

1-1-2001

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### Recommended Citation

Matthew G. Matzkin, *Gettin' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity by Not Paying for Their Likenesses*, 21 Loy. L.A. Ent. L. Rev. 227 (2001).  
Available at: <https://digitalcommons.lmu.edu/elr/vol21/iss2/1>

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# GETTIN' PLAYED: HOW THE VIDEO GAME INDUSTRY VIOLATES COLLEGE ATHLETES' RIGHTS OF PUBLICITY BY NOT PAYING FOR THEIR LIKENESSES

Matthew G. Matzkin\*

## I. INTRODUCTION

Envision all of the action and spirit of college athletics completely packaged and available on demand. For many fans, this dream is realized annually when video game producers release the latest college sports video game titles. Not surprisingly, producing these games is a lucrative enterprise, particularly as the games' graphics, sound and playability continue to improve with advances in technology.<sup>1</sup>

The combination of video games and college sports translates into revenue for both video game producers and the collegiate institutions licensing their names and logos.<sup>2</sup> However, the video game industry relies

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1. The gaming industry in general produces staggering revenues. In October 1999, Sony Computer Entertainment of America announced that business from its video game console, the Sony PlayStation, surpassed movie box office receipts. Sony expected PlayStation products to generate more than \$1 billion in sales for the 1999 holiday season. Sam Kennedy, *PlayStation Bigger than Hollywood*, GAME SPOT NEWS, at [http://headline.gamespot.com/news/99\\_11?18\\_vg\\_bigps/index.html](http://headline.gamespot.com/news/99_11?18_vg_bigps/index.html) (Nov. 18, 1999). Sports games comprise approximately 40% of all video game sales with football games being the most popular. Marcus W. Thompson II, *In the (Video) Zone with the Raiders*, CONTRA COSTA TIMES, Jan. 19, 2000. "The follow-up to the Sony PlayStation was the PlayStation 2 . . . [which] surpassed all expectations . . . The system sold approximately one million units in its first weekend of release . . . These staggering sales figures, as well as the potential of such a powerful and versatile machine . . ." Brad Shoemaker, *PlayStation 2 Special Report*, *Game Spot News*, at <http://zdnet.com/gamespot/stories/features/12059,2637793,00.html> (last visited Mar. 24, 2001).

2. For example, Electronic Arts ("EA"), maker of some of the most popular college titles such as *NCAA Football* and *March Madness*, posted revenues of more than \$1.4 billion for the

on more than simply the names and logos of National Collegiate Athletic Association ("NCAA") Division I schools. For a college sports video game to achieve ultimate success, the true college atmosphere must be captured. This feat is accomplished best by using the likenesses of real collegiate players and actual college teams.

Currently, the NCAA Bylaws strictly prohibit student athletes from receiving remuneration for their services as college athletes. This includes compensation for the use of their names and images.<sup>3</sup> Furthermore, the NCAA prohibits college athletes from authorizing their names and images for commercial use.<sup>4</sup> Thus, student athletes are completely barred from using their names and images for financial gain.<sup>5</sup>

In effect, the NCAA Bylaws create a safe haven for video game producers who use the likenesses of real student athletes in their video games.<sup>6</sup> Without mention, the Bylaws allow those producers to feature genuine college stars, as long as the game producers do not specifically include the student athletes' names.<sup>7</sup> Thus, game producers have no obligation to pay college athletes for the use of their names and images.<sup>8</sup> This differs dramatically from professional sports video games in which the players are identifiable by name and must be compensated accordingly.<sup>9</sup>

fiscal year of 2000. *NCAA Football 2001 Features*, at [http://ncaa2001.ea.com/press\\_3.html](http://ncaa2001.ea.com/press_3.html) (last modified Oct. 18, 2000). In order to use actual colleges and universities in these games, a video game company like EA must first obtain a license from the National Collegiate Athletic Association ("NCAA"). The profits from these licenses are then distributed amongst NCAA member institutions. See Vladimir P. Belo, Note, *The Shirts off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM & ENT L.J. 133, 134 (1996).

3. NCAA Bylaw §§ 12.5.2.1, 12.5.2.2. See discussion *infra* Parts III.B and IV.

4. *Id.*

5. *Id.*

6. Realism is the most important aspect of the modern sports video game industry. See Matthew Barrett, *GAME REVIEW: PlayStation's 'NCAA 2000'*, MICH. DAILY, Sept. 17, 1999, available at 1999 WL 18813814 ("The game's best feature, far and away, is its authenticity. Each school has its own stadium, fight song and the actual players from its team featured in the game (the players are identified only by their numbers, not their names)."). While game reviewers praise the realistic elements of the games, they also criticize the unrealistic aspects. See, e.g., Tracy Collins, *Whoah Nellie!, NCAA Football Game Makes Up in Action What It Lacks*, PITTSBURGH POST-GAZETTE, Aug. 27, 1999, available at 1999 WL 25689630 (praising many elements of *NCAA GameBreaker 2000*, but criticizing the NCAA for not allowing use of players' names). It follows that the games would not be nearly as profitable if they featured fictional schools and unfamiliar collegiate atmospheres.

7. See *infra* Parts III.B and IV describing how video games circumvent the NCAA Bylaws.

8. NCAA Bylaw § 12.5.2.1(b) (stating the players are not entitled to compensation for their images if the games do not identify the players by name).

9. For professional sports games, the appropriate players union must obtain a license to use the athletes' names. See, e.g., *PLAYERS INC Services*, at [http://209.207.210.246/inside\\_playersinc/services.asp](http://209.207.210.246/inside_playersinc/services.asp) (last visited Jan. 26, 2001) ("Any program involving six (6) or more NFL players requires a license from PLAYERS INC.").

With that contrast in mind, this Article analyzes college sports video games in terms of student athletes' rights of publicity. Part II discusses the modern right of publicity. Part III evaluates the NCAA regulations preventing student athletes from promoting or endorsing products. In addition, it explains why the names of student athletes may not accompany their images in video games. Part IV describes recent college sports video games, and details the technological advances furthering the misappropriation of college athletes' names and images. Part V applies the current test for the right of publicity to prove that computer simulated college sports video games violate student athletes' rights. Part VI presents possible solutions to this problem. The Article concludes that, although NCAA member institutions offer student athletes athletic scholarships as compensation,<sup>10</sup> those athletes should also receive compensation from video game producers. This compensation would be minimal, and would not destroy the dynamic of college athletics.

## II. THE RIGHT OF PUBLICITY

The right of publicity was first recognized in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*<sup>11</sup> The right of publicity is a state common law doctrine, often bolstered by legislation,<sup>12</sup> primarily focusing on the economic interest in the individual's own name or likeness.<sup>13</sup> Publicity rights center on the "right of an individual, [usually] a public figure or celebrity, to control the commercial use of his or her name or likeness."<sup>14</sup> Courts generally consider the following four elements to determine a violation of this right: 1) the defendant's use of the plaintiff's identity; 2) the appropriation of the plaintiff's name or likeness to the defendant's

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10. Schools extend economic benefits to some athletes by providing them with athletic scholarships. See C. Peter Goplerud III, *Pay For Play For College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081, 1088 (1997); Bob Molinaro, *Isn't This Rich? Lots of Bucks, But Not for Jocks*, VIRGINIAN-PILOT & LEDGER-STAR, Dec. 1, 1999, at C1 (commenting college athletes are treated like professional athletes "[r]ight up to the point where it's time to pay them . . . . The scholarship is payment enough, they say. A full athletic scholarship makes everything OK."). The video game producers cannot offer any such benefits or collateral as a result of NCAA prohibitions. See NCAA Bylaw §§ 12.5.2.1, 12.5.2.2.

11. 202 F.2d 866 (2d Cir. 1953). See Thomas Glenn Martin, Jr., Comment, *Rebirth and Rejuvenation in a Digital Hollywood: The Challenge Computer-Simulated Celebrities Present for California's Antiquated Right of Publicity*, 4 UCLA ENT. L. REV. 99, 109 (1996).

12. Martin, *supra* note 11, at 107.

13. *Id.* at 109. Although various rights to privacy have been discussed since the late 1800s, the "right of publicity" did not enjoy a separate existence until the *Haelan* court recognized it as distinct from the right of privacy. *Haelan*, 202 F.2d at 868. The right of privacy usually entails injury to an individual's feelings or reputation. Martin, *supra* note 11, at 109.

14. Martin, *supra* note 11, at 110.

advantage, commercially or otherwise; 3) lack of consent and 4) resulting injury.<sup>15</sup>

### A. Defendant's Use of the Plaintiff's Identity

Courts have failed to define or adopt a uniform definition of "identity."<sup>16</sup> The Ninth Circuit appears to take a very broad approach in its definition.<sup>17</sup> However, this element is generally met where the defendant appropriated the plaintiff's name, picture or other likeness.<sup>18</sup> Two cases help determine what constitutes a name or likeness.

In *Motschenbacher v. R.J. Reynolds Tobacco Co.*,<sup>19</sup> the plaintiff, Lothar Motschenbacher, was a famous professional racecar driver well known for the design and look of his racecar.<sup>20</sup> In a magazine advertisement for Winston cigarettes, the defendants, R.J. Reynolds Tobacco Company and William Esty Company, altered photographs of various racecars.<sup>21</sup> Because his car's distinctive features were not changed, several members of the racing community immediately recognized Motschenbacher's car in the advertisement.<sup>22</sup> Although Motschenbacher was not recognizable as the vehicle's driver, the car's distinctive markings were sufficient to create a direct inference that he was the driver.<sup>23</sup> The court therefore held Motschenbacher was identifiable.<sup>24</sup>

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15. *Eastwood v. Superior Court*, 198 Cal. Rptr. 342, 347 (Ct. App. 1983); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 413-14 (9th Cir. 1996); see also Darren F. Farrington, Note, *Should the First Amendment Protect Against Right of Publicity Infringement Actions Where the Media Is Merchandiser? Say It Ain't So, Joe*, 7 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 779, 793 (1997) (clarifying the elements of infringement of California common law right of publicity).

16. See Belo, *supra* note 2, at 136-44 (describing various cases in which an individual's "identity" has been at issue); see also Baila H. Celedonia, *Recent Developments in the Right of Publicity in the United States* in ADVANCED SEMINAR ON TRADEMARK LAW at 127, 136, 138-42 (PLI Patents, Copyrights, Trademarks, and Literary Property Practice Course, Handbook Series No. 515, 1998) (discussing cases that extend protection to voices as well as robots). Martin, *supra* note 11, at 113-14.

17. Martin Jr., *supra* note 11, at 113-14 (describing the Ninth Circuit's protection of an individual's "identity" as something beyond a laundry list of physical attributes).

18. *White*, 971 F.2d at 1397-98.

19. 498 F.2d 821 (9th Cir. 1974).

20. *Id.* at 822.

21. *Id.*

22. *Id.* These features included a white pinstripe, an oval medallion displaying the car's number, and the car's color. *Id.*

23. *Id.*

24. *Id.* at 827.

In *White v. Samsung Electronics America, Inc.*,<sup>25</sup> the defendant produced an advertisement featuring a robot dressed in a wig, gown and jewelry selected to resemble Vanna White's hair and dress.<sup>26</sup> The robot stood next to a game board easily recognizable as the *Wheel of Fortune* game show set, posed in a stance for which White is famous.<sup>27</sup> White neither consented to nor received compensation for the advertisement.<sup>28</sup> In holding White's right of publicity was violated, the court stated, "[i]t is not important *how* the defendant has appropriated the plaintiff's identity, but *whether* the defendant has done so."<sup>29</sup> In its analysis, the court cited William L. Prosser, who noted the possibility of appropriating one's "identity as by impersonation, without the use of either his name or his likeness."<sup>30</sup>

### *B. Appropriation of the Plaintiff's Name or Likeness*

The use of one's name or likeness is not enough to succeed in a right of publicity claim. To prevail, plaintiffs must establish the appropriation of their names or likenesses for commercial gain.<sup>31</sup> Usually, the appropriation is obvious.<sup>32</sup> However, cases exist where the plaintiff's identity may have been used, but was not appropriated for commercial gain.

In *Pesina v. Midway Manufacturing, Co.*,<sup>33</sup> a Northern Illinois District Court did not find the right of publicity violated because the plaintiff was not recognizable; thus, his identity could not be appropriated for commercial gain.<sup>34</sup> The plaintiff, Daniel Pesina, was a martial artist hired by a producer to model for characters in the *Mortal Kombat* series of arcade and home video games.<sup>35</sup> In deciding Pesina's right of publicity claim, the court proffered a two-part standard. First, the plaintiff must prove the commercial value of the plaintiff's name.<sup>36</sup> Second, the plaintiff

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25. 971 F.2d 1395 (9th Cir. 1992).

26. *Id.* at 1396.

27. *Id.*

28. *Id.*

29. *Id.* at 1398.

30. *Id.* at 1397-98 (quoting William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 401, n.155 (1960)).

31. *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 873-874 (C.D. Cal. 1999).

32. *Id.* (finding Los Angeles Magazine appropriated Dustin Hoffman's likeness for commercial gain when it used Hoffman's image in a fashion guide without his permission).

33. 948 F. Supp. 40 (N.D. Ill. 1996).

34. *Id.* at 43.

35. *Id.* at 41.

36. *Id.* at 42.

must demonstrate the likeness was recognizable.<sup>37</sup> In *Pesina*, the first element was not met because there was no evidence *Pesina*'s name or likeness had value prior to his association with the *Mortal Kombat* games.<sup>38</sup> The second element was not met because the court determined only six percent of 306 users recognized *Pesina* in the video games.<sup>39</sup> Thus, *Pesina*'s likeness was not recognizable.<sup>40</sup>

Unlike in *Motschenbacher* and *White*, where a fair number of people recognized the plaintiffs' identities,<sup>41</sup> in *Pesina* only a small number of players identified the plaintiff.<sup>42</sup> *Pesina* indicates a plaintiff's ability to recover is limited in cases where the plaintiff's likeness is not recognizable by many individuals.<sup>43</sup> Without name recognition, the plaintiffs lose the ability to claim commercial exploitation of their images.<sup>44</sup>

### C. Plaintiff's Lack of Consent

Plaintiffs cannot claim violation of their publicity rights if they consent to the use of their images. Whether plaintiffs consent to the use of their images usually raises the issue of federal copyright preemption. However, a right of publicity claim is qualitatively different than a copyright claim because one's identity, which is the basis of a right of publicity violation, is generally not copyrighable.<sup>45</sup>

Federal copyright law preempts state law claims encompassing rights granted by the Copyright Act of 1976 ("Copyright Act").<sup>46</sup> Courts have preempted state law claims in situations where plaintiffs contract with copyright holders to transfer the rights in their images.<sup>47</sup> Thus, the new

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37. *Id.*

38. *Id.*

39. *Pesina*, 948 F. Supp. at 42.

40. *Id.*

41. *Motschenbacher*, 498 F.2d at 822; *White*, 971 F.2d at 1396.

42. *Pesina*, 948 F. Supp. at 42.

43. Compare *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), and *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), with *Pesina v. Midway Mfg. Co.*, 948 F. Supp. 40 (N.D. Ill. 1996).

44. *Pesina*, 948 F. Supp. at 43.

45. *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 871, 875 (C.D. Cal. 1999).

46. *Id.* at 871.

47. *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 667 (7th Cir. 1986) (analyzing the rights of the defendant and major league baseball players under the "work for hire" doctrine defined in 17 U.S.C. § 101 as "a work prepared by an employee within the scope of his or her employment"). The court held the Baltimore Orioles Baseball Club contractually owned the copyright to the telecasts in question. *Id.* at 668.

copyright owner may sue for damages under federal law if the copyright is infringed.<sup>48</sup>

In *Ahn v. Midway Manufacturing Co.*,<sup>49</sup> a Northern Illinois District Court held federal copyright law preempts state law claims if two elements are satisfied: 1) the work is fixed in a tangible form and falls within the subject matter of § 102 of the Copyright Act and 2) the work is equivalent to any rights specified in § 106.<sup>50</sup> In order for a work to be fixed, it must be recorded under the author's authority.<sup>51</sup> The *Ahn* court found the plaintiff's images were fixed on the videotape with the plaintiff's consent.<sup>52</sup> Also, because the choreographed works were original works of authorship falling within the subject matter of copyright,<sup>53</sup> the work met the first condition for preemption.<sup>54</sup>

The court held the second element satisfied because the right of publicity is equivalent to the distribution right,<sup>55</sup> performance right,<sup>56</sup> or the preparation of derivative works right<sup>57</sup> enumerated in § 106. In sum, the court held the plaintiffs lost their rights of publicity when they consented to videotaping for the specific purpose of creating the video game.<sup>58</sup>

The *Ahn* court's reasoning is based largely on the Illinois Court of Appeals decision in *Baltimore Orioles, Inc. v. Major League Baseball Players Association*.<sup>59</sup> There, the primary issue was whether Major League Baseball clubs owned exclusive rights to the televised performances of players during Major League Baseball games and whether the players could rightfully claim publicity rights in the telecasts.<sup>60</sup> Engaged in the same copyright analysis as *Ahn*, the court determined the telecasts were fixed in tangible forms because they were recorded simultaneously with

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48. See generally *Ahn v. Midway Mfg. Co.*, 965 F. Supp. 1134 (N.D. Ill. 1997); *Baltimore Orioles*, 805 F.2d 663. Moreover, in such an instance, a loss of personal rights to the image recorded is occasioned. *Id.*

49. 965 F. Supp. 1134.

50. *Id.* at 1137.

51. *Id.* at 1138; see also 17 U.S.C. § 101 (1994).

52. *Ahn*, 965 F. Supp. at 1138.

53. 17 U.S.C. § 102(a)(4) (1994).

54. *Ahn*, 965 F. Supp. at 1138.

55. 17 U.S.C. § 106(3) (1994).

56. *Id.* § 106(4).

57. *Id.* § 106(2).

58. *Ahn*, 965 F. Supp. at 1140. The court also addressed the plaintiffs' claim under a *quantum meruit* theory. *Id.* The court ruled that such a claim must also fail because a valid enforceable agreement existed between the two parties. *Id.*

59. 805 F.2d 663 (7th Cir. 1986).

60. *Id.* at 667.



their transmission.<sup>61</sup> Additionally, it found the telecasts were audiovisual works within the subject matter of copyright.<sup>62</sup> Thus, the players attempt to prevent the owners from broadcasting a performance under which they were contractually bound to perform was a claim preempted by copyright law. The court held those property rights in the performances equivalent to rights granted by § 106 of the Copyright Act were preempted by federal law.<sup>63</sup>

*Ahn* and *Baltimore Orioles* relied heavily on the existence of express contracts between the parties.<sup>64</sup> In *Ahn*, the court held the written contract eliminated the plaintiffs' rights of publicity because the plaintiffs agreed to the videotaping of certain games.<sup>65</sup> Similarly, in *Baltimore Orioles*, the players were employees of their teams and no contractual provisions prevented the teams from selling broadcast rights.<sup>66</sup> In fact, the court noted the plaintiffs' did not negotiate for such a provision when their contracts were drafted.<sup>67</sup> Thus, because the players consented to have their likenesses used in a copyrighted product, they lost the rights of publicity in their performances.<sup>68</sup>

#### D. Resulting Injury

To satisfy the resulting injury prong, the plaintiffs must establish their names or likenesses have actual commercial value.<sup>69</sup> The greater the fame or notoriety of the individual, the greater the extent of the economic injury.<sup>70</sup>

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61. *Id.* at 668.

62. *Id.*

63. *Baltimore Orioles*, 805 F.2d at 674. The court's analysis did not conclude with the copyright claims. It further stated the players were merely attempting to obtain *ex post* what they did not negotiate *ex ante*. *Id.* at 679. In essence, the court stated the players should have contracted with their clubs for an interest in the copyright of the telecasts. *Id.*

64. *Ahn*, 965 F. Supp. at 1136, 1140; *Baltimore Orioles*, 805 F.2d at 679.

65. *Ahn*, 965 F. Supp. at 1140.

66. *Baltimore Orioles*, 805 F.2d at 670.

67. *Id.* at 679.

68. *Id.*

69. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 (9th Cir. 1974). The court specifically stated that "where the identity appropriated has commercial value, the injury may be largely or even wholly, of an economic or material nature." *Id.* In *Pesina*, the court stated that persons without a commercial value in their likeness cannot claim a violation of the right of publicity because they have suffered no harm. *Pesina v. Midway Mfg. Co.*, 948 F. Supp. 40, 42 (N.D. Ill. 1996).

70. *Motschenbacher*, 498 F.2d at 824 n.11.

### III. THE NCAA RULES GOVERNING AMATEURISM

NCAA Bylaws 12.5.2.1 and 12.5.2.2 preclude the name or picture of a currently enrolled college student athlete from appearing on commercial items.<sup>71</sup> More specifically, this applies to student athletes with remaining eligibility at their universities.<sup>72</sup> Nevertheless, while the direct rules governing the use of players' names are clear, there is an ever increasing debate surrounding the fairness of these Bylaws and the resulting exploitation of college athletes.<sup>73</sup>

The official website of the NCAA states several purposes of the organization including:

To initiate, stimulate and improve intercollegiate athletics programs for student athletes and to promote and develop educational leadership, physical fitness, athletics excellence and athletics participation as a recreational pursuit . . . . To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of the Association . . . . To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism.<sup>74</sup>

These purposes clarify the NCAA's goal of maintaining college athletics as an integral part of the higher educational experience, and of distinguishing college athletics from professional sports.<sup>75</sup> However, these purposes fail to consider the NCAA's operation as an entrepreneurial enterprise.<sup>76</sup> Hence, problems inevitably arise when the NCAA attempts to reconcile its educational and athletic goals with the economic and entrepreneurial activities of college sports.<sup>77</sup>

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71. NCAA Bylaw §§ 12.5.2.1, 12.5.2.2.

72. See Letter from Steve Mallonee, Director of Membership Services/Division I Governance Staff Liaison (Mar. 7, 1999) (on file with author).

73. See Stephen Schott, *Give Them What They Deserve: Compensating the Student Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW J. 25 *passim* (1996); J.A. Adande, *NCAA Rules by the Books*, L.A. TIMES, Feb. 26, 2000, at C1 (discussing the NCAA's stringent enforcement of its rules and the adverse effects on student athletes).

74. NCAA Online, *About the NCAA: Purposes*, at <http://www.ncaa.org/about/purposes.html> (last visited Aug. 24, 2000).

75. Schott, *supra* note 73, at 31.

76. *Id.*

77. *Id.*

### A. History of the NCAA

The NCAA was created in 1905 as an attempt to curb violence in college football.<sup>78</sup> It officially began in 1906 as the Intercollegiate Athletic Association of the United States ("IAAUS"), eventually assuming its current name in 1910.<sup>79</sup> The institution's first major crisis came shortly after World War II.<sup>80</sup> At that time, the members of the NCAA became concerned about the effects unrestricted television would have on football attendance.<sup>81</sup> In 1952, shortly after these concerns were aired, the NCAA established its headquarters in Kansas City, Missouri, and instituted a program to control live television broadcasts of football games.<sup>82</sup>

The NCAA is a private, nonprofit association consisting of approximately 1000 academically accredited universities in the United States.<sup>83</sup> It urges amateurism for its athletes and enacts policies to ensure wealth maximization for the participant universities.<sup>84</sup>

This contradiction between athletic amateurism and institutional profit is frequently disputed.<sup>85</sup> Some commentators even claim the concept of amateurism in the NCAA "is a sham due to [its] commercial nature."<sup>86</sup> In 1999, the NCAA granted CBS television exclusive broadcasting rights to the NCAA Division 1A Men's Basketball Tournament for eleven years at a price of approximately six billion dollars.<sup>87</sup> The net income from college football bowl games in 1993 through 1994 totaled \$40.7 million.<sup>88</sup> The television revenue alone from the 1993 through 1994 bowl games totaled \$36 million.<sup>89</sup> Because the NCAA is a nonprofit organization, this money is distributed among the member institutions.<sup>90</sup> Between the years of 1992

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78. NCAA Online, *About the NCAA: History*, at <http://www.ncaa.org/about/history.html> (last visited Aug. 24, 2000).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Schott, *supra* note 73, at 30.

84. *Id.* at 31.

85. See generally *id.*; Goplerud, *supra* note 10; Michael P. Acain, Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307 (1998).

86. Goplerud, *supra* note 10, at 1082.

87. Wallace I. Renfro, *NCAA Reaches Rights Agreement with CBS Sports*, available at <http://www.ncaa.org/releases/champother/1999111801co.htm> (Nov. 18, 1999).

88. Acain, *supra* note 85, at 309.

89. *Id.*

90. *Id.*

and 1999, the NCAA distributed \$862,395,310 to participating member institutions.<sup>91</sup>

However, these figures do not adequately represent the income derived from college athletics, as they encompass only national receipts of the two largest men's sports, basketball and football. Member institutions also receive hefty receipts from the regular season ticket sales for both men's and women's sports and the licensing of products bearing institutional athletic logos.<sup>92</sup> For example, in 1996, the University of Michigan collected close to 4.9 million dollars in royalties from the sale of licensed products bearing the University's athletic emblems.<sup>93</sup>

Despite these enormous revenues flowing into the coffers of NCAA institutions, and due to the NCAA's questionably steadfast belief in amateurism,<sup>94</sup> it remains unlikely student athletes will receive anything more than scholarships as compensation for their athletic contributions.<sup>95</sup> Despite the ever growing commercial nature of collegiate sports and the NCAA's role in increasing the member institutions' total income, the NCAA still claims its primary goal is preserving the concept of amateurism among its athletes.<sup>96</sup> In any event, the NCAA argues offering players compensation for their skills and services would destroy the concept of amateurism and the notion of the student athlete.<sup>97</sup> Purists of college athletics agree any denigration of the amateurism concept would be a giant step toward the destruction of intercollegiate athletics.<sup>98</sup>

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91. See NCAA Online, *NCAA Financial Section: Total Distribution to Members*, at [http://www.ncaa.org/financial/revenue\\_distribution/98-99\\_total\\_distribution.html](http://www.ncaa.org/financial/revenue_distribution/98-99_total_distribution.html) (last visited Aug. 24, 2000).

92. See *Review & Outlook: Foul!*, WALL ST. J., Feb. 11, 2000, at W17 ("Only three months back the NCAA granted CBS the rights to broadcast the March playoffs until 2013 in exchange for \$6.6 billion. That doesn't include, moreover, the revenues the schools enjoy from the regular season, including the lucrative business of licensing their logos for caps, sweatshirts, pennants and the like").

93. Goplerud, *supra* note 10, at 1087.

94. See Michael Dobie, *College Basketball*, NEWSDAY, Feb. 27, 2000, at C2 (quoting NCAA spokesman Wally Renfro as stating, "It has to do with higher education's belief . . . that you should be participating in college sports as an amateur in that sport and that you should come to as an amateur in your sport").

95. See *id.*

96. See Schott, *supra* note 73, at 31.

97. See *id.*

98. See *id.*; see also Welch Suggs, *The Demise of the 'Amateur Ideal'*, CHRON. OF HIGHER EDUC., Oct. 29, 1999, at A76 (discussing a proposed rule change that would allow certain professional athletes to compete on a collegiate level as long as they do not compete in the sport in which they were professionals. Murray Sperber, author of *Onward to Victory: The Crises that Shaped College Sports*, is quoted as saying "These rules will blur the line even more between amateur and pro . . . . From a P.R. point of view, the strongest thing college sports has going for it is its 'student-athlete' line and the public more or less accepting that." *Id.* Sperber further states

### B. NCAA Bylaws

NCAA Bylaw 12.5.2.1 states:

Subsequent to becoming a student athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual: (a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommends or promotes directly the sale or use of a commercial product or service of any kind, or (b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.<sup>99</sup>

NCAA Bylaw 12.5.2.2 states:

If a student-athlete's name or picture appears on commercial items (e.g., T-shirts, sweatshirts, serving trays, playing cards, posters, photographs) sold by an individual or agency without the student-athlete's knowledge or permission, the student-athlete (or the institution acting on behalf of the student athlete) is required to take steps to stop such an activity in order to retain his or her eligibility for intercollegiate athletics.<sup>100</sup>

Because Bylaw 12.5.2.1 prohibits receipt of remuneration for the endorsement of commercial products, and Bylaw 12.5.2.2 requires athletes to prohibit unknowing use of their names, a loophole exists within the Bylaws. This loophole would potentially allow student athletes to receive compensation for products using the athlete's name, as long as the athlete is aware of such use and the athlete does not specifically endorse the product. An example of this loophole would be a video game in which the athlete's name appears on the screen, but the athlete is not used for the purpose of endorsing the product. However, an official interpretation of Bylaws 12.5.2.1 and 12.5.2.2 clarifies the matter by stating it is not permissible for a commercial company to use the names of student athletes with eligibility remaining in a computerized simulated sports game.<sup>101</sup>

Thus, while member institutions can and do receive remuneration for allowing video game producers to use their uniforms and fight songs, none of the generated income is distributed to the student athletes who are an

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the rules "would build public cynicism and hasten the day when college sports become truly professional." *Id.*).

99. NCAA Bylaw § 12.5.2.1.

100. NCAA Bylaw § 12.5.2.2.

101. See Letter from Steve Mallonee, Director of Membership Services/Division I Governance Staff Liaison (Mar. 7, 1999) (on file with author).

integral part of those games.<sup>102</sup> In its current state, the NCAA is organized to earn substantial profits for its member institutions.<sup>103</sup> By organizing licensing committees, controlling television rights and establishing strict rules governing the amateur status of its athletes, the NCAA is as much a commercial regulator as it is a preserver of athletic amateurism.<sup>104</sup>

As discussed in Part III.A, income derived from bowl games and television rights is split equally among the NCAA member institutions.<sup>105</sup> However, video games present a unique situation. Although the universities receive some compensation through the licensing of their logos,<sup>106</sup> a substantial portion of the revenue earned from the games goes to the games' producers.<sup>107</sup> Although this Article does not suggest players should receive compensation directly from their universities, not compensating student athletes for their contributions to earnings of outside organizations likely violates those student athletes' rights of publicity.

#### IV. LET THE GAMES BEGIN

The purpose of college sports video games is to provide "gamers" the excitement and intimacy of college sports, and to offer access to subtleties not available in professional sports video games such as fight songs, rankings and variant styles of play.<sup>108</sup> Another significant difference is that players in college games are identified by their numbers rather than by their names.<sup>109</sup>

*NCAA Football* is a college football series developed annually by Electronic Arts ("EA") Sports.<sup>110</sup> A promotion for the game proudly announces features such as 3-D rendered stadiums, all 114 Division 1A

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102. See Collins, *supra* note 6.

103. See Schott, *supra* note 73, at 31.

104. See, e.g., Rick Morrissey, *Quick-Buck Boys Could Take Lesson from NCAA*, CHI. TRIB., Apr. 1, 2000, at 5 (discussing the NCAA's policing tactics concerning licenses for the Final Four); Steve Rock, *At Adidas Hearing, NCAA Details Licensing Practices*, KANSAS CITY STAR, Feb. 10, 1999, at D4 (listing some of the NCAA's international licensing efforts); Bob Molinaro, *supra* note 10, at C1 (discussing the amount of money handled by the NCAA). See generally Robert Lattinville, *Logo Cops: The Law and Business of Collegiate Licensing*, KAN J.L. & PUB. POL'Y, Spring 1996, at 81 (discussing the NCAA's licensing of merchandise).

105. See Acain, *supra* note 85, at 309.

106. See *Review & Outlook: Foul!*, WALL ST. J., Feb. 11, 2000 at W17.

107. See Kennedy, *supra* note 1.

108. See *NCAA 2001 Review*, at <http://www.operationsports.com/reviewvault/reviews.asp?game=ncaa2001psx> (last visited July 27, 2000).

109. *NCAA Football 2000 Features*, at <http://www.easports.com/99/ncaa2000/features.html> (last visited Sept. 6, 2000).

110. *Id.*

programs, updated rosters, fight songs, chants and the Heisman Trophy.<sup>111</sup> The uniforms are exact replicas of game day attire. An additional feature allows users to “edit player names” so the names will appear on the jerseys during the game.<sup>112</sup> Furthermore, “[p]layers are scaled to their actual height and weight.”<sup>113</sup> Thus, it is not difficult to understand Michael Vick is your quarterback if you are playing with Virginia Tech, or Chris Weinke if you choose Florida State.

In addition, a user of *NCAA Football 2001* can program the public address (“PA”) announcer to recite the name of virtually every player from the schools’ 2000 rosters.<sup>114</sup> At first, the PA announcer will only state the number of the athlete engaged in play.<sup>115</sup> However, after the user initiates the “edit player names” function and enters the names of the players, the PA announcer provides a more detailed commentary such as, “Pass complete to [Santana] Moss for a gain of 18 yards.”<sup>116</sup>

Because of the realistic feel of the games, some articles and game reviews do not refer to the players by their numbers, but rather by their actual names.<sup>117</sup> In two striking examples, journalists simulated bowl

111. *Id.* (The promotion for the 1999 version of the game is even more dramatic: “123 Authentic 3-D Stadiums, Every division 1A team complete with ‘98 rosters, real fight songs; Dynamic crowd noise with chants, PA announcer.”); *NCAA Football 99 Features: Real College Atmosphere*, at [http://www.easports.com/99/ncaa99/features\\_pc.html](http://www.easports.com/99/ncaa99/features_pc.html) (last visited Sept. 7, 2000).

112. See Matt, *NCAA March Madness 2000 (PSX) Review*, at [http://www.sports-gaming.com/basketball/march\\_madness\\_2000/review\\_psx.shtml](http://www.sports-gaming.com/basketball/march_madness_2000/review_psx.shtml) (Jan. 19, 2000) (explaining how player names can be edited and added). “NCAA rules prohibit March Madness 2000 from using real player [n]ames, so players [] have only numbers, not names.” *Id.*; Collins, *supra* note 6 (“Thanks to NCAA licensing regulations and strict guidelines protecting players from any glory—or even video game immortality—you can just call [Lavar Arrington] ‘No. 11.’”); Matt Chamberlin, *Sports Reviewers: Review: NCAA Football 2001*, at <http://www.sportsreviewers.com/reviews/ncaa2k1/ncaa2k1/2kl.htm> (Aug. 2, 2000) (“Due to regulations, actual players’ names cannot be used in NCAA-related games. Instead, their abilities, physical characteristics, and numbers are the only default identification.”).

113. Keith Jackson *Continues to Announce College Football*, at [http://www.989studios.com/pages/corporate/press\\_archives/press\\_keith.html](http://www.989studios.com/pages/corporate/press_archives/press_keith.html) (last visited Sept. 6, 2000); see also *NCAA Football 2000 Behind the Scenes*, at <http://www.easports.com/99/ncaa2000/behind.html> (last visited Sept. 6, 2000) (“Our modelers reviewed tons of reference[s] and focused on building model types that would represent the range of players seen in a real game. Details like stomach, arm and leg size/shape were all taken into consideration.”).

114. See Matt, *supra* note 112.

115. *Id.*

116. Chamberlin, *supra* note 112; Matt, *supra* note 112.

117. Steve Steinberg, *NCAA Football 2001*, at <http://www.happypuppy.com/psx/reviews/ncaafootba-psx-1.html> (Aug. 14, 2000) (“EA has done its homework. The post-Ron Dayne Wisconsin backfield is still strong with speedy Michael Bennett.”); Kevin M. Kaduk, *Dayne Begins Run for Heisman*, *BADGER HERALD* (Univ. of Wisc.), Aug. 31, 1999, available at 1999 WL 18810650 (“So humble is Dayne that he doesn’t even use the video game version of himself when playing NCAA Football 1999 on his Sony PlayStation, preferring to play with ‘his

games using *NCAA Football 2000* and wrote reports featuring the names of the student athletes even though the games did not reference the players by name.<sup>118</sup>

Articles referring to the graphic representations of the players by their actual names are not a new phenomena.<sup>119</sup> For several years, articles about the games have referred to on-screen players by their names instead of their numbers.<sup>120</sup> A game review appearing in *The Courier-Journal of Louisville* after a season opening loss by the University of Louisville to the University of Kentucky in 1998 stated, "Think you could've done better [than a season opening loss]? Here's your chance to try. Boot up *NCAA Football 99*, tell Tim Couch to pass any time he feels like it and see how often you can catch him on a blitz."<sup>121</sup> An article from the *Baton Rouge Advocate* discussing *NCAA Football 98* asserts, "If you pick LSU, you'll be coaching the unnamed equivalent of the 1996 [LSU] Tigers, with a No. 3 (Kevin Faulk) as your primary ball carrier and No. 35 (Charles Smith) anchoring your 4-3 defense at middle linebacker."<sup>122</sup>

Rather than accepting and adjusting to the NCAA rules prohibiting the use of players' names, sports gaming fans are increasingly frustrated by NCAA policies. A scathing review criticizing the NCAA for prohibiting the use of players' names appeared in a game review of *NCAA GameBreaker 2000* in the *Pittsburgh Post-Gazette*.<sup>123</sup> "The only thing standing between 'NCAA GameBreaker 2000' and perfection is the NCAA," writes Tracy Collins.<sup>124</sup> The author goes on to say that after examining the game's title and the two NCAA logos featured on the

boys,' Ohio State's Andy Katzenmoyer and Michael Wiley."); Matthew Barrett, *supra* note 6 ("Brady or Henson? You make the decision. And leave [University of Michigan head coach] Lloyd Carr out of it. Sound too good to be true? Well it's all within the realm of possibility in '*NCAA Football 2000*,' a game that's sure to keep college football fans locked to their controllers for hours on end.").

118. Chris Dickerson, *MU Looks Good on PlayStation: Herd Beats BYU in Video Game Bowl Simulation*, CHARLESTON DAILY MAIL, Dec. 27, 1999, at P1B; Brian J. French, *The Instant Replay: FSU 35, Hokies 14*, VIRGINIAN PILOT & LEDGER STAR, Dec. 21, 1999, at C6.

119. See, e.g., Kirk Bohls, *Texas Will Begin 1999 with Win and Big Plans*, AUSTIN AMERICAN-STATESMAN, Jan. 1, 1999, at C1, available at 1999 WL 7398320 ("The college football video game [NCAA Gameday '99], which uses the previous season's statistics from 1997 but the current 1998 season's projected starters, listed senior Richard Walton as Texas' starting quarterback and redshirt freshman Greg Cicero as the backup.").

120. *Id.*

121. Ric Manning, *College Football Video Games Break from Huddle*, THE COURIER-J. (Louisville, Ky.), Sept. 19, 1998, at 2S, available at 1998 WL 2112578.

122. Scott Rabalais, *NCAA and ABC Gain Yardage with Computer College Football*, THE BATON ROUGE ADVOC., Jan. 16, 1998, at Fun 32, available at 1998 WL 4885128.

123. Collins, *supra* note 6.

124. *Id.*



packaging, there is no question who is profiting.<sup>125</sup> Furthermore, Collins rails that in typical NCAA fashion, there is little acknowledgment of the numerous unpaid players who generate hundreds of millions of dollars for the member institutions.<sup>126</sup> Collins continues:

Lining up against the Wildcats of Arizona, there's a dynamic outside linebacker ready to shoot the gaps or plaster the passer. Watch him go, making a diving stop on the tailback! See as he gets up, does a little strut, and is hailed with these glowing words: "Tackle, No. 11." To those of us who have followed his exploits on the local scene and now the national scene, he's Pittsburgh's own Leapin' Lavar Arrington, *Sports Illustrated* cover boy and a key reason why Penn State is among the top-ranked teams in the nation. Thanks to NCAA licensing regulations and strict guidelines protecting players from any glory—or even video game immortality—you can just call him "No. 11."<sup>127</sup>

Thus, even though players' names are not used, it is obvious that gamers can pinpoint the identities of at least some of the student athletes they control onscreen. Nevertheless, game producers continue to benefit from the decreased licensing costs enjoyed by using numbers instead of names.<sup>128</sup>

Video games featuring graphic representations of college football players differ only slightly from the college basketball video games. In the basketball games, player names are not revealed, announcers do not state either the player's name or number, and the games do not contain the "edit player name" function.<sup>129</sup> However, the games depict players according to their relative sizes and weights,<sup>130</sup> and race.<sup>131</sup> Although the players' names are theoretically absent from the basketball video games, it is still unlikely the athletes' true identities go undetected.

The reality of such thinly veiled representations is evidenced in articles about college basketball video games, which routinely substitute

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125. *Id.*

126. *Id.*

127. *Id.*

128. See *supra* note 8 and accompanying text.

129. Matt, *supra* note 112 (noting the additional feature in *NCAA Football 2000* allowing gamers to enter player names into their systems is missing from *March Madness 2000*).

130. *NCAA Final Four 2000 Returns to PlayStation with All-New 3D Graphics and Unprecedented Gameplay*, at [http://www.989studios.com/pages/corporate/press\\_archives/E3\\_99\\_final\\_four.html](http://www.989studios.com/pages/corporate/press_archives/E3_99_final_four.html) (May 13, 1999) [hereinafter *NCAA Final Four*].

131. Scott DeVaney, *Shoot Out: NCAA March Madness 2000 vs. NCAA Final Four 2000*, at <http://www.checkout.com/games/features/info/0,7746,1853273,00.html> (Feb. 11, 2001).

student athletes' names for numbers. A review of *NCAA Final Four 2000* states, "[o]nly really hard-core college-hoops fans will be able to determine most of the players on the court . . . . However, most fans can pick out the dominant players, such as the University of Cincinnati's high-flying star Kenyon Martin . . . ." <sup>132</sup> Another author criticized *March Madness 2000* as too easy: "Case in point: Mateen Cleaves shot 14-for-15 from 3-point land and finished with 72 points in my first effort." <sup>133</sup> These reviews are more striking than the football examples because the basketball games do not offer the option of naming the players. Yet, the players remain identifiable. <sup>134</sup> Even without the option, reviews often still ignore the NCAA policy prohibiting student athletes from appearing in commercial products and state explicitly exactly what the NCAA is trying to prevent.

Similar to the football reviewers, the basketball commentators are expressing their frustration with the NCAA policies. One author noted the difference between the games by asking, "why can't this game incorporate the single best feature in a college video game? Why can't we name our players like in NCAA Football? I want A.J. Guyton to hit that three-pointer, not [Shooting Guard] 25." <sup>135</sup> Other reviewers are not nearly as polite. One stated, "this subtle difference hurts the replay value of the game. It's just hard to get attached to #14 or #32 . . . even if they are your prized blue-chip recruits." <sup>136</sup>

Sometimes, the featured student athletes comment on their computer generated reproductions. <sup>137</sup> In an interview with ex-college basketball star Jason Terry, *Sports Illustrated* learned, "Terry [spends time playing] with a Sony PlayStation, to which he devotes at least 40 hours every week playing video games, including a college basketball game that features a pixel version of him starring for Arizona." <sup>138</sup> Terry himself said, "They made me real good on that game . . . . I've got some moves and a nice little jump shot." <sup>139</sup>

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132. Lew Hamilton, *NCAA Final Four 2000*, at <http://www.gamecenter.com/Consoles/Sony/Ncaafinal2k.html> (Mar. 24, 2000).

133. Mark Blythe, *Reviewing College Basketball Video Games*, ORLANDO SENTINEL TRIBUNE, Apr. 2, 2000, at C13.

134. See *id.*

135. Jon-Paul Dumont, *EA Sports' 'March Madness 2000'*, INDIANA DAILY STUDENT, Mar. 1, 2000.

136. Matt, *supra* note 112.

137. Grant Wahl, *Inside College Basketball*, SPORTS ILLUSTRATED., Mar. 8, 1999, at 80.

138. *Id.*

139. *Id.*

Moreover, the games are marketed with pictures of players who are no longer student athletes.<sup>140</sup> NCAA Football 2001 features All-American Shaun Alexander from Alabama on the cover.<sup>141</sup> NCAA Final Four 2000, a college basketball game from 989 Studios, features Duke All-American Trajan Langdon.<sup>142</sup> Both players appear in their college uniforms. Both games expressly capitalize on the athletes' images: Alexander and Langdon grace the covers of the respective games, and the game creators claim the athletes helped design plays and modeled their skills to make the on-screen moves as realistic as possible.<sup>143</sup>

In reality, college sports fans are not easily fooled by the video games. In many cases they know exactly whose images they control.<sup>144</sup> Furthermore, some student athletes are aware of their onscreen representations,<sup>145</sup> and video game reviewers are quick to point out that the onscreen players are computer generated models of the actual players.<sup>146</sup> In short, the NCAA Bylaws are the only reason players' names do not appear as a part of the games.<sup>147</sup>

#### V. DO COLLEGE SPORTS VIDEO GAMES VIOLATE STUDENT ATHLETES' RIGHTS OF PUBLICITY?

Video games would not be the first medium attacked for violation of student athletes' rights of publicity. A 1996 law review article observed the growing frustrations of student athletes whose numbers were used to market merchandise for their universities.<sup>148</sup> Most recently, at the 2000 NCAA men's basketball championship, Michigan State basketball player Andre Hutson commented on the sale of school merchandise, "[i]t's kind of hard, especially this time of year, seeing so many people make money

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140. See e.g., *Shaun Alexander Joins Electron Arts' Lineup for NCAA Football 2001*, available at <<http://ncaa2001.ca.com/press.html>> (last visited Sept. 2, 2000).

141. See *id.*

142. *New Motion Capture Animations*, available at [http://www.989.sports.com/pages/finalfour200/motion\\_capture.htm](http://www.989.sports.com/pages/finalfour200/motion_capture.htm) (last visited Apr. 20, 2000).

143. See *id.* ("We have incorporated some great animations of Trajan Langdon, the former All-American from Duke.")

144. See Barrett, *supra* note 6.

145. See, e.g., Kaduk, *supra* note 117 (Ron Dayne; former University of Wisconsin running back); Wahl, *supra* note 145. (Jason Terry, former University of Arizona guard).

146. See *supra* notes 113-123 and accompanying text.

147. See *infra* Part V.

148. See Belo, *supra* note 2, at 135 n.7 (Former Duke basketball player, Grant Hill, complained in 1993 that the University sold game jerseys with his number for \$120 each.) (citing Laura Bolling, *NABC 'Issues Summit' Notes*, NCAA NEWS, Oct. 25, 1993 at 6).

off of us.”<sup>149</sup> Yet time and again, schools exploit their athletes for institutional gain.<sup>150</sup>

In 1994, a controversy arose over the use of player photographs and names on trading cards issued by universities.<sup>151</sup> When student athletes complained that the trading cards violated their rights of publicity, the universities responded, “athletes forfeit all rights to individual entitlements when they agree to participate in NCAA sanctioned athletics.”<sup>152</sup> During this controversy, at least eighteen universities were involved in producing three different varieties of trading cards.<sup>153</sup>

The first set of cards featured alumni players, and could only be made with the permission of the former player as well as the payment of appropriate compensation.<sup>154</sup> Furthermore, the alumni retained the right to halt production, and could sue for violation of their rights of publicity.<sup>155</sup> The second set of cards, used for promotional purposes, did not violate the athletes’ rights of publicity because the cards were not specifically used for commercial gain.<sup>156</sup> The third set of trading cards was the most problematic. This set was sold to raise revenue for school athletic departments.<sup>157</sup> Recognizing the “inherent exploitation” of these cards, the NCAA adopted regulations such as Bylaw 12.5.2.1 to ban outside profit seeking entities from using the names or likenesses of college football athletes to promote commercial products.<sup>158</sup> However, this Bylaw does not prevent universities from using a college athlete’s likeness.<sup>159</sup> Furthermore, commentators note the unlikelihood of a challenge to the printing of such trading cards because the student athletes have directly consented to the university’s use of their likenesses.<sup>160</sup>

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149. Morrissey, *supra* note 104. Hutson further stated that thirty customers bought Michigan State t-shirts because the athletes were in the retail store. *Id.*

150. See *id.*; James S. Thompson, Comment, *University Trading Cards: Do College Athletes Enjoy a Common Law Right to Publicity?*, 4 SETON HALL J. SPORT L. 143, 144 (1994); Belo, *supra* note 2, at 148.

151. Thompson, *supra* note 150, at 144.

152. *Id.*

153. *Id.* at 166 n.125 (listing the eighteen universities that traded cards during the 1992–1993 season) (citing Jeff Kurowski, *College Sets Attracting Attention*, SPORTS CARD PRICE GUIDE MONTHLY, Aug. 1993, at 14–18).

154. *Id.* at 163.

155. *Id.* at 163–64.

156. *Id.* at 164–65.

157. *Id.* at 165–66.

158. Thompson, *supra* note 150, at 166.

159. *Id.* at 167.

160. *Id.* at 176 (stating participation in college sports constitutes consent).

The NCAA allows universities to exploit the images of their athletes, but will not permit commercial enterprises to do the same. Because video game producers are commercial enterprises, the question becomes whether the video game image of a student athlete in uniform gives rise to a violation of that player's right of publicity. In order to answer this question, it is necessary to consider the right of publicity test discussed in Part II.

### *A. Defendant's Use of Plaintiff's Identity*

Virtually every college football game is televised in its local market, and many college sporting events are televised nationally.<sup>161</sup> As a result, student athletes are "ostensibly associated" with their numbers.<sup>162</sup> In college sports video games, the players are recognizable solely by their jerseys. Therefore, the identities of student athletes likely merge with the video product.<sup>163</sup>

In *White*,<sup>164</sup> the court presented the following hypothetical: Consider a hypothetical advertisement which depicts a mechanical robot with male features, an African-American complexion, and a bald head. The robot is wearing black hightop Air Jordan basketball sneakers, and a red basketball uniform with black trim, baggy shorts, and the number 23 (though not revealing "Bulls" or "Jordan" lettering). The ad depicts the robot dunking a basketball one-handed, stiff-armed, legs extended like open scissors, and tongue hanging out. Now, envision that this ad is run on television during professional basketball games. Considered individually, the robot's physical attributes, its dress, and its stance tell us little. Taken together, they lead to the only conclusion that any sports viewer who has, registered a discernible pulse in the past five years would reach: the ad is about Michael Jordan.<sup>165</sup>

Much like the Michael Jordan hypothetical, the court held the Vanna White advertisement left little doubt regarding the use of her identity.<sup>166</sup>

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161. See *id.* at 146 (stating college football and basketball are regularly televised).

162. Belo, *supra* note 2, at 145-46.

163. *Id.*

164. *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992).

165. *Id.* at 1399.

166. *Id.* The *White* ad depicted a robot dressed in a wig, gown, and jewelry selected to resemble Vanna White and her clothing. *Id.* The robot was posed next to a game board recognizable as a *Wheel of Fortune* set. *Id.*

College sports video games bear a remarkable resemblance to the Michael Jordan hypothetical posed by the court: Consider a video game depicting an African-American man dressed in a purple and white uniform with orange trim, a purple helmet featuring a large white "VT", and the number seven on his jersey (even revealing "Vick" lettering on the back). The game features the player storming downfield, offering one-handed stiff-arms to any defender, and eventually reaching the end zone. Considered individually, the player's physical attributes, dress and moves tell us little. Taken together, they lead to only one conclusion—the player is Michael Vick. For every new version of a college sports game, this "hypothetical" is easily duplicated. Hence, there is little argument that the athletes' identities are being used.

*B. Appropriation of the Plaintiff's Name or Likeness*

The appropriation element presents somewhat of a hurdle for the student athletes. Lesser known athletes are likely to find themselves in a situation similar to the plaintiff in *Pesina*.<sup>167</sup> The majority of college athletes are not well known. Even college athletes who are fortunate enough to play professionally, such as Billy Miller (USC '98, current Denver Bronco) and Craig Walendy (UCLA '98, current New York Giant), may retire relatively unknown and would have difficulty proving their identities were used expressly commercial gain.

In considering *Pesina*, however, it is evident this scenario is distinguishable in two ways.<sup>168</sup> In *Pesina*, the plaintiff's onscreen identity was not considered his image or likeness because he was not widely recognized.<sup>169</sup> The case is different with student athletes because the group as a whole should be considered. Even though the majority of video game users are not familiar with athletes such as Billy Miller and Craig Walendy, the purchasers would rather play a game featuring the players' names instead of their numbers. Thus, it would be advantageous for game marketers to advertise that the games feature the names of all college athletes. All professional games advertise their allegiance with the respective player's unions to add realism to the game as an incentive to purchase their product. Additionally, the NCAA would not enact Bylaws preventing players from profiting commercially if it was not worried that players could successfully market themselves.

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167. 748 F. Supp. 40 (N.D. Ill. 1996).

168. *Id.*

169. *Id.* at 42. *Pesina* was a martial arts expert used as a character in a video game. *Id.*

The *Pesina* rationale is less convincing when applied to well-known athletes. A cursory survey of sports video games reveals countless titles featuring the names of various star athletes. The current market features games such as "Tiger Woods Golf," "Ken Griffey Jr. Baseball," "Tony Larussa Baseball" and "[John] Madden Football." Not long ago, a game entitled "Bill Walsh College Football" existed.<sup>170</sup> Thus, a title such as "Chris Weinke Heisman Football" could certainly enhance the marketability of that game.

A second distinction between college athletes and *Pesina* is the recognizability of the players' onscreen images.<sup>171</sup> Purchasers of these games are aware they can interact with their favorite college stars.<sup>172</sup> Furthermore, even the athletes acknowledge the games allow them to participate as themselves.<sup>173</sup> Thus, by using the likenesses of college athletes, the video game producers are enhancing the value of their product and hence, appropriating the likenesses for commercial gain.

### C. Plaintiff's Lack of Consent

By consenting to participate in NCAA sanctioned events, student athletes forfeit all rights to individual entitlements as specified in the NCAA Bylaws.<sup>174</sup> The NCAA Bylaws expressly prohibit commercial enterprises from using players' images.<sup>175</sup> They also prohibit players from consenting to the use of their images for commercial purposes while maintaining NCAA eligibility.<sup>176</sup> The question arises, may universities transfer their players' likenesses when they license the use of their logos? The answer lies in a comparison of collegiate and professional athletics.

The most notable distinction between collegiate and professional athletics is the lack of employment contracts at the collegiate level.<sup>177</sup> In both *Ahn* and *Baltimore Orioles*, the court relied almost exclusively on the existence of written contracts between the plaintiffs and the organizations promoting their images.<sup>178</sup> For student athletes, however, no such written

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170. Thompson, *supra* note 1.

171. See *supra* Part IV.

172. *Id.*

173. Kaduk, *supra* note 117 (Ron Dayne, former University of Wisconsin running back); Wahl, *supra* note 137 (Jason Terry, former University of Arizona guard).

174. See *supra* Part IV; Thompson, *supra* note 150, at 144.

175. See *supra* Part III.

176. NCAA Bylaw § 12.5.2.2.

177. *Ahn v. Midway Mfg. Co.*, 965 F. Supp. 1134, 1140 (N.D. Ill. 1997); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n.*, 805 F.2d 663, 679 (7th Cir. 1986).

178. *Ahn*, 965 F. Supp. at 1140; *Baltimore Orioles*, 805 F.2d at 679.

agreements may exist. This is because the NCAA claims players transfer all rights to their images to the university upon entering college. It may initially appear as if the use of collegiate athletes' images in computer simulated games do not violate athletes' rights of publicity. However, universities may exploit the images of their athletes for solely noncommercial purposes such as promotional gifts or publicity for athletic events.<sup>179</sup> It is unlikely that video games qualify as noncommercial.

Furthermore, in *Ahn* and *Baltimore Orioles*, the plaintiffs' cases were subsumed under federal copyright law.<sup>180</sup> By contractually consenting to have their images captured on videotape, the players forfeited their publicity rights in favor of the defendants' copyrights.<sup>181</sup> However, collegiate athletes cannot claim copyright protection because the elements of a copyright claim cannot be met.<sup>182</sup> In order to be fixed in a tangible medium,<sup>183</sup> student athletes must first consent to videotaping for the purposes expressed in their contracts. However, as discussed, the NCAA Bylaws prohibit student athletes from entering into contracts for commercial purposes.<sup>184</sup> Thus, it is difficult to accept that college athletes who consent to the use of their images in computer games can never agree to the use of their identities for commercial gain.

#### D. Resulting Injury

The *Motschenbacher* court held economic injury satisfies the injury requirement.<sup>185</sup> The contracts of professional sports rookies provide sufficient evidence that student athletes not compensated for use of their identities suffer economic harm. This is simply because the images of popular college athletes possess economic value.

On the other hand, this prong represents a significant hurdle for student athletes. As the *Pesina* court held, claimants alleging right of publicity violations must establish their names have commercial value.<sup>186</sup> The names of student athletes have inherent commercial value: the more popular the player, the more money the school may earn by exploiting that player's name.<sup>187</sup>

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179. Thompson, *supra* note 150, at 165.

180. See discussion *supra* Part II.C.

181. See discussion *supra* Part II.C.

182. *Ahn*, 965 F. Supp. at 1138.

183. See *supra* note 52 and accompanying text.

184. See discussion *supra* Part III.B.

185. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 (9th Cir. 1974).

186. See discussion *supra* Part II.B.

187. NCAA Bylaw § 12.5.2.2.



## VI. HIGH-TECH PROBLEM, SIMPLE SOLUTION

The enhancement of video game graphics through modern technology creates a new problem for the NCAA Bylaws governing amateurism. To combat this problem, the NCAA Bylaws must be changed. This is a simple solution, suitable for all appropriation problems affecting college athletes.

College athletes are unique: their images may be exploited while they are prohibited from enjoying the monetary benefits stemming from such use.<sup>188</sup> No other student body members face such extreme restrictions. College sports aficionados may be concerned that allowing players to receive any sort of compensation would destroy the nature of the sport. Yet, if video game producers continue to withhold remuneration for use of the athletes' images, it only seems appropriate that game producers should be forced to alter the identities of the student athletes featured.

However, there are two problems inherent in this suggestion. First, the solution does not offer the best remedy for the student athletes. Assuming college athletes actually have a valid claim, changing the video games would eliminate any future compensation. As many student athletes are on scholarship and have little or no income, altering the games would divest athletes of any potential claims for compensation. Furthermore, student athletes may take great pride in their teams and efforts. For example, even without receiving name recognition, the featured football and basketball players know their computerized identity and hope to excel in their pixelized form.<sup>189</sup> Again, conspicuously changing all of the players in the video games would simply be another way of robbing student athletes of recognition for their success.

The second complication with forcing game producers to alter the identities of featured student athletes is that it could destroy the market for college versions of many of the best sports video games. Understandably, one thrill of playing video games featuring college athletes, as opposed to their professional counterparts, is the ability to control one's favorite

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188. See discussion *supra* Part III.

189. See John Raby, *Marshall Lose at Final Practice*, CHARLESTON GAZETTE, Dec. 27, 1999, at 1B. Nate Poole, Marshall wide receiver, stated he preferred playing an NFL video game because he would become obsessed with himself if he played a college game. "I'd play with Marshall, throw it 300 times. I'd have all my offensive yards," Poole joked. "I'd throw it to Nate Poole every time on that game." *Id.* An even more dramatic example of the games' importance to the athletes is a case in which a school was promised it would appear in *NCAA Final Four '99*, but did not make the game's final version. See Morgan Hardy, *Murray State Team Cut From PlayStation Video Game*, MURRAY STATE NEWS, Jan. 22, 1999, available at 1999 WL 10818559. The article quotes Mike Turner, Murry State forward, as saying, "It is really disappointing . . . Every kid grows up wondering if he'll ever get to actually be on a video game. This was probably my only shot." *Id.*

players.<sup>190</sup> Knowing that Chris Weinke is the starting quarterback for Florida State is as important as playing in the actual stadiums and with the proper fight songs. Despite lacking name recognition, the particular players are as integral to the game as are the teams. Thus, precluding them from the games is unfair to both players and fans alike.

A more effective change to the NCAA Bylaws would permit the video games to feature the names of the student athletes involved. Video game technology has advanced to such a level that it is unfair to student athletes to allow outside institutions to appropriate their images without paying respect to their names. Yet for many college athletes, namely those without a future in professional sports, seeing their name in a video game might serve as adequate compensation.

Still, monetarily compensating all depicted players for the use of their identities is the best resolution. The compensation received by all players would be equal and would certainly not rise to an amount that would destroy the amateur ideal of college sports. Thus, no potentially harmful issues regarding variant skill levels or incentives to produce would arise. The minimal compensation received by each student athlete would be nothing more than an acknowledgment that the student athlete's identity is being used for commercial gain.

## VI. CONCLUSION

The NCAA Bylaws governing amateurism remain a constant source of debate among fans of college athletics. Without taking sides on the overall fairness of the Bylaws, this Article identified one specific area where the Bylaws unfairly allow private companies to exploit collegiate athletes for monetary gain. In doing so, the NCAA Bylaws are unfair to both the athletes, whose images are depicted onscreen, and the fans who would rather play with the actual namesake of the student athlete. While a sweeping overhaul of the NCAA Bylaws<sup>191</sup> is likely unnecessary, the NCAA must recognize that growth in both college athletics and computer technology has created the need for corresponding growth or adjustment within the NCAA to remedy the situation. When private enterprises take direct advantage of student athletes' identities, the student athletes deserve

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190. The college games also give other team athletes such as Nate Poole this opportunity. Poole jokes that he'd substitute Marshall's second-string quarterback for Heisman finalist Chad Pennington, Marshall's starting quarterback, because "'I think he's getting enough publicity out here.'" Raby, *supra* note 189.

191. For suggestions as to how college sports can be remedied on a grander scale. See, Goplerud, *supra* note 10, at 1089–1102; Acain, *supra* note 85, at 319–52; Schott, *supra* note 73, at 41–49.

compensation. To hold otherwise is inconsistent with the modern day right of publicity.