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# **THE ONE-SIDED GAMES OF THE NCAA: HOW *IN RE NCAA STUDENT-ATHLETE* LEVELS THE PLAYING FIELD**

JENNIFER HINDS\*

This Comment discusses renewed support for challenging the National College Athletic Association (NCAA) waivers that bar its student-athletes from receiving compensation as unconscionable in light of the recent Ninth Circuit holding in *In re NCAA Student-Athlete Name and Licensing Litigation (In re NCAA Student-Athlete)*. While critics previously debated whether the NCAA waivers are unconscionable, the Ninth Circuit's holding that student-athletes have a right to publicity strongly suggests that the waivers as they currently stand are no longer enforceable.

Part II of this Comment provides a background on the NCAA waivers and Electronic Arts's (EA) use of the student-athletes' images in their videogames which lead to the suit. Part III then analyzes the Ninth Circuit decision and finds that although the majority correctly denied EA's anti-SLAPP motion, it also should have considered the resulting effect that the holding would have on the NCAA waivers. Part IV applies the doctrine of unconscionability to the NCAA waivers, and addresses various counterarguments. Ultimately, this Comment argues the NCAA waivers are procedurally unconscionable because the prospective student-athletes are unfairly surprised, and the student-athletes really have no meaningful choice to play elsewhere. Also, the NCAA waivers are substantively unconscionable because the NCAA and member schools retain the sole right to profit from the student-athletes' likeness. Part V concludes by acknowledging that while unconscionability is still difficult to establish, *In re NCAA Student-Athlete* opened the door for student-athletes to successfully proceed by arguing that the clauses are unconscionable under contract law.

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## I. INTRODUCTION

“The fact remains—the NCAA is not exploiting current or former student-athletes, but instead providing enormous benefit to them and the public.”<sup>1</sup> National Collegiate Athletic Association (“NCAA”) chief legal officer Donald Remy made this statement in response to the intense public scrutiny the NCAA received from *In re NCAA Student-Athlete Name and Licensing Litigation* (“*In re NCAA Student-Athlete*”).<sup>2</sup> He posited that *In re NCAA Student-Athlete* consisted of “baseless theories supported only by inaccurate speculation aimed at destroying amateurism in college athletics[.]”<sup>3</sup>

Contrary to Remy’s claims: [c]ompetition takes many forms.<sup>4</sup> Although this case raised questions about athletic competition on the football field and the basketball court, it is principally about the rules governing competition in a different arena—namely, the marketplace.<sup>5</sup>

*In re NCAA Student-Athlete* is a recent Ninth Circuit case concerning several former NCAA student-athletes who brought suit against Electronic Arts (“EA”) and the NCAA for using their likeness without compensating them.<sup>6</sup> There, the Ninth Circuit denied EA’s anti-SLAPP motion, which allowed the case to go forward.<sup>7</sup> Previously, the NCAA banned student-athletes from receiving compensation in the name of amateurism.<sup>8</sup> Although the NCAA did not explain its definition of amateurism, the

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1. Patrick Vint, *NCAA Comments on Ed O’Bannon Case in Middle of NFL Draft*, SB NATION (Apr. 26, 2013, 8:30 AM), <http://www.sbnation.com/college-football/2013/4/26/4268324/ed-obannon-lawsuit-ncaa-statement>.

2. *Id.*

3. *Id.*

4. Findings of Fact and Conclusions of Law at 1, *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. 4:09-cv-03329-CW (N.D. Cal. Aug. 8, 2014), *available at* <http://i.usatoday.net/sports/!Investigations-and-enterprise/OBANNONRULING.pdf>.

5. *Id.*

6. *See In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1268 (9th Cir. 2013).

7. *See id.* at 1269.

8. *See O’Bannon v. Nat’l Collegiate Athletic Ass’n*, No. C 09-1967 CW, at 1-2; *see also Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Oct. 16, 2014).

NCAA website claims that its Bylaws ensure that all its student-athletes compete on equal footing.<sup>9</sup> Under these Bylaws, NCAA student-athletes are contractually barred from receiving any compensation, aside from scholarships, in relation to their participation in athletics.<sup>10</sup> NCAA Bylaw 12.5.2.1 specifically bans student-athletes from receiving any compensation related to publicity and personal promotion.<sup>11</sup> Bylaw 12.5.1.1.1 is even more restrictive in requiring student-athletes to contractually relinquish their right of publicity to the member schools and to the NCAA as a condition to participation in sports.<sup>12</sup> Many NCAA student-athletes, sports commentators, and fans have questioned the fairness of this prohibition.<sup>13</sup>

These NCAA restrictions have also spurred social commentary concerning whether the restrictions legitimize the exploitation of student-athletes.<sup>14</sup> For instance, the popular comedy show *South Park* ridiculed the NCAA Bylaws by comparing its exploitation of NCAA student-athletes to the exploitation of drug-addicted new born children, or “crack babies.”<sup>15</sup>

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9. See *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Oct. 16, 2014).

10. C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081, 1084-85 (1997); see *NCAA Division I Manual: 2012-2013*, NCAA, 60-65, available at [http://grfx.cstv.com/photos/schools/denv/genrel/auto\\_pdf/2013-14/misc\\_non\\_event/compliance-manual-13.pdf](http://grfx.cstv.com/photos/schools/denv/genrel/auto_pdf/2013-14/misc_non_event/compliance-manual-13.pdf); see generally Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006).

11. *NCAA Rules – Media and Private Internet Websites*, NCAA, [http://grfx.cstv.com/photos/schools/samf/genrel/auto\\_pdf/Media\\_Internet\\_Sites.pdf](http://grfx.cstv.com/photos/schools/samf/genrel/auto_pdf/Media_Internet_Sites.pdf) (last visited Oct. 24, 2014); see *In re NCAA Student-Athlete*, 724 F.3d at 1289 (Thomas, J., dissenting).

12. See *NCAA Division I Manual: 2012-2013*, NCAA, 71, [http://grfx.cstv.com/photos/schools/denv/genrel/auto\\_pdf/2013-14/misc\\_non\\_event/compliance-manual-13.pdf](http://grfx.cstv.com/photos/schools/denv/genrel/auto_pdf/2013-14/misc_non_event/compliance-manual-13.pdf).

13. See *Bloom v. Nat’l Collegiate Athletic Ass’n*, 93 P.3d 621, 622 (Colo. App. 2004); Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 677 (2003); Matt Tracy, *Johnny Manziel: Twitter Outrage from Fans Over NCAA Suspension*, LATIN POST (Aug. 29, 2013, 11:18 AM), <http://www.latinpost.com/articles/1777/20130829/johnny-manziel-twitter-outrage-fans-over-ncaa-suspension.htm>.

14. See, e.g., Jason Whitlock, *True Reform Isn’t Part of NCAA’s Agenda*, FOX SPORTS (June 6, 2014, 3:03 PM), <http://www.foxsports.com/collegefootball/story/True-reform-isn%2527t-part-of-NCAA-agenda-president-Mark-Emmert-081111>.

15. *South Park: Crack Baby Athletic Ass’n* (Comedy Central television broadcast May 25, 2011). Aptly titled *Crack Baby Athletic Association*, the episode likens the NCAA to the South Park characters masquerading as a non-profit organization that cuts a deal with EA Sports to sell the likeness of crack-addicted babies who fight each other for a crack-filled ball. Similar to the

Cartman, a central character on *South Park* who is known for his aggressive and prejudicial behavior, justifies his exploitation of the crack babies by stating: “the Crack Baby Athletic Association is a storied franchise. It was founded over twelve days ago, with a firm ethical code that strictly states ‘benefits to players is detrimentalized [sic] to their well-being.’”<sup>16</sup> In stark contrast to the NCAA student-athletes, media and entertainment conglomerates such as ESPN, CBS, FOX, and EA pay the NCAA billions of dollars in annual revenue from licensing fees to broadcast live coverage of NCAA sporting events.<sup>17</sup> The NCAA, in turn, distributes some of this revenue to its member schools.<sup>18</sup>

The Ninth Circuit Court of Appeals’ holding in *In re NCAA Student-Athlete* demonstrates that the NCAA can no longer use amateurism to rationalize denying student-athletes just compensation for their misappropriated images.<sup>19</sup> The Ninth Circuit affirmed the Northern District of California’s finding that NCAA student-athletes cannot contractually relinquish their right of publicity,<sup>20</sup> and could sue EA for using their likenesses in its popular college sports videogames.<sup>21</sup> While this lofty decision correctly allows student-athletes to bring misappropriation claims, the decision does not address the potential consequences of rendering the NCAA Bylaws unconscionable, and as such, unenforceable.<sup>22</sup> While some commentators have previously argued that

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NCAA’s treatment of student athletes, the *South Park* characters do not allow the babies to receive compensation. The episode also analogizes the NCAA restrictions to slavery, which is an extreme, albeit understandable, comparison.

16. *Id.*

17. See Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107, 108-09 (2012).

18. See *id.* at 108.

19. See *In re NCAA Student-Athlete*, 724 F.3d at 1289 (Thomas J., dissenting); see generally *Keller v. Elec. Arts, Inc.*, No. C 09-1967 CW, 2010 WL 530108, (N.D. Cal. Feb. 8, 2010), *aff’d sub nom. In re NCAA Student-Athlete*, 724 F.3d 1268.

20. See *Keller*, 2010 WL 530108, at \*7 (N.D. Cal. Feb. 8, 2010), *aff’d sub nom. In re NCAA Student-Athlete*, 724 F.3d 1268.

21. See *In re NCAA Student-Athlete*, 724 F.3d at 1284.

22. See generally Nathan McCoy & Kerry Knox, Comment, *Flexing Union Muscle—Is it the Right Game Plan for Revenue Generating Student-Athletes in Their Contest for Benefits Reform with the NCAA?*, 69 TENN. L. REV. 1051 (2002).

the waivers are not unconscionable,<sup>23</sup> the Ninth Circuit's holding has opened the door for renewed arguments that the waivers are, in fact, unconscionable.

This Comment will argue that the Ninth Circuit's holding should have considered the underlying substantive concerns regarding the purpose of amateurism, and the holding's potential effect on the current NCAA Bylaws. Part II will discuss the background of the NCAA Bylaws and EA's *NCAA College Series* videogames. Part III will describe *In re NCAA Student-Athlete*, and examine the deficiencies of both the majority and dissenting opinions. Part IV will address various counterarguments and argue that the waivers are unconscionable. Part V will conclude by arguing that student-athletes can attack the waivers on the basis of their unconscionability.

## II. BACKGROUND

This section will provide background information about the NCAA Bylaws and EA's *NCAA College Series* videogames to demonstrate how the NCAA wrongly profited off of its student-athletes that recently culminated in *In re NCAA Student-Athlete*.

### A. *The NCAA Bylaws*

The NCAA is a nonprofit association comprised of over 1,200 institutions, conferences, organizations, and individuals that organize the athletic programs of many U.S. colleges and universities.<sup>24</sup> The NCAA, however, mandates that its athletic programs and the participating student-athletes must be amateur.<sup>25</sup> As previously mentioned, the NCAA itself does not explicate a definition of amateurism.<sup>26</sup> However, the *Oxford American Dictionary* defines amateurism as “the views and principles of a person who engages in an activity for pleasure *rather than profit*.”<sup>27</sup> The

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23. See generally Kendall K. Johnson, Note, *Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts*, 19 SPORTS LAW. J. 1 (2012).

24. See *Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> (last visited Oct. 16, 2014).

25. See *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> (last visited Oct. 16, 2014).

26. See generally *id.*

27. NEW OXFORD AMERICAN DICTIONARY 48 (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010) (emphasis added).

NCAA alleges that amateurism is “a bedrock principle of college athletics” and “crucial to preserving an academic environment in which acquiring a quality education is the first priority.”<sup>28</sup> Thus, the NCAA ostensibly passed its Bylaws so that no college player would have an unfair advantage over others in an effort to promote education.<sup>29</sup>

All prospective student-athletes must successfully receive amateurism certification from the NCAA Eligibility Center to participate in sports activities.<sup>30</sup> Upon passing the certification process, many student-athletes also sign a National Letter of Intent, a binding agreement that the student-athlete not only commits to playing sports at a specific university, but also commits to obeying the NCAA Bylaws.<sup>31</sup> Many students are still minors when they sign a National Letter of Intent.<sup>32</sup> The National Letter of Intent is a non-negotiable boilerplate contract that provides an ambiguous loophole for institutions to nullify the contract if the student-athlete does not meet the institution’s or the NCAA’s eligibility requirements.<sup>33</sup> But, it does not provide the student-athletes with such a loophole if, for example, the coach who recruited the athlete is fired or takes another job.<sup>34</sup> The irony is that a student-athlete’s amateurism status may be affected if he or she is represented by an agent while signing the contract; therefore, prospective student-athletes are expected to enter into these contracts only

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28. *Amateurism*, *supra* note 25.

29. *See id.*

30. *See id.*

31. *See* Debra D. Burke et al., *The NCAA Letter of Intent: A Voidable Agreement for Minors?*, 81 MISS. L.J. 265, 266-68 (2011) (arguing that individuals who signed NCAA Letters of Intent as minors should be able to later disaffirm such an agreement on ground of infancy); *see also* Orion Riggs, Note, *The Façade of Amateurism: The Inequities of Major-College Athletics*, 5 KAN. J. L. & PUB. POL’Y 137, 143 (1996). *See generally* *Letter Becomes Null and Void*, NATIONAL LETTER OF INTENT, <http://www.nationalletter.org/nliProvisions/nullAndVoid.html> (last visited Oct. 16, 2013).

32. *See* Burke et al., *supra* note 31.

33. Leo J. White, *The National Letter of Intent Violates Doctrine of Unconscionability*, CTS SPORTS LAW (Feb. 4, 2010), <http://ctsportslaw.com/2010/02/04/the-national-letter-of-intent-violates-doctrine-of-unconscionability/>.

34. *Id.*; *see generally* Michael J. Riella, Note, *Leveling the Playing Field: Applying the Doctrine of Unconscionability and Condition Precedent to Effectuate Student-Athlete Intent Under the National Letter of Intent*, 43 WM. & MARY L. REV. 2181, 2181-82 (2002).

on the advice of their often legally unsophisticated parents.<sup>35</sup> In some situations, this may not constitute proper representation if their parents are unfamiliar with the contractual process.<sup>36</sup> Even if a student-athlete does not sign a National Letter of Intent, he or she must still pass amateurism certification through the NCAA Eligibility Center and sign NCAA waivers where he or she agrees to follow the Bylaws in order to participate in sports.<sup>37</sup>

All student-athletes must strictly adhere to the NCAA amateurism requirements to remain eligible for intercollegiate competition.<sup>38</sup> If the NCAA determines that a student-athlete violated a rule that affects his or her eligibility, the NCAA can declare that student-athlete ineligible to participate in further athletic activities.<sup>39</sup> One of the most controversial rules is NCAA Bylaw 12.5.2, which outlines non-permissible promotional activities for student-athletes once they pass the certification process.<sup>40</sup> Specifically, Bylaw 12.5.2.1 indicates that:

[s]ubsequent 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

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35. See *Amateurism*, *supra* note 25; Staff Reporter, *The Truth Behind the National Letter of Intent*, NEON TOMMY (Apr. 29, 2010, 12:19 AM), <http://www.neontommy.com/2010/04/national-letter-of-intent>.

36. See, e.g., White, *supra* note 33.

37. *Amateurism*, *supra* note 25; see generally *The Truth Behind the National Letter of Intent*, NEON TOMMY (Apr. 29, 2010, 12:19 AM), <http://www.neontommy.com/2010/04/national-letter-of-intent> (author explains that “[t]echnically, the National Letter of Intent is a voluntary program . . .”).

38. See *Amateurism*, *supra* note 25; see also Dan Wetzel, *Latest college scandals again reveal folly of NCAA rules*, YAHOO SPORTS (Sept. 11, 2013, 5:08 PM), <http://sports.yahoo.com/news/ncaaf--latest-college-scandals-again-reveal-folly-of-ncaa-rules-210822795.html>.

39. See *Amateurism*, *supra* note 25; see also Kent Sterling, *After Long Illness, Amateurism in College Football Passes Away*, KENT STERLING.COM (Sept. 12, 2013), <http://kentsterling.com/2013/09/12/after-long-illness-amateurism-in-college-football-passes-away/> (describes corruption in college football as undermining the purpose of amateurism).

40. *NCAA Rules – Media and Private Internet Websites*, NCAA, 1-2, [http://grfx.cstv.com/photos/schools/samf/genrel/auto\\_pdf/Media\\_Internet\\_Sites.pdf](http://grfx.cstv.com/photos/schools/samf/genrel/auto_pdf/Media_Internet_Sites.pdf) (last visited Oct. 24, 2014); see generally Michael Rosenberg, *NCAA Amateurism Rules Unfair, But Manziel Not One To Challenge Them*, SPORTS ILLUSTRATED (May 28, 2014), <http://www.si.com/college-football/2013/08/05/johnny-manziel-ncaa>.



name or picture to advertise, recommend or promote 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>41</sup>

Interestingly, student-athletes whose:

[n]ame or picture appears on commercial items . . . or is used to promote a commercial product 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 athletes.<sup>42</sup>

However, the NCAA Bylaws interpret usage of a student-athlete's name and/or photo in a magazine or newspaper as exempt from the non-permissible activity rule.<sup>43</sup> Indeed, student-athletes are contractually bound to refrain from participating in promotional activities, but must also try to ensure that no one is wrongfully using their likeness.<sup>44</sup> In short, even if a student-athlete wished to license his or her image, he or she could not do so without potentially destroying his or her amateur status and rendering

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41. *NCAA Rules – Media and Private Internet Websites*, *supra* note 40; *see* Hart v. Elec. Arts, Inc., 717 F.3d 141, 145 n.3 (3d Cir. 2013) (“NCAA bylaws limit college athletes . . . to receiving only non-athletic financial aid . . . which cover only tuition and various school-related expenses.”).

42. *NCAA Rules – Media and Private Internet Websites*, *supra* note 40 at 2. (emphasis added).

43. *Id.*

44. Talor Bearman, Note, *Intercepting Licensing Rights: Why College Athletes Need a Federal Right of Publicity*, 15 VAND. J. ENT. & TECH. L. 85, 105 (2013) (discussing that the student athlete must sign a contract allowing his or her name and picture be used by the NCAA, the university he or she attends, and to the university's athletic conference, but the athlete cannot profit from his or her likeness without losing the ability to participate in NCAA athletic events); *see generally* Regulation of Unfair and Deceptive Acts and Practices in Connection Between an Athlete Agent and a Student Athlete, 15 U.S.C. § 7802 (2004).

himself or herself ineligible to participate in college sports.<sup>45</sup> Moreover, under this strict standard, even if a student-athlete's likeness is being used without consent or knowledge, his or her amateur status will potentially be destroyed if he or she does not take adequate steps to curb the activity.<sup>46</sup>

Student-athletes are required to sign forms in order to participate in an NCAA sport.<sup>47</sup> For example, by signing Form 08–3a, student-athletes agree to the following: “You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities, or programs.”<sup>48</sup> Finally, in addition to Form 08-3a, student-athletes must observe NCAA Bylaw Article 12.5.1.1, which provides:

A member institution or recognized entity thereof (e.g., fraternity, sorority or student government organization), a member conference or a non-institutional charitable, educational or nonprofit agency may use a student-athlete's name, picture or appearance to support its charitable or educational activities or to support activities considered incidental to the student-athlete's participation in intercollegiate athletics, provided the following conditions are met . . .<sup>49</sup>

Thus, not only are student-athletes unable to profit from their likenesses in any way, they also must contractually relinquish their rights of publicity to the NCAA and member schools, which allows both entities to profit off of their success.<sup>50</sup>

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45. See *In re NCAA Student-Athlete*, 724 F.3d at 1289 (Thomas, J., dissenting); see also Sean Hanlon & Ray Yasser, *J.J. Morrison and His Right of Publicity Lawsuit Against the NCAA*, 15 VILL. SPORTS & ENT. L.J. 241, 277 (2008) (arguing that the NCAA agreement with student athletes constitutes an unconscionable adhesion contract).

46. *NCAA Rules – Media and Private Internet Websites*, *supra* note 40 (informational articles and accompanying images of the student-athlete in a magazine or newspaper are excepted as would be a television station's broadcast of the event or its news coverage of the event in the public domain).

47. Order on NCAA's and CLC's Motions to Dismiss at \*2-3, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, C 09-1967 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010).

48. *Id.*

49. *Id.*

50. However, the 2014 form does not include the language “you authorize the NCAA”

The right of publicity, which has been referred to in connection with the right of privacy, is defined as the right of an individual to control any commercial use of his or her name, image, likeness, or some other identifying aspect of identity.<sup>51</sup> This right, however, is subject to First Amendment implications.<sup>52</sup> Generally, an individual can receive compensation for commercial use of his or her likeness because of its inherent economic value.<sup>53</sup> However, the above referenced Bylaws and agreements essentially mean that student-athletes have no right of publicity because they give the NCAA the sole ability to profit off their student-athlete's images.<sup>54</sup>

Of course, the NCAA claims that it bars student-athletes from receiving compensation in the name of amateurism.<sup>55</sup> Nevertheless, the NCAA fails to address how amateurism is preserved, for example, by not compensating a student-athlete for using his or her image on a brochure to promote ticket sales.<sup>56</sup> The NCAA also fails to address how amateurism is preserved by using a student-athlete's name on a jersey.<sup>57</sup> Additionally, the NCAA licenses many student-athletic activities in exchange for compensation and use of its logos.<sup>58</sup> In fact, the NCAA received revenues

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that was included in forms for previous years. *See generally Student-Athlete Statement—NCAA Division I*, NCAA, [http://www.ncaa.org/sites/default/files/DI%20Form%2014-3a%20-%20Student-Athlete%20Statement\\_0.pdf](http://www.ncaa.org/sites/default/files/DI%20Form%2014-3a%20-%20Student-Athlete%20Statement_0.pdf) (last visited Oct. 24, 2014).

51. *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967 (10th Cir. 1996); *see Haelan Labs., Inc. v. Topps Chewing Gums, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *see also* Bearman, *supra* note 44.

52. *See generally Cardtoons*, 95 F.3d 959.

53. *See generally id.*

54. *See* 15 U.S.C. § 7802 (2012).

55. 15 U.S.C. § 7802; *see* Findings of Fact and Conclusions of Law at 1, *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, No. 4:09-cv-03329-CW (N.D. Cal. Aug. 8, 2014), *available at* <http://i.usatoday.net/sports/!Investigations-and-enterprise/OBANNONRULING.pdf>; Bearman, *supra* note 44.

56. *See* Allie Grasgreen, *Opining on O'Bannon*, INSIDE HIGHER ED (Apr. 23, 2013), <http://www.insidehighered.com/news/2013/04/23/experts-weigh-possible-outcomes-effects-ncaa-likeness-lawsuit>.

57. *See id.*

58. *In re NCAA Student-Athlete*, 724 F.3d at 1289 (9th Cir. 2013) (Thomas J., dissenting); *NCAA Will Not Renew EA Sports Contract*, NCAA (July 17, 2013, 12:00 AM), <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-will-not-renew-ea-sports-contract>.

of \$871.6 million in the fiscal year 2011-2012, with 81% of the money coming from television and marketing fees.<sup>59</sup> One controversial licensing agreement is the NCAA's licensing agreement with EA, which has intensified the debate concerning both the NCAA Bylaws' ban on student-athletes receiving compensation and EA using the student-athletes' images without compensating them.<sup>60</sup>

### *B. EA Sports' NCAA Football and Basketball Series*

In 2010, popular videogame distributor EA was the world's third-largest gaming company, in terms of revenue, after Nintendo and Activision Blizzard.<sup>61</sup> EA created EA Sports in 1991 for the sole purpose of marketing its sports-themed videogames.<sup>62</sup> The brand soon evolved into its own lucrative sub-label and began releasing college-sports themed videogames, including the *NCAA Football* and *NCAA Basketball* series.<sup>63</sup> Although EA discontinued its *NCAA Basketball* franchise in 2010 because of declining sales, its *NCAA Football* series has continued to be quite popular.<sup>64</sup> Until June 2014, EA had a licensing agreement with the NCAA to use its logos in EA Sports' video games in exchange for paying the NCAA a portion of their revenue.<sup>65</sup> Additionally, EA currently has a

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59. *In re NCAA Student-Athlete*, 724 F.3d at 1289 n.5 (9th Cir. 2013) (Thomas J., dissenting).

60. *NCAA Will Not Renew EA Sports Contract*, NCAA (July 17, 2013, 12:00 AM), <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-will-not-renew-ea-sports-contract>; see also Rachel Axon & Steve Berkowitz, *NCAA Spokesman: 'Suit Threatens College Sports as We Know It'*, USA TODAY SPORTS (July 19, 2013, 7:28 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/07/19/ncaa-ea-lawsuit-jake-fischer-jake-smith-darius-robinson-chase-garnham-moses-alipate-victor-keise/2569615/>.

61. *Top 25 Gaming Companies 2010*, SOFTWARE TOP 100 (August 3, 2010, 7:45 AM), <http://archive.today/IXy2Y>.

62. *Electronic Arts Inc. History*, FUNDINGUNIVERSE, <http://www.fundinguniverse.com/company-histories/electronic-arts-inc-history/> (last visited Oct 24, 2014).

63. See *In re NCAA Student-Athlete*, 724 F.3d at 1271-1272 n.2 (9th Cir. 2013); pastapadre, *NCAA Basketball Series Officially Canceled*, PASTAPADRE (Feb. 10, 2010, 11:02 AM), [http://www.pastapadre.com/2010/02/10/ncaa-basketball-series-officially-canceled#more-\\$id](http://www.pastapadre.com/2010/02/10/ncaa-basketball-series-officially-canceled#more-$id).

64. See Eamonn Brennan, *No College Hoops Video Game? Bummer*, ESPN (Sept. 21, 2010, 9:52 AM), [http://espn.go.com/blog/collegebasketballnation/post/\\_id/15506/no-college-hoops-video-game-bummer](http://espn.go.com/blog/collegebasketballnation/post/_id/15506/no-college-hoops-video-game-bummer).

65. See generally NCAA, *supra* note 60.

license with the College Licensing Company (“CLC”), the NCAA’s licensing agent, to use member school names, team names, uniforms, logos, stadium fight songs, and other game elements.<sup>66</sup> Because of this licensing agreement, member schools also receive a portion of the revenue generated from CLC’s contract with EA.<sup>67</sup>

Clearly, EA owes much of the success of its *NCAA Football* franchise to EA’s focus on realism and detail—including the realistic sounds, game mechanics and team mascots—by creating virtual versions of actual stadiums, populating the stadiums with virtual athletes, coaches, cheerleaders, and fans realistically rendered by EA’s graphic artists, and incorporating sounds such as the crunch of the players’ pads and the roar of the crowd.<sup>68</sup>

In fact, the *EA Sports Blog* stated that “[e]ach year, *NCAA Football* playbook designer Anthony White strives to make each team’s playbook accurately represent their system and play style . . . [E]ach year, Anthony adds in actual plays run by teams that can only be found in specific playbooks.”<sup>69</sup> To accomplish this, EA attempts to match any “unique, highly identifiable playing behaviors by sending detailed questionnaires to team equipment managers.”<sup>70</sup> However, EA purports not to use the exact likeness of the players in their *NCAA Football* series, citing NCAA Bylaw 12.5’s restriction on athletes receiving remuneration from any publicity and the student-athlete’s surrender of their right of publicity.<sup>71</sup> Thus, unlike its other sports videogame franchises, such as the *Madden NFL Series*, EA does not license the likeness and identity rights for intercollegiate players.<sup>72</sup>

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66. See *Hart v. Elec. Arts, Inc.*, 717 F.3d 141, 146 n.5 (3d Cir. 2013).

67. See generally Andy Staples, *Ed O’Bannon v. the NCAA: A Complete Case Primer*, SPORTS ILLUSTRATED (Apr. 2, 2013), <http://www.si.com/college-football/2013/04/02/ed-obannon-ncaa-case-primer>.

68. See *In re NCAA Student-Athlete*, 724 F.3d at 1271; see also *Hart*, 717 F.3d at 146.

69. *Hart*, 717 F.3d at 146 n.6.

70. *In re NCAA Student-Athlete*, 724 F.3d at 1271.

71. See *Student-Athlete Likeness Lawsuit Timeline*, NCAA (Dec. 12, 2013, 12:00 AM), <http://www.ncaa.org/about/resources/media-center/press-releases/student-athlete-likeness-lawsuit-timeline> (stating that the NCAA’s agreement with EA “clearly prohibits the use of names and pictures of current student-athletes in [EA’s] electronic games”); Kanika Corley, *Are Videogame Manufacturers Permitted to Use Your Image for their Own Monetary Benefit, Without Your Consent? Well, it depends . . .*, ACCESS ATHLETES (June 22, 2013, 4:51 PM), <http://www.accessathletes.com/blog/keyword.cfm?keyword=%22EA%20Locker%22>.

In fact, EA omits the intercollegiate players' names from their jerseys, and assigns each player a different hometown than the player's actual hometown.<sup>73</sup>

While EA claims the virtual players in the game do not represent real life players, the videogame characters are truly representative of the actual players' positions, teams, heights, home states, and ethnicities.<sup>74</sup> NCAA college football fans would definitely recognize their favorite players.<sup>75</sup> For example, Alabama Crimson Tide fans can clearly recognize the Alabama Crimson Tide Player Quarterback #10 character in *NCAA Football 2013* as corresponding to Alabama Crimson Tide quarterback AJ McCarron in position, team, height, home state and ethnicity.<sup>76</sup>

Moreover, the game allows amateur roster makers to manually associate the actual players' names and upload a roster file to a built-in roster sharing system, like the EA Locker Feature, which permits remote roster sharing online through Xbox Live or PlayStation Network.<sup>77</sup> The Ninth Circuit states, "[u]sers can further alter reality in the game by entering 'Dynasty' mode, where the user assumes a head coach's responsibilities for a college program for up to thirty seasons including players from a randomly generated pool of high school athletes."<sup>78</sup> Users

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72. See Craig Powers, *NCAA Abandons EA Sports License, but the CLC Ensures a Realistic Future College Football Game*, SB NATION (July 17, 2013, 3:20 PM), <http://www.cougcenter.com/wsu-cougars-football/2013/7/17/4533022/ncaa-14-15-EA-sports-licensing-clc-license>; Samit Sarkar, *NFL Licensing Deals for Madden Series Haven't Expired, Says EA*, POLYGON.COM (Jan. 28, 2014, 6:24 PM), <http://www.polygon.com/2014/1/28/5355462/ea-madden-nfl-licensing-deals-havent-expired>.

73. *In re NCAA Student-Athlete*, 724 F.3d at 1271. *But see Hart*, 717 F.3d at 146.

74. *In re NCAA Student-Athlete*, 724 F.3d at 1271; *see also Adam Ramirez, EA Sports Used Ex-NCAA Athletes' Likeness Without Permission: 9th Cir.*, FINDLAW (July 31, 2013, 12:49 PM), <http://blogs.findlaw.com/courtside/2013/07/ea-sports-used-ex-ncaa-athletes-likeness-without-permission-9th-cir.html>.

75. See generally Ramirez, *supra* note 74.

76. See generally Jack Kerwin, *Alabama Crimson Tide News: Time To Recognize AJ McCarron*, INT'L BUS. TIMES (Oct. 31, 2012, 4:27 PM), <http://www.ibtimes.com/sportsnet/alabama-crimson-tide-news-time-recognize-aj-mccarron-857037>; Tony Breland, *AJ McCarron No. 4 Rated Player in EA Sports NCAA Football '14*, BAMAHAMMER.COM, <http://bamahammer.com/2013/06/11/aj-mccarron-no-4-rated-player-in-ea-sports-ncaa-football-14/#!bTix89> (last visited Oct. 24, 2014).

77. Corley, *supra* note 71; *PS3/Xbox 360 NCAA Football 14 EA Locker Download Directions*, GAME ROSTERS, <http://www.gamerosters.com/2014.html> (last visited Oct. 24, 2014).

78. *In re NCAA Student-Athlete*, 724 F.3d at 1271-72.

can also use “Campus Legend” mode to control a “virtual player from high school through college, making choices related to practices, academics, and social life.”<sup>79</sup> Thus, even though EA personally did not publish the names of the student-athletes, it gives videogame players the ability to do so, allowing users to associate the video game figures to the players. Therefore, EA intentionally tried to emulate the players by making their game as realistic as possible.<sup>80</sup> As a result of this obvious appropriation, EA has been named a party in many controversial lawsuits, the most recent of which reached the Ninth Circuit in *In re NCAA Student-Athlete*.<sup>81</sup> Because of the legal uncertainty surrounding the issue, EA has discontinued the game despite its incredible popularity.<sup>82</sup> This is obviously a negative consequence because it prevents consumers from playing popular games. However, this situation could have been prevented had EA decided to compensate the former student-athletes as it does for its *Madden NFL Series*.<sup>83</sup>

### III. *IN RE NCAA STUDENT-ATHLETE NAME & LIKENESS LICENSING LITIGATION*: THE SIGNIFICANT DECISION

This section will discuss the seminal case *In re NCAA Student-Athlete* by summarizing the factual and procedural background of the case and analyzing the majority and the dissent.

#### A. *Factual Background*

Samuel Keller (“Keller”) was a starting quarterback at Arizona State University (“ASU”) in 2005, and later transferred to the University of Nebraska (“Nebraska”), where he played during the 2007 football season.<sup>84</sup>

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79. *Id.* at 1272.

80. *See id.* at 1271.

81. *See id.* at 1268; *see also Hart*, 717 F.3d at 145.

82. Dave Singleton, *EA Sports to Discontinue NCAA Football Game*, BLOGUIN (Sept. 27, 2013, 3:21 PM), <http://www.bloguin.com/crystalballrun/2013-articles/september/ea-sports-to-discontinue-ncaa-football-game.html>.

83. *See* Curt Feldman & Tim Surette, *Big Deal: EA and NFL Ink Exclusive Licensing Agreement*, GAMESPOT (Dec. 13, 2004), <http://www.gamespot.com/articles/big-deal-ea-and-nfl-ink-exclusive-licensing-agreement/1100-6114977/>.

84. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1271 (9th Cir. 2013).

In order to participate in NCAA sports at both ASU and Nebraska, Keller signed waivers agreeing to abide by the NCAA's Bylaws to maintain his amateur status.<sup>85</sup>

In the 2005 edition of EA's *NCAA Football Series*, the virtual starting quarterback from ASU wore the same number as Keller, number 9, and also had the same height, weight, skin tone, hair color, hair style, handedness, home state, play style, visor preference, facial features, and school year.<sup>86</sup> In 2007, Keller transferred to Nebraska.<sup>87</sup> When EA Sports came out with the 2008 edition of the game, the virtual quarterback from Nebraska had the exact same characteristics as the 2005 virtual starting quarterback from ASU, except for the jersey number.<sup>88</sup> The Ninth Circuit attributed this jersey number deviation to Keller changing his jersey number right before the start of the 2008 season.<sup>89</sup>

Ed O'Bannon also competed as an NCAA student-athlete for the University of California, Los Angeles ("UCLA").<sup>90</sup> He was a member of the UCLA Men's Basketball team from 1991 to 1995,<sup>91</sup> a starter on UCLA's 1995 Championship team, and the 1995 NCAA Basketball Tournament's Most Outstanding Player.<sup>92</sup> Similar to Keller, O'Bannon was a star member of the team and participated pursuant to the rules and regulations of the NCAA, specifically NCAA Bylaw Articles 12.5.1 and

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85. *See id.* at 1289 (Thomas, J., dissenting).

86. *Id.* at 1272.

87. *Id.* at 1271.

88. *Id.* at 1272.

89. *Id.*

90. O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09-1967 CW, 2010 WL 445190, at \*2 (N.D. Cal. Feb. 8, 2010).

91. *Id.*; *see also* Karen Gullo and Matt Levenson, *Ex-NCAA Quarterback Sues Electronic Arts Over Games (Update 2)*, BLOOMBERG (May 6, 2009, 6:06 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aE3SJ3nIciB8&refer=us>.

92. Steve Eder & Ben Strauss, *Understanding Ed O'Bannon's Suit Against the N.C.A.A.*, N.Y. TIMES (June 9, 2014), <http://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html>; *see* Hilary Russ, *Athletes' Licensing Fight Survives NCAA's Bid to Toss*, LAW360 (Feb. 8, 2010, 7:27 PM), <http://www.law360.com/articles/148446/athletes-licensing-fight-survives-ncaa-s-bid-to-toss>.



12.5.2.1.<sup>93</sup> O'Bannon also alleges that EA misappropriated his image by using his likeness and the same stats for his character (as EA did with Keller's character) in the 1995 edition of their now defunct *NCAA Basketball Series*.<sup>94</sup>

### *B. Procedural History*

On May 5, 2009, Keller filed a putative class action lawsuit in the Northern District of California against EA Sports and the NCAA, claiming misappropriation of student-athletes' images that were used in the *NCAA Football* and *NCAA Basketball* series.<sup>95</sup> He also claimed that EA and the NCAA violated his right of publicity under California Civil Code § 3344 and California common law.<sup>96</sup> On July 21, 2009, Ed O'Bannon also filed a lawsuit against the NCAA and the CLC in the Northern District of California, alleging that NCAA waivers violated the Sherman Act and wrongly deprived him of his right of publicity.<sup>97</sup> On September 1, 2009, Keller and O'Bannon moved to consolidate their cases; the district court granted these motions to consolidate all related actions on January 15, 2010.<sup>98</sup>

EA, the NCAA and the CLC collectively moved to dismiss Keller's Complaint; EA also moved separately to strike the Complaint and dismiss the action as a strategic lawsuit against public participation ("SLAPP")

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93. *In re NCAA Student-Athlete Name & Likeness Litig.*, C 09-1967 CW, 2011 WL 1642256, at \*1-2 (N.D. Cal. May 2, 2011); *In re NCAA Student-Athlete*, 724 F.3d at 1289 (Thomas, J., dissenting).

94. *In re NCAA Student-Athlete*, 2011 WL 1642256, at \*3.

95. Complaint, Keller v. Electronic Arts, Inc., 3:09-CV-01967, 2009 WL 1270069 (N.D. Cal. May 5, 2009).

96. *In re NCAA Student-Athlete*, 724 F.3d at 1272.

97. *In re NCAA Student-Athlete*, 2011 WL 1642256, at \*4; see also Kurt Streecher, *Former UCLA Star Ed O'Bannon Leads Suit Against NCAA Over Use of Images*, L.A. TIMES (July 22, 2009), <http://articles.latimes.com/2009/jul/22/sports/sp-videogames-lawsuit22>; Jon Solomon, *Timeline: Ed O'Bannon vs. NCAA*, CBS SPORTS (June 6, 2014, 9:58 AM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24581878/timeline-ed-obannon-v-ncaa>.

98. Plaintiffs Samuel Michael Keller's and Edward C. O'Bannon, Jr.'s Notice of Joint Motion and Motion to Consolidate Actions, Keller v. Electronic Arts, Inc., 4:09-cv01967-CW, 2009 WL 2920919 (N.D. Cal. Sept. 1, 2009); Order Granting Plaintiffs Samuel Michael Keller's and Edward C. O'Bannon, Jr.'s Joint Motion to Consolidate Actions, Keller v. Electronic Arts, Inc., 4:09-cv-01967-CW (N.D. Cal. Jan. 15, 2010).

under California's anti-SLAPP statute, California Code of Civil Procedure § 425.16.<sup>99</sup> The anti-SLAPP motion under California law provides for a special motion that a defendant can file at the outset of a lawsuit to strike a complaint when it arises out of conduct that falls within the protection of the First Amendment.<sup>100</sup> The anti-SLAPP law is designed to prevent people from trying to chill free speech rights by suing people who are exercising these rights.<sup>101</sup> In this case, EA argued that they were exercising their First Amendment right to free speech when they used the student-athletes' likenesses in the game.<sup>102</sup> If EA had successfully established that they were attempting to exercise their First Amendment rights, the burden would have shifted to the plaintiffs to show that they would likely succeed on the merits, meaning that the speech was not protected.<sup>103</sup> The district court denied the anti-SLAPP motion because they found that the plaintiffs had established that they would likely succeed on the merits.<sup>104</sup> EA appealed the decision to the Ninth Circuit.<sup>105</sup>

On appeal, EA raised four affirmative First Amendment defenses under the anti-SLAPP motion that would have immunized them from any liability to the student-athletes: the "transformative use" test, the *Rogers* test, the 'public interest' test, and the 'public affairs' exemption."<sup>106</sup> EA also argued that even if their First Amendment defenses failed, NCAA student-athletes have no right of publicity because, pursuant to NCAA Bylaws, they contractually assigned their right of publicity to the NCAA and its member schools, and thus, the Bylaws prohibited them from receiving compensation.<sup>107</sup>

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99. *In re NCAA Student-Athlete*, 724 F.3d at 1272.

100. *See generally* CAL. CIV. PROC. CODE § 425.16 (West 2014).

101. *Platypus Wear, Inc. v. Goldberg*, 83 Cal. Rptr. 3d 95, 103 (Ct. App. 2008) (stating that the policy reasoning behind anti-SLAPP law was to prevent the chilling of First Amendment free speech rights).

102. *In re NCAA Student-Athlete*, 724 F.3d at 1273.

103. *See generally* CIV. PROC. § 425.16.

104. *See In re NCAA Student-Athlete*, 724 F.3d at 1279.

105. *See id.* at 1272.

106. *Id.* at 1273.

107. *See id.* at 1289 (Thomas, J., dissenting).

The Ninth Circuit ultimately affirmed the district court's decision and held that EA's affirmative defenses did not trump the plaintiffs' right of publicity claims.<sup>108</sup> Importantly, the court's denial of EA's anti-SLAPP motion arguably demonstrates that Keller, O'Bannon, and the other student-athletes would probably succeed on the merits in proving that EA's conduct fell outside of First Amendment protection because EA violated the student-athletes' right of publicity. Consequently, the majority did not address EA's defense on the basis of the NCAA waivers.<sup>109</sup> In fact, that component was not addressed in O'Bannon antitrust action.<sup>110</sup>

Judge Thomas strongly disagreed with the Ninth Circuit's holding.<sup>111</sup> While the dissent was primarily concerned with the belief that EA satisfied the transformative use doctrines, the dissent also addressed the NCAA waivers by stating:

Finally, as a qualitative matter, the publicity rights of college athletes are remarkably restricted. This consideration is critical because the "right to exploit commercially one's celebrity is primarily an economic right." NCAA rules prohibit athletes from benefitting economically from any success on the field. NCAA Bylaw 12.5 specifically prohibits commercial licensing of an NCAA athlete's name or picture. Before being allowed to compete each year, all Division I NCAA athletes must sign a contract stating that they understand the prohibition on licensing and affirming that they have not violated any amateurism rules. In short, even if an athlete wished to license his image to EA, the athlete could not do so without destroying amateur status. Thus, an individual college athlete's right of publicity is extraordinarily circumscribed and, in practical reality,

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108. *See id.* at 1284.

109. *See id.* at 1289 (Thomas, J., dissenting).

110. Steve Berkowitz, *Judge Releases Ruling on O'Bannon Case: NCAA Loses*, USA TODAY (Aug. 8, 2014, 11:29 PM), <http://www.usatoday.com/story/sports/college/2014/08/08/ed-obannon-antitrust-lawsuit-vs-ncaa/13801277/>; *see generally* John Solomon, *EA and CLC Settle Lawsuit by Ed O'Bannon Plaintiffs; NCAA Remains As Lone Defendant*, AL.COM (Sept. 28, 2013, 3:37 PM), [http://www.al.com/sports/index.ssf/2013/09/ea\\_will\\_not\\_make\\_college\\_footb.html](http://www.al.com/sports/index.ssf/2013/09/ea_will_not_make_college_footb.html).

111. *See In re NCAA Student-Athlete*, 724 F.3d at 1290 (Thomas, J., dissenting).

nonexistent.<sup>112</sup>

The dissent also argued that the majority mistakenly equated the right of publicity for student-athletes with that of professional athletes, because the, “marketing power of [professional NFL athletes] is well established, while that of the plaintiffs [student-athletes] is not.”<sup>113</sup>

On September 26, 2013, EA and CLC settled all of the claims brought against them.<sup>114</sup> The terms of the settlement will remain confidential until presented to the district court for preliminary approval.<sup>115</sup> However, both the plaintiffs and the NCAA have publicly stated that this settlement “does not affect Plaintiffs’ claims against Defendant National Collegiate Athletic Association.”<sup>116</sup> The NCAA publicly announced that they would fight the suits all the way to the United States Supreme Court if need be.<sup>117</sup> On appeal, the NCAA’s motion to dismiss the O’Bannon antitrust suit was denied.<sup>118</sup> While this denial was expected, it inevitably guarantees many years of continued litigation.<sup>119</sup> The District Court had also certified the

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112. *Id.* at 1289 (Thomas, J., dissenting) (internal citations omitted); *see also id.* at 1289, n.5 (Thomas, J., dissenting) (acknowledging that the equity behind the structure of NCAA athletes is an issue, but believing that it is beyond the scope of appeal).

113. *See id.* at 1288, n. 4; Vladimir P. Belo, Note, *The Shirts Off Their Backs: Colleges Getting Away With Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133, 134 (1996) (“The universities have begun licensing products that seek to capitalize on the popularity of actual players in addition to the popularity of the schools and their athletic teams.”); *see generally* William D. Holthaus, Jr., Note, *Ed O’Bannon v. NCAA: Do Former NCAA Athletes Have A Case Against the NCAA for Its Use of Their Likenesses?*, 55 ST. LOUIS U. L.J. 369 (2010); LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMP., TR. & MONO. § 22:32 (4th ed. 2012).

114. *See generally* Solomon, *supra* note 110.

115. *See* Steve Eder, *E.A. Sports Settles Lawsuit with College Athletes*, N.Y. TIMES (Sept. 26, 2013), [http://www.nytimes.com/2013/09/27/sports/ncaafotball/ea-sports-wont-make-college-video-game-in-2014.html?\\_r=0](http://www.nytimes.com/2013/09/27/sports/ncaafotball/ea-sports-wont-make-college-video-game-in-2014.html?_r=0); *see generally* Solomon, *supra* note 110.

116. Solomon, *supra* note 110.

117. Patrick Vint, *O’Bannon vs. the NCAA: The EA Settlement Means TV Money is Now the Battle*, SB NATION (Sept. 27, 2013, 9:11 AM), <http://www.sbnation.com/college-football/2013/9/27/4775712/obannon-ncaa-ea-settlement-clc>.

118. *See* Tom Farrey, *NCAA Motion Denied in Player Suit*, ESPN (Nov. 5, 2013, 6:01 PM), [http://espn.go.com/espn/otl/story/\\_/id/9879455/judge-denies-motion-dismiss-ed-obannon-ncaa-lawsuit](http://espn.go.com/espn/otl/story/_/id/9879455/judge-denies-motion-dismiss-ed-obannon-ncaa-lawsuit).

O'Bannon lawsuit as a class-action, but with a significant catch: while current and former NCAA athletes can challenge the NCAA restrictions on athlete compensation, the class is certified for "purposes of injunctive relief only," meaning the student-athletes can legally "prevent the N.C.A.A. from acting the same way in the future, but not for damages."<sup>120</sup>

The trial began on June 9, 2014, in District Court.<sup>121</sup> The trial concluded on June 27, 2014, with each side submitting final written closing statements to Judge Wilken by July 10, 2014.<sup>122</sup> On August 8, 2014, Judge Wilken released a 99-page ruling in favor of the plaintiffs.<sup>123</sup> The ruling issued an injunction that prohibits 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 revenue generated from the use of their names, images, and likenesses in addition to a full grant in aid."<sup>124</sup>

While the ruling theoretically could have enabled football and men's basketball programs to receive more aid from schools than they are receiving now, possibly at the expense of other programs, the judge limited the ruling by not allowing athletes to receive money for the endorsements and saying, "[a]llowing student-athletes to endorse commercial products would undermine the efforts of both the NCAA and its member schools to protect against the 'commercial exploitation' of student-athletes."<sup>125</sup> While the injunction will not be stayed while under appeal, the earliest group it

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119. See Hilary Russ, *Athletes' Licensing Fight Survives NCAA's Bid to Toss*, LAW360 (Feb. 8, 2010, 7:27 PM), <http://www.law360.com/articles/148446/athletes-licensing-fight-survives-ncaa-s-bid-to-toss>.

120. Greg Bishop, *N.C.A.A. Dodges a Bullet, But Change Is on the Way*, N.Y. TIMES (Nov. 10, 2013), [http://www.nytimes.com/2013/11/11/sports/ncaabasketball/ncaa-dodges-a-bullet-but-change-is-on-the-way.html?\\_r=1&adxnnl=1&adxnnlx=1387310021- /ui8tQTiZJV7z2ddt8sBLw](http://www.nytimes.com/2013/11/11/sports/ncaabasketball/ncaa-dodges-a-bullet-but-change-is-on-the-way.html?_r=1&adxnnl=1&adxnnlx=1387310021- /ui8tQTiZJV7z2ddt8sBLw).

121. Stewart Mandel, *Judge Allows Ed O'Bannon v. NCAA to Proceed to Trial*, SPORTS ILLUSTRATED (June 10, 2014), <http://www.si.com/college-football/2014/02/20/ed-obannon-lawsuit-proceeds-trial>.

122. Steve Berkowitz, *Closing Briefs Are In; O'Bannon Case in Hands of Judge*, USA TODAY (Jul. 11, 2014, 10:21 AM), <http://www.usatoday.com/story/sports/college/2014/07/10/ed-obannon-antitrust-case-against-ncaa-closing-judge-claudia-wilken/12510271/>.

123. Berkowitz, *supra* note 110.

124. *Id.*

125. *Id.*

will affect would be recruits entering school in 2016, as it will not take effect until the start of the next Football Bowl Subdivision and Division I basketball recruiting cycles.<sup>126</sup> The ruling also mandated that while the NCAA will be able to cap the amount of compensation that Division I football and men's basketball players can receive while they are in school, the cap will not be allowed to be an amount lower than the athlete's cost of attending school.<sup>127</sup> The ruling will also allow schools and conferences to deposit money in trust for the athletes that will become payable when the athletes leave an institution or their eligibility expires.<sup>128</sup>

While the NCAA claims that it has to review the ruling, it is almost certain to appeal the decision, as the ruling will potentially impact the antitrust suit still before Judge Wilken,<sup>129</sup> thus tying up the issue in court for years. While this is a major step for college athletes because it did not seem right that the players' images were used and the athletes were not able to be paid while their schools were making billions of dollars,<sup>130</sup> the ruling also raises issues as to whether this is a sign that the college-athlete model is set to crumble.

*C. Breaking Down The Majority Opinion of the Anti-Slapp Motion:  
Right Decision, Wrong Reasons*

The Ninth Circuit correctly denied EA's anti-SLAPP appeal and thus opened the door for arguments that the NCAA and EA wrongly interfered with the student-athlete's right of publicity.<sup>131</sup> The Ninth Circuit in *In re*

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126. *Id.*

127. *Id.*

128. Other consequences of the ruling include the following: "The NCAA will be allowed to set a cap on the amount of money that may be held in trust, but that cap cannot be less than \$5,000 in 2014 dollars for every year the athletes remain academically eligible. Schools will be allowed to offer less than the NCAA maximum amount if they so choose, but they cannot unlawfully conspire with each other in setting the amounts they offer. The NCAA will be allowed have rules that prevent the athletes from using the money being held in trust for them to obtain other financial benefits while they are in school. The NCAA also will be able to have rules that prevent schools from offering different amounts of deferred money to athletes who are in the same recruiting class on the same team. The amounts that schools decide to place in trust for the athletes may vary from year to year." *Id.*

129. Berkowitz, *supra* note 122.

130. *Id.*

131. See *In re NCAA Student-Athlete*, 724 F.3d at 1269.

*NCAA Student-Athlete* clearly recognized that the NCAA cannot contractually restrict or entirely eliminate a person's right of publicity, even in the name of amateurism.<sup>132</sup> While the decision is morally sound, it largely ignored the reality that the resulting confusion will upend the purpose of amateurism.

The Court correctly rejected the First Amendment defenses that would have given EA a blanket license to continue to profit off of the backs of the athletes.<sup>133</sup> Although the direct question of the NCAA waivers was not before the court, the failure to even address the waivers as they currently stand, regardless of ripeness, appears to be a deliberate avoidance of the issue.<sup>134</sup> While the court was deciding an appeal of a denial of an anti-SLAPP motion, it still would have been an appropriate context to address the broader issues since its holding may allow student-athletes to bring claims in violation of the waivers. Thus, the court's decision is substantively deficient because it failed to consider the policy that its decision could have on the NCAA waivers.<sup>135</sup> While the Ninth Circuit may have believed that it was unnecessary to address the NCAA waivers and amateurism, the decision exposed the shortsighted nature of the court and foreshadowed future lawsuits for the courts to decide, once and for all, the true definition of amateurism.<sup>136</sup>

Similarly, the pre-*In re NCAA Student-Athlete* holding in *Hart v. Electronic Arts, Inc.* also indicates the judiciary's overwhelming willingness to recognize a limitation on First Amendment communication defenses in the context of the right of publicity.<sup>137</sup> However, *Hart* failed to consider the decision's effect on amateurism and the NCAA waivers as a consequence of its decision.<sup>138</sup> The case is almost factually identical to *In*

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132. *Id.*

133. *Id.* at 1276; see also Timothy J. Bucher, Note, *Game On: Sports-Related Games and the Contentious Interplay Between the Right of Publicity and the First Amendment*, 14 TEX. REV. ENT. & SPORTS L. 1, 4 (2012); cf. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 96 (1984) (the Court's reasoning created greater confusion as to whether amateurism, as the NCAA describes it, even exists anymore).

134. See generally *In re NCAA Student-Athlete*, 724 F.3d 1268.

135. See, e.g., Kendall K. Johnson, Note, *Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts*, 19 SPORTS LAW. J. 1, 42-48 (2012).

136. *Id.*

137. See *Hart v. Elect. Arts, Inc.*, 717 F.3d 141, 145 (3d Cir. 2013).

re *NCAA Student-Athlete*; there, the Third Circuit reversed the district court's holding that First Amendment claims barred the former athlete's right of publicity assertion.<sup>139</sup> Former college athlete Ryan Hart sued EA for misappropriating his image while he was the star quarterback at Rutgers University in 2007.<sup>140</sup> While the district court initially found that Hart did not state a viable right of publicity, the Third Circuit reversed and held that he did have a viable right of publicity that was not barred by the First Amendment.<sup>141</sup> However, although the majority in *Hart* explicitly mentions that Hart was required to adhere to NCAA Bylaws while he was a football player at Rutgers, it does not further mention the contractual provisions.<sup>142</sup> Instead, similar to the Ninth Circuit, the Court analyzed the case in the context of First Amendment defenses, which were identical to the ones raised during the subsequent Ninth Circuit decision.<sup>143</sup>

It is clear that the First Amendment is a significant factor when scrutinizing sports-related videogames in the contentious context of right of publicity; however, merely sidestepping the issue only intensifies the inevitability that even more suits will be brought.<sup>144</sup> Again, this demonstrates that both the Third Circuit and the Ninth Circuit were reluctant to consider how their decisions undermine the purpose of even recognizing a right of publicity for student-athletes because they did not consider the effect on college athletes as a whole.<sup>145</sup>

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138. *See generally id.*

139. *Id.* at 145; *see also* *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996) (finding that while there was a right to publicity, First Amendment defenses generally trump that right in the absence of more compelling reasons).

140. *Hart*, 717 F.3d at 145.

141. *Id.*

142. *Id.*

143. *Id.* (citing *NCAA, 2011–12 NCAA Division I Manual* §§ 12.01.1; 12.1.2; 12.5.21 (2011) (“Only an amateur student-athlete is eligible for inter-collegiate athletics participation in a particular sport. In relevant part, these rules state that a collegiate athlete loses his or her ‘amateur’ status if (1) the athlete ‘[u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport,’ or (2) the athlete ‘[a]ccepts any remuneration or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind.’”).

144. Bucher, *supra* note 133, at 23.

145. *See generally* Maureen C. Weston, *The Fantasy of Athlete Publicity Rights: Public Fascination and Fantasy Sports' Assertion of Free Use Place Athlete Publicity Rights on an Uncertain Playing Field*, 11 CHAP. L. REV. 581 (2008).



*D. The Dissent Misses The Point By Failing to Adequately Address the Significance of the NCAA Waivers in Light of the Majority's Holding*

Unlike the majority, the dissent in *In re NCAA Student-Athlete* recognized the significance of the NCAA waivers.<sup>146</sup> The dissent stated that even if student-athletes have a right of publicity, their rights are incredibly restricted because they are banned from receiving compensation and because they contractually surrendered their rights of publicity to the NCAA.<sup>147</sup> In fact, the dissent emphasized that the NCAA waivers should have been critical to the majority's holding because the NCAA waivers eradicate student-athletes' economic rights, which, the dissent argues, is the key to even having a right of publicity.<sup>148</sup> However, the dissent mistakenly stated that the majority erroneously equated the right of publicity of student-athletes with that of professional athletes.<sup>149</sup> Not only did the dissent not provide any empirical data to prove that student-athletes do not have valuable images, but it also ignored the fact that EA Sports has made millions off its *NCAA Football* and *NCAA Basketball* series.<sup>150</sup>

The dissent essentially believed that the NCAA waivers render the individual college athlete's right of publicity practically nonexistent, and that the structure itself provides a significant backdrop to whether the right should be recognized.<sup>151</sup> However, the dissent similarly avoided directly addressing the issue by stating "[t]he issue . . . is beyond the scope of this appeal," and failed to consider that once the right of publicity is recognized, it undermines the NCAA rules and triggers a complete restructure.<sup>152</sup> Moreover, the dissent did not consider that signing the

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146. *In re NCAA Student-Athlete*, 724 F.3d 1268, 1289 (9th Cir. 2013) (Thomas, J., dissenting).

147. *Id.*

148. *Id.*; see also *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 415 (2001) ("The right to exploit commercially one's celebrity is primarily an economic right.").

149. *In re NCAA Student-Athlete*, 724 F.3d at 1286 (Thomas, J., dissenting).

150. See Chris Smith, *NCAA Football Video Game Is Worth Over \$75,000 Per Year for Top Teams*, FORBES (Aug. 22, 2013, 10:47 AM), <http://www.forbes.com/sites/chris-smith/2013/08/22/ncaa-football-video-game-is-worth-over-75000-per-year-for-top-teams/>.

151. *In re NCAA Student-Athlete*, 724 F.3d at 1289 (Thomas, J., dissenting).

152. *Id.* at n.5 (Thomas, J., dissenting).

NCAA waivers alone does not mean the agreements are enforceable.<sup>153</sup>

#### IV. THE APPLICATION OF UNCONSCIONABILITY DOCTRINE TO THE NCAA WAIVERS

This section will argue that student-athletes can attack the NCAA waivers under the contractual doctrine of unconscionability in light of the *In re NCAA Student-Athlete* holding.

##### *A. The Unconscionability Doctrine*

One burning question is whether the Ninth Circuit's holding has rendered NCAA Bylaws 12.5.1 and 12.5.2 unenforceable.<sup>154</sup> Many critics have contended that the NCAA waivers are unconscionable because the terms of the contracts unreasonably favor the NCAA.<sup>155</sup> Well-known athletes who enter college with a clear right of publicity usually receive the strongest support for NCAA waivers being unconscionable.<sup>156</sup> *In re NCAA Student-Athlete* opens the door for the argument that the NCAA waivers are unconscionable.

Unconscionability is a doctrine of contract law that describes terms that are so extremely unjust, or overwhelmingly one-sided in favor of the party who has the superior bargaining power that the party does not contract in good conscience.<sup>157</sup> Unconscionability is generally defined as an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other

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153. See generally Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn From Trademark Law*, 58 STAN. L. REV. 1161 (2006).

154. See Christian Dennie, *Amateurism Stifles A Student-Athlete's Dream*, 12 SPORTS LAW. J. 221, 234-37 (2005) (citing Interview with Aaron Adair, Former Student-Athlete, University of Oklahoma, in Norman, Okla. (Oct. 26, 2003)).

155. See Kristine Mueller, Note, *No Control Over Their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70, 70-71 (2004); Kendall K. Johnson, Note, *Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts*, 19 SPORTS LAW. J. 1, 48 (2012).

156. Mueller, *supra* note 155 at 70-71.

157. See, e.g., John Edward Murray, Jr., MURRAY ON CONTRACTS § 30, at 61-64 (4th ed. 2001); see also E. Allan Farnsworth, CONTRACTS § 4.287, at 307-08 (3d ed. 1999); see generally Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123 (2005).

parties.”<sup>158</sup> Typically, an unconscionable contract is deemed unenforceable because no reasonable or informed person would otherwise agree to it.<sup>159</sup>

Courts determine unconscionability by examining the circumstances of the parties when the contract was made, such as their bargaining power, age, and mental capacity.<sup>160</sup> Other issues potentially include lack of choice, superior knowledge, and other obligations or circumstances surrounding the bargaining process.<sup>161</sup> Additionally, “unconscionably” taking advantage of another party can render a contract unenforceable in a civil action.<sup>162</sup> In order to successfully establish unconscionability, the issue is whether the contract was unconscionable at the time it was made; therefore, subsequent circumstances that make the contract extremely one-sided are considered irrelevant.<sup>163</sup> Unconscionability is a factual analysis decided by a judge, and only applied when it would be a serious affront to the integrity of the judicial system to enforce such a contract.<sup>164</sup> In some instances, a judge only may render the offending clause unenforceable while upholding other aspects of the contract in order to bring about a fair outcome.<sup>165</sup>

In addition to unconscionability, to invalidate a contract or contractual clause on the basis of unconscionability, most courts require a showing of both procedural and substantive unconscionability.<sup>166</sup> Procedural

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158. Farnsworth, *supra* note 157 at 311 (citing *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965)).

159. *Id.*

160. *Id.*

161. *Id.*

162. *See Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

163. *See id.* at 450. Compare Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 629-31 (1943) (discussing that freedom of contract relates to society’s free enterprise system), with E. Allan Farnsworth, *CONTRACTS* § 1.7, at 20-21 (3d ed. 1999) (stating that the decline of the free enterprise system in the 20th century has led to a shift away from the historical emphasis on freedom of contract).

164. *See Farnsworth supra* note 157; *see Williams*, 350 F.2d at 449.

165. *See Carboni v. Arrospide*, 2 Cal. Rptr. 2d 845, 847 (Ct. App. 1991).

166. *See, e.g., Svalina v. Split Rock Land & Cattle Co.*, 816 P.2d 878, 882 (Wyo. 1991) (listing six factors used to determine procedural unconscionability, including whenever “one party [was] in some manner surprised by fine print or concealed terms”); *see Farnsworth supra* note 158.; *see also Williams*, 350 F.2d at 449 (noting that terms can be procedurally unconscionable if they are “hidden in a maze of fine print”).

unconscionability focuses on identifying flaws in the contract that made the agreement either unfairly surprising or coercive;<sup>167</sup> substantive unconscionability focuses on defects in the bargaining process by identifying grossly one-sided terms.<sup>168</sup> Generally, if there is more of one type of unconscionability present, less evidence of the other is required.<sup>169</sup>

Thus, unconscionability is reserved for the most extreme cases, and unfortunately, most contractual challenges based on unconscionability fail.<sup>170</sup> A mere imbalance of consideration between the parties is not enough to establish that a contract is unconscionable.<sup>171</sup> Clearly, in order for the student-athletes to establish unconscionability, it is not enough to demonstrate disparity in size and bargaining power, or that the deal is unfair; student-athletes must show that the contract is so grossly one-sided and procedurally flawed that it “shock[s] the conscience.”<sup>172</sup> Ultimately, however, student-athletes will be able to establish unconscionability as to the NCAA waivers.<sup>173</sup>

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167. *See* Dean Witter Reynolds, Inc. v. Superior Court, 259 Cal. Rptr. 789, 795 (Ct. App. 1989).

168. *Id.*

169. *Id.* (“A relatively larger degree of one will compensate for a relatively smaller degree of the other.”); *see, e.g.*, Carboni, 2 Cal. Rptr. 2d at 849 (noting the sliding scale relationship between the two concepts).

170. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1442 (2008) (“[I]t is well known that unconscionability is generally a loser of an argument.”); *see also* Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 215 n.219 (2009) (“[E]mpirical studies indicate that challenges based on contract policing doctrines, like duress and unconscionability, usually fail.”).

171. Even in cases where the result was extremely harsh, contracts have been enforced. *See, e.g.*, Drake v. W. Va. Self-Storage, Inc., 509 S.E.2d 21, 26 (W. Va. 1998) (holding that a contract entitled the defendant to sell plaintiff’s possessions worth more than \$10,000 for \$150 when she failed to make \$40 rental payments on a storage unit); Wille v. Sw. Bell Tel. Co., 549 P.2d 903, 907 (Kan. 1976) (“The UCC does not require that there be complete equality of bargaining power or that the agreement be equally beneficial to both parties”) (citations omitted); M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757, 766 (1969) (“[M]ere disparity of bargaining strength, without more, is not enough to make out a case of unconscionability.”).

172. *See* Johnson, *supra* note 155, at 18 (quoting Osgood v. Franklin, 1 N.Y. Ch. Ann. 275 (1816) (stating that unconscionability requires that an agreement “shock the conscience and confound the judgment of any man of common sense.”)) (citing Cal. Grocers Ass’n v. Bank of Am., 27 Cal. Rptr. 2d 396, 402 (Ct. App. 1994)).

173. *See generally id.*

*B. Student-Athletes Are Unfairly Surprised  
by the Terms of the Student-Athlete Waivers*

Unfair surprise is a key part of establishing procedural unconscionability.<sup>174</sup> This occurs when one party is either unable to comprehend the terms of the agreement, or is unaware that the terms existed in the first place.<sup>175</sup> Some examples of unfair surprise include when a party is uneducated, illiterate, unable to comprehend the language of the agreement, or is limited in understanding by infancy or mental incapacity.<sup>176</sup> Unfair surprise also occurs when a term is buried in small print, found in an unexpected location, or couched in intentionally confusing language.<sup>177</sup> However, this is not an exhaustive list.<sup>178</sup> Moreover, all parties are charged with a duty to read the terms of a contract—parties who simply failed to read the agreement cannot claim unfair surprise.<sup>179</sup>

The NCAA process takes advantage of young and inexperienced student-athletes who truly do not comprehend the magnitude of the contract

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174. See *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1296 (9th Cir. 2006).

175. See *Sanchez v. W. Pizza Enter.*, 172 Cal. App. 4th 154, 173 (2009) (“Unfair surprise results from misleading bargaining conduct or other circumstances indicating that a party’s consent was not an informed choice.”).

176. *Jackson v. Bank of Am. Corp.*, 711 F.3d 788, 793 (7th Cir. 2013) (citing *Amoco Oil Co. v. Ashcraft*, 791 F.2d 519, 522 (7th Cir. 1986) (holding that “mental incapacity that prevents a party from ‘appreciating the significance of the agreement’” is enough for unfair surprise under unconscionability)); *Johnson v. Mobil Oil Corp.*, 415 F. Supp. 264, 269 (E.D. Mich. 1976) (holding that illiteracy was sufficient to find unfair surprise); *Bekins Bar V Ranch v. Huth*, 664 P.2d 455, 462 (Utah 1983) (citing *Wille v. Sw. Bell Tel. Co.*, 549 P.2d 903, 907 (Kan. 1976)) (explaining that unfair surprise can be shown when parties are “underprivileged, unsophisticated, uneducated and illiterate.”); *Lovey v. Regence Blueshield of Idaho*, 72 P.3d 877, 882 (Idaho 2003) (indicating that unfair surprise can be demonstrated through “lack of understanding regarding the contract terms arising from the use of inconspicuous print, ambiguous wording, or complex legalistic language; the lack of opportunity to study the contract and inquire about its terms; or disparity in sophistication, knowledge, or experience of the parties.”).

177. *Walker v. Am. Cyanamid Co.*, 948 P.2d 1123, 1130 (Idaho 1997); see *Lovey*, 72 P.3d at 882.

178. See generally *Lovey*, 72 P.3d 877 (unfair surprise can include convoluted language and fine print).

179. *Stanley A. Kopp, Inc. v. John Deere Co.*, 510 F. Supp. 807, 811 (E.D. Pa. 1981) (“[A] person has a duty to read a contract before signing it and his failure to do so will not excuse his ignorance of its contents.”).

that they are signing.<sup>180</sup> Student-athletes, some of whom are not even eighteen-years-old at the time of contracting, are signing a contract that has been drafted by a party that is substantially more sophisticated and far more knowledgeable about the contract and its implications than the student-athletes.<sup>181</sup>

Few student-athletes, if any, consult an attorney first and are precluded from hiring an agent since that would violate the NCAA Bylaws.<sup>182</sup> Yet, it is puzzling that supporters of the NCAA process contend that these factors are not enough to find the NCAA process procedurally unconscionable, considering that many courts applying this rule to arbitration agreements have found procedurally unconscionable those that involve parties of unequal size, sophistication, and bargaining power.<sup>183</sup> While it is true that courts have found that disparity in size alone is not enough to render a contract unconscionable, disparity taken with other factors tends to support unconscionability.<sup>184</sup> Furthermore, while the NCAA undoubtedly has the power to take steps to ensure the student-athletes understand the terms and that the clauses are conspicuous, there is no evidence that the NCAA actually takes steps such as explaining some of the terms, putting key terms in bold type, and using contrasting colors or capital letters.<sup>185</sup>

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180. Preston Peeden, *NCAA Corrupt, Takes Advantage of Players*, THE DAILY BEACON (Apr. 25, 2013), <http://utdailybeacon.com/sports/2013/apr/25/ncaa-corrupt-takes-advantage-players/>.

181. See Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Anti-Trust Case*, SPORTS ILLUSTRATED (July 21, 2009), <http://www.si.com/more-sports/2009/07/21/ncaa> (noting that “the lack of ‘life experience’ of most incoming student-athletes” makes the process “exploitive and also one that creates a disparity in bargaining power”).

182. See, e.g., *The Truth Behind the National Letter of Intent*, NEON TOMMY (Apr. 29, 2010, 12:19 AM), <http://www.neontommy.com/2010/04/national-letter-of-intent>.

183. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (citing several California Supreme Court cases in which California courts have applied this rule of unconscionability to invalidate arbitration agreements or portions thereof on grounds of unconscionability). Any meaningful distinctions that may exist between arbitration agreements and contracts are not important in this context, for the Supreme Court repeatedly emphasizes that arbitration agreements stand on “equal footing” with contracts. *Id.* (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

184. See *id.* at 1746.

185. Johnson, *supra* note 155, at 20-21 (supporting the notion that the use of the given methods makes a contract more enforceable as a consequence of the clauses being more conspicuous) (citations omitted); see *Hubbert v. Dell Corp.*, 835 N.E.2d 113, 124 (Ill. App. Ct.

Supporters of the NCAA waivers also fail to demonstrate that student-athletes actually comprehend the terms.<sup>186</sup> In fact, one supporter merely concludes that “in all but the rarest cases, a student-athlete is fully aware of the relevant terms of the agreement.”<sup>187</sup> While some comprehension arguably can be presumed based on the general education presumptions since prospective student-athletes must be high school seniors, this presumption is not enough to make a blanket-sweeping statement that “student-athlete[s] [are] fully aware of the relevant terms.”<sup>188</sup>

Although the NCAA Student-Athlete Statement is a mere seven pages long with seven short separate clauses,<sup>189</sup> such brevity is not dispositive in and of itself to establish that all or even most student-athletes understand its terms. This is especially true since the actual NCAA Student-Athlete Manual that the contract internally references is almost 500 pages.<sup>190</sup> Furthermore, while the fact that each clause “requires an individual signature” could imply that the student-athlete has acknowledged the clause in question,<sup>191</sup> the mere act of signing each clause does not on its own mean that the athlete has been made fully aware of the magnitude of the terms. Finally, the fact that the contract was “written in comparatively plain English” is arguably still fairly subjective considering that many student-athletes come from ethnically diverse or limited educational backgrounds or lower socioeconomic statuses; practically speaking, their versions of “plain English” will differ greatly from those understood by legal scholars.<sup>192</sup>

While NCAA-member schools do employ a compliance staff who are

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2005) (identifying methods a contracting party can employ that a court may look to for purposes of rendering a clause conspicuous).

186. *Id.* at 21, n.143 (2012) (referencing Stanford Univ. Dept. of Athletics, 2010-11 Student-Athlete Handbook 5, 32 (2010)) (noting that Stanford University’s compliance personnel *attempts* to help student-athletes understand these terms). Note that attempting to help a student-athlete understand a contract’s terms does not guarantee that the student-athlete will ultimately understand its terms.

187. *Id.* at 21.

188. *Id.*

189. *Id.*

190. *Id.* at 20.

191. Johnson, *supra* note 155, at 21.

192. *Id.*

supposed to be available to explain the NCAA regulations and meet with student-athletes on an annual basis,<sup>193</sup> mere availability is not enough to show that the staff actually met with or explained the terms to the student-athletes. Even so, the compliance staff is primarily there to protect the NCAA and member schools' interests.<sup>194</sup> Moreover, the compliance staff is only available after the student-athlete becomes an enrolled student and is not a part of the initial contracting, which arguably is the heart of the unconscionability claim. Thus, the compliance staff has no incentive to explain the NCAA rules to *prospective* student-athletes. Although the Student-Athlete statement "explicitly refers student-athletes to a school's compliance staff and athletic director to explain the terms . . . [and provides] a phone number for the NCAA where additional questions can be answered,"<sup>195</sup> the statement fails to demonstrate whether, if at all, student-athletes fully realize that the school has sole right to profit from and use the student-athletes' images.

Although the NCAA process arguably mandates parental involvement because parental signatures are required on three of the main contractual documents for all student-athletes, this is only required for student-athletes who are minors.<sup>196</sup> While parents arguably have the best intentions for their children, it is unclear whether they truly understand the magnitude of what they are signing on behalf of their children.

Finally, supporters of the NCAA waivers fail to demonstrate that student-athletes are capable of fully assenting to a contract simply because they have been admitted to college.<sup>197</sup> Mere admission to college is not enough to state that the student-athletes can comprehend legal agreements, especially since many were admitted only on the basis of their athletic ability and had poor academic performance.<sup>198</sup> It is also untrue that

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193. See, e.g., *id.*

194. William C. Rhoden, *University Compliance Officers: Good Cop, Bad Cop*, N.Y. TIMES (Apr. 10, 2009), [http://www.nytimes.com/2009/04/11/sports/ncaabasketball/11rhoden.html?\\_r=0](http://www.nytimes.com/2009/04/11/sports/ncaabasketball/11rhoden.html?_r=0).

195. Johnson, *supra* note 155, at 21.

196. See, e.g., *Drug-Testing Consent Form – NCAA Division III*, NCAA, [http://www.ncaa.org/sites/default/files/DIII%20Form%2014-3f%20-%20Drug%20Testing%20Consent\\_0.pdf](http://www.ncaa.org/sites/default/files/DIII%20Form%2014-3f%20-%20Drug%20Testing%20Consent_0.pdf) (last visited Oct. 24, 2014).

197. Johnson, *supra* note 155, at 22.

198. See Allie Grasgreen, *A Rules Rebuke*, INSIDE HIGHER ED (May 3, 2013), <http://www.insidehighered.com/news/2013/05/03/ncaa-backtracks-recruiting-academic-rules>; see



student-athletes must show a mastery of reading comprehension on the SAT.<sup>199</sup> While student-athletes must receive a satisfactory score,<sup>200</sup> this basically means that student-athletes cannot completely fail the exam. Thus, based on this low standard, it is difficult to determine whether student-athletes are in the top of their class academically.<sup>201</sup> While it is true that age alone is not enough to render a contract unconscionable,<sup>202</sup> especially for student-athletes who are underage when they sign, it is a factor that, combined with others, can lean towards unconscionability.<sup>203</sup>

Even so, supporters of the waivers failed to demonstrate that the NCAA process as a whole is sufficient to make the contract procedurally conscionable.<sup>204</sup> Supporters attempt to point to the fact that “[y]oung people in the United States make decisions with far greater implications than the decision to allow an NCAA institution to use their publicity rights,” by stating 18-year-olds are eligible to serve life imprisonment.<sup>205</sup> This analogy is severely misplaced because likening life imprisonment to the NCAA contracts is simply not comparable because, arguably, life imprisonment is not a meaningful contract with the corrections department.

Ultimately, there are factors present that would help the student-athletes challenge the waivers as unconscionable, especially in light of *In re NCAA Student Athlete*.<sup>206</sup> In fact, in *In re NCAA Student-Athlete*, the court held that, contrary to the NCAA waivers, student-athletes do have a

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also Sara Ganim, *CNN Analysis: Some College Athletes Play Like Adults, Read Like 5th-Graders*, CNN (Jan. 8, 2014, 1:05 PM), <http://www.cnn.com/2014/01/07/us/ncaa-athletes-reading-scores/>.

199. See Grasgreen, *supra* note 198; see also Ganim, *supra* note 198.

200. See Ganim, *supra* note 198; see also Sam Weyrauch, *Banded Together: Recruited Athletes with Sub-Average Academics Can Receive Preference in Admissions*, THE BOWDOIN ORIENT (Mar. 28, 2014), <http://bowdoinorient.com/article/9151>; see generally Paula Lavigne, *Bad Grades? Some Schools Ok With It*, ESPN (Oct. 18, 2012, 2:36 PM), [http://espn.go.com/espn/otl/story/\\_/page/Outside-The-Lines-GPA/some-high-schools-actually-reducing-gpa-requirements-student-athletes](http://espn.go.com/espn/otl/story/_/page/Outside-The-Lines-GPA/some-high-schools-actually-reducing-gpa-requirements-student-athletes).

201. See Grasgreen, *supra* note 198; see also Ganim, *supra* note 198.

202. Johnson, *supra* note 155, at 22.

203. See *Thi of Georgia at Shamrock, LLC v. Fields*, No. CV 313-032, 2013 WL 6097569, at \*4 (S.D. Ga. Nov. 18, 2013).

204. *Contra* Johnson, *supra* note 155, at 23.

205. *Contra id.*

206. See generally *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

right of publicity that is not contractually eliminated.<sup>207</sup> Thus, the NCAA student-athlete waivers are likely procedurally unconscionable because the Ninth Circuit's holding opens the door for student-athletes to attack this offensive clause.

*C. Student-Athletes Do Not Have a Meaningful Choice  
to Not Contract with the NCAA Because  
Their Playing Choices Are Extremely Limited*

Supporters of the NCAA process claim that the most compelling theory that cuts against procedural unconscionability is that student-athletes have the option of either foregoing the NCAA contract altogether or to contract with a party outside of the NCAA.<sup>208</sup> However, just because these options are available does not mean that the student-athletes still have a *meaningful* choice.<sup>209</sup>

The NCAA is an organization that clearly provides student-athletes with an unmatched opportunity to compete at an elite level while pursuing a college degree.<sup>210</sup> The NCAA offers its contracts on a take-it-or-leave-it basis and do not allow any negotiation with the student-athletes.<sup>211</sup> Thus, the NCAA waivers are adhesion contracts, meaning that the student-athlete has no meaningful choice but to sign if they want to compete at an elite level in college sports.<sup>212</sup> While it is true that adhesion alone is not *per se* unconscionable, it is one of many factors leaning in favor of finding unconscionability.<sup>213</sup> Although adhesion contracts are prevalent, and most are enforceable, the real issue here is whether the student-athletes can reasonably reject it without giving up an opportunity to be noticed on a heightened level that is more likely to lead to professional playing

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207. *Id.* at 1269.

208. *See Johnson, supra* note 155, at 25-26.

209. *See, e.g., Williams*, 350 F.2d at 449-50.

210. Jason Belzer, *Leveling the Playing Field: Student Athletes or Employee-Athletes?*, FORBES (Sept. 9, 2013, 2:00 PM), <http://www.forbes.com/sites/jasonbelzer/2013/09/09/leveling-the-playing-field-student-athletes-or-employee-athletes/>.

211. *See The Value of College Sports*, NCAA (Sept. 26, 2014, 4:42 PM), <http://www.ncaa.org/student-athletes/value-college-sports>.

212. *See Morris v. Redwood Empire Bancorp*, 27 Cal. Rptr. 3d 797, 807 (Ct. App. 2005).

213. *Id.*

opportunities.<sup>214</sup>

Courts have found lack of meaningful choice when there is only one provider of a certain product or service and in those situations, the weaker party must accept the terms of the service or forego the product or service altogether because the provider is unwilling to negotiate the terms.<sup>215</sup> This clearly epitomizes the NCAA; no organization rivals the NCAA when it comes to size and prestige of the organization, as well as the opportunity to have collegiate scholarships and the opportunity to simultaneously engage in athletics and academics at a superior level.<sup>216</sup> Even though Major League Baseball (“MLB”) does allow high school students to be drafted directly out of high school,<sup>217</sup> this is still incomparable because only the top high school prospects have realistic chances of being drafted. It is also undisputed that the NCAA is not only a key step on the path to becoming a professional athlete, it also provides the student-athletes with the most prominent national stage for professional scouts and recruiters.<sup>218</sup>

Supporters of the NCAA process claim that “just because the NCAA may be the best provider of athletic opportunities does not mean that the NCAA is the only provider of such opportunities,” and this heavily weighs against finding unconscionability.<sup>219</sup> While courts have found that dominance of a certain provider does not make that seller a monopolist, the unconscionability analysis does not stop there,<sup>220</sup> and while the “coercive power of a monopolistic seller” is arguably alleviated when providers offer the weaker party the option to go elsewhere,<sup>221</sup> the alternative choice here (outside the NCAA) is simply incomparable in the field of amateur athletics.

Although there are many cases where no unconscionability was found because plaintiffs had an alternative choice in choosing a good or service,

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214. Johnson, *supra* note 155, at 25.

215. See, e.g., *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 171 (Cal. 1981).

216. Johnson, *supra* note 155, at 25.

217. *First Year Player Draft Rules*, MLB, <http://mlb.mlb.com/mlb/draftday/rules.jsp> (last visited Oct. 24, 2014).

218. Johnson, *supra* note 155, at 25.

219. *Id.*

220. *Id.*

221. *Id.* at 26.

the majority of those cases are incomparable. For instance, the sale of advertisements exclusively should be distinguishable from having to give up one's image rights in order to participate in high level sports. The court in *Discount Fabric House of Racine v. Wisconsin Telephone Company* held that a contract specifically limiting liability for errors in advertising was unconscionable. There, the telephone directory containing the advertisements was an "indispensable element of telephone service" due to the company's commercial efforts and there were no equal competitive methods for advertisement.<sup>222</sup> It is worth noting that there is a jurisdictional split concerning whether the meaningful alternative choice should at least be comparable, rather than just an alternative.<sup>223</sup>

In the amateur athletics context, there are no realistic meaningful alternatives. While it is true that student-athletes may participate in the National Association of Intercollegiate Athletics (NAIA) or the National Junior College Athletic Association (NJCAA), these are not only significantly limited options, but clearly few professional sports teams, if any, scout for student-athletes from that arena.<sup>224</sup> Moreover, while the best young basketball players can play professionally in the National Basketball Association (NBA), National Summer League (NSL), or National Development League (NDL), once they turn nineteen or have completed one year of college, that field is primarily comprised of bench players, and not as easy to break into as the NCAA.<sup>225</sup> Of course, while student-athletes

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222. See *Disc. Fabric House of Racine v. Wis. Tel. Co.*, 345 N.W.2d 417, 425-26 (Wis. 1984).

223. Compare *Allen v. Mich. Bell Tel. Co.*, 171 N.W.2d 689, 692 (Mich. 1969), with *Louisville Bear Safety Serv. v. S. Cent. Bell Tel. Co.*, 571 S.W.2d 438, 439-40 (Ky. Ct. App. 1978).

224. *Colleges*, NJCAA (Aug. 19, 2014, 2:08 PM), <http://www.njcaa.org/colleges.cfm>; *Guide NAIA: Guide For College-Bound Student-Athlete*, NAIA, 2, [http://www.naia.org/files/27900/1NAIA/membership/NAIA\\_GuidefortheCollegeBoundStudent.pdf?DB\\_OEM\\_ID=27900](http://www.naia.org/files/27900/1NAIA/membership/NAIA_GuidefortheCollegeBoundStudent.pdf?DB_OEM_ID=27900) (last visited Oct. 24, 2014) (the NAIA has nearly 300 member institutions with around \$450 million dollars in financial aid each year); *NAIA College Athletes and Athletic Scholarships*, NAIA (Aug. 18, 2014, 2:50PM), <http://www.athleticscholarships.net/naiainformation.htm> (last visited Oct. 24, 2014); see *Information for a Prospective NJCAA Student-Athlete*, NJCAA, 1, [http://www.njcaa.org/njcaaforms/140605\\_2\\_Prospective%20student%20brochure%2014-15.pdf](http://www.njcaa.org/njcaaforms/140605_2_Prospective%20student%20brochure%2014-15.pdf) (last visited Oct. 24, 2014) (the NJCAA has 513 member institutions and also provides athletic aid to student-athletes). However, these facts alone do not demonstrate how many players make the leap from the NAIA to either the NBA, NFL or WNBA, in contrast to the NCAA.

225. See *Player Eligibility and NBA Draft*, NBA PLAYERS ASSOCIATION, 1-2, <http://www.nbpa.com/sites/nbpa.org/files/ARTICLE%20X.pdf> (last visited Oct. 24, 2014). Note that a 2005 change to NBA Draft rules limited the number of high school seniors who are eligible to be selected, but some, such as John Wall, may be eligible to make the leap from high school to the NBA.

can play semi-professionally for the American Basketball Association, the World Basketball League, or the International Basketball League, those are still developmental leagues that are restricted to the very top players that are not the typical student-athlete coming into their own during college.<sup>226</sup>

There is also no real meaningful choice to participate in amateur football outside of the NCAA. While budding football players may participate in arena football, this is not an amateur sport because these players receive compensation.<sup>227</sup> In fact, in the case of Terrell Owens, it was more of a career-ending move to play arena football in an attempt to get back into the National Football League (NFL).<sup>228</sup> While supporters claim there are potential opportunities to play American-style football abroad, it ignores the lack of realistic opportunities that would develop from those options.<sup>229</sup> Moreover, there are no true statistics of how many student-athletes who play in these alternative leagues garner recognition in the NBA or NFL drafts that translates into professional play.<sup>230</sup>

While supporters concede that “these options are not perfectly comparable to the experience that the NCAA provides and do not afford identical benefits,” they also fail to demonstrate how the mere possibility of participating, however attenuated, in a less stellar field may equate to coming out with the same skills.<sup>231</sup> Hence, while student-athletes arguably have a mere “choice to take their athletic skills elsewhere,” the reality is that if they wish to play at a high level and transition into professional sports, the only real option appears to be the NCAA.<sup>232</sup>

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226. See Johnson, *supra* note 155, at 27.

227. See Zac Boyer, *In Arena League, Dreams of Following Jay Gruden's Path*, WASH. TIMES (July 22, 2014), <http://www.washingtontimes.com/news/2014/jul/22/arena-football-league-dreams-following-jay-grudens/?page=all>.

228. See Tim MacMahon, *IFL Team Releases Terrell Owens*, ESPN (May 30, 2012, 1:51 PM), [http://espn.go.com/dallas/nfl/story/\\_/id/7984924/terrell-owens-cut-indoor-football-team-loses-ownership-share](http://espn.go.com/dallas/nfl/story/_/id/7984924/terrell-owens-cut-indoor-football-team-loses-ownership-share).

229. See generally Johnson, *supra*, note 155.

230. There are no statistics currently available concerning the amount or percentage of players who transition from alternative leagues into the NFL or NBA.

231. Johnson, *supra* note 155, at 28.

232. *Id.*

*D. The NCAA Contracts Are Substantively  
Unconscionable and Unfair*

The fact that the contract terms unreasonably favor the NCAA strongly suggests that they are substantively unconscionable.<sup>233</sup> Not only do the contract terms unreasonably favor the NCAA, but the potential scholarship benefits, if available, pale in comparison to the NCAA's substantial merchandise licensing revenue and the multibillion-dollar television contracts.<sup>234</sup> In fact, one supporter of the NCAA process even states "it is estimated that Patrick Ewing generated \$12 million in revenue for Georgetown University during his four years at school in the early 1980s, far more than the value of his athletic scholarship."<sup>235</sup> Clearly NCAA revenue primarily comes from licensing student-athlete images for use in television broadcasts and merchandising.<sup>236</sup> Thus, student-athlete images undoubtedly generate a substantial portion of the revenue for the NCAA and its member schools.<sup>237</sup>

Student-athletes are also barred from receiving monetary compensation for their services while they are in school and, once they graduate, do not receive any royalties from NCAA products that continue to be sold using their likenesses.<sup>238</sup> Former student-athlete and *In re NCAA Student-Athlete* plaintiff Oscar Robertson claimed that the NCAA has continued to profit off his image by selling "Greats of the Game" trading cards, cut-up pieces of his uniform, photographs from his playing days, and

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233. See *Cordova v. World Fin. Corp. of N.M.*, 208 P.3d 901, 907 (N.M. 2009).

234. See Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107, 108-09 (2012); see also Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 131 (2006); C. Peter Goplerud III, *Pay for Play for College Athletes: Now, More than Ever*, 38 S. TEX. L. REV. 1081, 1081 (1997).

235. Paul C. Weiler & Gary R. Roberts, *SPORTS AND THE LAW: TEXT, CASES, PROBLEMS*, 647-48 (2d ed. 1998).

236. See Karcher, *supra* note 234, at 108-09; see also McCormick & McCormick, *supra* note 234, at 131; Goplerud III, *supra* note 234, at 1082.

237. See, e.g., Gregory Sconzo, Note, *They're Not Yours, They Are My Own: How NCAA Employment Restrictions Violate Antitrust Law*, 67 U. MIAMI L. REV. 737, 739 (2012); Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 682-83 (2003) (citing Mark Brown, *Autry Sues NCAA over Film Role*, CHI. SUN-TIMES, Apr. 3, 1996, available at 1996 WLNR 6428419).

238. Johnson, *supra* note 155, at 32; see also *In re NCAA Student-Athlete*, 724 F.3d at 1289 (Thomas J., dissenting).

video footage from his college games and has never compensated him.<sup>239</sup> Fellow plaintiff Tate George claimed that a clip of his game-winning shot during the 1990 NCAA Tournament, which ESPN has ranked one of the top five NCAA shots of all time, has been included in commercials for Vitamin Water, McDonald's, Burger King, Buick, Chrysler, and Cadillac.<sup>240</sup> George has also never received any compensation.<sup>241</sup> Finally, plaintiff Samuel Keller has focused on the use of his image in video games such as the "NCAA Football" series produced by EA, in which the Ninth Circuit ultimately held for Keller.<sup>242</sup> Other plaintiffs have pointed to the NCAA's profits from DVD sales, premium content on Web sites, jerseys and other apparel, posters, and rebroadcasts of classic games where their images were used.<sup>243</sup> The value that the NCAA reaps by taking the publicity rights of student-athletes is grossly disproportionate to the scholarship benefits the student-athletes receive in exchange.<sup>244</sup> Thus, these fantastical figures lean in favor of finding that the NCAA contracts meet the legal definition of substantive unconscionability.<sup>245</sup>

It is true that the unconscionability analysis must be taken as a whole and must be so grossly unfair to one party that the agreement as a whole "shock[s] the conscience."<sup>246</sup> Supporters of the NCAA provisions argue that student-athletes "receive the better end of the deal" in the form of scholarships, training and other benefits.<sup>247</sup> Arguably, while student-athletes do receive extremely valuable benefits in the form of scholarships, these benefits pale in comparison to the licensing revenues generated. Moreover, although NCAA schools provide benefits like travel, hotel stays and meals, to its student-athletes, these opportunities are also available to

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239. Johnson, *supra* note 155, at 32.

240. Class Action Complaint, *Robertson v. Nat'l Collegiate Athletic Ass'n*, No. CV 11 0388, 2011 WL 240797, at \*29-34 (N.D. Cal. Jan. 26, 2011).

241. *Id.* at \*29-34.

242. *In re NCAA Student-Athlete*, 724 F.3d at 1283-84.

243. *Robertson*, No. CV 11 0388, 2011 WL 240797, at \*16, 17, 27, 28, 36-38.

244. Johnson, *supra* note 155, at 6.

245. See *Cordova*, 208 P.3d at 901, 907-08.

246. *Am. Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 480 (Ct. App. 1996).

247. Johnson, *supra* note 155, at 33.

other non-athletic teams such as debate clubs.<sup>248</sup> Moreover, while student-athletes arguably receive access to the best athletic facilities, some of those facilities are also open to non-NCAA students for use on non-game or practice days.<sup>249</sup>

The most important benefit from playing in the NCAA that student-athletes receive is publicity from playing at such a high level. Supporters may argue that the publicity benefit received is attributed to the NCAA-funded public relations program to “promote [student-athletes’] accomplishments,” as well as the fact that many formerly unknown players “rise to stardom as a result of the NCAA-managed publicity.”<sup>250</sup> However, this still ignores the fact that the NCAA is *the only* such stage where a student-athlete can receive that high caliber of publicity, since, as previously discussed, there is almost no comparable opportunity in other such arenas.<sup>251</sup>

While supporters of the NCAA process may try to qualify the NCAA right to use the images as “limited” and “nonexclusive,” it downplays the very fact that it is truly exclusive because the players themselves cannot benefit from the use of their own images.<sup>252</sup> While the NCAA only has the right to use the player’s image as an NCAA athlete, and not his image as a whole, the student-athletes are solely challenging the use of their images from athletic participation, and not from other contexts.<sup>253</sup> Hence, while supporters of the NCAA process claim that student-athlete images are effectively worth nothing on the market, the very fact that these images and names help sell NCAA merchandise demonstrate the value of the images.<sup>254</sup>

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248. See *Financial Operations, Special Travel Situations*, THE COLLEGE OF WILLIAM AND MARY, <http://www.wm.edu/offices/financialoperations/travel/specialsituations/index.php> (last visited Oct. 24, 2014) (providing a breakdown of travel reimbursements for students who compete on debate or club teams).

249. See *Fitness, Facilities & Hours*, UNIVERSITY OF CHICAGO, <http://athletics.uchicago.edu/facilities/index> (last visited Oct. 24, 2014) (outlining fitness hours for non-NCAA students).

250. Johnson, *supra* note 155, at 34.

251. *Id.*

252. *Id.*

253. See *In re NCAA Student-Athlete*, 724 F.3d at 1289 (Thomas J., dissenting).

254. See *Editorial: O’Bannon v. NCAA: How Much are Athletes Worth?*, PITT NEWS (June 10, 2014, 11:31 PM), [http://www.pittnews.com/opinion/article\\_83ee9770-f118-11e3-a29e-](http://www.pittnews.com/opinion/article_83ee9770-f118-11e3-a29e-)



It is true that while courts “are not in the business of evaluating the fairness of contracts and attempting to achieve absolute equity,” they still must ensure that there is some fairness in the process.<sup>255</sup> Although the freedom of contract does allow parties to agree to terms that are blatantly imbalanced, the purpose of that prong rides on the freedom aspect, which is undoubtedly vitiated when there is no real meaningful choice to go outside the NCAA.<sup>256</sup> Courts look for terms that provide one party with no real opportunity to benefit or terms that “no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>257</sup> Thus, especially in extreme cases, addressed in more detail below, the NCAA comes out on the better end of the deal, and often comes out so far ahead that the deal can be purported to “shock the conscience.”

*E. Well-Known Student-Athletes with Extremely Valuable Images  
Epitomize the Unconscionability of NCAA Waivers*

It is undisputed that some student-athletes do come out of high school with an image that is practically guaranteed to be profitable.<sup>258</sup> For instance, former Texas A&M quarterback Johnny Manziel was highly recruited out of high school and received publicity for his football prowess since his sophomore year of high school.<sup>259</sup> “Others have received enough attention prior to college to have concrete marketing opportunities.”<sup>260</sup> When these student-athletes sign a contract giving away rights worth millions of dollars in exchange for a scholarship, the benefits of the

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0017a43b2370.html; *see generally* McCormick & McCormick, *supra* note 235; Goplerud III, *supra* note 235.

255. Johnson, *supra* note 155, at 35.

256. *See* Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 920 (N.J. Super. Ct. Ch. Div. 2002).

257. *See* Tulowitzki v. Atl. Richfield Co., 396 A.2d 956, 960 (Del. 1978).

258. *See generally* David Berri, *One More Reason to Pay College Athletes*, TIME (Aug. 17, 2013), <http://ideas.time.com/2013/08/17/one-more-reason-to-pay-college-athletes/>.

259. *College Football Player Bio for Johnny Manziel*, TEXAS A&M, [http://www.aggieathletics.com/ViewArticle.dbml?DB\\_OEM\\_ID=27300&ATCLID=205236136](http://www.aggieathletics.com/ViewArticle.dbml?DB_OEM_ID=27300&ATCLID=205236136) (last visited Oct 24, 2014).

260. Johnson, *supra* note 155, at 43.

contract are disparate enough to “shock the conscience,” and as such, unenforceable.<sup>261</sup>

“While a mediocre basketball player’s non-NCAA alternatives may be limited to recreational or semi-pro leagues, a high-profile player likely has his choice of any professional league in the world.”<sup>262</sup> Pursuant to NBA rules, a player must be one year removed from high school to be eligible to play in the NBA, regardless of whether he plays NCAA sports or not.<sup>263</sup> Moreover, as previously mentioned, the mere potential of an option alone does not necessarily render it a meaningful choice if it is not comparable.<sup>264</sup> Thus, the mere possibility of options is insufficient to pass substantial conscionability because the student-athlete does not have a meaningful choice to reject the terms.<sup>265</sup>

“Second, the substantive value of a student-athlete’s image” makes it easier to establish substantive unconscionability.<sup>266</sup> While a well-known student-athlete with a valuable image can receive immense consideration in return for the use of his image at a higher level than the average athlete because of the professional opportunities the NCAA experience makes available, this consideration does not justify depriving the student-athlete of his right of publicity.<sup>267</sup>

Although for most student-athletes, the access to world-class coaches and promotion from awards and honors have experiential value, these benefits do not negate the fact that the NCAA is receiving millions of dollars that may outweigh the experiential value.<sup>268</sup> “For the average softball player, swimmer, or fencer – no matter how talented – the experience ends upon graduation and has no cash value.”<sup>269</sup> Yet “for a high-profile athlete, particularly a men’s basketball player or football

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261. *Contra id.* at 48.

262. *See id.* at 43.

263. *See Player Eligibility and NBA Draft, supra* note 225.

264. *See Disc. Fabric House of Racine*, 345 N.W.2d at 424.

265. *See id.*

266. *Contra Johnson, supra* note 155, at 44.

267. *Contra id.*

268. *Contra id.*

269. *See id.*

player, the training and exposure he receives in college”<sup>270</sup> suggests a strongly likelihood of success that both the NCAA and schools are aware of at the time of recruitment.<sup>271</sup> “Success in the NCAA can earn a player hundreds of millions of dollars in eventual professional salary and promotional opportunities,” in addition to the possible thousands, if not millions, generated by using his image.<sup>272</sup> Therefore, although the potential reward for the student-athlete may arguably increase as the value in his or her image increases, the emphasis here turns on potential, which is still speculative and fails to counterbalance the actual proven monetary reward that the NCAA and its member schools receive.<sup>273</sup>

*F. In re NCAA Student-Athlete Epitomizes  
the Importance of Student-Athletes’ Right of Publicity*

Substantive unconscionability “turns not only on a ‘one-sided’ result, but also on an absence of ‘justification’ for it.”<sup>274</sup> While the NCAA claims to be a nonprofit organization and attempts to justify its actions through “amateurism,” the fact remains that the NCAA is essentially profiting on the millions of dollars that the student-athletes generate for them.<sup>275</sup> Thus, while it is true that the skyrocketing costs at universities in a struggling economy have recently threatened opportunities for athletes in “nonrevenue sports,” the NCAA should not be given a blanket license to profit from student-athletes on an exclusive basis, especially considering that athlete images help generate billions in licensing fees.<sup>276</sup> While the NCAA may claim that it “needs to implement a holistic funding model that takes revenue from more profitable sports,” this self-serving statement, combined with the other unconscionable factors leads in strong favor of finding unconscionability.<sup>277</sup>

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270. *See id.*

271. *See* Gary Gutting, *The Myth of the ‘Student-Athlete’*, N.Y. TIMES (Mar. 15, 2012, 8:30 PM) <http://opinionator.blogs.nytimes.com/2012/03/15/the-myth-of-the-student-athlete/>.

272. Johnson, *supra* note 155, at 44.

273. *See* Gutting, *supra* note 271.

274. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 692 (Cal. 2000) (internal citation omitted).

275. *See* Karcher, *supra* note 234, at 108.

276. *See* Johnson, *supra* note 155, at 6.

Moreover, there is no evidence that “an alternative right of publicity term that provided compensation to student-athletes even after graduation”<sup>278</sup> would undermine the amateurism goal in NCAA sports because there is no evidence that merely receiving money for use of one’s image makes that athlete non-professional.<sup>279</sup> While some courts, notably the Fifth Circuit in *McCormick v. NCAA* and the United States Supreme Court in *NCAA v. Board of Regents*, have stated the amateur character of college athletics creates a unique product that would not exist if players were paid, this was mere dicta and did not address the heart of the holding in those cases.<sup>280</sup> Furthermore, those cases concerned antitrust issues, and did not consider the doctrine of unconscionability.<sup>281</sup> It is true that the NCAA provides a unique experience that allows student-athletes a wide range of sports while receiving an education; however, even if the NCAA believes it has a legitimate business reason for excluding athletes from benefitting financially, that subjective reason is not enough to show that paying the student-athletes undermines amateurism.<sup>282</sup>

### *G. Policy Reasons in Favor of Finding the Contract’s Unconscionability*

These contracts clearly fit into the broader scheme of the unconscionability analysis, especially since the very heart of the contract is designed to “cure abuses in the natural bargaining process.”<sup>283</sup> While it is not there to level the playing field, the very nature of the unconscionability analysis is a vehicle that addresses bargaining power that is grossly

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277. *Id.* at 41.

278. *Id.* at 42.

279. See generally Tyson Hartnett, *Why College Athletes Should Be Paid*, HUFFINGTON POST (Jan. 23, 2014, 6:58 PM), [http://www.huffingtonpost.com/tyson-hartnett/college-athletes-should-be-paid\\_b\\_4133847.html](http://www.huffingtonpost.com/tyson-hartnett/college-athletes-should-be-paid_b_4133847.html).

280. See *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338, 1344 (5th Cir. 1988) (citing *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984)).

281. See *McCormack*, 845 F.2d at 1343; see also *Nat’l. Collegiate Athletic Ass’n*, 468 U.S. at 101.

282. See generally Hartnett, *supra* note 279.

283. Johnson, *supra* note 155, at 48.

unequal.<sup>284</sup> While arguably some imbalance is not enough, the issue turns on gross imbalance that threatens to overturn the heart of contract law.<sup>285</sup>

It is true that the unconscionability doctrine only aims to preserve the integrity of the bargaining process by identifying and correcting contracts that resulted from an abuse of bargaining power.<sup>286</sup> However, abuse occurs when a party with superior knowledge of the process has used that power to trick or coerce the other party into making a deal that was not truly voluntary.<sup>287</sup> It is clear the NCAA agreements fit these terms.<sup>288</sup> *In re NCAA Student-Athlete* mandates student athletes have the power in their images; therefore, court intervention is necessary to render the contracts unconscionable to cure a defect in the bargaining process.<sup>289</sup> While declaring the contracts unconscionable increases the bargaining power of the student and potentially alters the balance of power between the parties, such a result is needed to eliminate NCAA's current monopoly of control.<sup>290</sup>

It is also untrue that court intervention would interfere with the general right to contract.<sup>291</sup> While courts can find unconscionability based on youth and inexperience, it would not restrict student-athletes' right to contract at all, especially because youths can contract generally.<sup>292</sup> The issue depends on one party taking advantage of the other, and such intervention is unlikely to lead to widespread consequences of undermining the economic efficiency of contracts.<sup>293</sup> Instead, it would prevent an abuse in the bargaining process, which is the ultimate aim of the

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284. See *Gay v. CreditInform*, 511 F.3d 369, 391 (3d Cir. 2007).

285. See *Johnson*, *supra* note 155, at 44.

286. See *Vann v. Vann*, 767 N.W.2d 855, 861 (N.D. 2009).

287. See *Walker*, 948 P.2d at 1130.

288. See *In re NCAA Student-Athlete*, 724 F.3d at 1271; see also *Vann*, 767 N.W.2d at 861.

289. See *In re NCAA Student-Athlete*, 724 F.3d at 1284; see also *Vann*, 767 N.W.2d at 861.

290. See Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 554 (2003).

291. See *id.* at 569.

292. See *Mechs. Fin. Co. v. Paolino*, 102 A.2d 784, 786 (N.J. Super. Ct. App. Div. 1954).

293. See Schwartz & Scott, *supra* note, at 290.

unconscionability doctrine.<sup>294</sup>

## V. CONCLUSION

The Ninth Circuit correctly denied EA's anti-SLAPP motion, but left open many unanswered questions regarding the state of the NCAA waivers as a result of its holding. As a result, well-known student-athletes potentially may be able to successfully challenge the contracts.<sup>295</sup> Even the average student-athlete can and should be able to successfully challenge the NCAA waivers.<sup>296</sup> Where there is so little bargaining involved, it is simply unfair to enforce a contractual provision that potentially assigns the financial rights worth millions of dollars in exchange for a scholarship that is not guaranteed.

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294. *See id.*

295. *See* Paul Myerberg, *Manziel's Corporation Files Lawsuit to Protect 'Johnny Football'*, USA TODAY (Feb. 25, 2013, 4:33 PM), <http://www.usatoday.com/story/gameon/2013/02/25/johnny-manziel-files-lawsuit-johnny-football-phrase/1946701/>.

296. *See* Sean Hanlon & Ray Yasser, *J.J. Morrison and His Right of Publicity Lawsuit Against the NCAA*, 15 VILL. SPORTS & ENT. L.J. 241, 277, 298 (2008).