“The Emperor Has No Clothes”:
The NCAA’s Last Chance as the Middle Man
in College Athletics

Nicolas A. Novy*

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I. INTRODUCTION

Division I collegiate athletes are changing. Although they have
always been hardworking, dedicated, and coachable, over the past few
decades, they have transformed into something much more: money-
making tycoons for the National Collegiate Athletic Association
(NCAA) and their respective universities.1 The NCAA now rakes in

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* © 2014 Nicolas A. Novy. J.D. 2014, Villanova University School of Law; B.A.,
Economics, 2011, Catholic University of America. This Article is dedicated to the late Professor
Gordon Finch, who served as an important mentor throughout the writing and editing of this
Article.

com/ncaa-college-athletics-statistics/ (last visited Mar. 3, 2013) (noting total annual revenue
$10.6 billion annually, an increase of over 500% during the past twenty years.\textsuperscript{2} The industry’s success is a direct result of the NCAA’s self-proclaimed entitlement to depress the value of college athletes’ names and images at zero.\textsuperscript{3} The NCAA’s “Best Business Model in the World” essentially reaps the direct economic benefit of the student-athletes’ success on the playing field without compensating their efforts in order to achieve the alleged purposes of protecting athletes from exploitation of outside commercial enterprises and preserving amateurism.\textsuperscript{4} This Article argues that neither purpose is effectively achieved under the NCAA’s current model because it is the NCAA itself that is exploiting the value of its athletes.\textsuperscript{5}

Today’s college athlete is also different in one other significant way. No longer is a scholarship sufficient compensation for most of the revenue-generating athletes because these athletes in particular are coming from families and situations of significantly more modest means.\textsuperscript{6} As a result, there exists a substantial demand for illegal recruiting, agents, and boosters to get involved in order to compensate the athletes. The boosters help sustain the athletes through their college

\begin{itemize}
\item \textsuperscript{1}For a full discussion of the NCAA’s policies and the NCAA’s contractual agreement with incoming athletes, see infra notes 9-12 and accompanying text.
\item \textsuperscript{2}Id.; see also Vladimir P. Belo, Note, The Shirts off Their Backs: Colleges Getting Away with Violating the Right of Publicity, \textit{19 Hastings Comm. \\& Ent. L.J.} 133, 134 (2006) (discussing the rising trend of the NCAA’s revenue, which was only $1 billion annually in 1989 and reached $2.1 billion in 1993); Mark Schlabach, Commentary, NCAA: Where Does the Money Go?, \textit{ESPN: College Sports} (July 12, 2011), http://espn.go.com/college-sports/story/_/id/6756472/following-ncaa-money (explaining that the NCAA spends $30.6 million annually “on administrative expenses and staff salaries”).
\item \textsuperscript{3}For a full discussion of the how the NCAA is exploiting the value of its players, see infra notes 26-33 and accompanying text.
\item \textsuperscript{4}See \textit{The Fab Five} (ESPN Films 2011) (depicting the story of five freshman all-stars, known as the Fab Five, playing for the University of Michigan in the early 1990s). “The year after [Michigan] won their only title in 1989, merchandise royalties totaled $1.6 million. Following the Fab Five’s freshman season [in 1992, that total] would climb to a two-year total of $10.5 million. It was amateur athletics, but business was booming for everyone except the Fab Five themselves.” Id. (explaining the financial struggles of the Fab Five). For a full discussion of the how the NCAA is exploiting the value of its players, see infra notes 26-33 and accompanying text.
\item \textsuperscript{5}See Michelle Hill, 3 Points for Paying College Athletes, \textit{Sports Networker}, http://www.sportsnetworker.com/2010/03/22/3-points-for-paying-college-athletes/ (last visited Feb. 28, 2014) (explaining that student-athletes often do not have access to enough funds to purchase new jeans or order pizza on weekends).
\end{itemize}
years and, in some cases, assist their families in paying off existing debt.\footnote{See Charles Robinson & Jason Cole, Settlement Reached in Bush Civil Case, Yahoo! Sports (Apr. 21, 2010), http://rivals.yahoo.com/ncaa/football/news?slug=ys-bushcase042110 (recognizing that third-party contributions to Reggie Bush were for his family who was in dire financial difficulties from previously accumulated debt).}

More importantly, because the NCAA does not allow compensation of athletes outside the realm of an athletic scholarship, many players drop out of school as soon as they have the chance to earn a living playing the sport professionally—leaving their team and their education behind.\footnote{See THE FAB FIVE, supra note 5. After Chris Webber’s sophomore season, Mitch Albom, a Detroit columnist, recounts: I was with him once when we walked past a store in Ann Arbor, and it had his jersey hanging in the window, and I think it was $75 or something like that. He had just asked me if I could give him money for gas or pizza[], which I couldn’t, but he asked anyhow. And he saw this jersey in the window for $75[[], and he said, “They’re selling that for $75, and that goes to somebody, and I have to borrow money to put gas in my car.” I remember thinking to myself: he’s not coming back here. Id. For a discussion of the rate at which collegiate athletes leave their institution, see infra notes 131-135 and accompanying text.}

Part II of this Article illustrates the current model of the NCAA, the adhesion contract signed by all athletes who wish to participate in a collegiate sport, and the justifications the NCAA alleges for doing so. Part III notes the significant history of the NCAA. Part IV proposes three equitable solutions, and Part V concludes by explaining the most efficient of these three solutions.

II. SIGN HERE: THE POLICY JUSTIFICATION OF THE NCAA AND THE HISTORY BEHIND THEM

In seeking to preserve amateurism and prevent exploitation of student-athletes, the NCAA’s bylaws prohibit student-athletes from receiving any remuneration or compensation for their athletic success in their respective sport.\footnote{2011-12 NCAA DIVISION I MANUAL art. 12.5.2.1 (2011), available at http://saas.usc.edu/files/2012/08/NCAA-2011-12-Manual.pdf.} The NCAA, however, retains the exclusive right to use the athlete’s “name or picture to generally promote NCAA championships or other NCAA events, activities, or programs” through Form 08-3a (the Student-Athlete Statement), which is a mandatory condition for eligibility.\footnote{Form 08-3a Academic Year 2008-2009 Student-Athlete Statement—Division I, NCAA (2008), http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf.} In other words, the NCAA forces “student-athletes to relinquish in perpetuity all rights in the NCAA’s licensing of their images and likeness.”\footnote{See William D. Holthaus, Jr., Ed O’Brien 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, 376} These NCAA bylaws assert the power to
impose amateurism on college athletes, even if the preservation of their amateurism status is not in the student-athlete’s best interest.\textsuperscript{12} The following history may help to understand where the NCAA derived its alleged power from and to what extent it actually exists.

The NCAA was originally established to reform college football in hopes to curtail the violence that took the lives of twenty-five collegiate athletes in 1905.\textsuperscript{13} President Roosevelt sought to “civilize or destroy” the game and through the reformation established the NCAA with sixty-eight representatives from colleges across the nation, emphasizing amateurism and higher education.\textsuperscript{14} A mere thirty years later, of the 112 member schools in the association, eighty-one confessed to inducing players with open payrolls and disguised booster funds.\textsuperscript{15} Embarrassed, the NCAA enacted the “Sanity Code,” which prohibited all concealed and indirect benefits to college athletes with the exception of “scholarships awarded [for] financial need,” and imposed expulsion from the NCAA on violators.\textsuperscript{16} The efforts to impose penalties for compensating players was an overwhelming failure, because colleges refused to impose such harsh penalties on each other.\textsuperscript{17}

A few years later, in 1951, the NCAA was faced with another opportunity to assert its control over collegiate athletics, even though it had no real authority to do so.\textsuperscript{18} The University of Kentucky and five New York colleges were involved in a “point-shaving conspiracy” in which their players would perform poorly and were later compensated by local gamblers.\textsuperscript{19} Walter Byers, executive director of the NCAA, lobbied
Kentucky Dean A.D. Kirwan not to challenge “the NCAA’s dubious legal position” and lack of authority because “college sports must do something to restore public support.”

Byers’ plea was surprisingly effective because Dean Kirwan accepted the NCAA’s suspension of its baseball team for the entire 1952-53 season.

With a notch under its belt, the NCAA attempted to expand its vague authority by prohibiting televised games except those licensed by the NCAA. Unlike the other member schools, the University of Pennsylvania and the University of Notre Dame refused to comply, asserting their right to televise and advertise their own games. Byers immediately issued a notice that stated any team that showed up to play the two holdout schools would be penalized, attempting to isolate the University of Pennsylvania and Notre Dame. What was later known as the “big bluff” worked: both schools folded in fear of suspension or expulsion, and the NCAA went on to negotiate exclusive rights to televise college games with the television networks on behalf of every team. A short year later, NBC signed a one-year, $1.14 million deal with the NCAA for the exclusive license to televise collegiate football games. Television contracts have since grown exponentially and are one of the primary sources of revenue for the NCAA and its member institutions.

III. THE NCAA ON THE BRINK: A TIME FOR CHANGE

The NCAA’s justification for forcing athletes to relinquish their right to realize the value of their image is to protect the athlete from exploitation and preserve the sanctity of higher education. The NCAA, however, fails to protect the athlete in any meaningful way under its current model. As recognized in the early years of the NCAA, the

20. Id. (explaining how the NCAA originally obtained the college’s consent to be governed and, thus, punished for violations).

21. See id. at 7 (recounting the NCAA’s lack of legal and political authority to suspend college sports teams).

22. See id.

23. See id.

24. See id. (noting the impact of the “big bluff”).

25. Id (illustrating the impact of the first licensing deal with a television network).


27. For a discussion explaining why the NCAA’s bylaws fail to protect student-athletes from exploitation, see infra notes 32-48. The NCAA’s other justification for imposing amateurism—preserving higher education—is also severely undermined by policies and practices implemented by the NCAA’s member institutions. See Kristine Mueller, No Control over Their Rights of Publicity: College Athletes Left Sitting the Bench, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70, 84-87 (2004) (explaining that student-athletes are often treated differently by
institution completely lacks the authority to impose such restrictions on athletes without the consent of its athletes and member institutions. Furthermore, such policies will soon be challenged in federal court for violating antitrust laws. Whether it is the athletes that revoke their consent or a court order abolishing some of the restricting bylaws, the NCAA is on the brink of a major overhaul that is likely to destroy its perfect business model.

A. Amateurism as a Sham: Players Take Back Their Rights

The NCAA imposes amateurism on collegiate athletes as a means to justify the “contradictory nature of its mission,” which purports to preserve the ideals of amateurism while still trying to make as much money out of the lucrative “multi-billion dollar industry” as possible. Similar to colonialism, “college sports, as overseen by the NCAA, is a system imposed by well-meaning paternalists and rationalized with hoary sentiments about caring for the well-being of the colonized.” This, however, does not make the colonized any less injured by the injustice. The ideal to preserve amateurism is a compelling interest for those who wish to remain amateurs; however, to impose amateurism on a group of individuals with no bargaining power while depriving them due process of law is to “catch an unmistakable whiff of the plantation.”

professors). For athletes that are in danger of failing, some Division I schools offer “Mickey Mouse” classes that seem to be “just a cover for making it easier for student-athletes to get by and retain their eligibility.” Id. at 85. Additionally, studies have shown that teachers will often hold off on failing students if they are student-athletes and issue them an “incomplete” during their athletic season in order for them to retain eligibility. Id. at 84.

28. For a full discussion of the lack of the NCAA’s authority without consent, see infra notes 15-25 and accompanying text.


30. See Thompson, supra note 4 (explaining that an unfavorable result in court would lead to the NCAA’s demise).


32. See Branch, supra note 12, at 4.

33. See id. (explaining that the NCAA and corporations are enriching themselves on the efforts of student-athletes who are not eligible for pay). Student-athletes also do not have a claim for due process under the Constitution because the individual challenger must allege a “substantive property [right] or liberty interest.” Id. at 20 (noting that the right to play collegiate sports is neither of these). In other words, student-athletes have no constitutional right to protect an interest in their own athletic effort and, thus, “have no stake to seek their rights . . . because they have no rights at stake.” Id (demonstrating the circular logic that prevents college athletes from recognizing a share of their worth).
The NCAA continues to assert its dominion over college athletics by punishing trivial violations. In 2011, five Ohio State football players admitted to receiving discounts on tattoos in exchange for memorabilia and autographs. The NCAA suspended the players for five games and suspended the team from postseason play through the 2012 season because the coach was aware of the discounts received. As noted by one author, “[T]o punish players who weren’t even on the team at the time for transgressions committed by a coach they’ve never met . . . doesn’t much seem like a good way to ‘protect student-athletes.’” A similar violation was reported in 2010 at the University of Georgia, where standout receiver A.J. Green admitted to selling his own game-worn jersey in order to raise cash for a spring break vacation. Green was later suspended for a total of four games because the NCAA defined the buyer of the jersey as an “agent.” Ironically, the University of Georgia sold “no less than six versions of this jersey” on its own Web site and was never questioned by the NCAA for conducting such sales. Thus, it was not the act of selling Green’s jersey that violated NCAA policy; rather, it was the mere fact that neither the NCAA nor one of its member institutions was the party benefiting from the sale that induced penalization. Another illustration of this very principle is that the NCAA bans personal messages on the bodies of players but “codifies precisely how and where commercial insignia from multinational corporations can

34. See id. at 13 (describing trivial violations that were harshly punished).
36. See id.
37. Id.; see also Trevor LaFauci, Hypocrisy and the NCAA: What the March Madness Commercials Don’t Tell You, POLITICUS SPORTS (Mar. 25, 2013), http://sports.politicususa.com/hypocrisy-and-the-ncaa-what-the-march-madness-commercials-dont-tell-you.html (“The message from this commercial is neatly summarized at the end: ‘Just know that we’re always there for student athletes.’ However, recent actions of the NCAA don’t seem to align themselves to this message. In fact, recent actions show the NCAA to be hypocrites of the highest degree.”).

The NCAA, an organization that makes billions of dollars a year selling tickets, merchandise, marketing, and advertising does not allow a student-athlete to profit from their own original work. They can market Michigan quarterback Denard Robinson on the cover of EA Sports College Football 2014 all day long, but when Joel Bauman, second string wrestler from the University of Minnesota, wants to sell a song for 99 cents, that’s where they draw the line.

39. See id.
40. Id.
be displayed on college players for the [financial] benefit of the colleges.” Cam Newton wore fifteen corporate Under Armor logos during his national championship game pursuant to a multimillion dollar contract signed by Auburn University.  

The most recent suspension of sophomore Heisman-winning quarterback Johnny Manziel again brought the NCAA’s hypocrisy to light. The NCAA suspended Manziel for a half-game after the Heisman winner allegedly signed thousands of pieces of memorabilia on a South Beach vacation despite the lack of direct evidence that conclusively determined Manziel received any compensation for any of the signatures.  

Ironically, a month prior, Manziel and former Heisman winner John David Crow signed six helmets that were later auctioned at a Texas A&M alumni club meeting for a total of $81,600, and “[i]n the end, Texas A&M received every last penny of the money.” ESPN host and lawyer Jay Bilas recently demonstrated how a quick search on the NCAA’s own Web site for various players’ names returned items for sale related to that player:

For instance, a search for Manziel retrieved a Texas A&M shirt with his number on the back. In response to Bilas’ lengthy demonstration of his findings via Twitter, fans and supporters of college athletes raged. The hypocrisy that has loomed over the NCAA and its amateurism model was brought to full light.

The NCAA alleges that preserving amateurism will protect student-athletes from exploitation, but such a goal is severely undermined by the narrow definition that only permits the NCAA and its beneficiaries to reap the benefits of the athletes’ effort, while penalizing all other parties—creating nothing less than an impenetrable monopoly over the billion dollar industry of college sports. The success of the entire

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41. See Branch, supra note 12, at 13.
42. See id.
44. See id. (“In this case, however, there is just too much laughter to care. Like Terrelle Pryor before him, Manziel’s greatest act as a college football player is exposing this absurdity in all its glory.”).
college sports industry literally rests on the backs of its players and assumes the NCAA’s intentionally vague definition of a “student-athlete,” coupled with the blurred distinction of amateurism, will be enough to keep reaping the benefits of free labor. Neither the definition of amateurism nor the ability to impose it is anywhere in law or reason. Thus, once the eyes of the deprived are open, the NCAA’s perfect business model will surely crumble.

B. Legal Claims Against the NCAA

Despite the NCAA’s facing a lot of heat from critics and scholars regarding the policy justifications for fixing the worth of a college athlete’s image and likeness at zero, an even stronger argument is challenging the legality of such practices. The NCAA exploits the success of its star players’ personas through its corporate licensees by preventing players from recognizing any of their financial success. Both former and current athletes, however, may have valid claims against the NCAA that would ultimately lead to its demise.

1. The Right of Publicity

The right of publicity is a state common law doctrine that predominately focuses on the economic value of a person’s own name.

47. See Branch, supra note 12, at 25 (“No legal definition of amateurism exists, and any attempt to create one in enforceable law would expose its repulsive and unconstitutional nature—a bill of attainder, stripping from college athletes the rights of American citizenship.”).

48. See id. (“The whole edifice depends on the players’ willingness to perform what is effectively volunteer work.”). Players at North Carolina had once planned a “refuse to play” strike had they made it to the National Championship; however, such a plan never came to fruition because they were eliminated before the National Championship game. Id. At Michigan, the Fab Five engaged in silent protests after recognizing the value of their efforts were being exploited by Nike, Michigan, and the NCAA. The Fab Five, supra note 5. Whatever Nike wanted to sell, it threw on the Fab Five, including the rise of black socks and baggy shorts. Id. Jalen Rose, one of the star Fab Five players, recounted, “When we started to realize that everything we wore people were selling, we started to protest, and one of our silent protests was wear plain blue shirts that didn’t say Michigan, that didn’t say Nike, that didn’t say anything.” Id.


50. See Hanlon & Yasser, supra note 31, at 243 (explaining that the NCAA is “trampling upon” the legal rights of student-athletes by barring any type of remuneration).

51. See Tom Farrey, NCAA Athletes Can Pursue TV Money, ESPN: OUTSIDE THE LINES (Jan. 30, 2013, 12:02 PM), http://espn.go.com/espn/otl/story/_/id/8895337/judge-rules-ncaa-athletes-legally-pursue-television-money (“It’s great that the NCAA and its members have been able to capitalize monetarily on the publicity rights of their athletes, but there is no justification to deny them a portion of the benefits.”).
These rights primarily “center on the ‘the right of an individual, [usually] a public figure or celebrity, to control the commercial use of his or her name or likeness.” Courts will consider the following four elements to determine whether an individual’s right of publicity has been violated: (1) the use of plaintiff’s identity; (2) the appropriation of the plaintiff’s name or likeness to the defendant’s advantage, commercially or otherwise; (3) lack of consent by the plaintiff; and (4) resulting injury.

There is no doubting the NCAA and its member institutions make millions of dollars annually from the licenses to sell their star players’ jerseys, t-shirts, accessories, photographs, and video footage. They also reaped the benefits of an exclusive license with Electronic Arts (EA) that published an NCAA video game depicting the players as accurately as possible, including their proper skill attributes, jersey number, and accessories. However, the NCAA prohibits its licensees from using the players’ actual names; thus, the first inquiry is whether such commercial gain is at the expense of the players’ “identity.”

In determining what constitutes the plaintiff’s “identity,” courts have gone beyond one’s name and likeness and included distinctive characteristics that allow the general public to readily identify the plaintiff, such as an individual’s “distinctive voice.” In Midler v. Ford

52. See Matzkin, supra note 13, at 229 (explaining “the right of publicity” generally).
53. Id. (quoting Thomas Glenn Martin, Jr., Comment, Rebirth and Rejuvenation in a Digital Hollywood: The Challenge Computer-Simulated Celebrities Present for California’s Antiquated Right of Publicity, 4 UCLA ENT. L. REV. 99, 110 (1996)). A majority of courts and commentators have further noted that the right of publicity is not contingent on a plaintiff reaching “celebrity status,” because “non-celebrities should also be permitted to recover upon proof that the appropriated identity possessed commercial value.” ETW Corp. v. Jireh Publ’g Inc., 332 F.3d 915, 953 (6th Cir. 2003) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995)).
54. Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 413-14 (9th Cir. 1996) (quoting Eastwood v. Superior Court, 198 Cal. Rptr. 342, 347 (Dist. Ct. App. 1983)); see also White v. Samsung Elecs. Am., Inc., 971 F.2d 1395, 1397 (9th Cir. 1992). In general, defendants violate a plaintiff’s right to publicity if they appropriate the commercial value of a person’s identity by virtue of his “name, likeness, or other indicia of identity” without the person’s consent. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46. “No social purpose is served by having the defendant [in a right of publicity case] get for free some aspect of the plaintiff that would have market value and for which he would normally pay.” Harry Kalven, Jr., Privacy in Tort Law—Were Warren and Brandeis Wrong?, 31 L. & CONTEMP. PROBS. 326, 331 (1966).
55. See Hanlon & Yasser, supra note 31, at 245 (explaining that the sales of star players’ jerseys have “skyrocketed” over the last decade).
56. See Matzkin, supra note 13, at 227 n.1 (explaining that expected video game sales were to reach $1 billion during the 1999 holiday season).
57. See 2011-12 NCAA DIVISION I MANUAL, supra note 9, art. 12.5.1.1(h) (“Items that include an individual student-athlete’s name . . . may not be sold . . . .”).
58. See Midler v. Ford Motor Co., 849 F.2d 460, 463 (9th Cir. 1988).
Motor Co., the defendant hired a backup singer to sound exactly like the “nationally known actress and singer[s]” recording of her own song. The United States Court of Appeals for the Ninth Circuit held that “a voice [was] as distinctive and personal as a face”; thus, when the defendants impersonated her voice, they fundamentally “pirate[d] her identity.” In White v. Samsung Electronics America Inc., the defendant’s advertisement depicted the Wheel of Fortune stage and a robot dressed in a blonde wig and evening gown that turned over letters on a big board. Vanna White alleged that the defendants had violated her right of publicity, and the Ninth Circuit agreed, holding the defendant had indeed “appropriated the plaintiff’s identity” and her persona on the game show to reap commercial gain.

Consumers and fans across the country readily identify star players with the jersey number they wear. Many universities sell their star players’ jerseys at their online campus store, and while the name of the player is not sewn on the jersey, some schools go as close to doing so as they are able, putting the athletes’ names above the jersey or making all-too-obvious links between the merchandise and the players. For some schools, overall sales and increased revenue have been a direct result of the success of their basketball teams and the marketability of their star players. Likewise, although the EA Sports video games did not depict

59. Id. at 461.
60. Id. at 463.
61. 971 F.2d 1395, 1396 (9th Cir. 1992).
62. Id. at 1398-99. The opinion also offers this interesting hypothetical to buttress its position:

Consider [an] advertisement which depicts a mechanical robot with male features, an African-American complexion, and a bald head. The robot is wearing black hightop Air Jordan basketball sneakers, and a red basketball uniform with black trim, baggy shorts, and the number 23 (though not revealing “Bulls” or “Jordan” lettering). The ad depicts the robot dunking a basketball one-handed, stiff-armed, legs extended like open scissors, and tongue hanging out. Now envision that this ad is run on television during professional basketball games. Considered individually, the robot’s physical attributes, its dress, and its stance tell us little. Taken together, they lead to the only conclusion that any sports viewer who has registered a discernible pulse in the past five years [stated in 1992] would reach: the ad is about Michael Jordan.

63. Leslie E. Wong, Our Blood, Our Sweat, Their Profit: Ed O’Bannon Takes on the NCAA for Infringing on the Former Student-Athlete’s Right of Publicity, 42 TEX. TECH L. REV. 1069, 1082 (2010) (explaining that consumers, fans, and commentators will often refer to players by numbers because of their unique characteristic and, thus, players’ numbers are “inextricably linked” with their identities).
64. See Hanlon & Yasser, supra note 31, at 246.
65. See Melodie Little, Zags in Fashion, SPOKESMAN-REV. (Nov. 4, 2006), http://www.spookesman.com/stories/2006/nov/04/zags-in-fashion/ (noting that Gonzaga’s “online sales have risen by roughly 400 percent” over the past five years and attributing “the growing interest in
the players’ names, the inclusion of their precise physical attributes, skill set, and jersey number taken together could only lead to the conclusion: that the “athletes’ identities are being appropriated.”

Secondly, plaintiffs must show that the defendants gained an advantage commercially or otherwise, by use of the plaintiffs’ identities. A plaintiff’s identity is used for the commercial advantage of the defendant when “it is used in advertising the user’s goods . . . or . . . placed on merchandise marketed by the user.” In Hoffman v. Capital Cities/ABC Inc., Los Angeles Magazine featured a photo spread that digitally altered famous actors and actresses’ clothing to make it appear as though they were endorsing certain fashion designers. The court held that Dustin Hoffman’s right of publicity was violated because the magazine used his persona, which was both recognizable and valuable to further a commercial purpose.

There is little doubt that the NCAA is commercially advantaged by collegiate athletes, as a whole, through its licensing deals with EA Sports, Nike, Adidas, CBS, etc. However, a plaintiff will have to prove his persona was individually valuable at the time of the exploitation in order to recover for a right of publicity violation. This will not be a problem for the collegiate athletes who “reach a celebrity status long before they leave the university setting,” but lesser-known student-athletes may not be able to recover under the right of publicity because their personas were not “recognizable in the sense that a defendant could use their images for financial gain.” Although this is certainly the case for jersey sales, photographs, and accessories, this would not preclude

Zags-wear to the success of the men’s basketball team and interest in former forward Adam Morrison”).

66. See Matzkin, supra note 13, at 247 (explaining that video game depictions of players more closely resemble their persona than in the White case above).


68. See Hanlon & Yasser, supra note 31, at 275 (alteration in original) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995)).

69. 33 F. Supp. 2d 867 (C.D. Cal.), rev’d on other grounds, 255 F.3d 1180 (9th Cir. 1999).

70. Id. at 873-74.

71. See id. But see Pesina v. Midway Mfg. Co., 948 F. Supp. 40 (N.D. Ill. 1996) (holding that the plaintiff must have a commercial interest in his identity). The court recognized that a plaintiff “must demonstrate that he was a ‘celebrity’ when the defendant[] used his persona, name, and likeness; otherwise, his identity does not constitute an economic interest protectable.” Id. at 43.

72. See Wong, supra note 63, at 1086 (describing the NCAA’s billion dollar television contract with CBS, granting it exclusive rights). Member institutions also enter into multimillion dollar deals with Nike, Adidas, etc., to bear corporate logos on their respective uniforms. See id. at 1087.

73. See Pesina, 948 F. Supp. at 40.

74. See Wong, supra note 63, at 1087.
the lesser-known athletes from recovering royalties from the video games in which they are depicted simply because the success of selling the product depends on the defendant’s ability to exploit the personas of athletes on the entire team.\footnote{75}{See Matzkin, supra note 13, at 247 (advocating that a group of student-athletes should be considered “as a whole”).}

No consumer would want to play a video game that contained the personas of only a few players on each team.\footnote{76}{See id. at 227 (describing that the NCAA video game captures the whole “spirit of college athletics . . . available on demand”).}

Thirdly, in order for a defendant to violate a plaintiff’s right of publicity, the plaintiff’s persona must have been exploited without consent.\footnote{77}{Eastwood v. Superior Court, 198 Cal. Rptr. 342, 342-47 (Dist. Ct. App. 1983).}

Athletic scholarships, in general, are signed contracts where the athlete agrees to participate in his respective sport and receives a scholarship including room and board in return.\footnote{78}{See Taylor v. Wake Forest Univ., 191 S.E.2d 379, 382 (N.C. Ct. App. 1972) (holding that the refusal to participate in sport was a breach of contractual duties).}

The NCAA and its licensees “may use the name and picture of the student-athlete . . . but if the student exploits his own image for similar purposes, he risks losing eligibility.”\footnote{79}{See Wong, supra note 63, at 1090.}

Although the NCAA will argue that student-athletes consented by relinquishing all of their rights to market their personas exclusively to the NCAA, the court may find such an adhesion contract unconscionable and not validly enforceable.\footnote{80}{See generally Brian Welch, Comment, Unconscionable Amateurism: How the NCAA Violates Antitrust by Forcing Athletes To Sign Away Their Image Rights, 44 J. MARSHALL L. REV. 533 (2011).}

Athletic scholarship agreements between the university and the athlete are contracts of adhesion because an adhesion contract is a “standard-form contract prepared by one party, to be signed by the party in a weaker position . . . who adheres to the contract with little choice about the terms.”\footnote{81}{BLACK’S LAW DICTIONARY 342 (8th ed. 2004) (defining an adhesion contract).}

Although not all adhesion contracts are unconscionable, they will be more closely scrutinized due to their “standardized nature and the lack of bargaining power it affords the other party.”\footnote{82}{See Hanlon & Yasser, supra note 31, at 286-87 (noting the fact that a contract of adhesion gives “substantial weight” to an unconscionability claim). Thus, the inquiry into whether the contract is unconscionable “begins with an inquiry into whether the contract is one of adhesion.” Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689 (Cal. 2000).}

More specifically, courts will generally void any agreement or contract if its terms are so unfair and one-sided that it “shock[s] the conscience.”\footnote{83}{Rochin v. California, 342 U.S. 165, 209 (1952); see also Richard L. Barnes, Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability, 66 LA. L. REV. 123, 187 (2005) (“Adhesion should be a complement to unconscionability, but used with recognition...“).}
(1) there is an absence of meaningful choice for one of the parties (procedural unconscionability) and (2) the terms of the contract are unreasonably favorable to the drafting party (substantive unconscionability).

Upon finding a contract unconscionable, the contract may be voided in its entirety or "the court may refuse to enforce the particular term or terms that it deems unconscionable."

A court may find the Student-Athlete Statement, in which the athlete relinquishes all rights to his persona, procedurally unconscionable because there "is no meaningful choice" to negotiate the terms of the contract or change or delete any of the provisions. Athletes are given little opportunity to fully understand all of the terms of the contract primarily because of the "vast imbalance of knowledge" between the NCAA and the incoming student-athlete who is usually an eighteen-year-old recent high school graduate. The student-athlete also does not have any reasonable alternatives to accepting the "take it or leave it" contract if he wishes to continue to play his sport against decent competition, unless he chooses to move overseas. The Student-Athlete Statement may also be substantively unconscionable because the terms dictate that the NCAA has the exclusive right to commercially exploit the athlete and rely on the need to preserve amateurism for its justification. Even if amateurism was seen as such a compelling interest as to justify the

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84. Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003) (explaining procedural and substantive unconscionability); see also Hanlon & Yasser, supra note 31, at 289 (explaining that it is a well-accepted rule "that if more of one of the categories is present, than less of the other is required"). "A finding of unconscionability requires "a "procedural" and a "substantive" element, the former focusing on "oppression" or "surprise" due to unequal bargaining power, the latter on "overly harsh" or "one-sided" results." AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1746 (2011) (citations omitted).

85. Wong, supra note 63, at 1092 (explaining that the court would not void the entire athletic scholarship agreement).

86. See Hanlon & Yasser, supra note 31, at 291.

87. See id. at 292 (explaining athletes’ lack of bargaining power).

88. See id. But see Kendall K. Johnson, Enforceable Fair and Square: The Right of Publicity, Unconscionability, and NCAA Student-Athlete Contracts, 19 SPORTS LAW. J. 1 (2012) (referencing the American Basketball League (ABA), World Basketball Association (WBA), and International Basketball League (IBL) as meaningful alternatives to participating in collegiate sports run by the NCAA). However, the ABA, WBA, and IBL have all been disbanded since 1992. Chris Anderson et al., History of the World Basketball League, ASS’N FOR PROF’L BASKETBALL RESEARCH, http://www.apbr.org/wg188-92.html (explaining that when the league was in existence, players over 6 feet 5 inches were not allowed to play).

89. For a full discussion of amateurism as an invalid justification for exploiting the free labor of student-athletes, see supra notes 31-33 and accompanying text.
exclusive exploitation of student-athletes, the NCAA could still set up a trust fund that could only be accessed after graduation—successfully preserving the ideal of amateurism while the athlete remains eligible while also “alleviat[ing] the egregious commercial injuries to star student-athletes under the current substantive provisions.”\(^90\) Thus, the provisions requiring athletes to relinquish their rights to their images and personas exclusively to the NCAA are most likely procedurally and substantively unconscionable because a lack of meaningful choice exists and the terms themselves are unfairly oppressive.\(^91\)

Finally, the plaintiff must prove that the defendant’s use of his persona resulted in economic injury to the individual.\(^92\) The economic “loss would be equal to the market value of the license between the NCAA and the licensee.”\(^93\) Over 100 years ago, when the NCAA formed its bylaws, the economic disparity between the athletes and the NCAA did not exist; however, current athletes’ scholarships (that are often no more than $30,000 per year) cannot compare to the billion dollar licensing deals that give corporations exclusive rights to the athletes’ persona.\(^94\)

2. Former Athletes’ Claim Under the Sherman Act: Ed O’Bannon’s Day in Court

Ed O’Bannon, a former collegiate athlete who led the University of California to an NCAA national championship in 1995, filed suit in the United States District Court for the Northern District of California, alleging that the NCAA and its licensees have conspired to artificially depress payments to former athletes for use of their personas to zero, thus resulting in unjust enrichment and a violation of the Sherman Act.\(^95\) Specifically, the violation is particularly egregious in the case of former athletes because the NCAA and its business partners are still licensed to sell DVDs featuring classic games, video games featuring classic teams, photos, and apparel—all of which exploit the former athletes’ persona \textit{after} their eligibility ends.\(^96\) Essentially, the eighteen-year-old incoming college student releases the right to his image in perpetuity, even after the

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\(^90\) See Hanlon & Yasser, supra note 31, at 294.

\(^91\) See id. at 296.

\(^92\) Abdul-Jabbar v. Gen. Motors Corp., 85 F.3d 407, 416 (9th Cir. 1996).

\(^93\) Wong, supra note 63, at 1093.

\(^94\) See id. at 1093-94 (suggesting NCAA’s ability to use athlete’s names and likeness to promote college athletics generally may have been justified decades ago before the value of the industry and the value of the players astronomically increased).

\(^95\) See Holthaus, supra note 11, at 376-77.

\(^96\) See id. at 376.
NCAA's alleged justifications to preserve amateurism and education cease.\footnote{97}

The Sherman Act provides, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”\footnote{98} The Act prohibits unreasonable restraints on trade, and the court will balance the anticompetitive effect of the restriction against the defendant’s procompetitive justification, which is known as the “rule of reason.”\footnote{99} Courts will evaluate the effects of the restraint on trade primarily from the prospective of the consumer.\footnote{100}

In \textit{NCAA v. Board of Regents of the University of Oklahoma},\footnote{101} the United States Supreme Court shot down an NCAA policy that restricted the number of games that could be televised for the alleged purpose of maintaining “a competitive balance among amateur athletic teams.”\footnote{102} The Court reasoned that the anticompetitive effect outweighed the procompetitive justification because the NCAA's policy did not serve its purported goal and that other restrictions in its bylaws already preserved competitive balance.\footnote{103} Despite its holding that seemingly limited the NCAA's power over its member institutions, the Court stressed the importance of preserving amateurism as one of the essential factors that “distinguishes [the NCAA] from its professional competition.”\footnote{104} The United States Court of Appeals for the Fifth Circuit later expanded on the

\footnote{97. See Welch, supra note 80, at 538 n.25 (explaining difficulty in justifying policy after students are no longer in college).}
\footnote{98. 15 U.S.C. § 1 (2012).}
\footnote{99. See Holthaus, supra note 11, at 378 (explaining “rule of reason”); see also Cont’l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977) (“Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”); see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007) (“Appropriate factors to take into account include ‘specific information about the relevant business’ and ‘the restraint's history, nature, and effect.’” (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997))).}
\footnote{100. See Holthaus, supra note 11, at 378. In its design and function the rule distinguishes between restraints with anticompetitive effects that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. See also Leegin Creative Leather Prods., 551 U.S. at 886 (explaining the primary concern of rule of reason).}
\footnote{101. 468 U.S. 85 (1984).}
\footnote{102. Id. at 117.}
\footnote{103. See Holthaus, supra note 11, at 379 (citing Regents, 468 U.S. at 199).}
\footnote{104. Welch, supra note 80, at 539 (explaining important dicta in Regents decision). The court went on to say: [T]he NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice not only the choices available to sports fans but also those available to athletes and hence can be viewed as pro-competitive.}
\footnote{Id. at 102.}
Court’s dicta and reasoned that the NCAA’s eligibility requirements were meant to distinguish the college game from professional athletics and, thus, were a legitimate procompetitive justification for some anticompetitive effects it may have.\(^{105}\)

Former athletes, however, are no longer eligible for NCAA participation; thus, any procompetitive justification resting on the necessity to preserve amateurism or higher education would likely be seen as an unreasonable restraint on trade.\(^{106}\) Allowing collegiate athletes to license their own image after graduation would “increase[] supply, and theoretically, create a more competitive market for those licenses.”\(^{107}\) From the consumer’s prospective, such a policy would also enhance products such as jerseys, apparel, and video games; no longer would these products be restricted from bearing the names of a fan’s favorite collegiate athletes.\(^{108}\) For these reasons, a court would likely find that the anticompetitive effects of reserving exclusive rights of former college athletes’ personas in perpetuity outweigh the weak procompetitive justifications for doing so.\(^{109}\) Thus, at the very least, Ed O’Bannon will probably be entitled to royalties from replica jerseys, apparel bearing his persona, and video game sales.\(^{110}\)

IV. PROPOSED SOLUTIONS

Facing substantial political and legal pressure, the NCAA is on the brink of a major overhaul—one that it may be able to avoid if it chooses to amend its bylaws to comply with legal regulations and notions of justice and fairness.\(^{111}\) The NCAA’s window to compromise its

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105. McCormack v. NCAA, 845 F.2d 1338, 1344-45 (5th Cir. 1988).
106. See Holthaus, supra note 11, at 386; see also Pete Thamel, NCAA Sued over Licensing Practices, N.Y. TIMES (July 21, 2009), http://www.nytimes.com/2009/07/22/sports/ncabasketball/22ncaa.html?_r=O (noting that the Student-Athlete Statement is “a one-year contract that ends when the student is no longer a student-athlete”). Reserving exclusive rights to exploit the persona of a student-athlete is illegitimate and also an unintended result of the Student-Athlete Statement, which athletes are required to sign every two years of participation. Id.
107. See Holthaus, supra note 11, at 380-81 (explaining that such a policy would also, theoretically, drive down cost to consumers).
108. See id. at 383-84.
109. See Welch, supra note 80, at 553.
110. See Holthaus, supra note 11, at 386 (noting that O’Bannon would probably not be entitled to all of his requested relief which includes royalties for sales of “far more than video games and replica jerseys”).
111. See Associated Press, NCAA Battling Lawsuit Filed by Former Players Seeking To Compensate Student Athletes, FOX NEWS.COM (Apr. 1, 2013), http://www.foxnews.com/sports/2013/04/01/ncaa-battling-lawsuit-filed-by-former-players-seeking-to-compensate-student/ (“[Ed O’Bannon’s lawsuit] has the potential to fundamentally alter the NCAA’s business model in a dramatic way . . . . [T]his is the most significant legal threat the NCAA is facing.”); see also
hypocritical bylaws, however, is quickly collapsing. For instance, college football’s perennial powerhouse football conference, the Southeastern Conference, has recently decided it would not license its trademarks to the EA Sports NCAA Football video game and is planning to release a college football game called “College Football 15” without the NCAA.¹¹²

The following proposed solutions to the restructuring of the NCAA bylaws primarily focus on revenue-generating teams and players on those teams who are earning millions of dollars for their schools and the NCAA.¹¹³ The proposals attempt to take into account the effects of the restructuring on current athletes, former athletes, the preservation of the NCAA, the unique “product” that is collegiate athletics, and the future success of the member institutions along with any effects on non-revenue-generating sports.

A. Establishing a Trust Fund for Current Collegiate Athletes

One suggested approach is to establish a trust fund that only becomes available to athletes upon graduation, which could be used for further educational training or professional training for collegiate athletes who do not have the opportunity to sustain a career playing their sport at the professional level.¹¹⁴ Such an approach would be similar to the approach taken by the International Olympic Committee (IOC), which collects monies from endorsements and the use of athletes’ personas while keeping them in a trust fund until the athlete leaves competition, at which time the athlete may withdraw the funds.¹¹⁵ The trust fund approach would effectively preserve amateurism because the funds would be unavailable to the eligible collegiate athlete, while also alleviating the problem of unjust enrichment by the NCAA, its business

Jonathan Mahler, How Ed O’Bannon’s Lawsuit Would Dismantle the NCAA, DEADSPIN (May 5, 2013, 12:49 PM), http://deadspin.com/how-ed-obannons-lawsuit-would-dismantle-the-ncaa-489241635 (“[Ed O’Bannon’s case is a] storm that’s slowly rolling toward Indianapolis quietly gaining strength this week with the filing of several devastating documents in a federal court in California. If it stays on course, it’s going to hit with biblical force, reducing the National Collegiate Athletic Association to a heap of rubble.”).


¹¹³ See Branch, supra note 12, at 21 (“Ninety percent of the NCAA revenue is produced by 1 percent of the athletes . . . ”).

¹¹⁴ See Wong, supra note 63, at 1104 (explaining Ed O’Bannon’s suggestion to remedy injustice in college athletics). This approach would give student-athletes a legitimate chance to make a decent living in a profession other than sports. Id. at 1107 (“It is not be about personal gain . . . but a matter of basic fairness.”) (citations omitted)).

¹¹⁵ See Mueller, supra note 27, at 87-88.
partners, and the member institutions that make billions of dollars off the backs of the uncompensated student-athletes.\textsuperscript{116}

The individual trust fund approach, however, raises several practical concerns. The first is that creating individual trust funds available to players after they leave NCAA competition does not encourage kids to stay in school longer, nor does it help diminish the demand for illegal recruiting.\textsuperscript{117} In fact, it may encourage players to leave their schools even earlier, especially if they have accumulated wealth in their trust fund, because of their need to provide for themselves and their families outside the realm of a scholarship.\textsuperscript{118} Secondly, it would be practically difficult, and potentially disadvantageous, to create a fund for each individual athlete that continues to accumulate after the athlete leaves school.\textsuperscript{119} This approach would also strain the final product of collegiate athletics because it would encourage athletes to concern themselves more with individual monetary gain and personal success on the playing field rather than the success of the team (an issue that is inapplicable to the majority of Olympic sports).\textsuperscript{120} Courts have been hesitant, as noted in Regents and McCormack, to allow regulations that have the potential to destroy the unique atmosphere and final product of collegiate athletics—a product certainly distinguishable from professional sports.\textsuperscript{121} Furthermore, allocating funds in an individual trust may also not be the most efficient way to spread the wealth, because the players with the most personal success in collegiate sports are the players who are more likely to sign

\begin{footnotesize}
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\item See Wong, supra note 63, at 1105 (“The establishment of a trust fund is the most equitable solution for the former [and current] student-athlete.”). The author also suggests that the establishment of a trust could be expanded to athletes in non-revenue-generating sports as well. See id.
\item For a discussion of why athletes are choosing to drop out at a higher rate, see supra notes 6-8 and accompanying text.
\item See Hill, supra note 6 (noting that most revenue-generating athletes are products of low-income families).
\item See Wong, supra note 63, at 1105 (explaining that the trust fund approach may also “filter to athletes other than those who participate in revenue sports”). The Trust fund approach may lead to a “nine-figure verdict for former college-athletes [and] would impose an enormous burden on the NCAA and its member schools, resulting in university budget cuts and higher tuition bills that would ultimately impact students.” Holthaus, supra note 11, at 393.
\item See Stephanie Vedral, A Senior Urges: Let’s Keep College Basketball a Team Sport, SETONIAN (Nov. 29, 2012), http://www.thesetonian.com/opinion/a-senior-urges-let-s-keep-college-basketball-a-team-sport-1.2960741 (“Compared to the NBA, college basketball is much more of a team game and that is one of the major reasons why many people love and prefer NCAA play.”).
\item For a full discussion of Regents and McCormack, see supra notes 101-105 and accompanying text.
\end{enumerate}
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the multibillion dollar deal after leaving the NCAA. Although the trust fund approach undoubtedly solves some of the issues the NCAA faces concerning claims of unjust enrichment and unconscionable contracts, it creates a plethora of practical issues and also fails to address most of the realistic injustices present today.

B. Teams Acting as Unions: Implementation of Group Licensing

Another possibility that redresses unjust enrichment by the NCAA and its business partners is allowing each collegiate team to act as a union for its players. Much like the Major League Baseball Players Association (MLBPA), the union/college team would have exclusive rights to market the publicity rights of its team, as a group, to television corporations, Nike or another apparel corporations, and EA Sports for use of the team and its players in EA Sports’ video game. In Fleer Corp. v. Topps Chewing Gum, Inc., the court recognized that such a union “did receive the licensing income, [but it primarily acted] merely as a conduit that distributed all of the licensing revenue to the players.”

Although professional athletes have an individual right to control the use of their images, this proposal assumes that student-athletes grant the university the exclusive right to market their images while they are playing college athletics. If the NCAA amended its bylaws to allow athletes to realize the proceeds of their labor at the end of each athletic year through this group license, it would have the potential to alleviate most of the legal and political tension in college sports today. Although athletes would effectively lose their “amateur” status, the same was true for Olympic athletes in 1986, when the committee “expunged the word amateur from its charter.”

As a result, the NCAA would no longer be operating as a monopoly over the entire field of college athletes, because each team would be responsible for marketing its own players’ publicity rights in their best interest—theoretically opening up the market and driving prices down.

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122. See NCAA College Basketball AP All-America Teams, BASKETBALL-REFERENCE.COM, http://www.basketball-reference.com/awards/all-america.html (last visited Jan. 21, 2014) (noting that four out of five first-team college basketball All-Americans went pro the following year, and only one who chose not to is currently still in school at Creighton University).

123. See Fleer Corp. v. Topps Chewing Gum, Inc., 658 F.2d 139, 142 (3d Cir. 1981) (holding that group licensing is not unreasonable restraint on trade under antitrust law).

124. Id. at 143.

125. David Johansen, A Superstar Exception to Professional Baseball Licensing Logic?, WILLAMETTE SPORTS L.J. 1, 8 (2007) (explaining that players have the option to join a group-licensing union or can opt to market the use of their image individually).

126. See Branch, supra note 12, at 26 (explaining the policy change as a huge success for growth of Olympic sports).
for consumers. Consumers would be able to experience products that bear the athletes’ names, as the “amateurism” justification would no longer hold water, thereby increasing the value and utility of these products for consumers. Unlike the individualized trust funds, the group license controlled by the team would not induce athletes to be more concerned with personal success rather than team success—the more successful the team, the more compensation is given to each through the group license. Preserving the “product” of college athletics has less to do with preserving amateurism and more to do with preserving the selflessness of the team game, unlike the court in Regents suggested decades ago.

Finally, compensating athletes at the end of each academic year would diminish the demand for illegal recruiting and boosters, while also incentivizing collegiate athletes to stay in school and earn a college degree. In 2010, all five starters on the University of Kentucky basketball team declared for the draft early and never graduated college. Likewise, that same year, only 20% of collegiate all-stars spent more than two years in college—a drop-off from the 86% of all-stars who spent three or four years at their universities in 1997. Collegiate athletes today, especially those playing in revenue-generating sports, come from lesser means than they did decades ago, which creates an overriding belief that they cannot afford to “waste one second of their earning power by remaining in school.” For the same reason, illegal recruiting by compensating athletes and their families in hopes that they sign with a given team has distorted all notions of amateurism in its own sense, while also stripping awards, championships, and dignity from some of the NCAA’s most hallowed players.

127. See Radley, supra note 46.
128. See Holthaus, supra note 11, at 392 (explaining that if athletes were compensated then products bearing their persona would be “more authentic”).
129. For a full discussion of how the individualistic trust approach may diminish the team game, see supra note 120 and accompanying text.
130. For a full discussion of the Regents decision and the dicta suggesting amateurism is necessary, see supra notes 100-104 and accompanying text.
131. For a full discussion of how compensating athletes during their collegiate career would encourage them to stay in school, see infra notes 132-134 and accompanying text.
133. See id.
134. See id.
135. See Robinson & Cole, supra note 7. USC running back Reggie Bush and his family were compensated over $100,000 by two marketing agents while Bush was at USC for hotel stays, rental cars, payments on preexisting debt, and rent. Id. The Bush family was indeed
While this proposal does alleviate much of the injustice in the collegiate sports market today, it comes with its own host of practical difficulties and new challenges. If the NCAA permitted schools to negotiate licensing deals for their athletes as a union, it is more likely that they would meet the definition of an “employee” under the National Labor Relations Act (NLRA) because they would be represented and unionized wage earners. Assuming they would be classified as “employees,” this proposal would open up myriad difficulties, such as rules that govern the frequency and duration of practice, as well as the option for athletes to strike. Entitlement to workman’s compensation is another possibility, all of which add up to huge expenses for the universities that may then have to drop several nonrevenue sports programs in order to stay afloat. Furthermore, if the schools themselves decide which of their teams are worthy of group-licensing negotiations, the policy may face a multitude of Title IX concerns because only the revenue-generating sports (usually men’s basketball and football) have a substantial interest in their right of publicity. “Title IX requires not only equal opportunities for participation, but also equal treatment and benefits for athletes within collegiate programs.” Therefore, schools who only seek group-licensing contracts for their revenue-generating men’s teams will probably run afoul of Title IX requirements as well.

financially unstable, and most reparations were made so that his family was able to see him play, or to pay off preexisting debt. Id. When Bush won the Heisman trophy in 2005, he was later asked to surrender it due to his involvement in illegal benefits that he and his family had received. See Nakia Hogan, New Orleans Saints’ Reggie Bush First Player To Forfeit Heisman Trophy, TIMES-PICAYUNE (Sept. 15, 2010, 6:40 AM), http://www.nola.com/saints/index.ssf/2010/09/saints_bush_decides_to_give_ba.html (explaining that Bush’s collegiate career was tarnished as a result of his family’s financial insecurity).

137. See id. (explaining the practical difficulties of student-athletes also being “employees”).
138. See Anthony W. Miller, NCAA Division I Athletics: Amateurism and Exploitation, U.S. SPORTS ACAD. (Jan. 3, 2012), available at http://www.thesportjournal.org/article/ncaadivision-i-athletics-amateurism-and-exploitation (“[I]f colleges were to pay athletes, any surplus created by those programs would be used to compensate the athletes. Consequentially, many of the non-revenue generating programs would not have adequate funding to continue.”).
140. Hurst & Pressly, supra note 136, at 71-72.
141. See id. at 72 (explaining that Title IX remains “a sizable hurdle” if schools, themselves, attempt to compensate their revenue-generating athletes or athletic teams).
C. Restructuring the Student-Athlete Statement: A Contractual Compromise in Light of Public Policy and Preserving the Integrity in College Athletics

It is in the NCAA’s best interest to restructure its bylaws to allow for some type of compensation to be realized by the collegiate athletes who earn it.\textsuperscript{142} Currently, athletes essentially sell their rights of publicity to the NCAA for nothing by waiving it in a nonnegotiable contract, while the NCAA turns right around and makes billions of dollars by selling those precise rights to the largest television networks, apparel companies, and video game corporations.\textsuperscript{143} Such gross unfairness has not gone unnoticed, as explained above, and if the NCAA were to reformulate its bylaws to redistribute some of the wealth to the teams that earn it, it would face a much better chance of continuing to control the market for college athletes—even though this power is predominantly illusory.\textsuperscript{144}

My proposed solution would be to allow collegiate athletes to receive a portion of the revenue they generate through the use of their persona. This could be accomplished in the Student-Athlete Statement: instead of requiring athletes to relinquish the exclusive right to market their persona for nothing, the NCAA could allow athletes to realize an apportioned amount of revenue generated through the NCAA’s use of their personas and spread that amount evenly throughout the athletes’ respective teams.\textsuperscript{145} In other words, revenue generated from each individual player’s name and likeness (through jersey sales, video games, etc.) would be aggregated and dispersed to his team evenly. Athletes on each team would receive the same remuneration for the use of their personas at the end of each school year, even if the few star players’ names ended up being more valuable.\textsuperscript{146} Players would then be more likely to compromise the use of their image after their playing careers,

\begin{itemize}
\item \textsuperscript{142} See Mueller, supra note 27, at 87 (“‘Like millions of fans, I’m more than willing to drink beer and eat bowls of nachos as I watch college ball [but] [m]aybe it’s time to pay the entertainers—and not just the schools that exploit them.’” (quoting Larry Elder, The Exploitation of the Student-Athlete, CAPITALISM MAG. (May 2, 2000), http://capitalismmagazine.com/2000/05/the-exploitation-of-the-student-athlete/).
\item \textsuperscript{143} See Holthaus, supra note 11, at 376 (referencing O’Bannon’s complaint that advocates unfairness of the NCAA’s bylaws).
\item \textsuperscript{144} For a discussion of the true power behind the NCAA regulations and the history of the NCAA, see supra notes 13-25 and accompanying text.
\item \textsuperscript{145} For a full discussion of the current policy which requires athletes to waive the right to market their images, see supra notes 9-12 and accompanying text.
\item \textsuperscript{146} See Hill, supra note 6 (advocating for compensating athletes on an even rate through their prospective team).
\end{itemize}
and such proceeds generated from the use of their image at that time could go directly to the alumni’s universities.\footnote{See Mahler, supra note 111 (explaining that Ed O’Bannon is seeking monetary damages for the use of his image because he was never compensated for it in the first place).}

Such a solution would be nothing more than a compromised, contractual endorsement deal, and one that is grossly more equitable than requiring incoming seventeen-year-olds to “waive” the right to control their likenesses in perpetuity as a condition to play their sports and therefore, in most cases, to attend their universities.\footnote{See McCann, supra note 11. It is also important to note that the requirement to relinquish their right to market their personas is, in fact, not only a condition to play a sport but to go to school because so many of collegiate athletes’ educations depend on their participating in the sport to which the school recruits them. See Taylor v. Wake Forest Univ., 191 S.E.2d 379, 381 (N.C. Ct. App. 1972) (explaining that the university promptly terminated the student’s scholarship when he refused to participate in football his sophomore year).} While fairly compensating revenue-generating players and teams for exclusive use of the players’ images, the proposal would also not substantially change the “product” of collegiate athletics—keeping the focus on the success of the team rather than individual, statistical accomplishments.\footnote{For a full discussion of preserving the product of collegiate athletics by virtue of preserving the “team atmosphere,” see supra notes 129-130 and accompanying text.} This hypothetical compromise would also improve consumer products such as replica jerseys and video games because the use of athletes’ names would no longer be prohibited on these products.\footnote{See supra note 126 and accompanying text.} Fans would finally be able to more readily identify with their favorite college athletes and teams and, theoretically, would be willing to spend more for these improved products.

As noted in the Part IV.C proposal above, compensating athletes for the use of their images at the end of the academic year would also diminish the demand for illegal recruiting and encourage athletes to stay in school longer.\footnote{For a further discussion of how compensating athletes would diminish the demand for illegal recruiting and encourage kids to stay in school, see supra notes 131-136 and accompanying text. See also Mahler, supra note 111 (explaining that if athletes were compensated, “[m]ore student-athletes might decide to stay in school rather than gambling on the draft”).} Unlike the proposal announced in section B, however, the amendment to the bylaws as proposed here would not likely categorize athletes as “employees” because standard endorsement deals regarding the right to market an individual’s persona often provide clauses that explicitly state the relationship does not amount to “employment.”\footnote{See Endorsement Agreement, ONECLE (Dec. 1, 2003), http://contracts.onecle.com/ritz/norman.endorse.2003.12.01.shtml (“Nothing contained in this agreement shall be construed as establishing an employer/employee relationship between [the parties].”); see also Wong, supra} The chief concern for defining an “employee” under
the NLRA is the “employer’s ability to control the purported employee.” This includes “whether the employer provides benefits; who provides the tools and other materials to perform the work; who designates where work is done and whether the relationship is temporary or permanent.” Current athletes do receive benefits—scholarships in exchange for their participation. Thus, additional benefits that fairly compensate the athlete for the use of his image would probably not alter the outcome of the analysis. Other than redefining the amount of compensation, the other factors that determine the relationship between the athlete and the university/NCAA would stay virtually identical. Under these facts, courts have overwhelmingly concluded that student-athletes do not amount to “employees” because of the lack of intent between the athlete and the university to establish this relationship. Courts would likely be unwilling to distinguish this precedent due to the existence of a compromised endorsement deal that explicitly states the agreement “shall [not] be construed to establish an employer/employee relationship.” The proposed contractual compromise probably would not classify student-athletes as “employees” under the NLRA and, thus, would not raise issues of workman’s compensation and the right to strike against the students’ respective university.

The proposed solution would also probably not implicate Title IX issues because neither the universities nor the NCAA are impeding any team’s ability to generate revenue by discouraging third parties from

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154. Id. at 694-95 (defining the word “control”).
155. Id.
156. Id.
158. For a full discussion of endorsement deals that sell the rights to an individual’s image, see supra note 152 and accompanying text. But see Hurst & Pressly, supra note 136, at 70 (explaining that if a school paid a “monthly stipend” directly to a student in exchange for his participation in athletics, such compensation would likely classify him as an “employee” under the NLRA).
159. See Hurst & Pressly, supra note 136, at 71 (noting that if athletes are categorized as “employees,” they would have the ability to strike against their employer, i.e., university, under NLRA).
marketing a student-athlete’s persona.\textsuperscript{160} Although it is more likely that a given university’s men’s basketball or football team will generate more revenue from the use of the men’s images, it is entirely possible that if a women’s team has an outstanding year, a third-party marketing corporation would decide to use the women’s image and persona to endorse its product. More appropriately, however, decisions regarding which player or team a marketing corporation wishes to use as an endorsement are decisions that are left to the free market—outside of Title IX’s “equality of opportunity” realm.\textsuperscript{161} In short, this compromised endorsement deal alleviates many of the injustices inherent in the NCAA’s perfect business model, without implicating more issues, such as an employer/employee relationship or Title IX concerns.

V. Conclusion

The compromised endorsement contract outlined in Part IV.C is less than perfect. It is less than perfect from the athlete’s perspective because some of the star-athletes will not be recognizing the full value of their images and personas, and it is less than perfect from the NCAA’s and its member institutions’ perspectives because under the current bylaws, they are able to reap the benefit of the athletes’ labor without having to sacrifice a dime. However, as mentioned above, student-athletes are on the brink of overthrowing the NCAA’s very existence by requiring the NCAA to set up trust funds for current players and theoretically compensate \textit{all} former players.\textsuperscript{162} The most recent suspension of Johnny Manziel exacerbates this point—although the NCAA claims the absurd half-game suspension was due to a lack of evidence, it seems entirely more likely that it was “an NCAA maneuver to pad itself against future personality rights lawsuits” in light of a potentially unfavorable outcome in the class-action O’Bannon suit to which student-athletes would likely “seek back-compensation.”\textsuperscript{163} Thus, a compromise from both sides may be the most efficient way to preserve the integrity of the game while recognizing the legitimate value of the labor rendered.

\textsuperscript{160} 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity . . . .”).

\textsuperscript{161} See Hurst & Pressly, supra note 136, at 72; see also Blair v. Wash. State Univ., 740 P.2d 1379, 1383-84 (Wash. 1987) (holding that each sports team may keep the revenue that it generates and that it may be excluded from calculations of university financial support).

\textsuperscript{162} See Mahler, supra note 111.

\textsuperscript{163} See Jessop, supra note 45 (explaining the NCAA’s possible rationale for the absurdly light half-game suspension).
“You see everybody getting richer and richer,” Desmond Howard, who won the 1991 Heisman Trophy while playing for the Michigan Wolverines, told USA Today . . . . ‘And you walk around and you can’t put gas in your car? You can’t even fly home to see your parents?’

For Ed O’Bannon and former uncompensated athletes everywhere, “[i]t’s not about the money. It’s about what’s right.”

The class action suit represents much more than the possibility of a landmark payday; rather, it is a way to evoke change in a broken system that has been taking advantage of free labor and legitimizing it as being in the best interest of those producing the labor.

The proposed solution outlined in Part IV.C has the possibility to remedy this injustice, and such a remedy may be sufficient for current athletes to waive the use of their images to the NCAA after their playing days—essentially “giving back” to their universities in order for them to continue providing Division I athletics to non-revenue-generating teams. In other words, current athletes would receive an apportioned amount of compensation for the use of their images while their images are valuable, then subsequently waive the rights to those images during their enrollment in a university when they are no longer in school. This would allow the NCAA and respective universities to continue selling the

164. See Branch, supra note 12, at 11-12 (quoting Desmond Howard).
165. Dave Zirin, Root for Ed O’Bannon To Upset the NCAA, EDGE OF SPORTS (Mar. 18, 2010), http://www.edgeofsports.com/2010-03-18-510/index.html (quoting Ed O’Bannon). Sales of school apparel and merchandise have skyrocketed over the past decade such as “buggy shorts, t-shirts, [and] trading cards.” See THE FAB FIVE, supra note 5 (noting that as “freshmen [the Fab Five] felt excited, as sophomores—exploited”). Jalen Rose remembered: “We were in Chicago one time, and we went downtown to the Nike outlet, and we walked past a display [that read,] ‘Fab Five Nikes.’ That’s when [I realized] having your own shoe doesn’t necessarily put money in your pocket.” Id. Rose added, “I didn’t feel like a college kid anymore, I felt like a professional athlete [who] wasn’t getting paid.” Id.
166. See Mueller, supra note 27, at 87 (noting, as one commentator put it, “Like millions of fans, I’m more than willing to drink a beer and eat bowls of nachos as I watch college ball. It’s great entertainment. Maybe it’s time to pay the entertainers—and not just the schools that exploit them” (citation omitted)). The perception of the star student-athlete’s lifestyle is also inconsistent with reality, especially because most star athletes today come from more modest means. THE FAB FIVE, supra note 5 (“The perception of our lifestyle was that we were living like rock stars. But we weren’t living that lifestyle, that just wasn’t what it was. We were eating cereal some nights . . . cooking hot dogs . . . . We lived just like every college student.” (quoting Ray Jackson, member of the Fab Five)). “I drove a green Dodge Shadow that my mother gave me . . . . That’s why it kills me when they try to act like we was getting it so big.” Id (quoting Jalen Rose); see also Mahler, supra note 111 (“Paying athletes wouldn’t result in schools spending additional money on sports. They would just spend less of it on coaches and facilities and more on students.”).
167. For a discussion of the implications of non-revenue-generating teams, see Hurst & Pressly, supra note 136.
168. See id.
rights to “classic” games on television and “classic” teams in video games without having to worry about maintaining trust funds for all former players.\textsuperscript{169}

This proposed contractual endorsement compromise would only be sustained as long as both parties agreed to be governed by it. This is no different, however, from the current bylaws, which require athletes to relinquish the right to market their images for nothing because, as noted previously, the NCAA only has the power to impose amateurism, or any law, on those who consent to be governed.\textsuperscript{170} Exploited athletes across the country are one step closer to relinquishing that consent, and courts are on the brink of enjoining such practices.\textsuperscript{171}

Thus, it is in the interest of both parties to reach a compromise such as one proposed in Part IV.C in order to maintain the integrity of the game, preserve a governing body, and treat collegiate athletes with the respect and dignity for which they have been longing.\textsuperscript{172}

\textsuperscript{169} See Wong, \textit{supra} note 63, at 1106 (suggesting that establishing trust funds for all current, former, and future student-athletes would be extremely costly). “There are over 400,000 NCAA student-athletes, not to mention the hundreds of thousands of former student-athletes.” \textit{Id.}

\textsuperscript{170} For a full discussion of the transparent power of the NCAA, see \textit{supra} notes 13-25 and accompanying text.


\textsuperscript{172} See Wong, \textit{supra} note 63, at 1107 (“The O’Bannon decision . . . should compel the [NCAA] to create a realistic opportunity for former NCAA athletes to transition to a professional life—in something other than sports.”); \textit{see also} Mahler, \textit{supra} note 111 (“[T]he O’Bannon case has already performed a valuable service: It has exposed a system whose sole purpose is to deny the value of talented athletes. The system and its overlord—the NCAA—both deserve to die.”).