Contracts

On February 8, 2010, the United States District Court for the Northern District of California denied in part the NCAA and EA Sports’ motion to dismiss the Complaint. With the Complaint now past the 12(b)(6)¹¹² motion to dismiss stage, the NCAA and EA Sports will get the chance to argue their case on the merits.

In Dean Prosser’s now famous law review article, he recognized that a defendant’s chief affirmative defense is the plaintiff’s consent to the invasion, and this consent will effectively bar the plaintiff’s recovery of any judicial action or remedies in law or equity.¹¹³ The NCAA and EA Sports will assert that Plaintiffs waived their right of publicity, granting the NCAA exclusive rights to license and control the image and likenesses of Plaintiffs by signing Form 08-3a.

110. NCAA, Form 08-3(a) Academic Year 2008-09, *available at* http://www.ukathletics.com/doc_lib/compliance/0809_sa_statement.pdf.

111. Hanlon & Yasser, *supra* note 3, at 276 (quoting 2006-07 NCAA Division I Manual, art. 2.9, at 5 (2006) (purporting to protect amateur athletes from exploitation)).

112. The Civil Procedure Federal Rule 12(b)(6) motion is a motion which alleges that the plaintiff has failed to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6), *available at* <http://www.law.cornell.edu/rules/frcp/Rule12.htm> (last visited on Apr. 19, 2010).

113. Prosser, *supra* note 97.

“A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”¹¹⁴ Additionally, in most instances, a contract may not be enforced without the presence of a bargained for legal consideration or detriment. A contract of adhesion is defined as “a standard form contract prepared by one party, to be signed by the party in a weaker position . . . who adheres to the contract with little choice about the terms.”¹¹⁵ Often a standardized, boilerplate contract, such as Form 08-3a, can create an inequitable situation where one party may impose terms on the other party who may have a decreased bargaining position with little or no power. However, it is worth noting that adhesion contracts will not automatically be considered unconscionable, and not all unconscionable contracts are considered contracts of adhesion.¹¹⁶

1. The Doctrine of Unconscionability

The Uniform Commercial Code (U.C.C.) section 2-302 recognizes the doctrine of unconscionability and further states that if a contract is found to be unconscionable, it is unenforceable as a matter of law.¹¹⁷ However, technically, the U.C.C. only applies to the sale of goods in the commercial marketplace. As a result, the Restatement (Second) of Contracts, section 208, reflects the U.C.C. provision of section 2-302 by applying these principles to all contracts. “The basic test [to determine unconscionability] is whether, in light of the general commercial background and the commercial needs to the particular trade or case, the term or contract involved is so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”¹¹⁸ Additionally, as set forth in *Williams v. Walker-Thomas Furniture Co.*,¹¹⁹ there is a two-part test stating that a finding of unconscionability requires a finding of both procedural and substantive unconscionability.¹²⁰ Procedural unconscionability considers whether there was an absence of meaningful choice for one of the parties and whether the party in the weaker position was oppressed and surprised by the terms of the contract.¹²¹ The second element, substantive unconscionability, focuses on the actual terms of the contract and whether those terms unreasonably favor one of the parties of the contract while considering if the terms of the contract are contrary to public policy.¹²²

114. Hanlon & Yasser, *supra* note 3, at 277-78. (quoting RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

115. *Id.* at 285 (quoting BLACK’S LAW DICTIONARY 342 (8th ed. 2004).

116. *Id.* at 287; see also Virginia A. Fitt, *The NCAA’s Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555 (2009).

117. U.C.C. § 2-302. (1998).

118. Hanlon & Yasser, *supra* note 3, at 288 (quoting U.C.C. § 2-302(2) (1998)).

119. 350 F.2d 445 (D.C. Cir. 1965).

120. *Id.* at 450.

121. In many cases, meaningful choice may be negated by a gross inequality in bargaining power. Hanlon & Yasser, *supra* note 3, at 290.

122. *Id.*

2. Unconscionability Doctrine Applied to Plaintiff's Claim and Form 08-3a

Plaintiffs bear the burden of proving both procedural and substantive unconscionability before a court will find a contract, such as Form 08-3a, an unconscionable contract of adhesion and therefore unenforceable as a matter of law. Specifically, the Plaintiff must show that (1) an inequality of bargaining power exists between the NCAA and the student athlete; (2) there is a lack of meaningful choice by the student athlete; (3) supposedly agreed upon terms in the contract; and (4) terms that are unreasonably favorable to the institution.¹²³

i. Procedural Unconscionability

Form 08-3a is oppressive because there is no meaningful choice for the student athlete. If the student athlete wants to participate in NCAA sanctioned events, the student athlete must sign Form 08-3a on an annual basis. Form 08-3a will also be viewed as oppressive by the courts because of the gross inequality of bargaining power between a multi-billion dollar institution that has prepared Form 08-3a in advance and an arguably unsophisticated young person who has signed the form without the advice of counsel. As a result, Plaintiffs will allege that Form 08-3a is a contract of adhesion since the form was signed by an unsophisticated student who did not know the full ramifications and consequences of a contract which releases all future rights of publicity in perpetuity, and ultimately, permits the exploitation of his or her identity.¹²⁴

ii. Substantive Unconscionability

Form 08-3a is substantively unconscionable because it is one-sided, overly harsh, and “the sum total of its contractual terms drives too hard a bargain” against the student athlete.¹²⁵ NCAA rule 12.01.1 provides that only student athletes will be eligible for athletic participation and student athletes may not participate in NCAA sanctioned athletics without an annually signed Form 08-3a. In sum, if the student athlete refuses to sign Form 08-3a, he or she will be ineligible to participate in intercollegiate NCAA sanctioned events, arguably losing his or her scholarship and the educational benefits that derive therefrom (which may also bring up constitutional issues beyond the scope of this article).¹²⁶

123. *Id.* at 291; see also Vladimir P. Belo, *The Shirts off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133 (1996).

124. “A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law is some way recognizes as a duty.” Hanlon & Yasser, *supra* note 3, at 277-78 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981)). A contract of adhesion is defined as “a standard form contract prepared by one party, to be signed by the party in a weaker position ... who adheres to the contract with little choice about the terms.” *Id.* at 285.

125. *Id.* at 294 (quoting *United Companies Lending Corp. v. Sargeant*, 20 F. Supp. 2d 192, 206 (D. Mass. 1998)).

126. It is worth noting that NCAA rule 12.5.1.1(h) states “any commercial items with names, likeness or pictures of the multiple student athletes ... may be sold only at the member institution at which the student-athlete is enrolled ... Items that include an individual student-athlete’s name, picture or lines ... may not be sold.” Under

3. NCAA and EA Sports Respond

The NCAA and EA Sports will argue that when the student athlete signs Form 08-3a, the student athlete agrees to abide by all of the NCAA's regulations set forth in the contract and in the NCAA Manual and Rules.¹²⁷ In particular, the NCAA Manual states only a NCAA amateur student athlete will be eligible for intercollegiate athletics and said athlete will lose such amateur status upon accepting payment in connection with advertisement, promotion, and sale of commercial products.¹²⁸ The reasoning behind this policy argument, and Form 08-3a, is that the NCAA has an ethical duty to preserve and protect amateurism and Form 08-3a accomplishes this task under a rule of reason analysis.

B. First Amendment Protections v. Right of Publicity Exploitation

Discussed more fully, *supra*, EA Sports will likely argue that since it does not provide third-party consumers with direct access to a student athlete's name, images, or likeness through their video games, there is no violation of right of publicity laws. However, a caveat to this is that EA Sports allows third-party consumers to download student athletes' names, which then go on the back of their interactive video game jerseys. To go even further, EA Sports contracts with announcers to use these names when the downloaded rosters have been implemented into the video game.

To take a current example, a look at Tim Tebow from the University of Florida is illustrative of this ability. As if the height, weight, and image were not identifying enough, before the downloadable rosters are implemented, when Tebow drops back for a pass, the announcer of the video game would say, "Number 15 drops back for a pass." However, once downloadable rosters are implemented, the announcer now says "Tebow drops back for a pass." This facet takes the identification of the supposed "unidentified" player into the arena of obvious likeness and characteristic infringement. As a result of the foregoing, Plaintiffs will likely be able to meet their burden and establish a cause of action under the right of publicity misappropriation, but not before their claim is balanced against First Amendment protections.

The Supreme Court of the United States has mandated that a state of law right of publicity claim must be balanced against the protections and rustications of the First Amendment.¹²⁹ There is a constant tension between the First Amendment's goal of fostering and cultivating ideas, and the respect and protectionism of a

this reading, the virtual likeness of the student athletes depicted in the EA Sports video games would constitute a finding that EA Sports, who has been officially and exclusively licensed by the NCAA, has commercially exploited student athletes' likenesses without their consent. NCAA Manual, *supra* note 2, at art 12.5.1.1(h).

127. Hanlon & Yasser, *supra* note 3, at 275.

128. NCAA Manual, *supra* note 2, at art. 12.5.2.1.

129. Zacchini, v. Scripps-Howard Broad., 433 U.S. 562, 567 (1977).

public figure's image or likeness.¹³⁰ In determining whether an image or likeness is constitutionally protected, courts will consider "whether an intent to convey a particularized message is present, and whether the likelihood is great that the message would be understood by those who viewed it."¹³¹ During the last decade, First Amendment jurisprudence has expanded significantly to cover video games¹³² and courts have categorically held that interactive video games have protection under the First Amendment.¹³³ Recently, courts have also looked deeply within video games and have determined that the substantial creativity and expressive work within them falls within the parameters of First Amendment protections as well.¹³⁴

However, many of the First Amendment protections afforded to video games deal with professional athletes and their claims that their right of publicity laws have been violated. Most notably, in *Cardtoons L.C. v. Major League Baseball Players Association*,¹³⁵ the Tenth Circuit noted professional athletes make a handsome living playing a sport they love and that they engage in activities that generate significant amounts of income. Accordingly, the use of their name and likenesses do not impair the athlete's ability to earn a living. However, a stark distinction may be made with regards to NCAA amateur student athletes. As mentioned prior, the NCAA's stated goal is to preserve amateurism and, thus avoid paying student athletes. In this regard, the fact that student athletes are not paid may actually work in favor of the Plaintiffs' claim that the student athlete is entitled to a stricter right of publicity protection. As a result, student athletes have a strong claim that their images and likenesses have been misappropriated to such a degree as to restrict them from bearing the fruits of their achievements and their right to profit from their endeavors long after they have left the NCAA and collegiate athletics. EA Sports, though, will likely argue that student athletes benefit from and enjoy having their likenesses and even names on their worldwide selling video games.

Lastly, it is worth noting that in addition to First Amendment preemption, the Commerce Clause and the dormant Copyright Clause arguably contradict the right of publicity scope extension¹³⁶ and at the time of this article's writing, there is no case on the books that directly deals with an NCAA's student athlete right of publicity balanced against the First Amendment protections.

130. 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, 668 (2009).

131. *Id.* at 668-69 (quoting *Nordyke v. King*, 319 F.3d 1185, 1189 (9th Cir. 2003), *reh'g en banc denied*, 364 F.3d 1025 (9th Cir. 2004)).

132. *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180 (W.D. Wash. 2004).

133. *Smith v. California*, 361 U.S. 147 (1959).

134. *Romantics v. Activision Publ'g Inc.*, 574 F. Supp. 2d 758, 765-66. (E.D. Mich. 2008.); *see also* *E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 444 F. Supp. 2d 1012 (C.D. Cal. 2006).

135. 208 F.3d 885 (10th Cir. 2000).

136. U.S. CONST. art. I § 8, cl. 3 (the Commerce Clause gives Congress the power to "regulate Commerce ... among the several states."); *see also* cl. 8 (the Copyright Clause gives Congress the power "to promote the Progress of ... useful Arts.").

VI. REMEDIES

The remedies Plaintiffs may seek include monetary relief, disgorgement of profits from the wrongful use of putative class members' images, and a permanent injunction prohibiting Defendants from using former student athletes' images without valid consent.¹³⁷ In reality, EA Sports releases a new edition of these games each year, and the older games rarely sell; therefore, it is plausible to state that the Plaintiffs will opt for the damages remedy option and ask for an accounting of EA Sports' profits over the years that EA Sports has sold the video games.¹³⁸ If able to prevail in court, Plaintiffs will be entitled to monetary relief in the amount of EA Sports' revenue and gain.¹³⁹ Additionally, if Plaintiffs can prove that EA Sports was put on notice of this exploitation, or acted in an intentional or willful disregard, Plaintiffs may be entitled to punitive damages as well. The remedies offered in antitrust cases are designed to protect the market from anti-competitive practices, thereby attempting to ensure that the monopolization conduct is prohibited in the future.¹⁴⁰ As can be seen from *U.S. v. Microsoft*,¹⁴¹ the remedies in an antitrust violation case may include employing procompetitive practices into the market place, terminating illegal monopolies, and denying the defendant the fruits of antitrust violating practices.¹⁴²

VII. CONCLUSION

Student athletes possess both common law and statutory rights of publicity, and these rights should be defended in court. EA Sports is the dominate player in the video game industry and engages in exclusive agreements which depress competition in violation of federal antitrust laws. There is a clear absence in the NCAA constitution and bylaws that needs to be addressed regarding today's modern technological and integrative world of interactive video gaming. When this case proceeds to trial, a hotly contested issue will be Form 08-3a, which allegedly gives consent to the NCAA and EA Sports to use the student athlete's name and likeness in perpetuity. In response, Plaintiffs will submit to the aforementioned arguments of federal antitrust law under Section 1 of the Sherman Antitrust Act, contract law pertaining to adhesion contracts of unconscionability, and a violation of right of publicity laws for commercial gain.

The current state of antitrust jurisprudence, as it relates to the NCAA and student athletes, is unsound and in need of repair. Judicial failure to recognize this

137. *O'Bannon*, 2010 WL 445190, at *2.

138. Plaintiffs are also asking for injunctive relief to stop the NCAA and EA Sports from further violating antitrust and right of publicity laws in the future. Additionally, as mentioned, *supra*, O'Bannon is also asking for damages and royalty accountings from the television broadcasts of the 1995 UCLA NCAA National Championship basketball game, and memorabilia sold in connection therein.

139. Hanlon & Yasser, *supra* note 3, at 276. (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 (1995)).

140. Offir, *supra* note 42, at 92.

141. 87 F. Supp. 2d 30 (D.C. Cir. 2000).

142. 231 F. Supp. 2d 144 (D.C. Cir. 2002).

true monopolization by exclusive agreements between the NCAA and third-parties will result in a windfall and unjust enrichment for the NCAA, its member schools, along with EA Sports; while student athletes, of which the whole NCAA foundation is built upon, are left out in the cold.¹⁴³ The NCAA and its exclusive license agreements should not be permitted to use a student athlete's identity, image, or likeness without the student athlete's consent when the likeness is used for commercial gain in the marketplace. Federal courts should apply a rule of reason analysis to alleged Sherman Act violations by the NCAA particularly as it relates to the exclusive licensing agreement with EA Sports. The NCAA bylaws are inequitable to student athletes by unfairly allowing the NCAA and private companies such as EA Sports to exploit student athletes for monetary gain. It is time the NCAA realizes this and creates trust funds for future collegiate athletes once they leave the cell-like parameters of the NCAA's constitution. Until the NCAA changes its ways, many student athletes will have future claims of unjust enrichment and right of publicity causes of action against the NCAA.¹⁴⁴ Alternatively, the NCAA should assert a new position that third-parties such as EA Sports should not be permitted to profit off the images and likenesses of student athletes.

If and when Plaintiffs prevail, there will be a catastrophic effect on EA Sports video games and the games' interactive players. EA Sports will be unable to enter into exclusive licensing agreements, thereby opening the doors for competition in the relevant marketplace. The interactive video game avatars will be substantially scaled back to not encroach upon the student athletes' likenesses without their permission. More importantly, and of consequence to the NCAA, the NCAA could be required to pay hundreds of millions of dollars in damages since damages are trebled under federal antitrust law.

143. Kaburakis, *supra* note 95, at 32.

144. *Id.*