

NO CONTROL OVER THEIR RIGHTS OF PUBLICITY: COLLEGE ATHLETES

LEFT SITTING THE BENCH

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INTRODUCTION

The right of publicity is the right of every person to control the commercial use of his or her identity.¹ There are also personal interests protected by this right.² The protection is often said to apply to an individual's persona. A persona encompasses things such as a person's likeness, nickname³, performing style or mannerisms⁴, and voice imitations.⁵ An individual's right of publicity is governed by either common law or by state statutes, as no federal right of publicity exists.

The right of publicity has been applied in cases involving athletes, but the application of this right for college athletes has yet to be addressed in a serious manner by the judicial system. There is little case law on the issue in spite of the serious violations of college athletes' publicity rights. Student-athletes have virtually no control over the commercial use of their identities.

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¹ J. Thomas McCarthy and Paul M. Anderson, *Protection of the Athlete's Identity: The Right of Publicity, Endorsements and Domain Names*, 11 MARQ. SPORTS L. REV. 195 (2001).

² See *Waits v. Frito-Lay*, 978 F.2d 1093 (9th Cir. 1992), which recognized the right of publicity can be used to protect reputational interests of a celebrity. In *Waits*, a sound-alike of singer Tom Waits was used in a Doritos commercial, in spite of the fact that Waits had publicly proclaimed that he did not believe in celebrity commercial endorsements.

³ See *Hirsch v. S.C. Johnson & Son, Inc.*, 90 Wis.2d 379, 280 N.W.2d 129, 205 U.S.P.Q. 920 (Wis. 1979), where action was brought against manufacturer for unauthorized use of professional football player's nickname "Crazylegs" on a shaving gel.

⁴ See *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S. 2d 661 (2d Dep't 1977) (mem.), involving an action for misappropriation of Guy Lombardo's public personality. He was known as Mr. New Year's Eve, and the defendant aired an advertisement that simulated the gestures, musical beat and his performance of "Auld Lang Syne".

⁵ See *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) where performer, Bette Midler, sued automobile manufacturer and advertising agency based on advertising that used sound alike in commercial.

They cannot, themselves, enter into agreements for endorsements or the like, but the universities they play for are able to enter into endorsement agreements and other contracts for the commercial uses of the players' identities. Ultimately, the student-athletes sign over their rights of publicity, in a sense, to the universities.

Under the regulations of the National Collegiate Athletic Association ("NCAA"), athletes are not allowed to receive compensation for the commercial use of their personas and likenesses. These regulations result in the exploitation of the likenesses of college athletes in areas such as university trading cards, sales of a player's jersey, or the use of their likenesses in video games. This article will begin by discussing the case law involved in developing the right of publicity for athletes. It will then explore the regulations of the NCAA, and the methods involved in the exploitation of college athletes. The article will also discuss proposed and attempted solutions for combating this issue and the problems associated with these proposals.

II. CASE LAW DEVELOPING AN ATHLETE'S RIGHT OF PUBLICITY

One of the first cases to deal with a claim for infringement of an athlete's identity without his consent was in 1941, in the case of *O'Brien v. Pabst Sales Co.*⁶ O'Brien was previously a college football player for Texas Christian University, and during his time as a student-athlete, permitted the school to include photographs of him in a press kit. After O'Brien began to play professional football for the Philadelphia Eagles, Pabst Sales Company gained access to the press kit, and without O'Brien's permission, printed a calendar, which included his photograph on the cover, beer slogans, and photos of bottles of beer. O'Brien was involved in a group which

⁶ 124 F.2d 167 (5th Cir. 1941).

attempted to deter teens from drinking, and argued he would never endorse a beer product, and such an endorsement without his consent violated his right of publicity. The court dismissed his claim, holding that if he did not object to the publicity he received from sports pages, he could not object to the publicity he received from advertising for Pabst beer.

The Second Circuit in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*⁷ first recognized an athlete did have a legal claim for the uncompensated use of his identity. In *Haelan*, the plaintiff had a contract with a baseball player to use his photograph in connection with the sale of plaintiff's gum.⁸ The player also agreed not to grant any other gum manufacturer a similar right during the contract term.⁹ The defendant, aware of the contract between the plaintiff and the baseball player, induced the player to also enter into a contract to use the player's photograph in connection with the sale of defendant's gum.¹⁰ Defendant contended that the plaintiff's contracts created nothing more than a release of liability because a man has no legal interest in the publication of his picture beyond a right of privacy.¹¹ The Court in *Haelan* disagreed with this contention recognizing that, in addition to an independent right of privacy, "a man has a right in the publicity value of his photograph."¹²

Ali v. Playgirl, Inc. also recognized that an athlete has a right to control the distribution of his likeness.¹³ *Ali* involved an action brought by former heavyweight champion, Muhammad Ali, for injunctive relief and damages for the unauthorized printing and distribution of an

⁷ 202 F.2d 866, (2d Cir. 1953).

⁸ *Id.* at 867.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 868.

¹² *Id.* at 868. The court dubs this right a "right of publicity" and recognizes both economic and moral harms can arise from misappropriation of one's likeness.

¹³ 447 F. Supp. 723 (S.D.N.Y. 1978).

objectionable portrait of Ali in Playgirl Magazine.¹⁴ The portrait consisted of a nude black man seated in the corner of a boxing ring and was claimed to be unmistakably recognizable as Ali.¹⁵ The court examined the facts to determine if a preliminary injunction is appropriate.¹⁶ When examining the success of Ali's claim on its merits, the Court addressed one defense given by the Defendants. The Defendants argued that the statutory right of privacy does not extend to protect Ali, as he is an "athlete, who chooses to bring himself to public notice, who chooses, indeed . . .to rather stridently seek out publicity."¹⁷ The Court rejected this argument and stated that "such a contention confuses the fact that projection into the public arena may make for newsworthiness of one's activities, and all the hazards of publicity thus entailed, with the quite different and independent right to have one's personality, even if newsworthy, free from commercial exploitation at the hands of another."¹⁸ The Court held that, in light of the foregoing, there was a likelihood that Ali would prevail on both his statutory claim and his common law right of publicity.¹⁹

These are some of the first cases to recognize a right of publicity, and additionally apply this right to an athlete. The majority of cases, though, have addressed this right of publicity only in regard to professional athletes.²⁰ There are certainly fewer cases, if any, extending a right of

¹⁴ *Id.* at 725. Ali's claim was brought under Section 51 of the New York Civil Rights Act and his related common law right of publicity.

¹⁵ *Id.* at 725.

¹⁶ *Id.* at 726. The Court states that a preliminary injunction should be issued only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

¹⁷ *Id.* at 727.

¹⁸ *Id.* at 727, *citing* Booth v. Curtis Publishing Co., 223 N.Y.S.2d 737 (N.Y.A.D. 1962).

¹⁹ *Ali*, at 728. The Court went on to examine if there was irreparable injury and ultimately granted Ali a preliminary injunction.

²⁰ *Fleer Corp v. Topps Chewing Gum, Inc.*, 658 F.2d 138 (3d Cir. 1981); *Uhlaender v. Henricksen*, 316 F.Supp. 1277 (Minn. 1970); *Baltimore Orioles Inc. v. Major League Baseball Players Association*, 805 F.2d 663 (7th Cir.

publicity to college athletes. The reason for this may be due to the restrictions placed on college athletes by the NCAA, which will be discussed later in this article.

One case that did address the right of a college athlete to control the commercial use of his identity was *Bloom v. National Collegiate Athletic Association*.²¹ Jeremy Bloom was a young athlete that had obtained a scholarship to play football at the University of Colorado, but also was involved in competitive skiing at the Olympic level and had earned the U.S. National and World Cup championship titles in 2002.²² On top of all this, he also possessed good looks, which provided him with several modeling and entertainment opportunities, including a contract with Tommy Hilfiger.²³ The NCAA disallowed Bloom to play college football unless he forfeited his modeling and entertainment opportunities.²⁴

When Bloom was first offered the scholarship at the University of Colorado, he deferred his admission to prepare for the 2002 Winter Olympics.²⁵ After the Olympics, he chose to pursue his educational and football opportunities at the University, but declined the scholarship.²⁶ The University of Colorado filed a waiver in February of 2002, announcing its support of Bloom's endeavors in skiing and entertainment, but this waiver was denied by the NCAA.²⁷ The NCAA bylaws allow college athletes to play professional sports, such as minor-league baseball, during the summer, and then return to their sports in the fall or spring, as long as

1986); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974); *Hirsch v. S.C. Johnson & Son, Inc.*, 280 N.W. 2d 129 (Wis. 1979).

²¹ No. 02-CV-1249 (20th Dist. Ct. Colo. Aug. 15, 2002).

²² Laura Freedman, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673 (2003).

²³ *Id.* at 674.

²⁴ *Id.*

²⁵ *Id.* at 678.

²⁶ *Id.*

²⁷ *Id.* at 677.

the only money they accept is salary.²⁸ Skiers competing at the Olympic level do not receive salaries, though. Instead they receive minimal awards in prize money.²⁹ Therefore, they rely on compensation from endorsements to fund the expensive training and travel expenses that go along with participation in the sport.³⁰ The NCAA bylaw prohibiting college athletes from using their names and likeness for commercial products restricts athletes, such as Bloom, that are involved in sports outside of the collegiate level, from pursuing the opportunities presented to them.

This bylaw of the NCAA also restricted Bloom from participating in his entertainment and modeling opportunities. He also had been offered a contract to host a show on Nickelodeon, as well as the contract with Tommy Hilfiger.³¹ Bloom argued that these endorsements were not a result of his football ability, but rather a result of his skiing ability, and therefore, he should not have to forego these opportunities.³² Bloom went before the District Court of Boulder County to attempt to obtain an injunction against the NCAA and being forced to choose between playing football for the University of Colorado and his professional skiing career, and the endorsements and entertainment opportunities accompanying it.³³ The court denied his request for injunctive relief, recognizing the authority of the NCAA to regulate in this area by holding that the rules were rationally related to the NCAA's stated purposes of fostering amateurism and were not

²⁸ Freedman, *supra* note 22, at 679.

²⁹ Freedman, *supra* note 22, at 680.

³⁰ Freedman, *supra* note 22, at 680.

³¹ Freedman, *supra* note 22, at 681.

³² Darren Rovell, *Judge rules against Bloom in eligibility case*, August 17, 2002, available at <http://espn.go.com/ncf/news/2002/0815/1418409.html> (last visited July 20, 2004).

³³ *Id.*

arbitrarily applied.³⁴ The Court, though, did express disappointment with the NCAA and sympathy for Bloom.³⁵

Regardless of the sympathy felt for Bloom, the judge justified the different treatment of skiers and baseball players on the basis of the differences in salary structure between the pursuing of a professional career as a skier, as opposed to a baseball player.³⁶ The justification relied on the fact that, though some athletes would use the sponsorship money to pay for their athletic endeavors, some would simply take it as profit.³⁷ In response to Bloom's argument that his modeling and entertainment opportunities were a direct result from his skiing ability, rather than his ability as a football player, the judge found that the NCAA expressed a reasonable fear that personal appearances required under Bloom's contract with Tommy Hilfiger could utilize his football ability, therefore the prohibition on Bloom's continuing under the contract was rational.³⁸

Bloom chose to play football after the decision of the District Court of Boulder County, and was forced to pass on some of the lucrative opportunities presented to him.³⁹ Recently, though, Bloom announced his decision to continue to play football next fall, also while accepting endorsements for his skiing endeavors.⁴⁰ Bloom has continued competing in ski competitions following the court's decision, but has been doing so at his own expense.⁴¹ Bloom intends to

³⁴ Freedman, *supra* note 22, at 683.

³⁵ Freedman, *supra* note 22, at 684.

³⁶ Freedman, *supra* note 22, at 686.

³⁷ Freedman, *supra* note 22, at 686.

³⁸ Freedman, *supra* note 22, at 686.

³⁹ Freedman, *supra* note 22, at 687.

⁴⁰ Sports Illustrated, *Deal with it: Bloom to play football, ski, challenge NCAA's endorsement policy*, January, 19, 2004, available at <http://sportsillustrated.cnn.com/2004/football/ncaa/01/19/bc.bloom.sdecision.ap/index.html> (last visited June 6, 2004).

⁴¹ *Id.*

force the NCAA to either change its position or prevent him from playing football.⁴² He contends that fairness requires the NCAA to control his football career, while the International Olympic Committee controls his skiing career.⁴³ The result and action of the NCAA remains to be seen.

III. NCAA BY-LAWS

The NCAA Constitution and Bylaws form a contract between the NCAA and member institutions.⁴⁴ Though student-athletes do not directly enter into the contract, they are still considered to be parties to the contract.⁴⁵ The series of bylaws are intended almost solely to benefit the student athletes, and the amateurism rules are also intended to benefit the student athletes as to avoid their being exploited.⁴⁶ Because of the contract's intended benefits to student-athletes, they are considered to be third-party beneficiaries to the contract.⁴⁷

The rules and regulations of the NCAA are based on what is referred to by some commentators as the amateur/education model. This model views the student-athlete as embodying the altruistic values of selflessness, devotion, sacrifice, and purity.⁴⁸ The athletic scholarship is the form of compensation because it allows the student-athlete to participate in sports for pure pleasure while also allowing the individual to develop useful skills from his involvement in the academic program.⁴⁹

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Freedman, *supra* note 22, 689.

⁴⁵ Freedman, *supra* note 22, at 690.

⁴⁶ Freedman, *supra* note 22, at 690.

⁴⁷ Freedman, *supra* note 22, at 690.

⁴⁸ Michael P. Acain, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307 (1998)

⁴⁹ *Id.* at 311. The author contends that this model is outdated due to the commercialism present in college athletics today. Because of this change, the commercial/education model has been introduced. Under this model, college

Article 12 of the NCAA bylaws details the amateurism requirements of the organization. Article 12.02.5 defines a student-athlete as a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program. Any other student becomes a student-athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department. Article 12.1.1 address how a student-athlete can and must maintain amateur status. An athlete will lose amateur status if he uses his athletic skill, indirectly or directly, for pay in any form in that sport or receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based upon athletics skill or participation.⁵⁰ Pay is defined as the receipt of funds not permitted by the governing legislation of the Association not permitted by this article.⁵¹

Article 12 also lists several types of pay, which are prohibited. Article 12.1.1.1 prohibits any direct or indirect salary, gratuity or comparable compensation, any division or split of surplus (bonuses, game receipts, etc.), excessive or improper awards or benefits, or any cash, or the equivalent thereof (e.g., trust fund), as an award for participation in competition at any time, even if such an award is permitted under the rules governing an amateur, non-collegiate event in which the individual is participating. An award or a cash prize that an individual could not receive under NCAA legislation may not be forwarded in the individual's name to a different individual or agency. There are exceptions to prohibitions on payment, such as a student-athlete may receive awards from the U.S. Olympic Committee pursuant to its Operation Gold Program,

athletics are recognized as a commodity that is marketed, advertised and sold like any other product. This model is more sympathetic to the possibilities of rewarding college athletes with monetary compensation.

⁵⁰ This is not an exhaustive list, but rather reflects the restrictions relevant to this article. The complete list is available in the NCAA Division I Manual, *available at* <http://www.ncaa.org> (last visited July 19, 2004).

⁵¹ See NCAA *supra* note 50, 12.02.2.

he may receive educational expenses awarded by the Olympic Committee or a prospective athlete may receive educational expenses prior to collegiate enrollment from any individual or entity that is not an agent, professional sports team/organization or a representative of an institution's athletic interests.⁵² The NCAA does allow players to participate in professional sports in the summer and return to their college teams in the fall and spring as long as the only money they accept is from their stated salary.⁵³

The NCAA bylaws also restrict the commercial use of an athlete's name or picture. A student-athlete's picture may only be used in the advertisement of a commercial product or service under the following restrictions: if the primary purpose is to publicize the sponsor's congratulations to the student-athlete or team; if the advertisement does not include the reproduction of the product with which the business is associated or any other item identifying the business or service other than its name or trademark; if there is no indication in the makeup of the advertisement that the squad members, individually or collectively, or the institution, endorses the product or service; if the student-athlete has not signed a consent or release granting permission to use his name or picture in a manner inconsistent with the requirements of this section, and if the student has received a prize from a commercial sponsor in conjunction with participation in the institution's promotional activities and the advertisement involves the announcement of the receipt of the prize.⁵⁴ A student-athlete may continue to receive remuneration for the use of his name or picture in advertising a commercial product or service, if the athlete was receiving this remuneration prior to enrollment in an institution that is a member of the NCAA, the athlete became involved in the activities for reasons independent of his athletic

⁵² See NCAA *supra* note 50, 12.1.1.1.3.

⁵³ Freedman, *supra* note 22, at 679.

⁵⁴ See NCAA *supra* note 50, at 12.5.1.4

ability, no reference is made to his involvement in intercollegiate athletics and the athlete does not endorse the commercial product.⁵⁵

Another by-law that may impose restrictions on the ability of college athletes to accept certain opportunities for commercial use of their identities is By-law 19.8. This by-law provides that if an athlete that is ineligible to play under the NCAA rules or legislation, but is permitted to do so by a court order or injunction, and it is later determined that the athlete was improperly allowed to play, the NCAA may take certain actions against the member institution. One of the actions that may be taken against a member institution is vacating or striking the team records and performances achieved during the participation of an ineligible student-athlete. This by-law prevents member institutions from allowing players that may possibly be declared ineligible to participate in the sport. Controversial athletes, such as Jeremy Bloom, knowing the reluctance of universities in allowing them to play, may forego many beneficial opportunities opened up to them. In contrast, universities may be unwilling to allow the participation of athletes that may jeopardize a successful team record.

IV. EXPLOITATION OF A COLLEGE ATHLETE'S PERSONA

One of the first areas in which college athletes' rights of publicity were exploited was in the area of university trading cards. The NCAA does not allow college athletes to receive compensation more than tuition, room and board.⁵⁶ Therefore, a student athlete cannot sell his likeness commercially and receive compensation for such. Nevertheless, the NCAA does allow

⁵⁵ See NCAA *supra* note 50, at 12.5.1.3

⁵⁶ James S. Thompson, *University Trading Cards: Do College Athletes Enjoy a Common Law Right to Publicity*, 4 SETON HALL J. SPORT L. 143 (1994).

the universities to use a college athlete's likeness commercially.⁵⁷ Taking advantage of this, universities began to issue trading cards as a way to raise revenue for their athletic departments.⁵⁸ In recognizing the potential for commercial exploitation of college athletes, the NCAA passed several regulations making it impermissible for outside for-profit entities to use the athletes' likenesses and the trading cards to sell commercial products.⁵⁹

These regulations do not completely solve the problem, though. Athletes may still be at risk of exploitation from the universities themselves.⁶⁰ Schools were making a lot of profit from the trading cards, but yet, the athletes' whose likenesses are generating the sales, were unable to be compensated for the use of their likenesses under NCAA regulations.⁶¹ An argument can be made, though, that the college athletes' have indirectly consented to the universities use of their likenesses.⁶² By participating in NCAA regulated athletic programs, they agree to abide by the regulations of the NCAA.⁶³

The NCAA controls the rights to license the sale of college merchandise.⁶⁴ The schools themselves can profit from the sale of this merchandise, but the athletes are limited to accepting profits in the form of only tuition, fees, room and board and books.⁶⁵ The sale of college jerseys brings to light issues of right of publicity violations. The means of identifying a player is often by the number on his jersey.⁶⁶ Because the jersey numbers identify the players, these jerseys are

⁵⁷ *Id.* at 167.

⁵⁸ *Id.* at 166.

⁵⁹ *Id.*

⁶⁰ *Id.* at 167.

⁶¹ *Id.*

⁶² Thompson, *supra* note 56, at 176.

⁶³ Thompson, *supra* note 56, at 176.

⁶⁴ Vladimir P. Belo, *The Shirts Off Their Backs: Colleges Getting Away With Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133 (1996).

⁶⁵ *Id.* at 134-135.

⁶⁶ *Id.* at 145.

part of their personas.⁶⁷ The student-athlete's identity and persona are closely connected to the jersey, as the athlete has made a unique contribution in making that particular jersey number marketable.⁶⁸ A problem may arise in the instance if multiple players have worn the same number, as it may be difficult to determine which player has rights to the fame behind the number.

As the right of publicity is intended to prevent the unjust enrichment that occurs by the universities ability to profit from the control and use of the players' identities, the sale of college jerseys and the schools reaping the benefits from these sales is an exploitation of the athletes' identities and their rights of publicity.⁶⁹ The regulations of the NCAA prevent the student-athletes themselves from controlling the commercial use of their identities. The proclaimed basis behind this regulation is to prevent the commercial exploitation of student-athletes. In reality, the regulation seems to result in a situation it was allegedly designed to prevent.

Again, the defense of implied consent will arise in the instance of publicity violations in the area of merchandise sales. As the players agree to play for the schools, they consent to the regulation of the NCAA. Though, countering this argument, it can be argued that the regulations of the NCAA do not explicitly permit the schools to become unjustly enriched at the expense of exploiting aspects of a student-athlete's persona. If the athletic team is successful due to the efforts of the players, it is logical to think that consumers would be content to purchase merchandise that simply contained the school's logo or name, rather than merchandising a jersey, which has taken on the identity of the player on the field.

⁶⁷ *Id.*, at 145-146.

⁶⁸ *Id.* at 148.

⁶⁹ *Id.* at 147.

The identifying aspect of a student-athlete's jersey is evidenced in the area of video games. Video game producers have and continue to produce games that provide consumers with the excitement and intimacy of college sports.⁷⁰ Universities, which are members of the NCAA have allowed video game producers to use the schools' fight songs and uniforms.⁷¹ These games depict athletes by their jersey numbers, but allow players to insert names on the jerseys.⁷² The argument that the likeness of well-known college athletes' is not used in these games can be refuted by articles and game reviews of the video games in question. Because of the realistic feel of the games, these articles and reviews do not refer to the athletes by their numbers, but rather, by their names.⁷³ In an article discussing the game, "NCAA Football 98," the following assertion was made, "If you pick LSU, you'll be coaching the unnamed equivalent of the 1996 [LSU] Tigers, with a No. 3 (Kevin Faulk) as your primary ball carrier and No. 35 (Charles Smith) anchoring your 4-3 defense at middle linebacker."⁷⁴ The issue of right of publicity violations in the context of video games has been addressed in the professional arena⁷⁵, but has yet to be addressed in the collegiate level.

The NCAA itself may also be responsible for exploiting publicity rights of college-athletes. The Supreme Court has held that a person possesses a right of publicity in his or her performance.⁷⁶ The NCAA entered into a contract with CBS granting the network the exclusive

⁷⁰ Matthew G. Matzkin, *Getting' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity By Not Paying for Their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227 (2001).

⁷¹ *Id.* at 239.

⁷² *Id.* at 240.

⁷³ *Id.*

⁷⁴ Matzkin, *supra* note 70, at 241, *citing* Scott Rabalais, *NCAA and ABC Gain Yardage With Computer College Football*, *The Baton Rouge Advoc.*, Jan. 16, 1998, at Fun 32, *available at* 1998 WL 2112578.

⁷⁵ *See Ahn v. Midway Manufacturing Company*, 965 F. Supp. 1134 (N.D. Ill. 1997).

⁷⁶ *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), which held that entire television broadcast of the performance of human cannonball act without the performer's consent violated his right of publicity.

rights to broadcast the NCAA Men's Basketball Tournament from 2003 to 2014 in exchange for \$6 billion.⁷⁷ The student-athletes could possibly have a claim for violation of their rights of publicity as they did not consent to, nor were compensated for, the broadcast rights of their performances on the field or on the court. Admittedly, there are concerns that arise with this argument, as there may be issues of implied consent to the broadcasting as well as issues of copyright preemption.⁷⁸

V. WHY COMPENSATE STUDENT-ATHLETES?

The NCAA allows compensation to student-athletes in the form of a college education, room and board, books and fees. In comparison to the deals that the NCAA has made with regard to college athletics, this compensation is small in comparison. For example, take the \$6 billion contract between the NCAA and CBS and compare it to the cost of tuition, fees, books and housing.⁷⁹ Does the value of a college education even come close? Some commentators have made the argument that the education that student-athletes receive is, in fact, no compensation at all. Often student-athletes are treated differently by professors than the rest of the student body. For example, during athletes' periods of eligibility, students have often received a grade of "incomplete."⁸⁰ The athletes are then allowed to continue participating in their respective sports. "Once the students' athletic eligibility expired, and the athletes' value to

⁷⁷ CNNMoney, *CBS renews NCAA B'ball*, NY, Nov. 18, 1999, available at <http://money.cnn.com/1999/11/18/news/ncaa/> (last visited July 20, 2004).

⁷⁸ See *infra* text accompanying note 13.

⁷⁹ CNNMoney, *supra* note 77.

⁸⁰ Larry Elder, *The Exploitation of the Student-Athlete*, *Capitalism Magazine*, May, 2000, available at <http://www.capmag.com/article.asp?ID=2327> (last visited July 20, 2004).

the school disappeared, the ‘Incomplete’ often reverted to an ‘F’.”⁸¹ Professors are found to give athletes passing grades when not earned by the student or to simply forego giving them a grade for the purpose of retaining their eligibility.

Commentators have also argued that universities use the Americans with Disabilities Act to further lead athletes through college by holding their hands along the way.⁸² According to Dr. Linda Bensel-Myers, at the University of Tennessee, schools may designate “some student-athletes as ‘at risk,’ presumably meaning those likely to struggle academically.”⁸³ These athletes are then enrolled in what Dr. Bensl-Myers terms “Mickey Mouse” classes, which she seems to believe are just a cover for making it easier for student-athletes to get by and retain their academic eligibility to play.⁸⁴

The graduation rates of student-athletes versus the remaining student body is also evidence that student-athletes really do not received adequate compensation in the form of a college education. For students entering college in 1996, participating Division I-A football, their graduation rate was at 54%, though the overall student body for Division I-A schools graduated at a rate of 61%.⁸⁵ The graduation rate for Division I basketball players entering college in 1996 was only 44%.⁸⁶ Though looking at NCAA student-athletes across the board, of those student-athletes entering college in 1996, they graduated at a rate of 62%, which was higher than the overall student body with a graduation rate of 59%.⁸⁷ The main focus here

⁸¹ *Id.*

⁸² *Id.*, citing to comments made by Dr. Linda Bensel-Myers, an English teacher at the University of Tennessee.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ The NCAA News, *Athlete Graduation rates continue to climb*, September 1, 2003, available at <http://www.ncaa.org/news/2003/20030901/active/4018n01.html> (last visited July 20, 2004).

⁸⁶ *Id.*

⁸⁷ *Id.*

remains is on high revenue sports, such as men's football and basketball, as they are the student-athletes who experience the largest violations of their publicity rights.

In some cases the NCAA regulations prohibiting student-athletes from entering into commercial deals may themselves hinder the education received by the student-athletes. Take Jeremy Bloom, for example. He is a communications major at the University of Colorado.⁸⁸ The NCAA bylaws, though, have prohibited him from partaking of opportunities that may advance his career as a television broadcaster. Real world experience is encouraged and considered invaluable experience by the instructors in the broadcasting programming at the University of Colorado.⁸⁹ The NCAA, by prohibiting student-athletes that are studying in the types of programs that involve television and other commercial or entertainment aspects from participating in modeling and/or television jobs, also limits the educational opportunities available to them.

Opponents of allowing additional compensation to student-athletes have argued that an athletic scholarship is adequate compensation as collegiate level athletics can act as a stage for scouts from professional leagues such as the NFL or the NBA.⁹⁰ The reality though, is most of these athletes will not make it to professional leagues. This reality creates a problem in the context of allowing student-athletes to slide by with easy and impractical course just to retain their eligibility. These student-athletes who believe they will make it to the pros, but in actuality will not, will be left on the sidelines with a inadequate education and jobless.

⁸⁸ Freedman, *supra* note 22, at 682.

⁸⁹ Freedman, *supra* note 22, at 682.

⁹⁰ Thomas Hurst & J. Grier Pressly III, *Payment of Student-Athletes: Legal & Practical Obstacles*, 7 VILL. SPORTS & ENT. L.J. 55 (2000).

So if the alleged compensation of a college education appears so inadequate, then why not compensate the players for the huge revenues they generate for the schools? If left with little education and an inability to obtain employment, why not leave a little money in the pockets of the athletes? One commentator said, “Like millions of fans, I’m more than willing to drink 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.”⁹¹ Several commentators have suggested different formulas and ideas on compensating student-athletes for the exploitations of their identities and personas by the schools they work so hard for.

VI. PROPOSALS FOR COMPENSATING STUDENT-ATHLETES

A. *Creating a Trust*

One suggestion put forth is to create a trust for the athletes, which would become available to them upon graduation. Proponents for student-athlete compensation have suggested looking to the International Olympic Committee (IOC) for guidance.⁹² The IOC collects monies from sources such as endorsement fees and places them into a trust fund, out of which the athlete’s expenses are paid.⁹³ The money is available for withdrawal when the athlete’s career has ended.⁹⁴ This suggestion prevents unjustly enriching the universities relying on the celebrity status of their student-athletes for generating revenues. It allows the athletes to reap the financial benefits of their labors, while maintaining the focus on amateur athletics.⁹⁵ Withholding the

⁹¹ Elder, *supra* note 80, quoting Frank McKissack, a writer for The Progressive.

⁹² Belo, *supra* note 64, at 154.

⁹³ Belo, *supra* note 64.

⁹⁴ Belo, *supra* note 64.

⁹⁵ Belo, *supra* note 64, at 155.

income from student-athletes while in school keeps them from being blinded by dollar signs, and maintains the focus on the task at hand: playing well on the field and getting a quality education.

B. Revenue Sharing

Another proposal for compensating student-athletes is to implement a revenue sharing program. This proposal would require amended section 12.02.2 of the NCAA Constitution, “so that student-athletes may receive a portion of revenue generated by their team.”⁹⁶ Rules 15.2 and 12.1.1 would also need to be amended or repealed in part.⁹⁷ The revenue sharing system would involve sharing the net profits generated by a sport, and then distributing in a seniority based manner.⁹⁸ For example, a player in his or her fourth year of participation would receive 1% of the net revenues; a player in his or her third year would receive 0.75% of net revenues; a player in his or her second year would received 0.5% of the net revenues; and a player in his or her first year would receive 0.25% of the net revenues generated that year.⁹⁹

This revenue sharing system also includes compensation for participation of post-season tournaments.¹⁰⁰ A suggested distribution is 65% of playoff money goes to the universities, while the remaining 35% goes to the student-athletes.¹⁰¹ The distribution for post-season revenues differs from the suggested disbursement of revenues generated during the season in that playoff

⁹⁶ Acain, *supra* note 48, at 336. Rule 12.02.2 of the NCAA By-Laws states, “Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics,” *available* at <http://www.ncaa.org>.

⁹⁷ Acain, *supra* note 48, at 337. Rule 12.1.1. states that an athlete will lose his or her amateur status if he or she, “Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport.” Rule 15.2 details acceptable types of financial aid. The complete text of both Rules is *available* at <http://www.ncaa.org>.

⁹⁸ Acain, *supra* note 48, at 337.

⁹⁹ Acain, *supra* note 48, at 338.

¹⁰⁰ Acain, *supra* note 48, at 338.

¹⁰¹ Acain, *supra* note 48, at 338.

money should be distributed based on the player's role and performance in the post-season, rather than based on the number of years a player has participated.¹⁰²

An additional aspect of the revenue sharing system allows additional compensation based on athletic or academic All-American status. Certain newspapers and magazines annually select All-American teams made up of the best players in both basketball and football.¹⁰³ Additionally, certain corporations, such as General Telephone & Electric, sponsor an academic All-American team, honoring nearly 700 men and women student-athletes.¹⁰⁴ Currently, the NCAA limits compensation for All-American status to \$300.¹⁰⁵ Under the revenue sharing plan, student-athletes receiving these awards would be allowed greater compensation.¹⁰⁶

Revenue sharing also allows for student-athletes to accept endorsements. College merchandise sales are a booming business, and it is argued that student-athletes should be able to share in the profits from such sales, as they are often the reason behind the teams' popularity.¹⁰⁷ Also, as mentioned previously, compensation to student-athletes for sale of college jerseys is more so justified as the student-athletes' persona are embodied in the jerseys and their jersey numbers.¹⁰⁸ There are three forms of suggested endorsement revenue distribution. The first involves "dividing a portion of all fees collected by university[ies] through licensing agreements."¹⁰⁹ The second form involves distributing money obtained for allowing commercial

¹⁰² Acain, *supra* note 48, at 339.

¹⁰³ Acain, *supra* note 48, at 339.

¹⁰⁴ Acain, *supra* note 48, at 340.

¹⁰⁵ Acain, *supra* note 48, at 339.

¹⁰⁶ Acain, *supra* note 48, at 339.

¹⁰⁷ Acain, *supra* note 48, at 341.

¹⁰⁸ See *supra* text accompanying notes 64-69.

¹⁰⁹ Acain, *supra* note 48, 342.

sponsorship by product manufacturers of individual teams.¹¹⁰ The third method of endorsement distribution would “allow student-athletes to endorse products both nationally and locally.”¹¹¹

C. Removal of Restriction on Part-Time Employment of Student-Athletes

One attempted solution for inadequate of compensation for student athletes has been to lift the prohibition on student-athletes holding part-time jobs.¹¹² This solution in reality creates more problems than it solves. Student-athletes already have schedules that are stretched thin. It seems unlikely that they will be able to pick up a few hours a week at the local pizzeria, fit in practice and be able to devote adequate time to their studies.¹¹³ Something has to give and it seems most likely it would be academics. Also, in argument against allowing part-time jobs, is that it may promote illegal activities. A wealthy booster may slip a student-athlete working as a server a large tip under the table, which may go easily unreported as part of the student’s salary.¹¹⁴ “By allowing the student-athletes to get jobs, the NCAA has essentially made it easier for boosters to slip favored athletes extra money.”¹¹⁵

VII. POLICY CONSIDERATIONS FOR NOT COMPENSATING STUDENT-ATHLETES

A. Educational De-Emphasis

Compensating athletes for their athletic performances takes away from the educational aspects involved with college sports. The issue of publicity rights violations must be viewed in the context of an educational institution. One criticism of the revenue sharing proposal is that it

¹¹⁰ Acain, *supra* note 48, at 342.

¹¹¹ Acain, *supra* note 48, at 342.

¹¹² Acain, *supra* note 48.

¹¹³ Acain, *supra* note 48, at 316.

¹¹⁴ Acain, *supra* note 48, at 316.

¹¹⁵ Acain, *supra* note 48, at 316.

“does not address academic values,” which directly conflicts with the purposes of the NCAA.¹¹⁶ Opponents of revenue sharing believe that turning the current system of college athletics into a professional model will cause many universities to dispose of any obligation they have to afford student-athletes with a meaningful education.¹¹⁷ An argument has been made that the devaluation of a quality education is a greater cost to the student-athletes than the benefits they would receive under a professional model.¹¹⁸ The proponents of revenue sharing seem to disregard the economic value of a college education and the potential for income over the lifetime of the student-athletes, which can be in excess of \$500,000 and surpasses the amounts of potential income of the revenue sharing model.¹¹⁹

B. Perpetuation of Stereotypes and Stigmas

Stigmas exist on college campuses that student-athletes are “dumb jocks” or are given preferential treatment as compared to other students. A division already exists between the mainstream students and student-athletes, a division that will become greater if student-athletes are given monetary compensation for playing sports. Student-athletes are most likely to feel “isolated from the institution’s academic and social mainstream.”¹²⁰ The emphasis in the revenue sharing system away from education will intensify these stigmas and feelings of isolation that student-athletes currently experience.¹²¹

Allowing a system based on a professional model may also increase or create tensions between the student-athletes themselves. Professional athletes are often paid more or less

¹¹⁶ Rodney K. Smith and Robert D. Walker, *From Inequity to Opportunity: Keeping the Promises Made to Big-Time Intercollegiate Student-Athletes*, 1 NEV. L.J. 160, 173 (2001).

¹¹⁷ *Id.* at 173.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 173-174.

¹²¹ *Id.* at 174.

depending on their position, current popularity and/or performance level. Incorporating a professional model of revenue sharing in college athletics will be harmful to player relationships. The aspect of the revenue sharing proposal that allows for post-season compensation based on post-season performance will potentially create animosity between players on the same teams. Also, players who may receive more compensation based on higher post-season performances, can become even further isolated from the mainstream of their respective educational institutions.

C. Creating an Employer-Employee Relationship

Another criticism of paying student-athletes is that workers' compensation laws would govern college sports. A system of "pay for play" creates an employment type relationship between the students and the universities.¹²² This would create incredible costs for the universities as they would become responsible for the costs of players' injuries.¹²³ Courts have in the past rejected awarding workers' compensation benefits to student-athletes based on compensation in the form of athletic scholarships for various reasons, such as lack of intent to create an employer-employee relationship, policies considering amateurism and education main priorities¹²⁴ and also by applying an economic reality test.¹²⁵ By paying athletes for their performances on the field thrusts them into the position of university employees, thereby making them eligible for workers' compensation benefits.¹²⁶ With the great risk of injury in some college sports, especially high revenue generating sports like Division I football, the schools

¹²² Hurst, *supra* note 90.

¹²³ *Id.*

¹²⁴ *See* Rensing v. Indiana State University Board of Trustees, 444 N.E.2d 1170 (Ind. 1983).

¹²⁵ *See* Coleman v. Western Michigan University, 336 N.W.2d 224 (Mich. Ct. App. 1983), where the court considered the university's right to control a scholarship athlete, the right to discipline him and the lack of payment of wages.

¹²⁶ Hurst, *supra* note 90.

could potentially be paying big money for extensive medical procedures or loss of future earning power in the case of serious injuries.¹²⁷

Also along with placing student-athletes in the position of university employees, comes the governance of labor laws. Currently, student-athletes do not qualify as employees under the National Labor Relations Act, but paying them for their athletic performances would qualify them under this act, and thereby giving them the ability to establish unions and bargain collectively.¹²⁸ Any disagreement with regard to frequency of practice, amount of payments, or even credits required to graduate, would give the student-athletes the option to strike against the universities.¹²⁹

The creation of an employment relationship may also bring to light the issue of whether to performances of the student-athletes are to be considered a work-for-hire as under the 1976 Copyright Act.¹³⁰ If a student-athlete is receiving compensation in exchange for using his persona, then an issue may arise with regard to any existing copyrights, such as a copyright in the telecasts of the sporting events. A student-athlete may still not be able to control his or her rights of publicity if a game is broadcast without his or her consent.

Take for example the case of *Baltimore Orioles v. Major League Baseball Players' Association*.¹³¹ The case of *Baltimore Orioles*, involved a clash between the Major League Baseball Clubs ("Clubs") and the Major League Baseball Players Association ("Players"). The Players accused the Clubs of misappropriating their property rights in their performances by

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ A work for hire is defined in part in 17 U.S.C. § 101 as "a work prepared by an employee within the scope of his or her employment."

¹³¹ 805 F.2d 663 (7th Cir. 1986).

making telecasts without the Players' consent.¹³² The Clubs filed an action to obtain a declaratory judgment that the Clubs owned both the exclusive rights to broadcast the games and the exclusive rights to the telecasts.¹³³ The District Court found that the Clubs owned the copyright in the telecasts as works made for hire and that the Clubs' copyright in the telecasts preempted the Players' rights of publicity in their performances.¹³⁴ The Seventh Circuit addressed the case, and undertook a work for hire analysis and preemption analysis of the facts. The Seventh Circuit agreed with the decision of the District Court that the telecasts were works made for hire, and determined that the Clubs owned the copyright to the telecasts and all rights encompassed in the copyright.¹³⁵ The Players' right of publicity claims were also dismissed as it was determined that they were preempted by Section 301 of the Copyright Act. In deciding so, the Court also noted that the Players' might have had an opportunity to negotiate for these rights when bargaining the terms of their contracts.¹³⁶ Student-athletes could continue to have their rights of publicity infringed, as their performances would most likely be considered works for hire, resulting in a preemption of any publicity claims by the Federal Copyright Act.

D. Title IX Implications

Opponents of compensating student-athletes argue that doing so will create violations of Title IX. The purpose of Title IX "is to combat gender discrimination in educational programs and activities receiving federal funding."¹³⁷ Currently, the monies received from those sports generating the highest revenues are distributed to other athletic programs that do not produce such revenues. A concern exists with programs, such as revenue sharing, that money would be

¹³² *Id.* at 665.

¹³³ *Id.*

¹³⁴ *Id.* at 666.

¹³⁵ *Id.* at 672.

¹³⁶ *Id.* at 679.

¹³⁷ Acain, *supra* note 48, at 345.

taken away from the athletic department, so as to give it to the student-athletes, thereby taking it away from other programs that currently benefit from this money.¹³⁸ The Title IX violations arise because many athletic programs that do not produce revenues and benefit from the revenues generated by other programs are women's teams.¹³⁹ To avoid violating Title IX, universities would then have to also compensate a proportionate number of female athletes to male athletes receiving compensation.¹⁴⁰ Title IX not only requires universities to provide equal opportunities for participation in athletic programs, it also requires the schools to provide equal treatment and benefits for all student-athletes.¹⁴¹ To provide equal treatment and benefits to all student-athletes, male and female, universities would be required to compensate all athletic programs the same. Some may argue that Title IX compliance does not require equal access to revenue generated by men's sports, but rather means, simply, an equal opportunity to generate revenues.¹⁴² Coming back to the fact that women's sports rarely generate revenues, though, it seems unlikely that the women's programs have the same opportunity to generate revenues.¹⁴³ Having to disburse revenues to several student-athletes, men and women both, would be incredibly costly for universities and it seems unlikely that the institutions would be willing to do this, or would even be able to financially comply with Title IX.

Other concerns arise with the potentiality of Title IX violations. Rather than to be found violating Title IX, universities may cut non-revenue producing men's sports to create funds for

¹³⁸ Acain, *supra* note 48, at 347.

¹³⁹ Acain, *supra* note 48, at 347.

¹⁴⁰ Hurst, *supra* note 90.

¹⁴¹ Hurst, *supra* note 90.

¹⁴² *Id.* See Blair v. Washington State Univ., 740 P.2d 1379 (Wash. 1987), in which the Washington Supreme Court construed equal opportunity to mean an equal opportunity to raise revenues rather than an equal access to another sport's profits.

¹⁴³ Hurst, *supra* note 90.

women's teams.¹⁴⁴ This may have already occurred on many campuses due to the execution of Title IX, and implementing a compensation program would simply exacerbate this problem. The reverse inequities of what triggered Title IX could then occur. A question arises as to whether the non-revenue generating men's programs are being treated equally and receiving the same benefits as non-revenue generating men's programs.

One of the biggest hurdles to implementing a program compensating athletes for the revenues they are generating is that most schools really cannot afford to do this. The estimated cost of compensating student-athletes generating revenues, as well as providing payment to a proportionate number of female students is \$30 million per year.¹⁴⁵ Some schools do generate the revenue to cover these costs, but many do not. Many athletic departments generally operate at a loss, especially since the implementation of Title IX.¹⁴⁶ There have been suggestions for creating additional revenues, which include increasing student activity fees, increasing tuition and ticket prices, soliciting corporate sponsorship, creating a national football championship playoff, reducing available football scholarships, and requesting professional leagues, such as the NFL, NBA and WNBA to provide support of collegiate athletics, as they are in essence, the minor leagues to these professional leagues.¹⁴⁷ It seems unlikely that many of these suggestions would be favored. Increasing tuition and fees may restrict students that do not receive athletic scholarships from being able to attend universities, and reducing athletic scholarships may prevent student-athletes who could not otherwise afford college from attending. Soliciting

¹⁴⁴ Acain, *supra* note 48, at 349.

¹⁴⁵ Hurst, *supra* note 90.

¹⁴⁶ Hurst, *supra* note 90.

¹⁴⁷ Hurst, *supra* note 90.

corporate benefactors and the professional leagues to provide support would in effect create more costs as additional personnel would be needed to do the soliciting.

VIII. CONCLUSION

It seems that compensation of student-athletes for their athletic performances may not necessarily be the perfect answer to protecting their rights of publicity. The question remains whether student-athletes should be allowed to exercise their rights of publicity. Is the right of publicity something that should be assignable? Presently, a person can assign his or her publicity rights to another. An argument can be made that student-athletes, by accepting an athletic scholarship in exchange for a chance to participate in college athletics, have assigned their rights of publicity to the universities. They turn over any control they have to control the commercial use of their personas and likenesses to the institutions they agree to play for.

The problem seems to lie, not in the fact that student-athletes do not receive compensation for the use of their personas, identities, and likenesses, but rather, the focus of college sports has become very commercialized, and student-athletes are losing focus on what they are really there for: an education. Student-athletes see the fame and fortune that is being generated by their efforts, and understandably want a piece of the action. When a head coach is making six figures or more per year, it is difficult to maintain the focus on the student-athletes' education. For example, the head football coach of Louisiana State University (LSU) recently signed a seven-year contract granting him \$2.3 million this year and increasing by \$100,000 each

year thereafter.¹⁴⁸ The contract provides that a portion of his salary comes from shoe and equipment contracts and other deals.¹⁴⁹ His previous contract of \$1.6 million included a “stipulation that required him to make at least \$1 more than the highest-paid college coach in the country if LSU won the national championship.”¹⁵⁰ Contracts such as this make it very obvious to see that a coach may do whatever is necessary to win, and do so at all costs, especially at the expense of the student-athletes’ education. These contracts also help explain why student-athletes are so anxious to get paid for their efforts. They see their coaches getting paid from shoe and equipment contracts, when they are disallowed from doing so. These companies providing money to the universities and coaches are essentially paying for the student-athlete to wear their merchandise and make it popular. It is easy to see why student-athletes have a problem with this, as they are putting in all the effort, time, and risk of injury, and their coaches and schools are reaping all the rewards.

How do we take the commercialism out of college athletics and put amateurism and academics back in? The answer is not an easy, and maybe not even a possible one. Merchandise sales will continue, video games will continue to be produced, and television contracts will continue to be made. One suggestion in response to the exploitation that occurs with jersey sales is to limit merchandise sales to t-shirts with just the institution’s name or jerseys without specific numbers. Video games could include players that appear more ambiguous and do not resemble any specific player or playing style. Addressing the exploitation of television contracts seems more difficult as it is unlikely that game broadcasts would be removed from television. It seems

¹⁴⁸ Associated Press, *Contract starts at \$2.3M a year*, Feb. 19, 2004, available at <http://sports.espn.go.com/ncf/news/story?id=1739309> (last visited July 20, 2004).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

that it may be too late to change the commercialism that is overwhelmingly present in college sports. It may not be too late, though, to bring the emphasis back on education. The focus needs to be turned back to the fact that college athletes are actually in college to get an education that will create productive members of society, on and off the field.