ONE SHINING MOMENT TO A DARK UNKNOWN FUTURE: HOW THE EVOLUTION OF THE RIGHT OF PUBLICITY HAMMERS HOME THE FINAL NAIL IN THE NCAA'S ARGUMENT ON AMATEURISM IN COLLEGIATE ATHLETICS

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I. INTRODUCTION

On the night of March 26, 1979, a truly momentous event captured the imagination of Americans and unexpectedly forced its way into millions of homes nationwide.[1] This television occasion failed to involve royalty, politicians, or even a critically-acclaimed scripted television program, but instead focused the spotlight onto a couple dozen college students.[2] Taking place in Salt Lake City, Utah, basketball teams representing Michigan State University and Indiana State University, featuring two players not yet known simply as "Magic"[3] and "Larry Legend,"[4] squared off for the 1979

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[1] *See* Scott Taylor, *25th Anniversary: 1979 Final Four*, DESERET NEWS (Mar. 26, 2004), http://www.deseretnews.com/article/595051666/25th-Anniversary-1979-Final-Four.html?pg=all; *see also* Mike Lupica, *The First Real March Madness Was Magic vs. Bird in 1979*, N.Y. DAILY NEWS (Mar. 26, 2015), http://www.nydailynews.com/sports/college/lupica-march-bird-magic-started-madness-article-1.2152131 (describing the momentous game).

[2] *See* Lupica, *supra* note 1.

[3] Elected to the Naismith Memorial Basketball Hall of Fame in 2002, Earvin "Magic" Johnson went on to become one of the greatest National Basketball Association ("NBA") players of all time after leaving Michigan State following the 1979 season. *See Magic Johnson Bio*, NBA ENCYCLOPEDIA, http://www.nba.com/history/players/johnsonm_bio.html (last visited Nov. 7, 2016). Leader of the famous Showtime Lakers of the 1980s, Magic won five NBA championships and three regular season Most Valuable Player awards while also being named one of the members of the 1992 gold-medal-winning USA men's basketball team, known as "The Dream Team." *See id.*

[4] Named to the Basketball Hall of Fame in 1998, Larry Bird won three regular season Most Valuable Player awards during his NBA career along with three NBA championships. *See Larry Bird Bio*, NBA ENCYCLOPEDIA, http://www.nba.com/history/players/bird_bio.html (last visited Nov. 7, 2016). A teammate of Magic's on the 1992 Summer Olympics Dream Team, Bird and Magic helped revitalize the NBA during the 1980s by continuing their rivalry that began with the 1979 NCAA Men's Championship. *See id.*

NCAA[5] Division I Men's Basketball Championship.[6] Broadcast live on NBC, the finale of the 1979 NCAA Men's Final Four saw a twenty percent increase in viewership over the previous year's championship game and managed to garner forty million pairs of eyes in eighteen million different homes even though the Spartans of Michigan State spent a majority of the second half leading by double-digits.[7] While NCAA Tournaments and Final Fours since 1979 have managed to attain higher viewership ratings due to a widespread increase in both population and television sets throughout the United States,[8] no NCAA basketball championship game has since come close to the television ratings and viewership share of the 1979 championship game.[9]

Believe it or not, despite the fact that the phenomenon today known as "March Madness"[10] captivates the hearts and minds of millions of Americans each spring, the last two games of the Division I Men's Basketball Tournament were not referred to as the "Final Four" until attributed as such in the NCAA's *1975 Official Collegiate Basketball Guide*.[11] To top it off, the first time that the phrase "Final Four" was even capitalized occurred in the 1978 NCAA media guide.[12] Jumpstarted by the 1979 Division I Men's Basketball Championship between Michigan State and Indiana State, the concept known as March Madness experienced an absolute explosion in popularity over the ensuing decades.[13]

[5] Founded in 1906, the National Collegiate Athletic Association ("NCAA") is an organization of more than one thousand colleges and universities from around the country that governs and provides rules for its member schools, conferences, and student-athletes across three different divisions, Division I being the most financially viable and visible to the general public. *See College Athletics—The National Collegiate Athletic Association*, ST. U., http://education.stateuniversity.com/pages/1851/College-Athletics-National-Collegiate-Athletic-Association.html (last visited Nov. 7, 2016).

[6] *See* Taylor, *supra* note 1.

[7] *See id.*

[8] *See id.*

[9] *See id.* The 1979 championship matchup between Michigan State and Indiana State received "a 24.1 rating and 38 share (one rating point is the equivalent of [one] percent of the homes and [one] share is the equivalent of [one] percent of the homes watching television at the time)." *Id.*

[10] *See* Tim Bannon, *The Illinois Man Who Coined 'March Madness,'* CHI. TRIBUNE (Mar. 14, 2015), http://www.chicagotribune.com/sports/college/ct-flashback-march-madness-spt-0315-20150314-story.html (describing the origins and history of the term).

[11] *See* Mike Douchant, *March Madness: Growth of NCAA Tournament*, NAT'L ASS'N BASKETBALL COACHES (Mar. 11, 2003), http://www.nabc.org/sports/m-baskbl/spec-rel/031103aaa.html.

[12] *See id.*

[13] *See* Michael Wilbon, *Bird vs. Magic 1979 NCAA Championship Game Launched March Madness*, WASH. POST (Mar. 26, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/03/25/AR2009032502310.html.

Following this groundbreaking television event featuring little-known collegiate athletes, the NCAA tournament field rapidly expanded from forty to forty-eight teams in 1980 and then again to sixty-four teams in 1985.[14]

Together with the increase in both popularity and the amount of tournament-bound teams, the rights fees charged by the NCAA to allow networks to broadcast the event on television also jumped from a mere $5.2 million in 1979 to $96 million by 1985.[15] As more people glued their eyes to the television to watch a basketball tournament quickly growing into a month-long national event and more money poured into the NCAA's coffers, broadcast rights fees continued to skyrocket and the NCAA decided to move its Final Four from basketball arenas to football stadiums full-time after 1996 to allow for ticket sales to double and eventually triple.[16]

Eventually, a growing number of student-athletes began to question the ethical implications of the NCAA's refusal to share an expanding windfall with the players. In July 2009, former UCLA Bruin Ed O'Bannon[17] shined a glaring spotlight on the NCAA's not-for-profit business model by filing suit against the NCAA and the Collegiate Licensing Company ("CLC")[18] in the Northern District of California.[19] O'Bannon alleged in his suit that the NCAA engaged

[14] *See id.*

[15] *See id.*

[16] *See* Mitch Lawrence, *The NCAA Final Four: In Cavernous Football Stadium, Shooters May Meet Their Doom*, FORBES (Apr. 3, 2015), http://www.forbes.com/sites/mitchlawrence/2015/04/03/the-ncaa-final-four-kentucky-shooters-beware-the-road-ends-in-a-football-stadium/#5fb7c948509f. While this move to domed stadiums has allowed the NCAA to sell thousands more in tickets, twenty years of evidence shows that college basketball players tend to suffer extremely poor shooting slumps more often than not when subjected to playing away from traditional basketball arenas. *See, e.g.*, *id.* While nothing has been conclusively proven, one prevailing theory is that the different depth dimensions of the crowd and stands offered by domes adversely affects the players' sight lines while shooting. *See id.*

[17] O'Bannon starred for the UCLA Bruins during the mid-1990s and led his team to the school's eleventh national championship in 1995. *See Top 10 Top College Players Who Failed in the Pros: Ed O'Bannon*, REAL CLEAR SPORTS (May 17, 2013), http://www.realclearsports.com/lists/college_players_failed_in_nba/ed_obannon_ucla_html. O'Bannon followed up his college career with being drafted by the NBA's New Jersey Nets, but O'Bannon failed to reach his potential as a professional player due to a series of injuries. *Id.*

[18] Founded in 1981, the CLC was originally started to help represent legendary Alabama football coach Paul "Bear" Bryant with a licensing deal and later grew to sign around two hundred different schools along with bowl games, athletic conferences, and the NCAA itself. *See About CLC: Connecting Passionate Fans to College Brands*, COLLEGIATE LICENSING CO., https://www.clc.com/About-CLC.aspx (last visited Nov. 12, 2016). Today, the CLC controls approximately eighty percent of the market for collegiate licensed merchandise. *See id.*; *see also Money & March Madness: The NCAA Lawsuit*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/money-and-march-madness/ncaa-lawsuit/ (last visited Nov. 6, 2016) (describing the types of merchandise the CLC controls).

[19] *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014); *Money & March Madness*,

in restraint-of-trade tactics which violated the Sherman Antitrust Act and deprived former and current student-athletes of their individual right of publicity.[20] O'Bannon felt spurred on to file this lawsuit after spending time at a friend's house in 2008 when his friend's son showed him an Electronic Arts-produced basketball video game that featured a UCLA player sharing the same former jersey number, handedness, shaved head, and complexion as that of O'Bannon during his UCLA career.[21] In March 2010, the Northern District of California consolidated O'Bannon's lawsuit with that of former University of Nebraska quarterback Sam Keller,[22] who originally levied suit against Electronic Arts ("EA") ("EA Sports")[23] for violating the individual right of publicity of each and every student-athlete to have appeared in an EA Sports video game licensed by the NCAA and the CLC.[24]

Six years after the consolidation of the two suits, the issue of sharing NCAA revenue generated by the effort and likenesses of the NCAA's student-athletes with those same players continues to rage on in the public between staunch opponents on each side. This article will examine and analyze the development of the sports video game licensing craze, the rapid rise in popularity of and revenue earned by NCAA Division I men's basketball and football, the growing emergence of the intellectual property right known as the "right of publicity," and how the right of publicity might finally turn out to be the proverbial wooden stake to the heart of the NCAA's vampirical argument clinging to the history of amateurism

supra note 18.

[20] *See Money & March Madness*, *supra* note 18.

[21] *See* Lee Romney, *Ed O'Bannon Testifies in Lawsuit against NCAA*, L.A. TIMES (June 9, 2014), http://www.latimes.com/sports/sportsnow/la-sp-sn-ed-obannon-ncaa-20140609-story.html.

[22] A cautionary tale on the fragility of young athletes hoping to turn pro, scouting service Rivals.com rated Keller as the ninth best quarterback in the high school class of 2003, but a mix of injuries and bad luck forced Keller to eventually transfer from Arizona State and finish his collegiate football career at the University of Nebraska. *See NU Football Bio: Sam Keller*, NEB. ATHLETICS, http://www.huskers.com/ViewArticle.dbml?ATCLID=866801 (last visited Nov. 12, 2016). Following his college career, Keller signed with and was subsequently cut by the Oakland Raiders. *See* Steve Corkran, *Raiders Sign QB Sam Keller*, EAST BAY TIMES (June 25, 2008), http://www.eastbaytimes.com/2008/06/25/raider-sign-qb-sam-keller/; *Raiders Cut Ex-SRV Star Keller*, EAST BAY TIMES (July 24, 2008), http://www.eastbaytimes.com/2008/07/24/raiders-cut-ex-srv-star-keller/.

[23] *See* Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 U.S. Dist. LEXIS 10719, at *5–9 (N.D. Cal. Feb. 8, 2010).

[24] *See Money & March Madness*, *supra* note 18. Following the consolidation of the *O'Bannon* and *Keller* lawsuits, the case transformed into *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*. *See In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (2013).

and the student-athlete.

II. THE RISE OF SPORTS VIDEO GAMES AND THE ASSOCIATED LICENSING CRAZE

A. The Emergence of Video Games: From a Distraction to a National Obsession

In 1958, an American physicist named William Higinbotham, who helped develop the first nuclear bomb,[25] took his talents to an extremely different stratosphere while employed at Brookhaven National Laboratory.[26] In an effort to liven up the tour of the laboratory for visitors, Higinbotham took several weeks to create an analog computer connected to an oscilloscope[27] with two paddles attached.[28] Entitled *Tennis for Two* by its creator, the game allowed two human players to adjust their paddle dials so as to angle their respective virtual tennis rackets in order to knock the ball back over the center line displayed on the screen in front of the players.[29] Over time, *Tennis for Two* gained recognition both as the first sports video game and perhaps the first video game of all time.[30]

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[25] A physicist by trade, Mr. Higinbotham helped produce electronic components as part of the creation of the first atomic bomb in Los Alamos, New Mexico during World War II and later grew into an outspoken proponent of tightly controlling nuclear weapons worldwide. *See* Ronald Sullivan, *William A. Higinbotham, 84; Helped Build First Atomic Bomb*, N.Y. TIMES (Nov. 15, 1994), http://www.nytimes.com/1994/11/15/obituaries/william-a-higinbotham-84-helped-build-first-atomic-bomb.html.

[26] *See id.* Located in Long Island, New York, Brookhaven National Laboratory "is a multipurpose research institution funded primarily by the U.S. Department of Energy's Office of Science." *About Brookhaven National Laboratory*, BROOKHAVEN NAT'L LABORATORY, https://www.bnl.gov/about/ (last visited Nov. 6, 2016).

[27] *See* Sullivan, *supra* note 25. An oscilloscope is a device that displays readings of an electrical signal in graph forms. *See The Oscilloscope*, UNIV. EVANSVILLE, http://uenics.evansville.edu/~amr63/equipment/scope/oscilloscope.html (last visited Nov. 6, 2016).

[28] *See* Jeremy Reimer, *The Evolution of Gaming: Computers, Consoles, and Arcade*, ARS TECHNICA (Oct. 10, 2005), http://arstechnica.com/features/2005/10/gaming-evolution/2/.

[29] *See id.* While the game possessed no internal scoring system and was extremely primitive compared to what would come afterwards, *Tennis for Two* nonetheless "represented the first time an action game with an electronic display had been demonstrated" for public use. *Id.*

[30] *See* DANIELLE SARVER COOMBS & BOB BATCHELOR, AMERICAN HISTORY THROUGH AMERICAN SPORTS: FROM COLONIAL LACROSSE TO EXTREME SPORTS 79 (2013). There remains debate on which game actually arrived first, however, since a number of researchers actually hold *OXO* as the very first video game ever created. *See* Alexander Smith, *The Priesthood at Play: Computer Games in the 1950s*, THEY CREATE WORLDS, https://videogamehistorian.wordpress.com/2014/01/22/the-priesthood-at-play-computer-games-in-the-1950s/ (last visited Nov. 12, 2016). Invented in 1952 by Alexander Douglas for the Electronic Delay Storage Automatic Calculator ("EDSAC") computer, *OXO* was a primitive computer version of the ancient game of tic-tac-toe. *See id.*

Despite the fact that *Tennis for Two* laid the groundwork for the future of video games to come and became the original landmark for sports video games, it still failed to make an immediate impact on the public and even its creators.[31] While the 1960s saw a number of inventors attempting to electrify the commercial possibilities of the arcade and home console markets, no one truly managed to break through to widespread success until Atari's release of *Pong* in 1972.[32] Bearing similarities to forbearers such as *Tennis for Two* and Ralph Baer's *Table Tennis*,[33] and now known as "the first video game to be mass-produced and successful," the release of *Pong* sparked a worldwide video game revolution on its way to grossing $40 million in sales by the end of 1975 thanks to the game's easy-to-grasp features along with a deal with then-department store giant, Sears.[34] While Atari co-founder and *Pong* co-creator Nolan Bushnell[35] sold Atari for millions just four years after he founded the company, the video game market boom was only in its earliest stages.[36]

[31] *See* Matt Barton & Bill Loguidice, *The History of* Pong*: Avoid Missing Game to Start Industry*, GAMASUTRA, http://www.gamasutra.com/view/feature/3900/the_history_of_pong_avoid_missing_.php?print=1 (last visited Nov. 12, 2016). Not truly understanding what they had on their hands, the creators of *Tennis for Two* disassembled the machine's components just a little over one year after initially demonstrating it to the public. *See id.*

[32] *See The History of Video Arcade Games: Visual Timeline*, BMI GAMING, http://www.bmigaming.com/videogamehistory.htm (last visited Nov. 12, 2016).

[33] *See* Barton & Loguidice, *supra* note 31. Mr. Baer created the Magnavox Odyssey, now known as the very first video game console for use in the home. *See id*. While Baer originally conceived the Odyssey in the 1950s, he was not able to contract with the necessary television manufacturer until he reached a deal with Magnavox in 1971. *See id.* Included among the Odyssey's twelve video games bundled with the system was *Table Tennis*, a paddle-and-ball game meant to imitate table tennis and which Baer designed specifically to teach new Odyssey owners how to properly use the system's controllers. *See id.* Following a Magnavox product demonstration of the Odyssey in 1972, co-founder of Atari, Nolan Bushnell, grew inspired to create his own simplistic table-tennis game now known as *Pong*. *See id.* In fact, the similarity between Baer's game and *Pong* along with proof of Bushnell playing Baer's game before its release resulted in Magnavox winning a patent infringement lawsuit against Atari, producer of *Pong*. *See id.*; *see also The Power of* Pong, SHORTLIST, http://www.shortlist.com/tech/gaming/the-power-of-pong (last visited Nov. 6, 2016) (describing how *Pong* was the imitation, not vice versa).

[34] *See* Barton & Loguidice, *supra* note 31; *The Power of* Pong, *supra* note 33.

[35] *See* Barton & Loguidice, *supra* note 31; *The Power of* Pong, *supra* note 33. One of the most interesting men and inventors of the past century, Mr. Bushnell left Atari behind to invent satellite navigation car technology, which he sold to Rupert Murdoch for $50 million, and create the Chuck E. Cheese pizza chain, among a host of other accomplishments. *See The Power of* Pong, *supra* note 33.

[36] *See The Power of* Pong, *supra* note 33.

B. The Sports Video Game Sector Develops an Insatiable Appetite for Licensing Material

In 1983, a little-known publisher named Electronic Arts[37] changed the course of sports video games forever by delivering the computer game, *One on One: Dr. J vs. Larry Bird* ("*One on One*"), to the public.[38] A basketball video game featuring graphics and gameplay features well before its time, *One on One* represented the very first time in which a sports game licensed the likenesses of individual professional athletes.[39] The success of *One on One* inevitably boosted this licensing approach and saw everyone from Wayne Gretzky to Joe Montana and John Madden agree to plaster their names on video game covers in order to boost sales.[40]

By finding a way to accurately replicate the likenesses of both Julius "Dr. J" Erving[41] and former 1979 NCAA March Madness star Larry "Legend" Bird along with each star's respective abilities and usual on-court movements with such limited technology, the creators of *One on One* hit an absolute home run with consumers.[42] On top of replicating Erving's and Bird's respective abilities and likenesses, *One on One* also stuck with gamers and continues to be held in high regard thanks to additional flourishes such as the ability to dunk the basketball so hard that the glass backboard shatters, revealing an irate janitor on the scene to clean up the mess.[43] Since technical limitations of early video games generally prevented the possibility of accurately portraying famous athletes, the combination of exceptional game development and marketplace

[37] Founded by a man named Trip Hawkins in 1982, Electronic Arts' main focus centered on creating the best quality sports video games for consumers. *See* COOMBS & BATCHELOR, *supra* note 30, at 81. By employing a strategy of marrying statistical-based card games such as *Strat-O-Matic* with the reality of live televised sports, EA grew from a small video game publisher to one of the most successful in the world thanks to its ability to secure licensing agreements with top sports leagues. *See id.* at 81, 84.

[38] *See Game Infos:* One on One*: Julius Erving vs. Larry Bird*, STADIUM 64, http://s64.emuunlim.org/gameinfos/oneonone/oneonone.htm (last visited Nov. 7, 2016).

[39] *See* COOMBS & BATCHELOR, *supra* note 30, at 84.

[40] *See id.* at 82, 84 (referring to the 1988 *Wayne Gretzky Hockey* game, the 1991 *Joe Montana Football* game, and the 1988 *John Madden Football* game).

[41] A winner of three professional basketball championships, two with the New York Nets of the American Basketball Association ("ABA") and one with the Philadelphia 76ers of the NBA following the ABA-NBA merger of 1976, Dr. J won Most Valuable Player awards in both leagues and was admitted to the Basketball Hall of Fame in 1993. *See Julius Erving Bio*, NBA ENCYCLOPEDIA, http://www.nba.com/history/players/erving_bio.html (last visited Nov. 12, 2016). While Erving continues to garner recognition as one of the greatest all-around basketball players of all time, he is best remembered for his incredibly imaginative and powerful slam dunks. *See id.*

[42] *See Game Infos:* One on One, *supra* note 38.

[43] *See id.*

affordability inherent in *One on One* single-handedly created an entirely new sports-centric segment of the video game market.

Before long, American professional sports leagues and their respective players unions were willing to cut licenses with any game developer willing to meet their price since consumers quickly grew enthralled with playing simulated games as their favorite real-life athletes and franchises.[44] To further illustrate this sports game licensing phenomenon, 1989 saw the widespread home release of *Tecmo Bowl* and *NFL*, two football video games based on the National Football League ("NFL").[45] The biggest difference between the two titles rests in the fact that *Tecmo Bowl*'s production company, Tecmo, acquired the right to use the names and likenesses of real NFL players through its licensing agreement with the National Football League Players Association ("NFLPA").[46] On the other hand, Atlus's *NFL* game featured the NFL shield logo on the cover of the game along with the real names, logos, jerseys, and helmets of the NFL's twenty-eight member franchises at the time.[47] Since the NFL and the NFLPA had licensed their respective rights to different games, this meant that *Tecmo Bowl* featured only city names instead of actual team names and logos while *NFL* allowed the user to only play as nameless and generic athletes, but wearing the real uniforms of their favorite NFL teams.[48]

One of life's greatest edicts states that "[h]istory is written by the victors,"[49] and this competition between *Tecmo Bowl* and *NFL* is no different. Still known almost thirty years later as one of the greatest and most popular sports video games ever made,[50] *Tecmo Bowl* holds a massive following to this day[51] thanks to gameplay

[44] *See* COOMBS & BATCHELOR, *supra* note 30, at 84. Following *One on One*, video game developers continued to sign licensing deals with professional sports leagues, including video game producer Intellevision cutting a number of agreements with multiple sports leagues to place the various leagues' logos on Intellevision's video game cartridges and boxes. *See id.* at 83, 84.

[45] *See* Lucas M. Thomas, Tecmo Bowl *VC Review*, IMAGINE GAMES NETWORK (Mar. 13, 2007), http://www.ign.com/articles/2007/03/13/tecmo-bowl-vc-review; NFL *for NES,* MOBYGAMES, http://www.mobygames.com/game/nes/nfl (last visited Nov. 12, 2016).

[46] *See* Thomas, *supra* note 45.

[47] *See* NFL *for NES*, *supra* note 45.

[48] *See* Thomas, *supra* note 45.

[49] Christopher Carrico, *History This Week: A Struggle on Two Fronts: Against Reactionaries and Against Imperialists*, STABROEK NEWS (Sept. 2, 2010), http://www.stabroek news.com/2010/features/09/02/history-this-weeka-struggle-on-two-fronts-against-reaction aries-and-against-imperialists/.

[50] *See, e.g.*, Doug Aamoth, *All-TIME 100 Video Games: 1980s:* Tecmo Bowl, TIME (Nov. 15, 2012), http://techland.time.com/2012/11/15/all-time-100-video-games/.

[51] *See* Chris Burke, *25 Years Later,* Tecmo Super Bowl *Maintains Cult Following*, SPORTS ILLUSTRATED (July 7, 2016), http://www.si.com/nfl/2016/07/06/tecmo-super-bowl-nfl-video-

made possible by the computer versions of Bo Jackson[52] and Lawrence Taylor.[53] While *Tecmo Bowl* would go on to have a cult-like following and be hailed by *Time* magazine as one of the hundred greatest video games ever made,[54] *NFL* remains merely a lost footnote in the history of video games and necessitates an extensive Internet search for additional information.[55] Following the immense success of *Tecmo Bowl* and its successor, *Tecmo Super Bowl*, which featured both the NFL and NFLPA licenses,[56] developers and sports leagues quickly learned that video gamers would much rather pretend to be their favorite sports heroes instead of completely unrecognizable polygons running around in their team's favorite uniform.[57]

C. The NCAA Joins the Sports Video Game Licensing Extravaganza

After seeing all of the financial success experienced by professional leagues in licensing their rights for video games, it was only natural that the NCAA would want in on the rights licensing craze. In the 1990s, the NCAA took the next logical step and began licensing the images and likenesses of its Division I men's basketball and football teams and individual players to EA Sports, specifically with *Bill Walsh College Football '95*[58] and *NCAA March Madness '98*.[59] While the college football franchise would later

games-nintendo.

[52] No athlete is more synonymous with a video game than Bo Jackson with *Tecmo Bowl*, due to his game character's sheer dominance. *See* Abe Stein, *Bo Knows* Tecmo Bowl, MIT GAME LAB (Mar. 25, 2013), http://gamelab.mit.edu/bo-knows-tecmo-bowl/. While Bo Jackson only played running back in the NFL for four years with the then-Los Angeles Raiders, former *Tecmo Bowl* players continue to remember exactly how unstoppable of a video game character he was in comparison to the rest of his pixelated competition. *See* Mark Lelinwalla, *Remembering Bo Jackson's '*Tecmo Bowl*' Dominance*, TECH TIMES (Oct. 21, 2015), http://www.techtimes.com/articles/97976/20151021/bo-jackson-unstoppable-tecmo-bowl.htm.

[53] In addition to Bo Jackson's offensive dominance in *Tecmo Bowl*, former New York Giant and NFL Hall of Fame linebacker Lawrence Taylor has long been remembered for single-handedly destroying the offensive and special teams units of the other twenty-six teams not featuring Bo Jackson. *See* Neal Coolong, *The Most Dominant Player in the NFL and in Video Games of the Past*, SB NATION: BEHIND STEEL CURTAIN (Jan. 11, 2013), http://www.behindthesteelcurtain.com/2013/1/11/3864990/tecmo-bowl-lawrence-taylor-field-goal-block-bo-jackson.

[54] Aamoth, *supra* note 50.

[55] *See, e.g.*, NFL *Football: Nintendo Entertainment System*, GIANT BOMB, http://www.giantbomb.com/nfl-football/3030-15289/ (last visited Nov. 2, 2016) (referencing one of the few websites found in a web search that actually discusses *NFL* the game, albeit briefly).

[56] *See* Tecmo Super Bowl*: A Historical Touchdown*, VIDEOGAME CANON (Mar. 30, 2011) http://vgc.gameology.org/node/4210.

[57] *See id.*

[58] *See* Alex Burr, *Bill Walsh College Football '95*, SEGA-16 (Jan. 14, 2010), http://www.sega-16.com/2010/01/bill-walsh-college-football-95/.

[59] *See March Madness '98*, MOBYGAMES, http://www.mobygames.com/game/march-

transform into the *NCAA Football* series,[60] the NCAA and its licensing arm, the CLC, continued to license the images and likenesses of its men's basketball and football teams and student-athletes until 2009 for basketball and 2013 for football.[61]

Over that stretch, the *NCAA* games served as an incredibly helpful marketing tool for the NCAA and its member schools while also providing massive financial dividends each year to the institutions whose teams and student-athletes were chosen to appear in the games.[62] With the addition of the revenue coming in through video game licensing, the NCAA nearly surpassing $1 billion for the first time during the 2014 fiscal year,[63] and a television rights contract extension allowing CBS and Turner to televise the Division I Men's Basketball Tournament through 2032 for an additional $8.8 billion on top of the original fourteen year, $11 billion deal, the NCAA continued to transform into a modern-day economic powerhouse of epic proportions.[64]

III. THE RIGHT OF PUBLICITY: NAME, IMAGE, LIKENESS, AND BEYOND

A. A Brief History of the Creation and Recognition of the Right of Publicity

For nearly as long as the United States has trudged forward as a nation, intellectual property rights have maintained a place in the public's consciousness as well as the U.S. legal system.[65] More

madness-98 (last visited Nov. 3, 2016); *see also NCAA March Madness Series*, MOBYGAMES, http://www.mobygames.com/game-group/ncaa-march-madness-series (last visited Nov. 3, 2016) (showing an extensive series of *March Madness* games with NCAA licenses).

[60] *See NCAA Football Series*, MOBYGAMES, http://www.mobygames.com/game-group/ncaa-football-series (last visited Nov. 3, 2016).

[61] *See* Matt Porter, *Sheldon McClellan Stars in NCAA Basketball 'Video Game,'* CANES WATCH (Feb. 20, 2016), http://caneswatch.blog.palmbeachpost.com/2016/02/20/sheldon-mcclellan-stars-in-ncaa-basketball-video-game/.

[62] *See, e.g.*, Chris Smith, *NCAA Football Video Game is Worth Over $75,000 Per Year for Top Teams*, FORBES (Aug. 22, 2013), http://www.forbes.com/sites/chrissmith/2013/08/22/ncaa-football-video-game-is-worth-over-75000-per-year-for-top-teams/#628e7d701e26.

[63] *See* Steve Berkowitz, *NCAA Nearly Topped $1 Billion in Revenue in 2014*, USA TODAY (Mar. 11, 2013), http://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/.

[64] *See* Erik Brady, *NCAA Extends Tournament Deal with CBS, Turner through 2032 for $8.8 Billion*, USA TODAY (Apr. 12, 2016), http://www.usatoday.com/story/sports/ncaab/2016/04/12/ncaa-contract-extension-cbs-turner-ncaa-tournament-march-madness/82939124/.

[65] *See* Wayne M. Cox, Note, *Rhymin' and Stealin'? The History of Sampling in the Hip-Hop and Dance Music Worlds and How U.S. Copyright Law & Judicial Precedent Serves to Shackle Art*, 14 VA. SPORTS & ENT. L.J. 219, 219 (2015). Roughly 226 years have passed since the Founding Fathers of this nation passed the Copyright Act of 1790, which provides

specifically, the Founding Fathers originally "borrowed" early concepts from Great Britain to establish U.S. copyright law and provided for both an intellectual property clause within the Constitution along with the creation of the Copyright Act of 1790.[66] Concerning copyright's spiritual brother, trademark law originally gained acceptance as a state-recognized common law right in the early days of this country.[67] Soon after the enactment of the Copyright Act of 1790, a Boston sailmaker by the name of George Breck attempted to establish a federal trademark right by taking his matter up with the federal government and then-Secretary of State Thomas Jefferson.[68] While Jefferson highly recommended the recognition of a federal trademark right to his colleagues, such a law would not come to pass for nearly another century.[69]

While the Copyright Act of 1790 and the Trademark Law of 1870[70] helped firmly establish federal rights of copyright and trademark in this nation, the history behind the right of publicity reveals a much murkier backstory in comparison. Often confused with its more well-known relatives in the intellectual property family tree, the right of publicity actually represents an entirely different beast of its own.[71] As of today, it is generally accepted that the right of publicity consists of three components: name, image, and likeness.[72] In another departure from copyright and trademark law, the right of publicity possesses no grounding in federal law and its interpretation completely depends upon in which state a cause of action arises.[73] However, a vast majority of the states that recognize the right of publicity under either statute or common law

Congress with the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*; *see* U.S. CONST. art. I, § 8, cl. 8.

[66] *See* Cox, *supra* note 65, at 219.

[67] *See* Zvi S. Rosen, *In Search of the Trade-Mark Cases: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law*, 83 ST. JOHN'S L. REV. 827, 831 (2009).

[68] *See id.* at 830.

[69] *See id.* at 830–31.

[70] The Trademark Law of 1870 was later deemed unconstitutional by the United States Supreme Court in 1878. *See* Anne H. Chasser, *A Historical Perspective: The International Trademark Association and the United States Patent and Trademark Office*, 93 TRADEMARK REP. 35, 38 (2003). Following the Court's ruling, a federal right of trademark was later firmly established with the Trademark Act of 1881 with assistance from the International Trademark Association. *See id.* at 39.

[71] *See A Brief History of the Right of Publicity*, RIGHT PUBLICITY http://rightofpublicity.com /brief-history-of-rop (last visited Nov. 3, 2016).

[72] *See* Marc H. Greenberg & Michael L. Lovitz, *Right of Publicity and the Intersection of Copyright and Trademark Law*, GOLDEN GATE U. SCH. L. DIGITAL COMMONS (Mar. 29, 2012), http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1485&context=pubs.

[73] *See id.*

generally incorporate some amalgamation of the three-pronged concept of name, image, and likeness ("NIL").[74]

Starting in 1903, New York emerged as the first state to execute a right of publicity law that "prohibit[ed] the use of the name, portrait, or picture of any living person without prior consent for 'advertising purposes' or 'for the purposes of trade.'"[75] While New York initially combined the right of publicity with a bundle of personal rights under the New York Civil Rights Law, Judge Jerome Frank eventually distinguished the right of publicity from the right of privacy in 1953 by specifically honing in on the related economic interests instead of the personal interests typically aligned with the right of privacy.[76] In this action, Judge Frank boldly stated:

> [I]n addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . . . This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures. We think the New York decisions recognize such a right.[77]

Today, Judge Frank's decision in *Haelan* bears recognition as one of the first instances in which a court laid out the legal parameters of the right of publicity on record.[78]

Following Judge Frank's clear interpretation of the right of publicity, the Supreme Court of the United States was kind enough to further outline this still-developing intellectual property right in *Zacchini v. Scripps-Howard Broadcasting*[79] in 1977.[80] Representing

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[74] *See id.*
[75] *Id.*
[76] *See id.*
[77] Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2d Cir. 1953).
[78] *See* Greenberg & Lovitz, *supra* note 72.
[79] Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).
[80] *See A Brief History of the Right of Publicity*, *supra* note 71.

the only time in our nation's history in which the highest court in the land agreed to review the right of publicity, *Zacchini* dealt with Mario Zacchini[81] and his lawsuit regarding the broadcast of his "human cannonball" routine on local television.[82] In the suit, a local television station taped Mr. Zacchini's human cannonball performance at an Ohio county fair in secret and subsequently broadcast the performance on a local newscast without the permission of Mr. Zacchini.[83] According to the declaration of the Court:

> "The rationale for [protecting the right of publicity] is the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay." . . . Moreover, the broadcast of petitioner's entire performance, unlike the unauthorized use of another's name for purposes of trade or the incidental use of a name or picture by the press, goes to the heart of petitioner's ability to earn a living as an entertainer. Thus, in this case, Ohio has recognized what may be the strongest case for a "right of publicity"—involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.[84]

Justice White further wrote: "Ohio's decision to protect petitioner's right of publicity . . . provides an economic incentive for him to make the investment required to produce a performance of interest to the public."[85] With this sole recognition of the right of publicity, Justice White and the Court provided a solid foundation off of which future courts and claimants could build.[86]

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[81] Known as one of the first human cannonball performers together with his older brothers, Mr. Zacchini attained fame due to his propensity for being shot out of a cannon from one end of a circus tent to another in front of adoring fans worldwide. *See* Glenn Collins, *Mario Zacchini, Sensational Human Cannonball, Dies at 87*, N.Y. TIMES (Feb. 3, 1999), http://www.nytimes.com/1999/02/03/arts/mario-zacchini-sensational-human-cannonball-dies-at-87.html.

[82] *See A Brief History of the Right of Publicity*, *supra* note 71.

[83] *See Zacchini*, 433 U.S. at 563, 564.

[84] *Id.* at 576 (alteration in original) (internal citation omitted).

[85] *Id.*

[86] *See A Brief History of the Right of Publicity*, *supra* note 71.

B. The Right of Publicity in Today's Economy and the Fight for Federal Statutory Protection

In the years following the *Zacchini* decision, the right of publicity continued to pick up steam as states around the country adopted its components via either statute or common law. Today, twenty-two states in the U.S. have enacted some type of statute recognizing the right of publicity and thirty-eight states maintain a common law precedent regarding the right.[87] In addition, the majority view nationwide tends to hold that every state that has not explicitly rejected the concept of the right of publicity recognizes the right in some form.[88] Despite this push in recent years, there remains some disconnect around the U.S., as would seem inevitable with any right that has the propensity to change in subtle-to-substantive ways depending on the location of a person.[89] Specifically, while the right of publicity has found some sort of home throughout most of the nation to cover personal attributes as wide-ranging as "name, nicknames, pseudonyms, voice, signature, likeness, [and] photograph[,]" states disagree whether the right of publicity may be assigned and/or passed down to future heirs or if the right even survives a person's death.[90]

For all of the reasons stated above, intellectual property organizations have continued to push the U.S. government for the passage of some type of federal right of publicity in order to cure the disagreements between states.[91] In particular, the International Trademark Association ("INTA") and the American Bar Association ("ABA") have made their support for Congress to enact a federal right of publicity extremely clear in recent years.[92] INTA has taken the position that "[t]he 'right of publicity or persona' is an evolving and developing area of the law that has similarities to trademark law, impacts trademark owners, and, as a result, is of interest to

[87] *See id.*

[88] *See id.*

[89] *See What is Right of Publicity?*, INT'L TRADEMARK ASS'N, http://www.inta.org/Advocacy/Pages/RightofPublicity.aspx (last visited Nov. 11, 2016).

[90] *Id.*

[91] *See id.*; *see also* Kevin L. Vick & Jean-Paul Jassy, *Why a Federal Right of Publicity Statute Is Necessary*, 28 COMM. LAWYER 14, 14 (2011) (discussing the value of preempting an array of state laws with a uniform federal right of publicity statute).

[92] *See* Vick & Jassy, *supra* note 91, at 17; *see also* Int'l Trademark Ass'n [INTA], Board Res., *U.S. Federal Right of Publicity* (Mar. 3, 1998), http://www.inta.org/Advocacy/Pages/USFederalRightofPublicity.aspx [hereinafter INTA Board Res.] (providing an example in which INTA—by passing a board resolution—advocated for the U.S. to pass a federal right of publicity law).

INTA."[93] In INTA's official board resolution regarding the right of publicity in the U.S., the group declared that the right should be addressed on a federal level via an amendment to the Lanham Act, which:

> 1. Preempts all state law, both statutory and common law[;]
> 2. Harmonizes, to the extent practicable, the divergent laws of various states in a manner that recognizes the principles underlying the right of publicity and fairly balances competing public interests[;]
> 3. Recognizes the principles underlying the right of publicity by providing for a descendible and transferable right of publicity for a fixed term after death without regard to whether their right was exploited during a person's lifetime[;]
> 4. Protects the public interest by providing, through a "grandfather clause," prior user rights for the owners of names and marks consisting of an aspect of persona lawfully acquired before enactment of federal right of publicity legislation[; and]
> 5. Protects the public's interest by exempting from liability, uses of persona that meet fair use/First Amendment standards for uses such as, without limitation, news, biography, history, fiction, commentary and parody.[94]

INTA further reasoned that negotiating licenses on behalf of its members' celebrity clients and their corresponding estates, along with pursuing infringers, would be "more predictable" should Congress enact the right of publicity via a statutory measure.[95]

While the measures and reasoning used by INTA in its board resolution more than eighteen years ago failed to accomplish its ultimate goal of federal enactment,[96] the core concepts continue to live on in nearly every modern argument that supports a federal right of publicity.[97] For example, in a more detailed article published in the ABA's *Communications Lawyer*, the authors opine that "[t]he state-by-state approach to right of publicity law risks causing a 'race to the bottom,' where a handful of states provide ever-expanding rights of publicity that invite forum shopping and give short shrift to First Amendment rights and public domain

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[93] *What is Right of Publicity?*, *supra* note 89.
[94] INTA Board Res., *supra* note 92.
[95] *Id.*
[96] *See* Vick & Jassy, *supra* note 91, at 17.
[97] *See id.*

interests."[98] Even though the authors here echo INTA's demand for express preemption of state law and a provision providing a postmortem right of publicity to a person's heirs,[99] they split with INTA by suggesting more specific provisions granting both statutory and actual damages to those injured under the right of publicity—although declining to advocate for punitive damages or injunctive relief—while boldly espousing that "[t]he right of publicity should not be assignable during a person's lifetime . . . ."[100]

At this point in time, with right of publicity actions constantly arising throughout the nation as digital rights in the modern economy continue to evolve,[101] the most important thing to a claimant attempting to allege a cause of action rests on which state law best gives them a chance to attain damages that also shares a tangible connection with the facts of the action itself. In the meantime, intellectual property organizations, celebrities, and student-athletes alike continue to push for a federal right of publicity.

IV. THE STUDENT-ATHLETES RESPOND TO THE COLLEGIATE REVENUE EXPLOSION

A. What are We Fighting for?: The Respective Sides' Arguments

As it stands today, approximately six years following the consolidation of the *O'Bannon* and *Keller* actions, the entire fight between the NCAA and its student-athletes lies at a crossroads.[102] The plaintiffs in *O'Bannon* continue to argue that the NCAA has long deprived collegiate athletes of their rights of publicity through the use of agreements with NCAA business partners, which unlawfully restrains trade in violation of the Sherman Act.[103] However, the NCAA maintains that its own business relationships pose no prohibition on student-athletes from licensing their individual NILs to interested licensees, and that a majority of players have only failed themselves by not taking part in such licensor-licensee relationships on their own.[104] This long-running

[98] *Id*. at 16.

[99] *See id*. at 18.

[100] *Id.* at 18, 19.

[101] *See* Marc Misthal, *Risk of Violating Right of Publicity is Increasing*, LAW360 (May 10, 2016), http://www.law360.com/articles/794563/risk-of-violating-right-of-publicity-increasing.

[102] *See* Tristan Griffin, *Payment of College Student-Athletes at Center of Legal Battles*, 75 TEX. B. J. 850, 850 (2012).

[103] *See id*.

[104] *See id.*

argument stems from a particularly demanding form that is signed every year by each and every collegiate student that participates in athletics for NCAA member schools.[105] Known as a "Form 08-3a":

> Athletes must fill out this agreement at the beginning of each year and return it to the athletic director before they can compete. It authorizes "the NCAA [or a third party acting on behalf of the NCAA] to use [an] [athlete's] name or picture to generally promote NCAA championships or other NCAA events, activities, or programs." The plaintiffs contend that student athletes sign this form under duress and have never given informed consent to the commercial use of their images; therefore, this form does not give the NCAA a right of publicity. . . . [I]t is worth noting that an athlete cannot participate in intercollegiate athletics until he or she has signed this form. This gives the NCAA the clear upper-hand in terms of bargaining power. For an aspiring student-athlete, the decision is simple: sign the form and play, or refuse to sign the form and say goodbye to your collegiate athletics career.[106]

Given the choice between fulfilling one's dream of competing athletically in college or giving it up over a piece of bureaucratic red tape, it is no wonder that decades worth of eighteen-year-old collegiate freshmen have willingly signed this form. However, not only do the plaintiffs allege that this agreement between a collegiate athlete and the NCAA restricts the student-athlete's ability to license their respective NILs for commercial reasons, but that this agreement also prohibits the NCAA from doing likewise since it charges the NCAA with the duty not to use a student-athlete's NIL for monetary benefit.[107] More pointedly, the Form 08-3a "restricts and precludes the student-athlete's ability to use his or her name, image or likeness for commercial purposes, *particularly after graduation*."[108]

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[105] *See* O'Bannon v. NCAA, No. C 09-1967 CW, No. C 09-3329 CW, No. C 09-4882 CW, 2010 U.S. Dist. LEXIS 19170, at *3 (N.D. Cal. Feb. 8, 2010).

[106] Griffin, *supra* note 102, at 852 (first and third alterations in original); *see Form 08-3a*: *Student-Athlete Statement—Division I,* NAT'L COLLEGIATE ATHLETICS ASS'N (2010), http://www.liberty.edu/media/1912/compliance/newformsdec2010/currentflames/compliance/SA%20Statement%20Form.pdf.

[107] *See* Griffin, *supra* note 102, at 852.

[108] James A. Johnson, O'Bannon*: What is the Right of Publicity?*, NYSBA J., Sept. 2014, at 37.

Without the current restrictions presented by Form 08-3a, plaintiffs contend that former collegiate athletes would possess the power to enter the wildly lucrative collegiate licensing market and force potential companies to bid amongst each other in a free market environment for the right to use one's NIL.[109] However, so long as the Form 08-3a continues to bind unwitting student-athletes into a one-sided relationship with the NCAA which gives away for free the right to use an individual's NIL for "video games, trading cards, DVDs[,]" athletic jerseys, and apparel, the NCAA will continue to operate a monopolistic business in which its members profit at the expense of those actually responsible for creating the income.[110]

A great modern day example of this confounding economic practice and alleged partnership between the NCAA and its student-athletes is none other than Tim Tebow, the cover athlete of EA Sports' *NCAA Football '11*.[111] The first ever sophomore collegiate football player to win the Heisman Trophy,[112] Tebow grew to become one of the most popular and famous college football players of all time.[113] Even though Tebow spent his time at the University of Florida on a $13,000 per year athletic scholarship due to his football prowess,[114] it remains unquestioned that his value both to the NCAA and the University of Florida substantially outweighed the monetary value of his athletic scholarship.[115] In fact, according to California State University San Marcos Professor Robert Brown and his collegiate football revenue economic model, a player on Tebow's level possesses a value that ranges from $1.3 million to more than $2.5 million over the course of just a single

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[109] *See* Griffin, *supra* note 102, at 852.

[110] *See id.* at 850.

[111] *See* Jon Robinson, *Tebow Talks* 'NCAA Football '11', ESPN (Apr. 15, 2010), http://www.espn.com/espn/thelife/videogames/news/story?id=5063653.

[112] Sam Richmond, *Tim Tebow: Heisman Trophy Win in 2007 was First by a Sophomore*, NCAA, http://www.ncaa.com/news/football/article/2015-12-08/tim-tebow-heisman-trophy-win-2007-was-first-sophomore (last updated Dec. 8, 2015). Originally created as the "DAC Trophy" by New York City's Downtown Athletic Club ("DAC") in 1935, the trophy was renamed the "Heisman Trophy" one year later, following the death of famous football coach and DAC athletic director, John W. Heisman. *See Heisman Milestones*, HEISMAN, http://heisman.com/sports/2016/8/15/GEN_0815162149.aspx?path=heisman_winners (last visited Nov. 7, 2016). Since its inception, the Downtown Athletic Club has awarded the Heisman Trophy "annually to college football's 'most outstanding' player . . . ." Chris Huston, *Purdue's almost-Heisman Era*, HEISMAN, http://heisman.com/news/2015/9/10/Heisman_Winners_purdues almostheismans.aspx (last visited Nov. 7, 2016).

[113] *See* Mike Fish, *What Price Glory? The Star's Value*, ESPN (Dec. 11, 2009), http://www.espn.com/espn/otl/news/story?page=fish/091211.

[114] *See id.*

[115] *See id.*

college football season.[116] Even veteran sports agent David Falk[117] chimed in on Tebow's importance, saying that:

> You'd have to ascertain the incremental revenues that a school like Florida is getting . . . . In the five previous years before Tebow, say their average record was 7-5. And when he is there, it is 10-1. They're winning national championships, conference championships. Before, they went to minor bowls, and now they're in big bowls. [Look at] bowl revenues and sponsorships. I'd try to say he is, or was, a major factor in the increase in revenues.[118]

During Tebow's tenure at the University of Florida, a total of 2,401,532 people paid to see him play football at his home stadium, which does not even account for the several hundreds of thousands, if not a couple of million, that paid to see him play road games and bowl games around the country.[119] To boot, "[d]uring the Tebow Years, the salaries of the [University of Florida's] head football coach and the athletic director [each] doubled," along with the fact that the Southeastern Conference ("SEC") in which Tebow played signed a $2.25 billion contract with ESPN before the start of Tebow's junior year.[120] On top of all of that, sales of Tebow's blue and orange number fifteen football jersey to adoring fans nationwide helped transform the University of Florida into the third-highest seller of merchandise among U.S. colleges and universities.[121] Thanks to the extreme popularity of college football and its cover boy Tebow, *NCAA Football '11* sold more than three million copies[122] and facilitated very lucrative license dividends paid out by EA Sports to participating collegiate football programs

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[116] *See id.*

[117] Known as Michael Jordan's longtime agent since the 1980s, Falk went on to create a client representation and marketing empire by going on to battle the NBA and its franchises time and time again on behalf of former star players including Jordan, Patrick Ewing, and Alonzo Mourning, among others. *See* John Lombardo, *Champions 2015: David Falk*, SPORTSBUSINESS J. (Feb. 23, 2015), http://www.sportsbusinessdaily.com/Journal/Issues/2015/02/23/Champions/Falk.aspx.

[118] Fish, *supra* note 113 (alteration in original).

[119] *See id.*

[120] *Id.*

[121] *See* Dave Curtis, *Sales of Tim Tebow's Jersey Help Make UF the No. 3 School for Merchandising in U.S.*, ORLANDO SENTINEL (Jan. 1, 2008), http://articles.orlandosentinel.com/2008-01-01/news/jersey01_1_tim-tebow-uf-jerseys. In fact, the University of Florida garnered nearly an $80,000 profit off of Tebow jersey sales during his junior season alone. *See* Kevin Brockway, *Tebow Happy to Let UF Use His Image*, GAINESVILLE SUN (Sept. 26, 2009), http://www.gainesville.com/news/20090926/tebow-happy-to-let-uf-use-his-image/1.

[122] *See* John Gaudiosi, *Video Game Industry Fails to Capitalize on March Madness*, FORBES (Apr. 2, 2011), http://www.forbes.com/sites/johngaudiosi/2011/04/02/game-industry-fails-to-capitalize-on-march-madness/#3837a51d3d67.

around the country.[123] Despite all of the above, Tebow once stated that he does not believe that the University of Florida exploited his image and that "the money that's generated from that is probably going to good stuff . . . . I'm sure that it's going to good use, and that doesn't irritate me at all."[124]

However, following Tebow's short-lived yet eventful career as a professional player in the NFL,[125] Tebow has certainly taken advantage of a wide variety of economic and sponsorship opportunities stemming from his college football fame. While a vast majority of football players that wash out of the NFL generally settle into a more normal lifestyle, Tebow's top-notch talent agency immediately began a bidding war between ESPN, CBS, and Fox for Tebow's services as a football analyst following his release from the New England Patriots in 2013.[126] During Tebow's NFL career, he earned a net worth of approximately $10 million between his time with the Denver Broncos, New York Jets, Philadelphia Eagles, and New England Patriots.[127] Instead of just attempting to live on his

[123] *See* Smith, *supra* note 62. For a "first-tier" collegiate football program such as Tebow's Florida Gators, EA Sports paid to the school anywhere from $78,000 to more than $140,000 for the right to feature the University and its football team, stadium, jerseys, and players in the popular football game series. *See id.*

[124] Brockway, *supra* note 121.

[125] Drafted in the first round of the 2010 NFL draft, Tebow went on to play out one of the most interesting NFL careers seen to this point. *See Tim Tebow Biography,* BIOGRAPHY, http://www.biography.com/people/tim-tebow-20786869 (last updated Apr. 21, 2015). Following a lack of playing time during his rookie year, Tebow became the starting quarterback for the Denver Broncos in 2011 and led them on an unexpected run to the playoffs, where the Broncos beat the Pittsburgh Steelers but then lost to the New England Patriots in the divisional round. *See id.* Following the 2011 season, the Broncos traded Tebow to the New York Jets, where he failed to get much playing time before being released by the Jets in April 2013. *See id.* The summer of 2013 saw Tebow sign with the Patriots before being released before the start of the 2013 season. *See id.* Tebow received one more shot at the NFL in the spring of 2015 when he signed with the Philadelphia Eagles, but failed to make the final roster. *See Eagles Release QB Tim Tebow*, ESPN, http://www.espn.com /nfl/story/_/id/13588372/tim-tebow-released-philadelphia-eagles (last updated Sept. 6, 2015). Tebow ended his NFL career making just sixteen career starts with a 9-7 win-loss record as a starting quarterback. *See* Zach Kruse, *Is Tim Tebow Really a 'Winner'?*, BLEACHER REP. (June 13, 2013), http://bleacherreport.com/articles/1671601-is-tim-tebow-really-a-winner.

[126] *See* Ira Boudway, *How Much is Tim Tebow Worth in the Booth?*, BLOOMBERG (Dec. 5, 2013), http://www.bloomberg.com/news/articles/2013-12-05/how-much-is-tim-tebow-worth-in-the-booth.

[127] *See generally Tim Tebow Net Worth*, THERICHEST, http://www.therichest.com/celebnet worth/athletes/nfl/tim-tebow-net-worth/ (last visited Nov. 5, 2016) (providing Tebow's net worth). Additionally, Tebow had nonguaranteed contracts during his time with the Patriots and the Eagles, which were not paid in full for their original stated value due to both teams releasing Tebow prior to the start of the 2013 and 2015 regular seasons, respectively. *See* Tyler Greenawalt, *Can the Patriots Groom Tebow to be a Good NFL Quarterback?*, NPR (June 12, 2013), http://www.npr.org/sections/thetwo-way/2013/06/11/190742956/The-Patriots-Are-Grooming-Tebow-To-Become-A-NFL-Quarterback; Tom Pelissero, *Tim Tebow's Eagles Contract has $0 Guaranteed*, USA TODAY (Apr. 22, 2015), http://www.usatoday.com/story

playing proceeds, Tebow accepted a college football analyst position with ESPN in 2013,[128] which he continues to hold.[129] Further, Tebow leveraged his polarizing presence in the media by becoming a prominent pitchman for large companies, such as his hard-to-miss "Heisman House" commercials on behalf of Nissan.[130]

Recently, Tebow announced to the world that he planned to pursue his long-stalled baseball career after having not played the sport since he was a junior in high school.[131] While most bystanders focused on the actual theatrics of the tryout itself,[132] Tebow's representatives quietly announced on the day of his tryout in front of scouts and executives from twenty-eight different Major League Baseball ("MLB") franchises that he had recently signed a multiyear sponsorship deal with Adidas, the global shoe and apparel company.[133] This lucrative endorsement deal grew even more apparent due to the fact that Tebow conducted his tryout while wearing a host of Adidas apparel from head to toe, including shorts and cleats.[134] While Tebow and his representatives stated several times that his baseball endeavor is "definitely not about money," the fact that he suddenly began selling signed baseball gear for between $125 and $175 each, and that his newfound love for

/sports/nfl/eagles/2015/04/22/tim-tebow-contract-no-guarantees-philadelphia/26175271; *see also* Olivia Stacey, *Tim Tebow's Net Worth: 5 Fast Facts You Need to Know*, HEAVY (Aug. 29, 2016), http://heavy.com/sports/2016/08/tim-tebow-net-worth-salary-nfl-contract-how-much-money-home-broadcasting-career-non-profit-foundation/ (discussing Tebow's multiple, nonguaranteed contracts).

[128] *See* Tony Manfred, *ESPN Hires Tim Tebow as a College Football Analyst*, BUS. INSIDER (Dec. 30, 2013), http://www.businessinsider.com/espn-hires-tim-tebow-2013-12.

[129] *See* Dayn Perry, *Tim Tebow, Supposedly Serious about Baseball, Will Keep His Football Day Job*, CBS SPORTS (Sept. 8, 2016), http://www.cbssports.com/mlb/news/tim-tebow-supposedly-serious-about-baseball-will-keep-his-football-day-job/.

[130] *See* Matt Lombardi, *Tim Tebow's New 'Heisman House' Commercial is Amazing*, SPUN (Sept. 1, 2016), http://thespun.com/sec/florida/tim-tebow-heisman-commercial.

[131] *See* A.J. Perez, *Tim Tebow Set to Pursue Pro Baseball Career*, USA TODAY (Aug. 9, 2016), http://www.usatoday.com/story/sports/nfl/2016/08/09/tim-tebow-baseball/88443158/. While Tebow went eleven whole years without playing baseball, his final year playing the sport as a junior in high school saw him reach all-state status in the state of Florida with a .494 batting average. *See id.*; *Twenty MLB Teams to Attend Tim Tebow's Workout on Aug. 30*, ABC NEWS (Aug. 23, 2016), http://abcnews.go.com/Sports/twenty-mlb-teams-attend-tim-tebows-workout-aug/story?id=41589446.

[132] *See* Josh Peter, *Baseball Scouts on Tim Tebow Range from 'Waste of Time' to 'Better than I Expected,'* USA TODAY (Aug. 31, 2016), http://www.usatoday.com/story/sports/mlb/2016/08/30/tim-tebow-baseball-tryout-showcase-workout-scouts-usc-reaction/89611816/.

[133] *See id.*; Darren Rovell, *Tim Tebow Signs Apparel Deal with Adidas Ahead of MLB Workout*, ESPN (Aug. 30, 2016), http://www.espn.com/mlb/story/_/id/17423864/tim-tebow-signs-apparel-deal-adidas; *see also* Mike Florio, *Baseball Dreams Accelerate Endorsement Realities for Tebow*, NBC SPORTS (Aug. 31, 2016), http://profootballtalk.nbcsports.com/2016/08/31/baseball-dreams-accelerate-endorsement-realities-for-tebow/ (discussing Tebow's financial opportunities via endorsements if he plays baseball).

[134] *See* Florio, *supra* note 133.

baseball secured him an endorsement deal with Adidas, strongly hints otherwise.[135]

To top it all off, on September 8, 2016, the New York Mets announced that they had officially signed Tebow to a minor league contract and that Tebow would begin his professional baseball career in the fall instructional league on September 18th in Port St. Lucie, Florida.[136] On Tebow's first day with the Mets in Florida, inside sources revealed that Tebow had signed a special "bridge agreement" with MLB's jersey producer, Majestic Athletic, which allowed a "special event item" of his number fifteen Mets jersey to be sold both online and at Port St. Lucie.[137] Despite the fact that MLB franchises are generally not allowed to use a player's name or image prior to being named a member of the forty-man major league roster, Tebow's bridge agreement specifically provided Majestic with permission to create Tebow-branded merchandise before he ever spent a single day at the major league level.[138]

Regardless of his future as a baseball player, it remains obvious that Tebow has done everything humanly possible to capitalize monetarily off of his fame as a star collegiate football player and Heisman Trophy winner, outside of actually profiting off of his right of publicity and NIL during his time as a Florida Gator (thanks to Form 08-3a).[139] When observing the staying power of Tebow's

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[135] *Id.*

[136] *See* Adam Rubin, *From Jets to Mets: Why Amazin's Tossed a 'Hail Mary' to Tim Tebow*, ESPN (Sept. 8, 2016), http://www.espn.com/blog/new-york/mets/post/_/id/124054/from-jets-to-mets-why-amazins-tossed-a-hail-mary-to-tim-tebow.

[137] *See* A.J. Perez, *Why Tim Tebow's Jersey is Available for Purchase*, USA TODAY (Sept. 19, 2016), http://www.usatoday.com/story/sports/mlb/2016/09/19/tim-tebow-jersey/90690040/. Due to the fact that Tebow is not yet a member of the Major League Baseball Players Association, the revenue created from the sale of his jerseys does not have to be split with the union and the Mets possess the right to keep all of the merchandise revenue. *See id.* However, as part of his minor league contract, the Mets guaranteed Tebow a $100,000 signing bonus. *See id.*

[138] *See* Darren Rovell, *Tim Tebow's No. 15 Mets Jersey Tops Day's Sales for Online Shops*, ESPN, http://www.espn.com/mlb/story/_/id/17586582/new-york-mets-sell-tim-tebow-jerseys-former-qb-begins-pro-baseball-career (last updated Sept. 20, 2016). On just its first day of sales alone, Tebow's blue and orange number fifteen jersey was the best-seller on MLB's merchandise website ahead of likely future Hall of Famer David Ortiz and current All-Star Kris Bryant. *See id.* The most ridiculous example of this rush to market the name and likeness of Tebow as soon as possible manifested itself in a photograph taken of a golf cart rushing toward the baseball fields at Port St. Lucie, holding several dozen Tebow Mets jerseys on Tebow's first day at the baseball complex. *See id.*

[139] *See* Barry Petchesky, *Baseball is Already Profitable for Tim Tebow*, DEADSPIN (Aug. 17, 2016), http://deadspin.com/baseball-is-already-profitable-for-tim-tebow-1785407642. Even the MLB recognized Tebow's most famous period as an athlete when it stated in a tweet: "@TimTebow's back in blue and orange. And his jersey is available in @OfficialMLBShop . . ." in reference to Tebow's time in blue and orange for the Florida Gators. *See* @MLB, TWITTER (Sept. 19, 2016, 1:05 PM), https://twitter.com/MLB/status/777961737844772864/photo/1; *see*

marketability years after leaving college for the NFL, one can only imagine how many millions of dollars Tebow would have commanded at the University of Florida without the restrictions of Form 08-3a. With around 460,000 student-athletes performing athletically in more than twenty-four sports at NCAA member schools each year,[140] and greater than ninety percent of them not enjoying professional athletic careers,[141] the inability to profit off of their individual college glory presents a great dilemma. When it comes down to it, not everyone maintains connections to some of the country's greatest marketing and advertising professionals like Tim Tebow did, and that inequality seems to be on the verge of changing in the coming months and years.

B. The Ultimate Cinderella Run: The Fight to Reach a Trial

Over its life span, the case of *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* experienced a wide array of twists and turns seemingly every few months or so. On July 21, 2009, Ed O'Bannon and the law firm he hired, Hausfeld LLP, officially filed a groundbreaking lawsuit against the NCAA and the CLC concerning their use of players' "images in DVDs, video games, photographs, apparel[,] and other material."[142] Approximately seven months later, U.S. District Court for the Northern District of California (Oakland) Judge Claudia Wilken denied the NCAA's motion to dismiss O'Bannon's lawsuit on behalf of former collegiate men's basketball players aggrieved over the use of their NILs in various forms.[143] Soon thereafter, Judge Wilken also consolidated Sam Keller's lawsuit with that of O'Bannon's in order to create a solitary comprehensive suit against the NCAA, CLC, and EA.[144] In the following months, several handfuls of former NCAA men's collegiate

also Kimberly Alters, *Tim Tebow's New Mets Jersey is Selling Like Crazy*, WEEK (Sept. 19, 2016), http://theweek.com/speedreads/649807/tim-tebows-new-mets-jersey-selling-like-crazy (describing Tebow's jersey colors both presently as a Met and previously as a Florida Gator).

[140] *See Student-Athletes*, NCAA, http://www.ncaa.org/student-athletes (last visited Nov. 17, 2016).

[141] *See* Jake New, *A Long Shot: College Athletes Greatly Overestimate their Chances of Playing Professionally*, INSIDE HIGHER ED (Jan. 27, 2015), https://www.insidehighered.com/news/2015/01/27/college-athletes-greatly-overestimate-their-chances-playing-professionally.

[142] *Former Bruin O'Bannon Sues NCAA*, ESPN (July 21, 2009), http://www.espn.com/mens-college-basketball/news/story?id=4346470.

[143] *See NCAA Loses Motion to Dismiss Suit from Former UCLA F Ed O'Bannon*, SPORTSBUSINESS DAILY (Feb. 9, 2010), http://m.sportsbusinessdaily.com/Daily/Issues/2010/02/Issue-102/Collegiate-Sports/NCAA-Loses-Motion-To-Dismiss-Suit-From-Former-UCLA-F-Ed-Obannon.aspx.

[144] *See Money & March Madness*, *supra* note 18.

basketball and football players decided to officially join O'Bannon's suit, including NBA legends such as Bill Russell and Oscar Robertson.[145]

In 2011, Judge Wilken committed a flip-flop of the highest degree by first deciding to dismiss EA from the lawsuit while maintaining the places of the NCAA and CLC as defendants,[146] and then just two months later determining that EA actually must remain in the case as a defendant due to new "significant" allegations detailing that EA colluded with the NCAA to not offer financial compensation to former collegiate athletes for the use of the players' NILs following the end of their respective collegiate athletic careers.[147] Later in 2012, attorneys for the plaintiffs managed to dig up past NCAA emails that provided direct proof of the NCAA's actual knowledge and allowance of EA's efforts to make the characters in its *NCAA Football* and *NCAA Basketball* video games possess physical and athletic attributes as similar as possible to those of the virtual characters' real-life counterparts.[148] Specifically, a July 2003 email from then-NCAA Director of Corporate Alliances, Peter Davis, detailed that, should then-Ole Miss quarterback Eli Manning[149] get

[145] *See id.*; *see also* Katie Thomas, *Ex-Players Join Suit vs. N.C.A.A.*, N.Y. TIMES (Mar. 10, 2010), http://www.nytimes.com/2010/03/11/sports/ncaabasketball/11colleges.html (stating that in 2010, eleven other former college football and basketball players joined O'Bannon in the class-action lawsuit). Both longtime members of the Naismith Basketball Hall of Fame and pioneers of the NBA during the 1960s and 1970s, Oscar "The Big O" Robertson and Bill Russell garnered a great deal of accolades, including Russell winning the most championships of all time with eleven, and Robertson winning one himself while also becoming the only player in NBA history to average a triple-double for an entire season. *See Bill Russell Bio*, NBA ENCYCLOPEDIA, http://www.nba.com/history/players/russell_bio.html (last visited Nov. 6, 2016); *Oscar Robertson Bio*, NBA ENCYCLOPEDIA, http://www.nba.com/history/players/robertson_bio.html (last visited Nov. 6, 2016).

[146] *See EA Dismissed from Antitrust Lawsuit*, ESPN (May 5, 2011), http://www.espn.com/ncaa/news/story?id=6487782. Judge Wilken based her initial decision on a perceived lack of evidence showing that EA conspired with the NCAA in an active effort to prevent student-athletes from receiving compensation for the use of their NILs. *See id.*

[147] *See* Karen Gullo, *Electronic Arts Must Face Ex-Athletes' Antitrust Claims*, BLOOMBERG (July 28, 2011), http://www.bloomberg.com/news/articles/2011-07-28/electronic-arts-must-face-ex-athletes-antitrust-claims-over-use-of-images.

[148] *See* Jon Solomon, *NCAA Knew EA Sports Video Games Used Real Players, E-Mails from Ed O'Bannon Lawsuit Show*, ALA. MEDIA GROUP (Nov. 12, 2012), http://www.al.com/sports/index.ssf/2012/11/ncaa_knew_ea_sports_video_game.html.

[149] The son of former New Orleans Saints quarterback Archie Manning and brother of retired NFL superstar Peyton Manning, Eli left Ole Miss to be drafted first overall in the 2004 NFL draft and forced a trade to the New York Giants. *See Eli Manning Biography*, BIOGRAPHY, http://www.biography.com/people/eli-manning-20734877 (last visited Nov. 5, 2016). Since winning the starting quarterback job in the fall of 2004, Manning has not missed a start since and has twice led the Giants to Super Bowl victories over the favored New England Patriots, along with winning the Super Bowl Most Valuable Player award each time. *See id.*; *see also* Michael Eisen, *Eli Reflects on 10 Year Anniversary of First Start,* N.Y. GIANTS (Nov. 21, 2014), http://www.giants.com/news-and-blogs/article-1/Eli-reflects-on-10-

injured, the roster within the game would reflect that change, and further stated: "We don't actually use player names but we do use all the attributes and jersey numbers of the players."[150]

The case took a truly bizarre detour in the first month of 2013 when Jon King, the former lead plaintiff's attorney on the case, sued his previous firm after being fired during the litigation, claiming that Hausfeld LLP had engaged in a number of unethical practices including inviting a "staggering" amount of other law firms to join in on the *O'Bannon* suit as "some form of political deal relating to other matters[,]" since Hausfeld LLP was allegedly dealing with "immediate and crushing debt obligations."[151] The case later got back on track when Mr. King rescinded his allegations of unethical violations against Hausfeld LLP in a consent judgment.[152]

Soon thereafter, a former EA Sports employee further piled onto Peter Davis' 2003 email by admitting in a deposition that EA Sports linked certain player identifying jersey numbers, biographical information, and statistics directly to student-athletes' virtual game avatars.[153] EA and the CLC followed this latest crushing blow by announcing publicly that they had both agreed to settle with the plaintiffs concerning only video game-related claims.[154] EA soon

year-anniversary-of-first-start/de18fb6f-098c-4466-a820-91e9218d7f12 (stating that since his first start in 2004, Eli had not missed a start for ten years and continued his streak through 2014); *Eli Manning: Game Log: 2015,* NFL, http://www.nfl.com/player/elimanning/2505996/gamelogs?season=2015 (last visited Nov. 11, 2016) (showing that Eli also started in every game in 2015); *Eli Manning: Game Log: 2016,* NFL, http://www.nfl.com/player/elimanning/2505996/gamelogs?season=2016 (last visited Nov. 11, 2016) (showing that Eli also started in every game in 2016).

150 Solomon, *supra* note 148.

151 Jon Solomon, *Former Lead Attorney for Ed O'Bannon Plaintiffs vs. NCAA Sues His Old Firm Over Firing*, ALA. MEDIA GROUP (Jan. 22, 2013), http://www.al.com/sports/index.ssf/2013/01/former_lead_attorney_for_ed_ob.html. According to King, these speculative financial problems allegedly forced Hausfeld LLP to put together a litigation fund into which other law firms would pool their own financial resources together for Hausfeld LLP's use without revealing any of these secret dealings to the court, its clients, or opposing counsel. *See id.* The suit further claimed that Hausfeld LLP committed a series of conflicts of interest by discussing important matters of the case with Tom McMillen, a University of Maryland board member. *See id.*

152 *See* Allissa Wickham, *NCAA Fights to Depose Ex-Hausfeld Atty in Antitrust Case*, LAW360 (Nov. 18, 2014), http://www.law360.com/articles/597340/ncaa-fights-to-depose-ex-hausfeld-atty-in-antitrust-case. This strange turn of developments popped up again one year later when the NCAA fought for its right to depose King concerning his previous allegations against Hausfeld LLP. *See id.*

153 *See* Jon Solomon, *Ex-EA Sports Producer: NCAA Video Games Replicated Real College Players*, ALA. MEDIA GROUP (May 8, 2013), http://www.al.com/sports/index.ssf/2013/05/ex-ea_sports_producer_ncaa_vid.html.

154 *See* Jon Solomon, *EA Sports and CLC Settle Lawsuit by Ed O'Bannon Plaintiffs; NCAA Remains as Lone Defendant*, ALA. MEDIA GROUP, http://www.al.com/sports/index.ssf/2013/09/ea_will_not_make_college_footb.html (last updated Sept. 28, 2013) [hereinafter Solomon, *EA Sports and CLC Settle Lawsuit*]. The terms of this settlement provided that EA and the CLC

disclosed the news that *NCAA Football '14*, released in 2013, would officially be the last of its kind and that the company would cease production of the series,[155] having already ended the *NCAA Basketball* franchise in 2009 with *NCAA Basketball '10*.[156] This left the remainder of the *O'Bannon* lawsuit to pursue video game-related claims solely against the NCAA together with an equal share of modern-day television revenue earned by the NCAA from the various media rights deals with its broadcast partners.[157] By November of that same year, Judge Wilken partially certified the class-action suit levied by O'Bannon and his fellow plaintiffs while also allowing student-athletes the right to challenge the NCAA's current day rules governing amateurism in collegiate athletics.[158]

Despite EA's and the CLC's decision to settle with both the *Keller* and *O'Bannon* plaintiffs, the NCAA continued its refusal to settle with either of the plaintiff groups and requested that both suits continue to remain consolidated in an effort to further delay the ultimate *O'Bannon* trial.[159] However, Judge Wilken ultimately decided to separate the *Keller* and *O'Bannon* suits in May 2014, resulting in scheduled trial dates of March 2015 for the former and June 2014 for the latter.[160] Feeling the pressure of the pending

would pay out a $40 million settlement to more than one hundred thousand former NCAA men's football and basketball players. *See* Jon Solomon, *Current NCAA Players Could Benefit from Video Game Settlement*, CBS SPORTS (May 31, 2014), http://www.cbssports.com/college-football/news/current-ncaa-players-could-benefit-from-video-game-settlement/ [hereinafter Solomon, *NCAA Players Could Benefit from Settlement*]. This settlement specifically only covered the use of current and former players' names and likenesses in EA Sports' *NCAA Football* and *NCAA Basketball* video game franchises. *See id.* The settlement terms provided that Sam Keller, Ed O'Bannon, and former Rutgers quarterback Ryan Hart would receive $15,000 each, former West Virginia football player Shawne Alston would receive $5,000, any other plaintiffs who were deposed would get $5,000, and $2,500 would be paid to all other named plaintiffs. *See id.*

[155] *See* Darren Rovell, *EA Sports Settles with Ex-Players*, ESPN (Sept. 26, 2013), http://www.espn.com/college-football/story/_/id/9728042/ea-sports-stop-producing-college-football-game.

[156] *See* Eamonn Brennan, *The College Basketball Video Game is Dead*, ESPN (July 10, 2013), http://www.espn.com/blog/collegebasketballnation/post/_/id/86183/the-college-basketball-video-game-is-dead.

[157] *See* Solomon, *EA Sports and CLC Settle Lawsuit*, *supra* note 154.

[158] *See* Jon Solomon, *Judge Allows College Players to Challenge NCAA Amateurism Rules in Ed O'Bannon Case*, ALA. MEDIA GROUP (last updated Nov. 9, 2013), http://www.al.com/sports/index.ssf/2013/11/judge_allows_college_players_t.html. However, this same ruling prevented student-athletes from seeking damages due to appearances in prior television broadcasts of NCAA athletic events. *See id.*

[159] *See* Kevin Trahan, *Your One-Stop NCAA v. O'Bannon Trial Primer: What to Know for June 9*, SB NATION (June 2, 2014), http://www.sbnation.com/college-football/2014/6/2/5759916/ncaa-ed-obannon-lawsuit-trial.

[160] *See id.* Judge Wilken based her decision to split the formerly consolidated cases on the idea that this would allow the eventual *Keller* trial to focus specifically on the images of student-athletes being used in EA Sports-created and NCAA-branded video games. *See*

O'Bannon suit continuing to build up, the NCAA ultimately settled with the video game-focused *Keller* plaintiffs on the same day on which the *O'Bannon* trial officially began.[161] Since both the *Keller* and *O'Bannon* plaintiffs had already settled their video game-based disputes with EA and the CLC, the video game settlement between Keller and the NCAA completely extinguished all of the pending claims held by the plaintiffs in the *Keller* suit, and left the *O'Bannon* plaintiffs to fight on alone against the NCAA for its alleged restraint of trade and misuse of student-athletes' NILs.[162]

C. O'Bannon's Own "Sherman's March" to the U.S. Supreme Court

Beginning on June 9, 2014, the plaintiffs, spearheaded by Ed O'Bannon, battled the NCAA and its attorneys during a bench trial that lasted for approximately three weeks.[163] Featuring an entire cavalcade of star witnesses on both sides—including NCAA President Mark Emmert, various NCAA conference commissioners, school presidents, athletic directors, famous economists and professors, and authors[164]—the trial ultimately wound up producing a ninety-nine-page ruling from Judge Wilken.[165] In her decision, Judge Wilken agreed with the plaintiffs' argument that the NCAA indeed violated antitrust laws through its restraint of trade with respect to the NCAA's amateurism rules.[166] Judge Wilken shed additional light on her thinking by concluding:

Russell Westerholm, *NCAA Avoids Trial with Sam Keller Plaintiffs, Settling for $20 Million Over Video Game Lawsuit*, U. HERALD (June 9, 2014), http://www.universityherald.com/articles/9833/20140609/ncaa-avoids-trial-with-sam-keller-plaintiffs-settling-for-20-million-over-video-game-lawsuit.htm.

[161] *See* Westerholm, *supra* note 160. This settlement awarded $20 million to a mix of former and current NCAA collegiate men's basketball and football players whose images and likenesses were used in various EA Sports video games. *See id.* Additionally, since the NCAA allowed then-current student-athletes to share in the *Keller* settlement funds without punishment, the NCAA made sure to protect its amateurism argument by stating: "This proposed settlement does not equate to payment of current student-athletes for their athletic performance, regardless of how it is being publicly characterized." *Id.*

[162] *See id.*

[163] *See* Steve Berkowitz, *Judge Releases Ruling on* O'Bannon *Case: NCAA Loses*, USA TODAY (Aug. 8, 2014), http://www.usatoday.com/story/sports/college/2014/08/08/ed-obannon-antitrust-lawsuit-vs-ncaa/13801277/.

[164] *See* Lester Munson, *NCAA Athletes Get Their Day in Court*, ESPN (June 8, 2014), www.espn.com/espn/otl/story/_/id/11045682/ed-obannon-lawsuit-ncaa-paying-players-set-begin.

[165] *See* Berkowitz, *supra* note 163.

[166] *See id.*

> [T]he NCAA's challenged rules unreasonably restrain trade in violation of [section] 1 of the Sherman Act. Specifically, the association's rules prohibiting student-athletes from receiving any compensation for the use of their names, images, and likenesses restrains price competition among FBS football and Division I basketball schools as suppliers of the unique combination of educational and athletic opportunities that elite football and basketball recruits seek. Alternatively, the rules restrain trade in the market where these schools compete to acquire recruits' athletic services and licensing rights.[167]

Judge Wilken further addressed the NCAA's rules preventing student-athletes from receiving compensation for their respective NILs by suggesting that NCAA member schools could use the revenue derived from the licensing of student-athletes' NILs to provide players with full cost of attendance scholarships or to hold that same money in trust for collegiate athletes until they leave school.[168] Ultimately, Judge Wilken issued an injunction that prevented the NCAA "from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS football or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid."[169]

Judge Wilken issued such a ruling in this situation for the primary reason of allowing men's collegiate football and basketball players to receive fixed compensation from NCAA member schools in exchange for the use of their NILs in order to allow players to receive the full cost of attending undergraduate institutions.[170] Concerning the cap, Judge Wilken's injunction initially allowed for the NCAA to set a cap on the total amount of monetary compensation, which may be held in trust for the players so long as that capped amount never reaches less than the 2014 value of $5,000 USD for each year in which a student-athlete is academically eligible.[171]

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[167] O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014).

[168] *See id.*

[169] *Id.* at 1007–08.

[170] *See* Berkowitz, *supra* note 163 ("It is widely acknowledged that the NCAA's current version of a scholarship—which basically comprises tuition, room, board, books and mandatory fees—does not cover costs of attendance like transportation and various incidental expenses.").

[171] *See id.* The ruling also included additional provisions, the most important of which are: that NCAA member schools are allowed to offer student-athletes less than the NCAA-set

Judge Wilken's ruling and injunction in the summer of 2014 represented an absolute game-changer in both its creative attempts to compensate student-athletes and its steadfast rejection of the NCAA's long-held argument that television networks entered into licensing deals not to obtain the NILs of student-athletes, but rather to obtain exclusive access to the arena or stadium holding a certain athletic event.[172] To the surprise of no one, NCAA President Mark Emmert quickly announced that the NCAA would appeal Judge Wilken's decision that the NCAA violated antitrust law by restraining the rights of publicity and NILs originally belonging to student-athletes.[173] On August 29, 2014, the NCAA and its attorneys went ahead in filing its appeal of the Court's ruling and injunction that would allow student-athletes to benefit from deferred monetary payments in exchange for the use of the players' individual NILs and force schools to cover a student-athlete's full cost of attending an undergraduate institution.[174]

Following a winter stretching into 2015 during which both sides filed their respective briefs and the U.S. Court of Appeals for the Ninth Circuit bore witness to a whole host of amicus briefs,[175] the

maximum amount but are not allowed to collude with other schools in order to price fix the market; that the NCAA may institute rules to prevent players from using their trust money to obtain other financial benefits while still attending school; and that the NCAA may institute rules to prevent member schools from offering differing amounts of deferred trust money to athletes within the same class on the same collegiate athletic team. *See id.*

[172] *See id.* Former CBS Sports President and the NCAA's designated TV expert during the 2014 trial, Neal Pilson, attempted to convince the court that broadcasters "need not acquire the rights to use student-athletes' names, images, and likenesses." *Id.* Furthermore, Judge Wilken held the contrary by writing that "[i]n these agreements, the networks often seek to acquire the rights to use the names, images, and likenesses of the participating student-athletes during the telecast." *O'Bannon*, 7 F. Supp. 3d at 968.

[173] *See NCAA Will Appeal* O'Bannon *Ruling*, ESPN (Aug. 10, 2014), http://www.espn.com/college-sports/story/_/id/11334265/mark-emmert-says-ncaa-appeal-ed-obannon-ruling.

[174] *See* Jon Solomon, O'Bannon *Plaintiffs won't Appeal Judge's NCAA Ruling*, CBS SPORTS (Sept. 8, 2014), http://www.cbssports.com/college-football/news/obannon-plaintiffs-wont-appeal-judges-ncaa-ruling/. While the NCAA appealed the entirety of Judge Wilken's decision, the plaintiffs decided not to appeal any part of the order and injunction. *See id.* Even though the plaintiffs certainly considered challenging the $5,000 cap instituted by the court, O'Bannon's legal team and its leader Mr. Hausfeld ultimately stated: "Could it have been more? Possibly. . . . Is it enough? When you add that amount per year per athlete for all of the schools, you're talking $300-500 million, if not more. That's not a bad chunk." *Id.*

[175] *See Edward O'Bannon, Jr. v. NCAA*, U.S. COURTS NINTH CIRCUIT, https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000757 (last updated Jan. 28, 2016). One of the most interesting parties to file an amicus brief in support of the plaintiffs was the Screen Actors Guild-American Federation of Television and Radio Artists ("SAG"). *Id.*; *see* Y. Peter Kang, *NCAA Athletes Should Get Publicity Pay, SAG Tells 9th Circ.*, LAW360 (Jan. 29, 2015), http://www.law360.com/articles/616502/ncaa-athletes-should-get-publicity-pay-sag-tells-9th-circ. In its brief, SAG "argued that actors and other performers have a significant interest in its outcome because its members' names, voices and likenesses have commercial value, which sometimes continues even after death, providing income for their families." Kang, *supra*.

three-judge appellate panel heard oral arguments in March 2015.[176] In a roller-coaster case that occasionally has resembled something closer to a circus clown show, Chief Judge Sidney Thomas kicked off oral arguments by quipping: "Fortunately we scheduled the hearing so it doesn't conflict with March Madness."[177] Facing a three-judge appellate panel that included Chief Judge Thomas, Judge Gordon Quist, and Judge Jay Bybee,[178] attorneys on opposite sides of the aisle vehemently argued the merits of Judge Wilken's order and injunction together with the concept of amateurism for nearly an hour and a half.[179] While the panel only took approximately eighty minutes to hear the arguments from the NCAA's and O'Bannon's attorneys, the three judges took more than six whole months before delivering their opinion the following September.[180]

In its official opinion on the NCAA's appeal, the U.S. Court of Appeals for the Ninth Circuit partially agreed with O'Bannon and affirmed Judge Wilken's ruling that the NCAA and its policies violated antitrust law due to its restraint of student-athletes' rights with respect to their individual NILs.[181] However, the panel's opinion, written by Judge Bybee, disagreed with the cash payment method offered by Judge Wilken and limited O'Bannon's victory by holding that Division I schools must only compensate their student-athletes by providing up to the full cost of attendance at each institution.[182] On the topic of providing hypothetical cash sums to Division I men's football and basketball players in exchange for the

[176] *See Edward O'Bannon, Jr. v. NCAA*, *supra* note 175.

[177] Jon Solomon, *NCAA On Trial: Judges Hear Ed O'Bannon Appeal*, CBS SPORTS (Mar. 17, 2015), http://www.cbssports.com/college-football/news/ncaa-on-trial-judges-hear-ed-obannon-appeal/.

[178] Not coincidentally, this same exact panel of judges previously heard oral arguments during the *Keller v. Electronic Arts* case in which the panel ruled 2-1 in favor of Keller's argument that NCAA-licensed video games bore no First Amendment protection due to the fact that they recreated the very same likenesses of student-athletes. *See id.*

[179] *See id.* Not surprisingly, some of the panel's most poignant concerns focused on the difficulty of defending monetary compensation to be held in trust for student-athletes as anything other than "pay-for-play" along with how to actually enforce such deferred payments in exchange for the use of players' NILs. *See id.* Concerning another problem in attempting to value such NILs in relation to antitrust injury, *O'Bannon* attorney Mr. Hausfeld responded: "Names, images and likenesses of the athletes have value because there are commercial enterprises willing to pay for them and because the NCAA commercializes them." *Id.*

[180] *Id.* (referring to the length of time of the oral argument); *see also* Michael McCann, *What the Appeals Court Ruling Means for O'Bannon's Ongoing NCAA Lawsuit*, SPORTS ILLUSTRATED (Sept. 30, 2015), http://www.si.com/college-basketball/2015/09/30/ed-obannon-ncaa-lawsuit-appeals-court-ruling (referring to the month in which the Court of Appeals for the Ninth Circuit delivered its decision on the appeal).

[181] *See* McCann, *supra* note 180.

[182] *See id.*

use of their individual NILs, Judge Bybee cautioned that:

> The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; we have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL. At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its "particular brand of football" to minor league status.[183]

Using language stemming from the 1984 U.S. Supreme Court *Board of Regents*[184] case bandied about by the NCAA throughout the litigation, the panel agreed with the NCAA that cash payments crossed the line of amateurism, but at the same time disagreed with the defendant that any challenges to amateurism must fail as a matter of law.[185] The case summary accompanying the opinion further stated:

> The panel held that it was not precluded from reaching the merits of plaintiffs' Sherman Act claim because: (1) the Supreme Court did not hold in *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984), that the NCAA's amateurism rules are valid as a matter of law; (2) the rules are subject to the Sherman Act because they regulate commercial activity; and (3) the plaintiffs established that they suffered injury in fact, and therefore had standing, by showing that, absent the NCAA's rules, video game makers would likely pay them for the right to use their names,

[183] O'Bannon v. NCAA, 802 F.3d 1049, 1078–79 (9th Cir. 2015) (quoting NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984)).

[184] Argued and decided in the spring of 1984, this landmark decision ended the NCAA's longtime monopoly over television contracts relating to college football. *See Bd. of Regents*, 468 U.S. at 98, 112; Jon Solomon, *NCAA Supreme Court Ruling Felt at O'Bannon Trial 30 Years Later*, CBS SPORTS (June 26, 2014), http://www.cbssports.com/college-football/news/ncaa-supreme-court-ruling-felt-at-obannon-trial-30-years-later/. In Justice Byron "Whizzer" White's dissent in *Board of Regents*, he predicted the eventual commercialization of collegiate athletics and the NCAA's problems surrounding the concept of amateurism, writing:

> By mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher education, the NCAA ensures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere.

Bd. of Regents, 468 U.S. at 122 (White, J., dissenting).

[185] *See* McCann, *supra* note 180.

> images, and likenesses in college sports video games. The panel held that even though many of the NCAA's rules were likely to be procompetitive, they were not exempt from antitrust scrutiny.[186]

In the end, the panel deemed Judge Wilken's injunction providing for deferred cash payments unsatisfactory as a means of compensating former and current student-athletes in exchange for the NCAA's consistent violation of section 1 of the Sherman Act.[187] However, while the panel agreed on the topic of forcing NCAA member colleges and universities to provide up to the full cost of attendance, none of the judges managed to develop a substitute method that would accurately compensate student-athletes, despite Judge Bybee admitting: "[T]he plaintiffs have shown that they are injured in fact as a result of the NCAA's rules having foreclosed the market for their NILs in video games."[188] If the judges agreed that the student-athletes were injured by the NCAA's anti-competitive rules and policies restraining a player's ability to profit from his or her individual right of publicity, and Judge Thomas agreed that Judge Wilken's cash deferment idea would have served as an appropriate remedy,[189] it boggles the mind that the panel's decision still managed to leave the injured players in a proverbial no-man's land with a rather hollow victory except for a cost of attendance remedy already being offered at the time by a number of institutions.[190]

Between a decision that only further muddled the fight between the *O'Bannon* plaintiffs and the NCAA, together with the fact that the same three-judge panel later voted to deny a rehearing en banc of the case in December 2015,[191] the plaintiffs were left with no choice other than to petition for writ of certiorari with the Supreme Court of the United States on March 14, 2016.[192] Since the plaintiffs disagreed with the Ninth Circuit's decision to vacate

[186] *O'Bannon*, 802 F.3d at 1049–50.

[187] *See* McCann, *supra* note 180.

[188] *Id.*

[189] *See id.*

[190] For example, as of 2015, the sixty-five member schools representing the Power Five Conferences, including "the Atlantic Coast, Big Ten, Big 12, Pac-12 and Southeastern conferences," voted to provide the necessary funds for student-athletes to receive full cost of attendance scholarships. *See Cost of Attendance Q&A*, NCAA, http://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa. (last updated Sept. 3, 2015).

[191] *See* Jon Solomon, *Judges Deny* O'Bannon *Petition to Rehear Appeal vs. NCAA*, CBS SPORTS (Dec. 16, 2015), http://www.cbssports.com/college-football/news/judges-deny-obannon-petition-to-rehear-appeal-vs-ncaa/.

[192] O'Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015), *petition for cert. filed*, 2016 WL 1085599 (U.S. Mar. 14, 2016) (No. 15-1167).

Judge Wilken's $5,000 deferred payment compensation model and the NCAA remained opposed to the panel's application of the 1984 *Board of Regents* decision, both sides decided to seek Supreme Court review.[193] On September 26, 2016, the Supreme Court held a conference in which it heard both sides' pleas for review of the Ninth Circuit's opinion.[194] However, despite the mess and confusion left behind by the case's murky litigation history, the Justices ultimately announced their decision declining to hear *O'Bannon* for review just one week later on October 3, 2016.[195]

While this refusal by the Supreme Court to hear *O'Bannon* left both sides mostly unhappy with the outcome, it remains incontrovertible that the *O'Bannon* case branded the NCAA as an antitrust violator and that the long-running litigation forced reporters, student-athletes, and plain-clothes citizens alike to further scrutinize the NCAA's rules and policies like never before.[196] In the time that *O'Bannon* stretched from its filing to its conclusion, former University of Connecticut star Shabazz Napier forced the NCAA to change its rules governing student-athlete meal plans after Napier followed up his Division I Men's Basketball Championship run by declaring on national television that he went to bed hungry all too often thanks to NCAA rules, and former Northwestern quarterback Kain Colter led an unsuccessful but daring attempt to unionize the Northwestern football team.[197] Thanks to the road traveled by the *O'Bannon* plaintiffs, the NCAA remains stranded at the proverbial edge of the cliff in its hard-headed defense of amateurism, even though this defense is ultimately doomed to fail.

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[193] *See* Steve Berkowitz, *O'Bannon-NCAA Case Takes a Twist in Filing with Supreme Court*, USA TODAY (July 8, 2016), http://www.usatoday.com/story/sports/college/2016/07/08/ed-obannon-ncaa-antitrust-case-supreme-court/86879916/. According to Stanford Law School Professor Jeffrey Fisher, a situation in which opposing sides each seek Supreme Court review is "uncommon, but not super-rare . . . . It's considerably more uncommon for both sides to urge the [C]ourt to take the same question. What the plaintiffs are doing is not unheard-of, but it only happens a handful of times" each year. *Id.*

[194] *See O'Bannon v. NCAA*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/obannon-v-ncaa/ (last visited Sept. 19, 2016).

[195] *See* Adam Liptak, *Supreme Court Declines to Consider N.C.A.A. Rules on Paying Athletes*, N.Y. TIMES (Oct. 3, 2016), http://www.nytimes.com/2016/10/04/us/politics/supreme-court-declconsider-ncaa-rules-on-paying-athletes.html.

[196] *See* Joe Nocera, O'Bannon *Ruling Stands, but N.C.A.A.'s Status Quo May Yet Collapse*, N.Y. TIMES (Oct. 3, 2016), http://www.nytimes.com/2016/10/04/sports/ncaa-obannon-case-ruling-supreme-court.html?_r=0.

[197] *See id.*

V. WHERE ARE WE NOW AND WHERE IS THIS GOING? COMPROMISES, PROBLEMS, AND SOLUTIONS

A. Potential Solutions and Licensing Systems Designed to Compensate Student-Athletes

With the legal, sports, television, and entertainment industries watching with great interest and exasperation over the past six years of legal battles, few have actually managed to provide substantive fixes in order to address the inadequate compensation at the heart of the *O'Bannon v. NCAA* case. While talking heads at seemingly every single major sports network and publication argue whether student-athletes should be paid by the NCAA in exchange for their decades worth of contributions to a multi-billion dollar behemoth,[198] there remains a true lack of creativity. Even the Ninth Circuit's cost of attendance proposal has now been rendered a thing of the past following the NCAA's July 2015 announcement regarding its distribution of $18.9 million to Division I schools in order to assist in the payment of full cost of attendance scholarships to student-athletes.[199]

In recent years, there has been a sharp increase in the number of student-athletes seeking protection and the right to commercially profit from their NILs, including former Mississippi State quarterback Dak Prescott, former Ohio State running back Zeke Elliott, and infamous former Texas A&M Aggie Johnny Manziel.[200] Another former star collegiate athlete, former University of Kentucky Wildcat and current NBA star Anthony Davis, waited until after his announced departure from school to file trademark

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[198] *See* Kieran McCauley, *College Athletes Shouldn't Be Paid*, DAILY LOC. NEWS (Apr. 28, 2015), http://www.dailylocal.com/article/DL/20150428/SPORTS/150429826.

[199] *See* Steve Berkowitz, *NCAA to Distribute $18.9M to Help Pay Cost-of-Attendance Scholarships*, USA TODAY (July 20, 2015), http://www.usatoday.com/story/sports/college/2015/07/20/ncaa-18-million-help-pay-cost—attendance-scholarships/30428777/. NCAA Chief Financial Officer Kathleen McNeely elaborated that this new distribution would go into a pool in which the NCAA already distributes more than $500 million annually to Division I schools and athletic conferences. *See id.*

[200] *See* Amanda Hyland, *Student Athletes and Compensation for Likeness*, L. J. NEWSL. (Nov. 2015), http://www.lawjournalnewsletters.com/issues/ljn_intproperty/22_3/news/student_athletes_and_compensation_for_likeness-162114-1.html. Now teammates and starting for the NFL's Dallas Cowboys, Elliott applied for five different trademark registrations, including "Zeke" and "Eze," while Prescott sought registrations for his name, "Dak Attack," and "Who Dak." *See id.* Manziel proved the most entrepreneurial by having his family start a company, named JMAN2 Enterprises, which then filed the "Johnny Football" trademark application on Manziel's behalf while Manziel was still a student-athlete. *See id.* The trademark registration then reverted to Manziel's personal ownership following his departure from college. *See id.*

registrations for phrases such as "Fear the Brow" and "Raise the Brow" in order to commercially profit from his famous unibrow.[201] Right now, it remains a bit tricky for student-athletes to file trademark registrations due to the NCAA's restrictions on student-athletes sponsoring commercial products, but expect that this trend will continue to rise since it represents one of the few ways in which student-athletes may actually protect and eventually profit from their individual NILs.[202]

With the above in mind, there remains no better and no fairer option at this point than to consider the possibilities of a potential collegiate licensing system in which the student-athletes actually benefit instead of the NCAA reaping licensing profits from players' NILs via the CLC. Since the tide of *O'Bannon* continued a shift in favor of removing the NCAA's restraints on student-athletes' individual rights of publicity by way of the outdated Form 08-3a at both the District Court and Court of Appeals levels, it seems inevitable that a day will soon arrive when players will gain the right to commercially profit from their own NILs regardless of any future cash payments that may or may not be paid to players.

One radical option would involve the installation of a salary cap, in which every Division I men's basketball and football team would have certain financial caps on the amount that each program could spend on student-athletes.[203] Each player would be guaranteed a minimum salary that would take up approximately half of the salary cap altogether.[204] The remainder of the salary cap would be used by coaches and recruiters in order to convince star high school recruits to attend a certain university over another.[205] However, this model poses to horrify a vast majority of Americans that believe student-athletes are compensated well enough at present time through full-tuition scholarships, in addition to the pending mess in dealing with the Title IX balance between men's and women's sports programs and the awful disadvantage that smaller colleges would be forced into.[206] Additionally, nothing included in such a salary cap model would accurately reflect the financial realities of modern television and rights deals struck between the NCAA and its

[201] Darren Rovell, *Anthony Davis Trademarks His Brow*, CNBC (June 25, 2012), http://www.cnbc.com/id/47951613.

[202] *See* Hyland, *supra* note 200.

[203] *See* Joe Nocera, *A Way to Start Paying College Athletes*, N.Y. TIMES (Jan. 8, 2016), http://www.nytimes.com/2016/01/09/sports/a-way-to-start-paying-college-athletes.html.

[204] *See id.*

[205] *See id.*

[206] *See id.*

broadcast partners on the backs of student-athletes' names, images, and likenesses.

Another concept known as the "Olympic Model" would continue the NCAA's current prohibition of paying student-athletes in exchange for their performance in collegiate athletics, but would relax the NCAA's current "amateurism" restraints and allow college athletes to profit off of their respective rights of publicity and NILs.[207] In such a system, the NCAA would absolve its current status as an antitrust violator, provide student-athletes with their lawful earning power based on their NILs, and allow the NCAA to continue signing massive broadcast and licensing deals with corporate partners without the headaches of providing stipends or deferred cash payments to players.[208] Again, however, such a system might run into its fair share of Title IX dilemmas due to the fact that far more male student-athletes are likely to possess lucrative economic opportunities based on their NILs compared to their female counterparts.[209]

B. Reinforcements to the Rescue? The Curious Cases of Shawne Alston and Jeffrey Kessler

Regardless of the Supreme Court's decision to deny review of *O'Bannon v. NCAA*, the affirmation by Judge Wilken and the Ninth Circuit that the NCAA's current rules unlawfully restrain trade by way of preventing student-athletes from profiting off of their own rights of publicity and corresponding NILs has already managed to box the NCAA and its outdated concept of amateurism into a corner.[210] While the *O'Bannon* plaintiffs were not granted the opportunity to take advantage of this trend, there are two cases currently waiting in the wings ready to pounce on the idea of the NCAA as an antitrust violator in order to obtain compensation for student-athletes.

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[207] *See* Michael Schwartz, *Changing the NCAA: A Case for the Olympic Model*, SPORTS MBA BLOG (Sept. 3, 2013), http://www.sportsmbablog.com/changing-the-ncaa-case-for-olympic-model/.

[208] *See id.*

[209] *See id.*

[210] *See, e.g.*, Jason M. Gerber, *Ninth Circuit's Decision in the Ed O'Bannon Case and the Curious Connection With Johnny Football*, MAC L. BLOG, http://www.maclaw.com/ninth-circuits-decision-in-the-ed-obannon-case-and-the-curious-connection-with-johnny-football/ (last visited Nov. 7, 2016).

In March 2014, former West Virginia University running back Shawne Alston filed a class-action suit against the NCAA and its Power Five conferences, alleging that the NCAA committed antitrust violations through a widespread secret agreement among the conferences to impose a cap on the financial value of athletic scholarships set below the cost of attending those same undergraduate institutions.[211] Alston's suit originally demanded an injunction that prevented the NCAA and its conferences from colluding together in an effort to keep the value of athletic scholarships lower than the actual cost of attendance.[212] However, this demand disappeared in the aftermath of the Power Five voting to provide full cost of attendance scholarships to student-athletes and strictly left the *Alston* action to pursue damages as compensation for the gap between the cost of attending an undergraduate institution and the amount of grant-in-aid that the student-athlete received while competing.[213]

The more threatening case of the two for the NCAA, however, most certainly appears to be the class action also filed in 2014 by NFLPA outside counsel Jeffrey Kessler on behalf of two former Division I men's football players and one men's basketball player.[214] Known today as Tom Brady's attorney in the "Deflategate" controversy against the NFL, Kessler originally made a name for himself by using litigation as a means of creating free agency for NFL players during the early 1990s.[215] In this instance, Mr. Kessler decided to use his several decades-worth of experience

[211] *See* Jon Solomon, *Lawsuit Challenges NCAA Rules Capping the Value of Athletic Scholarships*, ALA. MEDIA GROUP (Mar. 5, 2014), http://www.al.com/sports/index.ssf/2014/03/lawsuit_challenges_ncaa_rules.html. Prior to this suit against the NCAA, Alston previously sued EA Sports for using the names and likenesses of student-athletes in its *NCAA Football* video game series without providing proper compensation to the affected collegiate athletes. *See* Martin Rickman, *Former West Virginia Player Files Lawsuit against NCAA for Capping Scholarship Value*, SPORTS ILLUSTRATED (Mar. 5, 2014), http://www.si.com/college-football/campus-union/2014/03/05/ncaa-lawsuit-shawne-alston-antitrust.

[212] *See* Justin Sievert, *The Forgotten Antitrust Case: How an NCAA Loss in* Alston *Could Impact College Athletics*, SPORTING NEWS (Nov. 4, 2015), http://www.sportingnews.com/ncaa-football/news/ncaa-antitrust-case-shawne-alston-effects-college-athletics/1uro6chmw5naj1o6n15opblfmy.

[213] *See id.*

[214] *See* Jon Solomon, *Meet Jeffrey Kessler, Lawyer Whose Suit Strikes Fear in NCAA's Heart*, CBS SPORTS (Nov. 4, 2014), http://www.cbssports.com/college-football/news/meet-jeffrey-kessler-lawyer-whose-suit-strikes-fear-in-ncaas-heart/. The named plaintiffs include former Clemson Tiger Martin Jenkins, former Middle Tennessee football player Anfornee Stewart, and current Wisconsin Badger basketball player Nigel Hayes. *Id.*

[215] *See* Hayden Bird, *Meet Tom Brady's Impressive Legal Team*, BOS. GLOBE MEDIA (May 25, 2016), https://www.boston.com/sports/deflategate/2016/05/25/meet-tom-bradys-expensive-legal-team.

litigating antitrust and sports-related cases to help represent college players who refuse to believe that there should be a cap on the value of athletic scholarships and that players whose value to their respective schools surpasses that of an athletic scholarship should be compensated up to their full financial value.[216] Despite the fact that neither of these cases pursue the right of publicity and NIL route used in *O'Bannon*, both cases still remain primed to take advantage of the NCAA's newfound violator status under the Sherman Act, thanks to the *O'Bannon* lawsuit paving the road in the first place.

VI. CONCLUSION

Thanks to the overwhelming transformation of collegiate athletics over the past several decades, the battle will only continue to rage on between student-athletes and the NCAA until some sort of just compensation crosses the aisle from the administration to the players. While the stage has certainly been set for the courts to finally rule once and for all on the issues of amateurism and providing collegiate athletes with a form of financial compensation while still attending colleges and universities, this fight will not cease even in the aftermath of the conclusion of *O'Bannon*. At this point in time, far too much evidence has come to light showing exactly how the NCAA and its member schools profit every day off of its student-athletes, whether in the form of television broadcast deals, video games, or even small trinkets in the book store reflecting the name, image, or likeness of the star player on the local college's basketball team.

Until the day on which this crucial divide between the NCAA and its student-athletes finds a common meeting ground, the NCAA and its member schools will likely continue to find themselves on the receiving end of endless lawsuits seeking proper compensation for players. While a great deal of the national populace will certainly be outraged on the day that the NCAA finally gives in to the student-athletes and the changing times, that anger will eventually subside over time since change always has been and always will be undefeated. In the end, no person, no organization, no matter how large and powerful, is immune to change. As the late, great David Bowie once penned so eloquently: "And these children that you spit

[216] *See* Telephone Interview by Bill Littlefield, NPR Commentator, WBUR Bos., with Michael McCann, Sports L. Writer, Sports Illustrated (Oct. 3, 2015), http://www.wbur.org/onlyagame/2015/10/03/ncaa-antitrust-obannon-lawsuit.

on/As they try to change their worlds/Are immune to your consultations/They're quite aware of what they're going through/Ch-ch-ch-ch-Changes/Turn and face the strange/Ch-ch-Changes."[217]

[217] DAVID BOWIE, *Changes, on* HUNKY DORY (Trident Studios 1971).