"J.J. MORRISON" AND HIS RIGHT OF PUBLICITY LAWSUIT AGAINST THE NCAA

Student-athletes shall be amateurs . . . motivated primarily by education . . . [and] should be protected from exploitation by professional and commercial enterprises.[1]

By Sean Hanlon and Ray Yasser[2]

I. Introduction

College sports are big business. The concomitant demand for college sports merchandise has not gone unnoticed by the National Collegiate Athletic Association ("NCAA"), the NCAA member institutions, licensees of those institutions, or black market enterprises.[3] Today's market for licensed collegiate merchandise is nearly three billion dollars per year.[4] Revenue derived from licensed collegiate

1. NCAA, 2006-07 NCAA Division I Manual, art. 2.9, at 5 (2006), *available at* http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_d1_manual.pdf [hereinafter NCAA Division I Manual].

2. Sean Hanlon received a basketball scholarship to Northwestern University. He graduated from the University of Tulsa College of Law in 2006 with the Highest Honors. After clerking for Magistrate Judge Sam Joyner in the Northern District of Oklahoma, he joined the law firm of GableGotwals in Tulsa, Oklahoma. Mr. Hanlon is currently with the law firm of Holland & Hart in Denver, Colorado.

Ray Yasser is a Professor of Law at the University of Tulsa College of Law. He has published extensively in the field of sports law and is a co-author of one of the nation's most widely used sports law casebooks. He was a "walk on" basketball player at the University of Delaware in 1967 and 1968.

Neither Mr. Hanlon nor Professor Yasser can legitimately claim to having had their names or likenesses commercially exploited by Northwestern University, the University of Delaware or the NCAA. Both, however, would like to thank University of Tulsa Law Students Sarah Goss and Melissa Taylor for their assistance in preparing this article. They also wish to thank faculty assistant Cyndee Jones for her help in all facets of the production process.

3. *See* The Collegiate Licensing Company - Application Process, http://www.clc.com/clcweb/publishing.nsf/Content/applicationprocess.html (last visited May 1, 2008) (noting existence of over 2,500 companies officially licensed by The Collegiate Licensing Company to produce collegiate sports merchandise).

4. *See* The Collegiate Licensing Company - History, http://www.clc.com/clcweb/publishing.nsf/Content/history.html (last visited May 1, 2008) (noting financial strength of collegiate licensing market); *see also* Vladimir P. Belo, Note, *The Shirts Off Their Backs: Colleges Getting Away With Violating the Right of Publicity,* 19 Hastings Comm. & Ent. L.J. 133, 134 (1996) (discussing collegiate sports market). The market was "250 million in 1984," "1 billion in 1989," and "reached 2.1 billion in 1993." *Id.*

merchandise generates substantial royalties for NCAA institutions.[5] It is no surprise that the most successful NCAA institutions also enjoy the largest share of the royalties generated by the sale of college sports merchandise. During the 2005-2006 academic year, the University of Texas Longhorns – College Football's National Champion – brought in a staggering $8.2 million in merchandising royalties, shattering the previous NCAA institution's record for merchandising royalties by more than two million dollars.[6]

In today's information age, technology has made the world a much smaller place. Star NCAA players – particularly those participating in high profile Division I sports such as basketball and football – quickly gain national attention, notoriety, and stardom.[7] As a result, college sports merchandise is not limited solely to the schools and their athletic teams, but has expanded to capitalize on the popularity of individual players.[8] Television stations recognize the appeal of individual star players and incorporate this understanding into the commercials promoting the games. In order to boost their ratings, for example, television stations frequently generate interest in college games by showing an image of the star player's jersey from each team. Or, more blatantly, the television stations will show some quick highlights of the star players with commentary such as, "Tune in to watch the country's two leading scorers – Gonzaga's Adam Morrison and Duke's J.J. Redick – go head-to-head in an epic battle that cannot be missed!"

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5. *See, e.g.*, Husky Wear, LLC, About Our Products, http://www.huskywear.com/help_answer.asp?ID=19#7 (last visited May 1, 2008) (stating "Husky Wear, LLC is a licensee with UCONN and has been since 1994 . . . [and w]hen you purchase a product on this website, a *royalty* is paid to The University of Connecticut. Each item must be approved by both The Collegiate Licensing Company and The University of Connecticut.") (emphasis added).

6. *See For the Record*, SPORTS ILLUSTRATED, Sept. 4, 2006, at 34 (reporting Texas passed previous merchandise record). The previous record for an NCAA institution's merchandising royalties was set by the University of Michigan during the 1993-94 academic year; however, the Texas Longhorns shattered that mark in the 2005-06 academic year, and have some cool toys to show for it. *See id.* For example, the Texas Longhorns' football stadium now boasts the "world's largest high-definition video display," which measures 144.85 feet diagonally and is nicknamed "Godzillatron." *See id.* (describing scoreboard at Texas' Royal-Memorial Stadium); *see also* Carter Strickland, *Georgia Ranks 4th in Royalty Revenue*, ATLANTA J. & CONST., Aug. 27, 2006, at E10 (referring to Texas royalty record amount of $8.2 million).

7. *See, e.g., Adam Morrison Has Reached Rock Star Status: Nation's Leading Scorer is Popular Across the Nation*, GOZAGS.COM (Official Site of Gonzaga University Bulldogs), Jan. 29, 2006, http://gozags.cstv.com/sports/m-baskbl/spec-rel/012906aaa.html (commenting on popularity of Adam Morrison) [hereinafter *Adam Morrison, Rock Star Status*].

8. *See* Belo, *supra* note 4, at 134 (suggesting schools are marketing individual players for their own financial gain through, for example, replica jerseys featuring star player's numbers).

Certain types of collegiate sports merchandise are quickly becoming top-sellers for NCAA member institutions and their licensees, most notably authentic or replica jerseys featuring the star players' jersey numbers and video games that quite accurately depict each individual athlete's physical appearance and athletic skill in addition to the players' numbers.[9] Undoubtedly by design, most of the jerseys made available for sale feature the uniform number of the school's star player or players. Similarly, it is not surprising that the physical attributes and athletic capabilities displayed in the video games are remarkably accurate for star players.[10]

Despite the amount of revenue that flows from a star player's identity, the NCAA prohibits a student-athlete from reaping any of the financial rewards under the guise of preserving amateurism. As mentioned, the money generated from the identities of star players certainly does not go uncollected, but rather fills the coffers of the NCAA institutions. If student-athletes generating the lion's share of this revenue are prohibited from receiving any of the proceeds, someone has to take it, right? Why not the NCAA and its licensed vendors?

Through its licensees, the NCAA exploits star players' identities for commercial gain without obtaining true consent from the student-athlete, resulting in financial injuries year after year. This practice is not appropriate – it is appropriation – and it is trampling upon the student athlete's right of publicity. Yet, the NCAA asserts that when a student-athlete signs his or her scholarship agreement, that contract incorporates all of the NCAA rules and regulations by reference, which provides the requisite consent. As this Comment will show, however, this consent is not legally viable because the athletic scholarship agreement is an unconscionable contract of adhesion.

This Comment contends that an aggrieved student-athlete possesses a viable cause of action to assert in a lawsuit against the NCAA, and offers the necessary counter-attack to defeat the NCAA's main defense of consent. In Part II, the fictitious NCAA

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9. *See* Andrew Carter, *Virtual Payoff: Video Game Provides Added Revenue for Schools*, ORLANDO SENTINEL, Aug. 15, 2006, at Sports-1 (discussing profitability of college sports games).

10. *See* EA Sports, March Madness 2006, Screenshots, http://www.easports.com/marchmadness06/theater.jsp?media=screenshots (last visited Feb. 15, 2008) (illustrating accurate depiction of virtual players based on physical attributes such as height, weight, hairstyle, skin tone, facial hair, tattoos, and other identifying characteristics such as head bands or wrist bands). Virtual players' athletic capabilities, such as speed and agility, are also represented. *See id.*

basketball player "J.J. Morrison" is introduced.[11] The hypothetical facts associated with J.J. Morrison provide the backdrop for application of the prima facie case of appropriation. In order to gain some familiarity with "big-time" intercollegiate athletics and the body governing its activities, Part III presents an overview of the NCAA, including its purposes, principles, legislative process, and the contradictory nature of its mission.[12] Part IV presents the basic law of appropriation, and the emergence of one's right of publicity.[13] Part V reviews the current literature supporting the right of publicity extending to NCAA student-athletes and concludes with J.J. Morrison's prima facie right of publicity case against the NCAA and its licensees.[14] Part VI discusses the NCAA's main defense – consent to exploit arising out of athletic scholarship agreement – but demonstrates that the defense is unavailing because athletic scholarships are unconscionable contracts of adhesion.[15] Part VII provides the final judgment, holding in favor of J.J. Morrison.

II. J.J. MORRISON

Excitement is in the air. The energy inside the arena is contagious, and you cannot believe you are sitting courtside at such a big game. The Gonzuke Bull Devils – currently rated number two in the nation – are squaring off against the top rated team in the country. The Bull Devils are fortunate to be playing this game at home, in front of their loyal fans. From your seat, you can see Dick Vitale gesticulating; a man possessed. Behind "Dickie V" a sea of electrified undergraduates are clad in navy blue and red, with faces painted to match. The students are randomly jumping around, so that from across the gym floor the group appears to be a mass of caffeinated jumping beans. The horns, drums, and other instruments from the school's band blast out *Louie, Louie* as the two teams jog back to the sidelines after warming up for last minute strategy

11. For a further discussion of the background of J.J. Morrison, see *infra* notes 16-20 and accompanying text.

12. For a further discussion of the overview of the NCAA, see *infra* notes 33-91 and accompanying text. Parts III and VI of this article have been incorporated from Sean Hanlon's previous publication, and have been modified and updated as necessary to better fit within the contours of this Comment. *See* Sean M. Hanlon, *Athletic Scholarships as Unconscionable Contracts of Adhesion: Has the NCAA Fouled Out?*, 13 SPORTS LAW. J. 41 (2006).

13. For a further discussion of appropriation and the right of publicity, see *infra* notes 92-162 and accompanying text.

14. For a further discussion of J.J. Morrison's hypothetical right of publicity case against the NCAA, see *infra* notes 211-23 and accompanying text.

15. For a further discussion of the argument why consent is an invalid defense in this context, see *infra* notes 332-67 and accompanying text.

sessions. After the *Star Spangled Banner*, the lights dim and the P.A. announcer recites the starting lineups alternating between the two teams. Last to be announced is the hometown favorite: "Starting at shooting guard for YOUR Gonzuke Bull Devils, a 6'6" junior out of Roanoke, Washington . . . NUMBER THREE . . . J.J. MORRRRR-RISON!" The crowd erupts into a fevered pitch – and this is all before the opening tip.

Meet J.J. Morrison,[16] the All-American and all-time leading scorer for not only the Gonzuke Bull Devils, but for the entire conference as well. J.J. averages 28.6 points, 7.2 rebounds, and 4.7 assists per game, shooting 92.2% from the free-throw line, and an astounding 50.8% from the field. His field goal accuracy is remarkable for a player who leads the NCAA in three-pointers made. Amazingly, J.J. Morrison's scoring average is even higher when competing against teams ranked in the Top twenty-five. This star player could write the book on the "sport's bedrock objectives: scoring and winning."[17] His notoriety and stardom spans the entire nation, reaching rock-star-status.[18]

Due to J.J. Morrison's popularity, the sale of Gonzuke sports merchandise has skyrocketed.[19] Undoubtedly the overall success in sales of all Gonzuke paraphernalia relates to J.J. Morrison's identity, and the unique contribution of his athletic skill and gamesmanship. Particular examples include: (1) Gonzuke merchandise sporting the number three (particularly authentic basketball jerseys, but also including t-shirts and other accessories), and (2) the 2007 version of EA Sports' video game *NCAA March Madness*.[20]

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16. "J.J. Morrison" is a fictitious NCAA student-athlete based on actual facts derived from both J.J. Redick of the 2005-06 Duke Blue Devils and Adam Morrison of the 2005-06 Gonzaga Bulldogs. *See* Grant Wahl, *Jewel of a Duel*, SPORTS ILLUSTRATED, Mar. 6, 2006, at 62 (comparing athletic accomplishments of J.J. Redick and Adam Morrison). Furthermore, all of the examples involving certain NCAA licensees and the marketing of actual student-athletes are also based on actual facts. For the purposes of this Comment, think of your favorite college basketball or football player, and insert that student-athlete's name and facts in place of "J.J. Morrison."

17. Wahl, *supra* note 16, at 62 (discussing athletic prowess of Morrison).

18. *See Adam Morrison, Rock Star Status, supra* note 7 (showing Morrison's popularity among commentators, on ESPN and on Internet blogs).

19. *See, e.g.*, Melodie Little, *Zags In Fashion: Sales of GU Merchandise Take Off, Both at Campus Store and Online*, SPOKESMAN REVIEW (Spokane, Wash.), Nov. 4, 2006, at A1 (quoting Dave Heinze, director of Gonzaga's campus stores, collegiate licensing and online sales) (Gonzaga University's "online sales have risen by roughly 400 percent" over the past five years). Heinze attributes "the growing interest in Zagswear to the success of the men's basketball team and interest in former forward Adam Morrison." *Id.*

20. *See* Tim Surette, *Morrison Chosen as Face of* NCAA March Madness 07, GAMESPOT NEWS, Oct. 30, 2006, http://www.gamespot.com/news/6160729.html

A. Authentic Jerseys, T-shirts, and Other Accessories Featuring #3

During J.J. Morrison's stint as a Gonzuke basketball player, the popularity of the Gonzuke basketball program flourished. Before J.J. Morrison, the market for Gonzuke merchandise was basically limited to local die-hards, current students, and alumni. Now, officially licensed vendors of Gonzuke sports merchandise entertain daily orders from all over the country, and are flooded with orders during the holiday season and the NCAA postseason tournament.[21] Some of the most popular items are the authentic Gonzuke basketball jerseys, t-shirts, and other accessories featuring the number three. Although NCAA rules prohibit the appearance of J.J. Morrison's name on any of these items, some licensed vendors find subtle – and sometimes not so subtle – ways of marketing the item by exploiting J.J. Morrison's identity for commercial gain without his consent.[22]

Consider the following examples.[23] One licensee of Gonzuke has the following description on its website associated with a picture of a Gonzuke basketball jersey number three:

> This great new adult jersey from Colosseum features sewn on letters and logos and the number of one of [Gonzuke's] finest player[s] this year. NCAA rules prohibit the use of a player's name, but we all know who wears this one![24]

Another vendor of Gonzuke University merchandise, even goes so far as to include the words "J.J. Morrison Jersey" above the online

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(reporting EA Sports' *NCAA March Madness 2007* was released on Microsoft's Xbox 360 and Sony's PlayStation 2 game platforms on January 16, 2007, and Adam Morrison was chosen for cover of game).

21. *See* Little, *supra* note 19, at A1 ("[Gonzaga University merchandise] is made by about 100 manufacturers throughout the country that are approved by the Collegiate Licensing Co. to manufacture and sell branded products. In return, Gonzaga gets royalties. The popularity of our men's basketball team kind of put us on the map around the country.").

22. These tactics are above and beyond the automatic association most sports fans make – the identification of the star player with the college sports merchandise featuring that star player's number.

23. The examples are taken from actual practices, but, for the purposes of this Comment, the text substitutes the school name "Gonzuke" and the player name "J.J. Morrison" and the number "three" in place of the actual school and student-athletes.

24. Husky Wear, LLC - Jerseys, http://huskywear.com/jerseys.php (last visited Nov. 10, 2006) (referring to then University of Connecticut player Rudy Gay). Although Rudy Gay is now playing in the NBA, this quote appeared on this website during Rudy Gay's tenure as an NCAA student-athlete. *See id.*

picture of a Gonzuke basketball jersey bearing the number three and selling for the price of $70.00.[25] Also listed next to the jersey is the statement: "[s]upport your favorite [Gonzuke] basketball player with this handsome replica jersey."[26] This description may connote support of the student-athlete in a moral or emotional sense, but it certainly does not provide any remuneration. Additionally, an email sent to this particular vendor confirmed that "all of the NCAA products [for sale by this vendor] are officially licensed."[27]

An alumnus of Gonzuke University, and current director of Gonzuke's campus stores, collegiate licensing and online sales "attributes the growing interest in [Zuke-wear] to the success of the men's basketball team and the interest in [shooting guard J.J. Morrison] . . . . Anything with the No. 3 on it we could sell. He [is] just hugely popular."[28]

B. Video Game by EA Sports: *NCAA March Madness*

The popular video games created by Electronic Arts (EA) Sports – such as *NCAA March Madness 2006* – not only utilize the specific jersey numbers associated with current individual NCAA student-athletes, but have made full use of today's amazing graphics to create realistic images. The game depicts stadiums, school uniforms, mascots, and individual *players* with remarkable accuracy. To promote, market, advertise, and sell the video game, EA Sports'

25. *See* Seattle Team Shop, Derek Raivio Gonzaga Jersey, http://www.seattleteams.com/istar.asp?a=6&id=00011388X05R!NIKE&csurl=%2Fistar%2Easp%3Fa%3D3%26dept%3DGONZ%26class%3DJERSEY%26 (last visited Nov. 10, 2006) (marketing Gonzaga University basketball jersey with number five) [hereinafter Raivio Jersey]. This licensed vendor included a caption - "Derek Raivio Jersey" - above the image of the jersey for sale. *See id.* While this online picture and caption was displayed, Derek Raivio was an NCAA student-athlete. *See* Gonzaga University Men's Basketball - Player Bio: Derek Raivio, http://gozags.cstv.com/sports/m-baskbl/mtt/raivio_derek00.html (last visited May 1, 2006) (listing Raivio as current player during relevant time). Raivio was a senior point guard for the 2006-2007 Gonzaga University Bulldogs, coming off of a junior season where he started 31 of the 33 games for the Bulldogs. *See id.* Raivio's career free throw percentage of 90.3 ranked first, at the time, in the NCAA, and after his junior season he was ranked 7th in three pointers made, 10th in steals, and was only 17 assists shy of being ranked 10th all-time among Gonzaga University Men's Basketball players. *See id.*

26. *See, e.g.,* Raivio Jersey, *supra* note 25 (suggesting site marketed apparel using Derek Raivio)

27. E-mail from Conor Glassey, e-Commerce Manager, JAS Sports Inc., to Sean M. Hanlon, Law Student, University of Tulsa College of Law (Oct. 6, 2006, 14:50 CST) (on file with author) (confirming products on Seattle Team Shop's website, particularly Gonzaga University replica jerseys, are officially licensed). The representative from Seattle Team Shop stated: "Yes – all of the NCAA products that we sell are officially licensed." *Id.*

28. Little, *supra* note 19, at A1.

television commercials and website prominently display images of identifiable star players, including J.J. Morrison.[29]

The video game is officially licensed by the NCAA, and produces six-figure paydays for some NCAA institutions.[30] EA Sports, which also makes college baseball and college football video games, is the Collegiate Licensing Company's "single largest licensee."[31] At some NCAA schools, these video games are proving to be "as profitable as any non-apparel item."[32]

III. AN OVERVIEW OF THE NCAA: ITS PURPOSES, PRINCIPLES, LEGISLATIVE PROCESS, & CONTRADICTORY MISSION

Today's NCAA[33] has expanded to include 1,281 voluntary member institutions and their student-athletes.[34] The organization is devoted to the sound administration of intercollegiate athletics.[35] The NCAA was formed with noble intentions and high ideals.[36] Since its inception in the early 1900s, the array of NCAA rules and regulations have increased exponentially to the point where the NCAA controls much of intercollegiate athletics.[37] The NCAA:

29. *See* EA Sports, March Madness 2006, Screenshots, *supra* note 10 (noting resemblance of players in video game to actual NCAA basketball players).

30. *See* Carter, *supra* note 9, at Sports-1 (stating that *NCAA Football 2006* "made more than enough for EA to spread royalties among every school represented in the game").

31. *Id.*

32. *Id.*

33. *See* Louis Hakim, *The Student-Athlete vs. The Athlete Student: Has the Time Arrived for an Extended-Term Scholarship Contract?*, 2 VA. J. SPORTS & L. 145, 153-55 (2000) (detailing President Theodore Roosevelt's involvement with birth of NCAA); s*ee also* Sarah M. Konsky, Comment, *An Antitrust Challenge to the NCAA Transfer Rules*, 70 U. CHI. L. REV. 1581, 1582 (2003); Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 489 (1995); Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 12 (2000) (discussing early history of NCAA).

34. *See* NCAA Membership Composition and Sport Sponsorship, http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html (last visited May 1, 2008) (tallying number of teams in three NCAA divisions).

35. *See* RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 3 (Univ. Press of America 1985) (identifying NCAA among institutions that govern amateur sports).

36. For example, the NCAA goals, purposes, and principles discussed in this Comment are much truer to form when analyzing Division III athletics. These noble standards, however, have been clouded at the Division I level where money and big business have flourished and take precedence over the foundational purposes for which the NCAA was put into existence (namely, student-athlete welfare and amateurism).

37. *See generally* Smith, *supra* note 33, at 10 (explaining how NCAA rules manual grew from 161 pages in 1970-71 to three volumes totaling over 1,000 pages in 1998-99). Today, the three manuals total 1,179 pages. *See* NCAA DIVISION I MANUAL, *supra* note 1 (containing 476 pages); NCAA, 2006-2007 NCAA DIVISION II

> regulates athletic competition among its members, sets rules for eligibility to participate, establishes restrictions and guidelines for recruitment of prospective student-athletes, conducts several dozen championship events in the sports sanctioned by the association, enters into television and promotional contracts relating to these championship events, and enters into agreements to license the NCAA name and logos.[38]

The current structure of the NCAA functions like a large corporation. The NCAA operates through the Council, the Executive Committee, and the Board of Directors – formerly referred to as the Presidents Commission.[39] The Council - the NCAA's ruling body - consists of "a president, secretary-treasurer, and forty-[nine] institutional representatives who set general policy and oversee the various committees."[40] The Executive Committee is comprised of twenty members, and "oversees the organizational bureaucracy and ongoing business."[41] The Board of Directors has eighteen members and generally oversees the NCAA, conducts studies of intercollegiate athletics issues with the purpose of gaining knowledge to urge certain courses of action, and proposes legislation.[42]

The NCAA also has a Committee on Infractions serving as its enforcement arm.[43] This Committee on Infractions hears cases, oversees investigations about potential rule violations, and levies

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MANUAL (2006), *available at* http://www.ncaa.org/library/membership/division_ii_manual/2006-07/2006-07_d2_manual.pdf (containing 372 pages); NCAA, 2006-2007 NCAA DIVISION III MANUAL (2006), *available at* http://www.ncaa.org/library/membership/division_iii_manual/2006-07/2006-07_d3_manual.pdf (containing 331 pages).

38. YASSER ET AL., *supra* note 35, at 2-3.

39. *See* Ray Yasser, *A Comprehensive Blueprint for the Reform of Intercollegiate Athletics*, 3 Marq. Sports L.J. 123, 125 (1993) [hereinafter, Yasser, *Blueprint*] (describing NCAA administrative structure); *see also* NCAA DIVISION I MANUAL, *supra* note 1, art. 4.2.1, at 21 (reporting on makeup of Board of Directors). The Board of Directors includes eighteen members and is comprised of presidents or chancellors. *See id.*

40. NCAA DIVISION I MANUAL, *supra* note 1, art. 4.5.1, at 24 ("Management Council shall include 49 members.").

41. Konsky, *supra* note 33, at 1582 (providing overview of NCAA); *see also* NCAA DIVISION I MANUAL, *supra* note 1, art. 4.1.1-4.1.2, at 21 (defining role of Executive Committee).

42. *See* NCAA DIVISION I MANUAL, *supra* note 1, art. 4.1-4.5, at 21-28 (describing Board of Directors role).

43. *See* Konsky, *supra* note 33, at 1582 (explaining NCAA Council's structure); *see also* Yasser, *Blueprint*, *supra* note 39, at 128 (noting NCAA has own Infractions Committee).

penalties.[44] Institutions under fire may appeal the rulings by the Committee on Infractions. The NCAA Council may hear any appeal as the final stage of the enforcement process.[45]

The NCAA is divided into three divisions: Division I, Division II, and Division III.[46] A variety of factors determine the division to which a member institution belongs. These factors include the number of sports offered at the institution, and whether and to what extent athletic scholarships are available.[47] This Comment will focus on Division I sports and will solely utilize the 2006-2007 NCAA Division I Manual.

A. NCAA Purposes and Goals

The fundamental policy of the NCAA is:

> The competitive athletics programs of member institutions are designed to be a vital part of the *educational system.* A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the *educational program* and the athlete as an integral part of the student body and, by so doing, *retain a clear line of demarcation between intercollegiate athletics and professional sports.*[48]

Thus, the NCAA declares that the organizational pillars are: education and amateurism.[49]

In addition to serving the goals of education and amateurism, the NCAA further outlines nine purposes that the NCAA and its members should strive to achieve.[50] Of the nine purposes listed,

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44. *See* Konsky, *supra* note 33, at 1582; *see also* Yasser, *Blueprint*, *supra* note 39, at 128-29 (defining duties of Infractions Committee).

45. *See* Yasser, *Blueprint*, *supra* note 39, at 129 (explaining appeals process).

46. *See* Ray Yasser & Clay Fees, *Attacking the NCAA's Anti-Transfer Rules as Covenants Not to Compete*, 15 Seton Hall J. Sport L. 221, 223 (2005) (acknowledging three divisions of schools belonging to NCAA). NCAA Division I Football further delineates into Division I-A and Division I-AA. *See id.*

47. *See id.* (listing factors NCAA considers when classifying school within particular division).

48. NCAA DIVISION I MANUAL, *supra* note 1, art. 1.3.1, at 1 (emphasis added).

49. *See* Yasser, *Blueprint*, *supra* note 39, at 126 (analyzing some of NCAA's inherent problems). Professor Yasser argues that the NCAA's contradictory goals of preserving amateurism in athletics while making as much money as possible for member schools leads to an intercollegiate sports structure that is seriously flawed and requires reform. *See id.*

50. *See* NCAA DIVISION I MANUAL, *supra* note 1, art. 1.2, at 1 (identifying purposes of NCAA). At NCAA Division I Manual details at the ouset:

> The purposes of this Association are:
> To initiate, stimulate and improve intercollegiate athletics programs for student-athletes and to promote and develop educational leadership,

one is particularly noteworthy in the context of this Comment. NCAA Article 1.2(c) provides that one of the purposes of the NCAA is "[t]o encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism."[51]

B. NCAA Principles

There are sixteen principles listed under Article 2 of the NCAA Constitution.[52] For the purpose of this Comment, the principles of primary importance include: (1) the student-athlete's well-being,[53] (2) amateurism,[54] and (3) governing eligibility.[55] Other interre-

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physical fitness, athletics excellence and athletics participation as a recreational pursuit;

To uphold the principle of institutional control of, and responsibility for, all intercollegiate sports in conformity with the constitution and bylaws of this Association;

To encourage its members to adopt eligibility rules to comply with satisfactory standards of scholarship, sportsmanship and amateurism;

To formulate, copyright and publish rules of play governing intercollegiate athletics;

To preserve intercollegiate athletics records;

To supervise the conduct of, and to establish eligibility standards for, regional and national athletics events under the auspices of this Association;

To cooperate with other amateur athletics organizations in promoting and conducting national and international athletics events;

To legislate, through bylaws or by resolutions of a Convention, upon any subject of general concern to the members related to the administration of intercollegiate athletics; and

To study in general all phases of competitive intercollegiate athletics and establish standards whereby the colleges and universities of the United States can maintain their athletics programs on a high level.

Id.

51. *Id.* art. 1.2(c), at 1 (listing one purpose of NCAA).

52. *See generally id.* art. 2, at 3-5 (requiring legislation enacted by NCAA to further at least one of sixteen enumerated principles).

53. *See id.* art. 2.2, at 3 ("The Principle of Student-Athlete Well-Being").

54. *See id.* art. 2.9, at 5 ("The Principle of Amateurism").

55. *See id.* art. 2.12, at 5 ("Eligibility requirements shall be designed to assure proper emphasis on educational objectives, to promote competitive equity among institutions, and *to prevent exploitation of student-athletes.*") (emphasis added).

lated principles include the principle of institutional control and responsibility,[56] and the principle of competitive equity.[57]

C. The Byzantine NCAA Legislation Process

The NCAA legislation process is more complicated than the process by which bills become laws in the United States Congress.[58] NCAA proposals for legislation (legislative ideas, equivalent to bills) can be proposed by an NCAA Conference legislative recommendation, the NCAA Management Council or Board of Directors, an NCAA Cabinet or Committee, an NCAA member, or simply a referral to the NCAA from any source.[59] Next, the proposal goes to the Management Council for formal initial consideration.[60] If approved, the Management Council must notify all of the NCAA

56. *See id.* art. 2.1, at 3 (outilining "Principle of Institutional Control and Responsibility"). The Principle of Institutional Control and Responsibility reads as follows:

> 2.1.1 Responsibility for Control. It is the responsibility of each member institution to control its intercollegiate athletics program in compliance with the rules and regulations of the Association. The institution's president or chancellor is responsible for the administration of all aspects of the athletics program, including approval of the budget and audit of all expenditures.
>
> 2.1.2 Scope of Responsibility. The institution's responsibility for the conduct of its intercollegiate athletics program includes responsibility for the actions of its staff members and for the actions of any other individual or organization engaged in activities promoting the athletics interest of the institution.

Id.

57. *See id.* art. 2.10, at 5 ("The structure and programs of the Association and the activities of its members shall promote opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics.").

58. *See* Project Vote Smart - Government 101: How a Bill Becomes a Law, http://www.vote-smart.org/resource_govt101_02.php (last visited May 1, 2008) (describing process through which U.S. bill becomes law). For a bill to become a law, either the Senate or the House of Representatives must first introduce it as an idea for legislation. *See id.* The bill is then discussed in Committee Hearings before it goes on to Floor Action in the house in which the bill was first introduced. *See id.* If passed in that house, it goes to the other house for Committee Hearings and Floor Action. *See id.* If the bill is then passed in the second house, it goes to the State Governor or President (bills under consideration to become state laws would go to the Governor of that particular state, while bills under consideration to become federal laws would go to the President of the United States) to be accepted or vetoed. *See id.* Once the President or Governor signs a bill or both houses override a veto, the bill becomes a law. *See id.*

59. *See generally* NCAA DIVISION I MANUAL, *supra* note 1, art. 5, at 31-46 (identifying first step in NCAA legislative process); *see also id.* art. 5.3.2.2.1, at 36 (explaining approval process); *id.* figs. 5.1-5.2, at 44-45 (displaying NCAA legislative process in charts).

60. *See id.* art. 5.3.2.4.1, at 38 (explaining step in NCAA legislative process).

member institutions of the proposal.[61] That notification triggers a sixty-day comment period during which the members can give input to the Management Council.[62] After the sixty-day comment period expires, the Management Council reconvenes for a second consideration of the proposal, taking into account any comments.[63] If the second consideration is approved without significant modification,[64] the proposal goes to the Board of Directors for consideration.[65] If approved without significant modification,[66] the Board of Directors must notify the members, triggering a sixty-day period in which members disagreeing with the approved proposal can request membership override.[67] If there is a request for an override vote, and the override board attains at least a five-eighths majority vote, then the proposal is denied.[68] But, if there is either no call for an override vote, or if the override board does not attain a five-eighths majority vote, then the Board of Directors' action is final and the proposal becomes NCAA legislation.[69]

In addition to the general NCAA legislative process, it is important to discuss the basis of NCAA legislation,[70] the approaches to the legislative process,[71] and the different categories of legislation

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61. *See id.* art. 5.3.2.4.2, at 38 (explaining step in NCAA legislative process).

62. *See id.* (explaining step in NCAA legislative process).

63. *See id.* art. 5.3.2.2.1, at 36. (explaining step in NCAA legislative process).

64. *See id.* art. 5.3.2.2.2.1, at 36 (explaining effect of type of modification on proposed legislation). The NCAA rule for altering a proposal states:

> If the Management Council alters a proposal after its initial approval but does not increase the modification of existing legislation beyond that of its initial proposal, it may proceed to take action to forward the proposal to the Board of Directors. If the alteration increases the modification beyond that initially approved, the Management Council shall forward the altered proposal to the Division I membership for review and comment before taking final action.

Id.

65. *See id.* (explaining step in NCAA legislative process).

66. *See id.* (explaining step in NCAA legislative process).

67. *Id.* art. 5.3.2.3, at 37 (explaining membership override). The NCAA procedural rule for a membership override states:

> The member institutions may override (e.g., rescind) the adoption of legislation enacted under the procedures set forth in Constitution 5.3.2.2.2 or the failure of the Board of Directors, or of the Management Council in legislative areas delegated to it by the Board in accordance with Constitution 5.3.2.2.1.2 to act on or adopt legislation initiated and considered through the legislative process. (*Adopted 1/9/96, effective 8/1/97)*

Id.

68. *See id.* art. 5.3.2.3.3, at 37 (explaining step in NCAA legislative process).

69. *See id.* art. 5.3.2.2.2, at 36 (explaining step in NCAA legislative process).

70. *See id.* art. 5.01.1, at 31 (outlining basis of legislation).

71. *See id.* art. 5.01.2, at 31 (identifying approaches to legislation).

involved.[72] The basis for NCAA legislation is to ensure that it is "consistent with the purposes and fundamental policy set forth in Constitution 1,[73] and shall be designed to *advance one or more principles such as those set forth in Constitution 2.*"[74]

The NCAA has two approaches with respect to its legislative process.[75] First, the NCAA "recognizes that certain fundamental policies, practices and principles have applicability to all members."[76] Second, the NCAA realizes that some legislation will only be applicable to "division groupings of members, based on a common philosophy shared among the individual members of the division and . . . are common to the nature and purposes of the institutions in the division."[77]

As a result of the recognized approaches, NCAA legislation is divided into four categories:[78] (1) dominant, (2) division dominant, (3) common, and (4) federated.[79] "A dominant provision is one that applies to all [NCAA members] and is of sufficient importance to the entire membership . . . ."[80] A division dominant provision only "applies to members of a certain division and is of sufficient importance to that division."[81] A common provision applies "to more than one of the divisions of the [NCAA.]"[82] Finally, "a federated provision is a regulation adopted by a majority vote of the delegates present and voting of one or more of the divisions or subdivisions of the Association . . . [and] applies only to the division(s) or subdivision(s) that adopt(s) it."[83]

The NCAA Constitution's fundamental policies, purposes, and principles are dominant provisions applying to all NCAA mem-

72. *Id.* art. 5.02.1, at 31 (defining categories of legislation).

73. *Id.* art. 1.3.1, at 1.

74. *Id.* art. 5.01.1, at 31 (emphasis added).

75. *Id.* art. 5.0.1.2, at 31 (recognizing duel approaches to legislation).

76. *Id.*

77. *Id.*

78. *See id.* art. 5.02.1, at 31 (listing four categories of legislation).

79. *See id.* (noting that each category is identified in NCAA Manual by different symbol). A dominant provision is identified by an asterisk (*), a division dominant provision is identified by a diamond (◊), a common provision is identified by the pound sign (#), and a federated provision is identified by the Roman numeral(s) of the division(s) or subdivision(s) to which the provision is applicable. *See id.*

80. *Id.* art. 5.02.1.1, at 31 (defining dominant legislation).

81. *Id.* art. 5.02.1.1.1, at 31 (defining division dominant legislation).

82. *Id.* art. 5.02.1.2, at 31 (defining common legislation).

83. *Id.* art. 5.02.1.3, at 31 (defining federated legislation).

bers.[84] The NCAA Bylaws governing amateurism, analyzed in this Comment, are common provisions, applying to NCAA Division I, II, and III sports.

D. NCAA's Contradictory Mission

Over the years, the NCAA has been subject to criticism regarding the contradictory nature of its mission.[85] The NCAA purports to preserve the ideals of amateurism and student-athlete welfare on one hand, while trying to make as much money as possible for its member schools on the other hand. Consequently, the principle of student-athlete welfare has eroded over time, blurring the principle of amateurism along with it.[86] Over the course of the NCAA's existence, big-time intercollegiate athletics has grown into a multi-billion dollar industry and NCAA member institutions and their licensees strive to cash in on the loot.[87] The NCAA's principle of amateurism states that "student-athletes should be protected from exploitation by professional and commercial enterprises";[88] however, the NCAA not only allows this exploitation to occur by its licensees, but also actively participates in the exploitation through its own member institutions, all the while collecting a steady flow of royalties. Therefore, as the great fortune of big-time intercollegiate athletics flourishes, the principle of student-athlete welfare erodes, the principle of amateurism blurs, and the lofty mission of the NCAA is contradicted.[89] Mario Puzo was correct when he began his classic novel, *The Godfather,* with, "Behind every great fortune there

84. *See generally id.* art. 1, at 1 (showing Article One is dominant provision); *see also id.* art. 2, at 3-5 (showing Article Three is dominant provision).

85. *See* Yasser, *Blueprint*, *supra* note 39, at 155-56 (providing conflict of interest argument involving NCAA).

86. *See* Kevin B. Blackistone, *As Colleges Go Big-Time, Scholarships Lose Worth*, DALLAS MORNING NEWS, Apr. 4 1998, at 1B (reporting one college basketball coach motivated players by threatening to take away their scholarships if they did not perform at certain levels).

87. *See id.* (noting schools' preoccupation with winning and financial benefits associated with winning may result in harm to students' welfare).

88. NCAA DIVISION I MANUAL, *supra* note 1, art. 2.9, at 5 (identifying NCAA's principle of amateurism).

89. *See e.g., id.* arts. 2.2, 2.9, at 3, 5 (identifying student-athlete welfare and amateurism as NCAA principles).

is a crime."[90] The time has come to reform the structure of big-time intercollegiate athletics as governed by the NCAA.[91]

IV. LAW OF APPROPRIATION & THE "RIGHT OF PUBLICITY"

The "right to privacy" - or the invasion of privacy - is "largely a twentieth-century concept."[92] It is reputed to have begun with the famous phrase, "the right to be let alone," which appeared in a late 19th century torts treatise written by Judge Cooley of the Michigan Supreme Court.[93] Judge Cooley's treatise "analyzed a series of nineteenth-century court decisions on defamation, trespass upon a personal property right (such as lectures or publications), and breach of confidence under implied contract law."[94] When viewed in the aggregate, Judge Cooley deduced that these decisions were striving to protect the broader "right to be let alone."[95]

Amazingly, the law of appropriation as we know it today emerged from two highly influential law review articles. Taken together, these law review articles molded and clarified the courts' understanding and acceptance of the principles contained in the law of privacy, ultimately creating four "invasion of privacy" torts. Appropriation is one of these torts. In order to understand the evolution of the law of appropriation, an introduction to these important articles is necessary.

A. Warren and Brandeis: *The Right to Privacy*

In 1890, Samuel Warren and Louis Brandeis wrote a now famous law review article that expounded upon Judge Cooley's "right to be let alone" concept.[96] Warren and Brandeis were the first to

90. MARIO PUZO, THE GODFATHER Title Page (Putnam 1969). Puzo begins his classic novel with this quote from Balzac. *See id.* As an interesting side note, *The Godfather* was the favorite book of Walter Byers, the NCAA's first executive director. *See* Don Yaeger, UNDUE PROCESS: THE NCAA'S INJUSTICE FOR ALL 7 (Sagamore Pub. 1991) (acknowledging Byers' favorite book).

91. *See* Yasser, *Blueprint*, *supra* note 39, at 123 (summarizing article). The article describes a comprehensive proposal to reform the current NCAA which offers a working "blueprint for restructuring, not a call for demolition." *Id.* Professor Yasser takes a hard look at the NCAA, piece by piece, and then proposes solutions to make the reformed NCAA "something stronger and more beautiful." *Id.* His solutions derive from the underlying goal of having college sports occupy a "more appropriate role in the life of the university." *Id.*

92. WILLIAM R. BUCKLEY & CATHY J. OKRENT, TORTS AND PERSONAL INJURY LAW 151 (3d ed. Thompson Delmar Learning 2004).

93. *See id.* (identifying roots of invasion of privacy tort).

94. *Id.*

95. *Id.*

96. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (noting subject matter of article). Collaborators Warren and

coin the phrase "right to privacy" and argued for it to be legally recognized.[97] In fact, Warren and Brandeis' seminal law review article is "generally credited with significant influence in prompting ultimate judicial acceptance of the [invasion of privacy] tort";[98] however, the article "had little immediate effect upon the law."[99] In 1902, for instance, the Court of Appeals of New York – in a 4-3 decision – rejected Warren and Brandeis' support of a right of privacy and declared that the right of privacy did not exist.[100] The Court's reasoning for rejecting the right of privacy included "lack of precedent, the purely mental character of the injury, [and] the 'vast amount of litigation' that might be expected to ensue."[101] Interestingly, the Court's decision resulted in so much public disapproval that (1) a concurring judge "[took] the unprecedented step of publishing a law review article in defense of the decision," and (2) the "next New York Legislature enacted a statute making it both a misdemeanor and a tort to make use of the name, portrait or picture of any person 'for advertising purposes or for the purposes of trade' without his written consent."[102]

For the next three decades, the courts were in continual disagreement over whether a right to privacy existed.[103] After this period of indecisiveness, a strong majority of jurisdictions began to recognize the right to privacy, while the remaining courts still rejecting such a view began to be overturned.[104]

Brandeis graduated first and second in their class from Harvard Law School in 1877. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 384 (1960) (explaining background of co-authors). *See also* BUCKLEY & OKRENT, *supra* note 92, at 151 (suggesting Warren and Brandeis article expanded on Judge Cooley's original concept of "right to be let alone").

97. *See* Claire E. Gorman, Note, *Publicity and Privacy Rights: Evening Out the Playing Field for Celebrities and Private Citizens in the Modern Game of Mass Media*, 53 DEPAUL L. REV. 1247, 1252 (2004) (tracing genesis of right to privacy tort to Warren and Brandeis article); *see also* BUCKLEY & OKRENT, *supra* note 92, at 151 (naming co-authors of *The Right to Privacy* article as first to articulate term).

98. JOHN L. DIAMOND, LAWRENCE C. LEVINE, & M. STUART MADDEN, UNDERSTANDING TORTS 451 (2d ed. Lexis 2000). The law review article written by Samuel D. Warren and Louis D. Brandeis is "regarded as the outstanding example of the influence of legal periodicals upon the American law." Prosser, *supra* note 96, at 383.

99. Prosser, *supra* note 96, at 384.

100. *See id.* at 385 (referring to *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538 (1902) (rejecting right to privacy concept)).

101. *Id.*

102. *Id.* (referring to Denis O'Brien, *The Right of Privacy*, 2 Colum. L. Rev. 437 (1902)).

103. *See id.* at 386 (noting lack of consensus among states over whether tort existed).

104. *See id.* (providing list of states that recognized right of privacy as of 1960).

B. Dean William L. Prosser: *Privacy*

By 1960 there were over 300 cases dealing with the law of privacy; however, most cases dealt with "whether the right of privacy existed at all."[105] At this point in time, the law of privacy was often described as "a haystack in a hurricane."[106] Seeking to advance the law surrounding the right of privacy, Dean William L. Prosser wrote a law review article to specifically articulate what interests the right to privacy protects, and against what conduct this protection is necessary.[107] Dean Prosser theorized that within the law of privacy there exist "four distinct kinds of invasions of four different interests of the plaintiff."[108] The only commonality existing among the newly identified invasion of privacy torts was "that each represents an interference with the right of the plaintiff. . . 'to be let alone.'"[109] The invasion of privacy torts were described as:

> 1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
> 2. Public disclosure of embarrassing private facts about the plaintiff.
> 3. Publicity which places the plaintiff in a false light in the public eye.
> 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[110]

The fourth invasion of privacy tort identified by Prosser involves the "exploitation of attributes of the plaintiff's identity."[111] The tort arises when the defendant appropriates the plaintiff's name or likeness, without consent, resulting in a benefit or advantage for the defendant.[112] In a footnote, Dean Prosser remarked that "[i]t is not impossible that there might be appropriation of the plaintiff's identity . . . without the use of either his name or likeness, and that this would be an invasion of his right of privacy."[113] At the

105. *Id.* at 388 (suggesting early cases were concerned with issue of whether tort existed).

106. *Id.* at 407 (categorizing privacy law during 1960s as scattered).

107. *See id.* at 388 (summarizing purpose of article). William Prosser served as Dean of the College of Law at UC Berkeley. *See id.* at 383 n.* (noting professional position of Dean Prosser).

108. *Id.* at 389 (articulating different categories of invasions).

109. *Id.* at 389.

110. *Id.* (identifying four types of invasions).

111. *Id.* at 401.

112. *See id.* at 401-02 (defining tort of appropriation).

113. *Id.* at 401 n.155.

time of Dean Prosser's article, however, no such cases had arisen.[114] For Prosser, the central feature running through this privacy tort involves the symbol of the plaintiff's identity. Appropriation does not occur unless the *symbol* of the plaintiff's identity is pirated for the defendant's advantage without the plaintiff's consent.[115]

The courts' determination of appropriation turns on a two-step analysis. First, the courts must determine "whether there has been appropriation of an aspect of the plaintiff's identity."[116] This could include any symbol - such as a fictitious stage name - so long as it "can be so identified with the plaintiff that he is entitled to protection against its use."[117] Second, the courts must determine "whether the defendant has appropriated the name or likeness for his own advantage."[118] Prosser notes that while the statutes have limited the defendant's advantage strictly to pecuniary advantage, the common law has not been so restrictive – finding appropriation to exist, for example, when the defendant posed as plaintiff's common law wife.[119] In most cases, however, the commercial element must be present for appropriation to exist.

Appropriation differs drastically from the other three privacy torts listed by Prosser in terms of the interest being protected.[120] For the privacy torts of intrusion, public disclosure of private facts, and false light in the public eye, the interest is largely mental.[121] Appropriation, on the other hand, involves a proprietary interest in the "exclusive use of the plaintiff's name or likeness as an aspect of his identity."[122] This proprietary interest exists as "a right of value upon which the plaintiff can capitalize by selling licenses."[123]

Dean Prosser's article was so influential that his four-tort model of the legal right of privacy was adopted in the *Restatement*

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114. *See id.* (admitting case involving these circumstances had not arisen at time article was written).

115. *See id.* at 403 ("It is the plaintiff's name as a *symbol of his identity* that is involved here, and not his name as a mere name.") (emphasis added).

116. *Id.*

117. *Id.* at 404 (expanding protection to include fictitious or stage names associated with person).

118. *Id.* at 405 (discussing "for his own advantage" requirement).

119. *See id.* at 405 n.180 (providing examples of non-pecuniary advantages).

120. *See id.* at 406 (contrasting appropriation with other three categories of invasions).

121. *See id.* (identifying protected interest in three other categories of invasions).

122. *Id.*

123. *Id.*

(Second) of Torts.[124] With respect to appropriation, section 652C provides: "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."[125] It is clear from the hundreds of case citations utilizing Prosser's model that the four invasions of privacy torts are well established in American jurisprudence.

C. Emergence of the "Right of Publicity" & Its Embodiment in *Restatement (Third) of Unfair Competition*

While it became clear that Dean Prosser's four-tort model – designed to protect various privacy interests from certain identified conduct – enjoys judicial acceptance, it is less clear how commercial injuries under the appropriation tort fall under an invasion of one's privacy. This confusion becomes even more apparent when dealing with celebrities or other individuals whose identity carries some form of notoriety or fame. Some of the early decisions dealing with this question "preclud[ed] celebrities from invoking a right of privacy to prevent unauthorized commercial use of their names or likenesses."[126] In *O'Brien v. Pabst Sales Co.*, a famous college football player's photograph was included in a calendar made by Pabst Co. to advertise its beer.[127] The calendar included "complete schedules of all major college games; professional schedules; and pictures of Grantland Rice's 1938 All American Football Team."[128] Davey O'Brien was shown in his Texas Christian University ("TCU") football uniform poised to throw the ball. Also included on the calendar was the caption "Pabst Blue Ribbon, Football Calendar, 1939," a photograph of a Pabst Blue Ribbon beer glass, and a bottle of Pabst Blue Ribbon.[129]

O'Brien testified that he was a member of the Allied Youth of America, an organization that discouraged young people from

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124. *See* RESTATEMENT (SECOND) OF TORTS §§ 652A-I (1977) (listing Prosser's four tort model); *see also* Gorman, *supra* note 97, at 1254 (adopting Dean Prosser's four-tort model of privacy torts).

125. RESTATEMENT (SECOND) OF TORTS §§ 652C (1977) (illustrating definition of appropriation tort in Restatement remains similar to definition in Prosser's *Privacy*).

126. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, reporters notes, cmt. b (1995) (citing O'Brien v. Pabst Sales Co., 124 F.2d 167 (5th Cir. 1941); Pallas v. Crowley-Milner & Co., 54 N.W.2d 595 334 (Mich. 1952)).

127. *See* 124 F.2d 167, 168 (5th Cir. 1941) (summarizing subject of plaintiff's suit).

128. *Id.* (describing calendar).

129. *See id.* (describing calendar).

drinking alcohol.[130] O'Brien claimed that using "his photograph as part of defendant's advertising was an invasion of his right of privacy and that he had been damaged thereby."[131] The court denied O'Brien's claim, reasoning that while this may have been actionable for a private person, O'Brien's nationwide celebrity status as a football player made him a public person, and therefore no right to privacy attached to the photograph used by Pabst Blue Ribbon.[132] O'Brien was not asked for consent by Pabst Blue Ribbon and, if asked, he would have vehemently denied the request. But it is interesting to note that the court found that the director of the TCU publicity department had given the necessary consent, and TCU received payment for the use of the O'Brien photo.[133]

The appropriation tort identified by Prosser and incorporated in the *Restatement (Second) of Torts* includes harm to both personal and commercial interests "caused by an unauthorized exploitation of the plaintiff's identity."[134] Despite this reality, *O'Brien* demonstrates the difficulty some courts had in extending relief to "well-known personalities whose celebrity precluded the allegations of injury to solitude or personal feelings normally associated with an invasion of privacy."[135] Therefore, fairness dictates that a separate right to protect the pecuniary value of a celebrity's persona is necessary.

In 1953, the common law right of publicity was born when the United States Court of Appeals for the Second Circuit became the first to "formally distinguish the rights of publicity and privacy."[136] In *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, a baseball player had entered into a contract granting the plaintiff the "exclusive right to use the ball-player's photograph in connection with the sales of plaintiff's gum."[137] The baseball player further agreed not to grant a similar right to any other gum manufacturer during the

130. *See id.* at 168-69 (citing O'Brien's reason for objecting to his inclusion on calendar).

131. *Id.* at 168.

132. *See id.* at 169 (providing rationale for declining to find invasion of right to privacy).

133. *See id.* at 169-70 (establishing that defendant paid T.C.U. director one dollar for using photograph and assumed this meant defendant had necessary consent).

134. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, cmt. b (1995) (noting harm is to both personal and commercial interests of plaintiff).

135. *Id.* (summarizing reason why courts were originally reluctant to accept tort).

136. *Id.* § 46 reporters notes, cmt. b (citing first case to make distinction).

137. 202 F.2d 866, 867 (2d Cir. 1953) (providing terms of exclusive contract between ball player and chewing gum company).

term of the contract, which also granted the plaintiff an option to extend the term for a designated period.[138] The defendant, a rival chewing gum manufacturer with knowledge of the contract between the baseball player and the plaintiff, "deliberately induced the ball-player to authorize defendant, by a contract with defendant, to use the player's photograph in connection with the sales of defendant's gum either during the original or extended term of plaintiff's contract."[139] After obtaining this authorization from the baseball player, the defendant used the photograph to enhance the sales of its gum.

During the lawsuit, defendants maintained their innocence based on the theory that the contract between the plaintiff and the baseball player was simply a release of the baseball player's personal right to privacy.[140] Without this release the plaintiff, when using the photograph for the plaintiff's advantage, would be liable for an invasion of the baseball player's privacy.[141] From this argument, the defendants concluded that since the plaintiff's contract vested no property or other legal interest in the plaintiff, the defendants had undertaken no actionable wrong.[142] In other words, the defendants were claiming that the baseball player only held "a personal and non-assignable right not to have his feelings hurt by such a publication."[143] The majority in *Haelan* rejected this defense, and instead held:

> [I]n addition to and *independent of that right of privacy* . . . a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture . . . . This right might be called a "*right of publicity.*" For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses [sic], trains and subways. This right of publicity would usually yield them no money unless it

138. *See id.* (detailing terms of contract).

139. *Id.*

140. *See id.* (recounting defendant's argument).

141. *See id.* (recounting defendant's characterization of agreement between ball-player and plaintiff).

142. *See id.* (summarizing defendant's legal argument).

143. *Id.* at 868.

> could be made the subject of an exclusive grant which barred any other advertiser from using their pictures.[144]

The *Haelan* court thus recognized a right of publicity as distinctly separate from the right of privacy, although an infringement upon these two independent rights may arise out of the same appropriative conduct.[145]

Following *Haelan*, legal debate ensued, and currently courts and state legislatures are still grappling with whether a "right of publicity" should be recognized separately from the invasion of privacy tort of "appropriation." To demonstrate, many common law rules today "view the right of publicity as an independent doctrine distinct from the right of privacy," yet "other cases continue to protect the commercial value of a person's identity through the privacy tort."[146] Thirteen states have codified a statutorily-based right of publicity, but most are broad enough to "redress injuries to both commercial and personal interests."[147]

For those jurisdictions recognizing a cause of action for a right of publicity separate from a cause of action for invasion of privacy, the following general methodology is utilized.[148] First, the court will determine the nature of harm suffered by the plaintiff. If the harm suffered by the plaintiff relates to personal interests, "such as a person's well-being and the right to be free of negative public discourse" then the plaintiff has a cause of action for invasion of privacy.[149] On the other hand, if commercial interests of the plaintiff are at stake, then the plaintiff has a cause of action for a violation of his or her right of publicity.[150]

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144. *Id.* (emphasis added).

145. *See* Sheldon W. Halpern, *The Right of Publicity: Commercial Exploitation of the Associative Value of Personality*, 39 VAND. L. REV. 1199, 1208 (1986) (tracing independent right of publicity stemming from *Haelan*). Shortly after *Haelan*, Professor Nimmer wrote an influential article seeking to define this new right of publicity. *See id.* at 1208-09 (citing Melville B. Nimmer, *The Right of Publicity,* 19 LAW & CONTEMP. PROBS. 203 (1954) and explaining that Nimmer thought right of privacy and existing models were inadequate to address new right in announced in *Haelan*).

146. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 reporters notes, cmt. b (1995).

147. *Id.* (identifying conflicting views regarding whether right of publicity and right of privacy are independent rights or whether right to publicity is encompassed by right to privacy).

148. Because each state would have its own statutory and common law to specifically guide this issue, the general methodology proffered by this Comment makes reference to the Restatements to define the theories of law.

149. Belo, *supra* note 4, at 137.

150. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. b (1995) (illustrating that claim may arise under both theories if both personal and commercial harm have demonstrably resulted).

Second, if the cause of action is for invasion of privacy, the plaintiff must satisfy the elements for appropriation, as defined by the *Restatement (Second) of Torts*, section 652C.[151] Otherwise, if the cause of action is to protect one's right of publicity, the plaintiff must satisfy the elements for appropriation, as defined by the *Restatement (Third) of Unfair Competition* sections 46-47. If the plaintiff proves the prima facie case in either or both instances, then the defendant is either liable for the invasion of privacy which harmed personal interests, or liable for violating the right of publicity which harmed the plaintiff's commercial interests.

As previously mentioned, section 652C defines appropriation as "[o]ne who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."[152] The definition for appropriation under section 652C is silent with regard to consent. Section 652F, however, incorporates the absolute privileges to publish defamatory matter listed under sections 583-592A as applying to the invasion of privacy tort of appropriation.[153] Section 583 provides that if proper consent is obtained, the defendant would not be liable for invasion of privacy.[154]

By contrast, section 46 of the *Restatement (Third) of Unfair Competition* defines the right of publicity as a separate right, and recognizes the separate interest arising from appropriation that exploits the commercial value of a person's identity. Section 46 provides: "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability for the relief appropriate under the rules stated in sections 48 and 49."[155] Consequently, the right of publicity definition differs in one crucial respect from the definition of appropriation relating to the invasion of privacy. The latter limits the appropriation to name or likeness, while the former recognizes that appropriation of the commercial value of a person's identity can include – in addition to

151. *See* RESTATEMENT (SECOND) OF TORTS § 652C (1977) (listing elements required for appropriation).

152. *Id.* (defining appropriation).

153. *See id.* § 652F (stating absolute privileges apply to invasion of privacy).

154. *See id.* § 583 (identifying consent as defense to invasion of privacy tort).

155. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

name or likeness – "other indicia of identity for the purposes of trade."[156]

Section 47 clarifies the meaning of "[u]se [f]or [p]urposes [o]f [t]rade" as follows:

> The name, likeness, and other indicia of a person's identity are used 'for purposes of trade'. . . *if they are used in advertising the user's goods or services, or are placed on merchandise marketed by the user,* or are used in connection with services rendered by the user. However, use 'for purposes of trade' does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses.[157]

The right of publicity's broadened definition allows the fact-finder to determine whether the purported symbol of identity is "so closely and uniquely associated with the identity of a particular individual that [its] use enables the defendant to appropriate the commercial value of the person's identity."[158]

Several other aspects arising out of the emergence of the right of publicity are noteworthy. First, the right of publicity recognizes that when another's identity is appropriated for purposes of trade, the resulting injury can encompass both personal and commercial interests.[159] Second, case law reflects the purpose of the right of publicity as stemming from "[t]he desire to secure for plaintiffs the commercial value of their identity and to prevent the perceived unjust enrichment of an appropriator."[160] Third, celebrities are "not precluded from establishing cognizable injury to personal interests in addition to commercial loss, nor are less well-known plaintiffs precluded from establishing commercial loss in addition to injury to personal interest, whether recoverable through a single or companion causes of action."[161] Finally, when establishing liability

156. *Compare* RESTATEMENT (SECOND) OF TORTS, § 652C (1977) (defining appropriation), *with* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995) (defining appropriation).

157. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995) (emphasis added).

158. *Id.* § 46 cmt. d (instructing when use of other identifying characteristics which are not person's name or likeness will infringe right of publicity).

159. *See id.* § 46 cmt. a (outlining scope of injury for appropriation).

160. *Id.* § 46 reporters note, cmt. c (outlining underlying policy of right of publicity claim).

161. *Id.* § 46 cmt. b Some cases, however, have limited the right of publicity to people able to demonstrate a certain level of fame or notoriety, and have lim-

against the defendant, it need not be proven that the defendant intended to identify the plaintiff.[162]

V. STUDENT-ATHLETES' RIGHT OF PUBLICITY

For over ten years, many writings have discussed how appropriation, particularly the right of publicity, applies in the NCAA student-athlete context.[163] Much of the literature points out the inequity of the NCAA allowing its institutions and licensees to profit from merchandise specifically designed to identify star athletes. Two of the most blatant inequalities involve (1) authentic or replica game jerseys featuring the jersey numbers of star players,[164] and (2) video games depicting collegiate athletes, particularly the college basketball video game created each year by EA Sports titled: *NCAA March Madness*. The NCAA exclusively controls the right to license these products. Rather than "protecting" the student-athletes from "exploitation by professional and commercial enterprises" – as described in the NCAA manual as one of its main principles – the NCAA and its licensees engage in highly lucrative exploitation. The NCAA not only allows this exploitation to occur by outside professional and commercial enterprises, but actively participates in exploiting the commercial value of star student-athletes' identities. Under the guise of preserving amateurism, the NCAA disallow student-athletes from receiving any remuneration for the sale of prod-

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ited invasion of privacy claims under the theory of appropriation to non-celebrities. *See id.*

162. *See id.* § 46 cmt. e (1995) (noting that "a mistake regarding the plaintiff's consent is not a defense").

163. *See, e.g.,* Belo, *supra* note 4; Matthew G. Matzkin, *Gettin' Played: How the Video Game Industry Violates College Athletes' Rights of Publicity by Not Paying for Their Likenesses*, 21 LOY. L.A. ENT. L. REV. 227 (2001); Michael P. Acain, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 LOY. L.A. ENT. L.J. 307 (1998); Laura Freedman, Comment, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673 (2003); David Warta, Comment, *Personal Foul: Unnecessary Restriction of Endorsement and Employment Opportunities for NCAA Student-Athletes*, 39 TULSA L. REV. 419 (2003); Kristine Mueller, *No Control Over Their Rights of Publicity: College Athletes Left Sitting the Bench*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 70 (2004); Rodney K. Smith & Robert D. Walker, *From Inequity to Opportunity: Keeping the Promises Made to Big-Time Intercollegiate Student-Athletes*, 1 NEV. L.J. 160 (2001); James S. Thompson, Comment, *University Trading Cards: Do College Athletes Enjoy a Common Law Right to Publicity?*, 4 SETON HALL J. SPORT. L. 143 (1994). This list of scholarly works is not meant to be exhaustive, but rather to serve as a sampling of related pieces advocating that the student-athletes' right of publicity is being infringed upon.

164. This area of infringement would also include t-shirts and other accessories making use of a star player's number to boost sales.

ucts that are so "closely and uniquely associated with the identity" of each student-athlete.[165]

A. Jerseys Featuring the Student-Athlete's Number

"*Anything with the No. 3 on it we could sell.*"[166]

Players labeled as P-T-P'ers (prime-time-players) by wacky college basketball commentator Dick Vitale are in danger of having their identity commercially exploited. Authentic or replica jerseys featuring the numbers of prime-time-players – in addition to t-shirts and other accessories featuring a star player's number – are often top sellers for the NCAA institutions and licensees.

A jersey number is very much a part of a star player's identity.[167] A star player's jersey number becomes inseparably linked to the player. As images of star players are broadcast nationwide via televised games, commercials, newspapers, magazines, and the Internet, it is the jersey number that is often associated with the player's name.

Jersey numbers differentiate players. The greatest players are occasionally honored by having their jersey number retired as "a symbolic gesture" providing that no other player will ever wear a particular number again.[168] This act memorializes the player's identity with that specific team and jersey number.[169] There is no doubt that placing a star player's number on a jersey for sale enhances its popularity, demand and, consequently, its value.[170] While it may be true that people purchase college sports merchandise simply because of the school or athletic team, it cannot be overlooked that merchandise featuring star-players' jersey numbers are best-selling items.

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165. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995).

166. Little, *supra* note 19, at A1 (quoting Dave Heinze, director of Gonzaga's campus stores, collegiate licensing and online sales and referring to popularity of Adam Morrison, NCAA leading scorer for 2005-06 basketball season, who wore number three for Gonzaga Bulldogs).

167. *See* Belo, *supra* note 4, at 145-48 (suggesting athlete's jersey constitutes part of athlete's identity).

168. *See id.* at 145 (describing custom of retiring jersey number of certain players).

169. *See id.* (illustrating that retiring certain numbers lends support to link between athlete and jersey number).

170. Commercial enterprises pay millions of dollars for celebrities to endorse their products, thus recognizing that individuals with a certain level of fame and notoriety can have a dramatic effect on sales.

A star player's jersey is inextricably linked to his or her identity. The jersey number represents the player's *name or likeness.* Appropriation of one's name can include "a real name, nickname, or professional name," and one's likeness is usually embodied in a "photograph, drawing, film, or physical look-alike."[171] The NCAA prohibits the use of a student-athlete's name to appear on licensed jerseys, but regards the jersey number as not significantly linked to the individual.[172]

Fairness dictates, however, that the law should extend beyond the arbitrary boundaries laid out by the NCAA in order to protect against the commercial appropriation of a player's identity. In a footnote of Dean Prosser's influential article that created four different causes of action under the invasion of privacy, he remarked, "[i]t is not impossible that there might be appropriation of the plaintiff's identity . . . without the use of either his name or likeness, and that would be an invasion of his right of privacy."[173] Similarly, the *Restatement (Third) of Unfair Competition* has recognized the necessity of this extension, embodying the principle in section 46, which, in addition to name or likeness also includes "other indicia of identity."[174] Furthermore, some commentators have identified several cases finding a right of publicity in situations beyond the traditional notions of name or likeness.[175] To exemplify the reach of this extension, a brief discussion of two particular cases is warranted.

1. Carson v. Here's Johnny Portable Toilets, Inc.

A cause of action for a right of publicity claim is not limited to the appropriation of one's name or likeness, but should extend to other ways "whenever [one's] *identity* is intentionally appropriated

171. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. d (1995) (providing examples of how person's name or likeness can be appropriated).

172. *See* NCAA DIVISION I MANUAL, *supra* note 1, art. 12.5.2.1, at 78 (declining to prohibit use of student-athlete's jersey number in advertisements and promotions); *see also id.* art. 12.5.1.1(h), at 75 (placing restrictions on using student-athlete's "name, picture, or likeness," but not mentioning jersey number).

173. Prosser, *supra* note 96, at 401 n.155 (suggesting person's identity should be given expansive definition).

174. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

175. *See, e.g.,* Belo, *supra* note 4, at 139-44 (providing examples of cases which have taken more expansive view of person's identity); Matzkin, *supra* note 163, at 230-31 (providing examples of cases which have taken more expansive view of person's identity).

for commercial purposes."[176] In *Carson*, the former host of *The Tonight Show* – Johnny Carson – brought suit against a "corporation engaged in renting and selling 'Here's Johnny' portable toilets."[177] Carson claimed that his right of publicity was violated by the defendant corporation's unauthorized use of his famous monologue cue, "Here's Johnny," which was "generally associated with Carson by a substantial segment of the television viewing public."[178] Dismissing Carson's complaint, the trial court held that the right of publicity "extend[s] only to a 'name or likeness,' and 'Here's Johnny' did not qualify."[179]

The appellate court, however, did not agree, and found the trial court's conception of the right of publicity to be too narrow.[180] The appellate court held that the right of publicity must protect the "pecuniary interest in the commercial exploitation of his identity."[181] It was clear to the court that "[i]f the celebrity's identity is commercially exploited, there has been an invasion of his right whether or not his 'name or likeness' is used."[182] Citing to other court decisions sharing this line of reasoning,[183] as well as to the persuasive authority of Prosser's idea that "[i]t is the plaintiff's name as a symbol of his identity that is involved here, and not as a mere name,"[184] the appellate court concluded that Carson was entitled to judgment because the defendant had appropriated the commercial value of Carson's identity without consent.[185]

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176. Carson v. Here's Johnny Portable Toilets, Inc., 698 F.2d 831, 837 (6th Cir. 1983) (emphasis added) (showing past courts have taken more expansive view of person's identity in right of publicity cases).

177. *Id.* at 833 (noting owner of corporation combined "Here's Johnny" phrase with "The World's Foremost Commodian" to achieve "a good play on a phrase").

178. *Id.* at 832-33.

179. *Id.* at 833 (recounting district court's decision).

180. *See id.* at 835 (disagreeing with district court regarding scope of identity in right of publicity claim).

181. *Id.* at 834.

182. *Id.* at 835.

183. *See* Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821 (9th Cir. 1974) (altering, slightly, features on famous race-car for cigarette television commercial); Ali v. Playgirl, Inc., 447 F. Supp. 723 (S.D.N.Y. 1978) (using drawing of Muhammad Ali with phrase, "The Greatest"); Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129 (Wis. 1979) (using football running back's nickname, "Crazylegs" to market woman's moisturizing shaving gel). These cases all recognized the right of publicity extending to various symbols of one's identity, absent of one's name or likeness.

184. Prosser, s*upra* note 96, at 403.

185. *See Carson*, 698 F.2d at 836 (finding use of phrase "Here's Johnny" was appropriation of plaintiff's identity).

2. Motschenbacher v. R.J. Reynolds Tobacco Co.

A celebrity may have a pecuniary interest in a tangible symbol so closely identified with the celebrity's identity that an appropriation of that symbol will make a right of publicity claim actionable.[186] This right of publicity persists even if the celebrity's name is not used, and even if the likeness of the celebrity is unrecognizable to some.[187] In *Motschenbacher*, an internationally known racecar driver brought suit against the defendants for using his racecar in a television commercial for cigarettes.[188] Motschenbacher's racecars were unique and readily identified as his own. His racecars contained "a distinctive narrow white pinstripe appearing on no other car."[189] His cars were all solid red, and he used a white oval as the background for his racing number "11" – as opposed to the "circular backgrounds of all other cars."[190] In the commercial, the defendants used a photograph of Motschenbacher's car without his consent, but altered the photograph by changing the racing number to "71" and adding a spoiler to the car with the name of their product.[191] Despite changing the number and adding a spoiler, the other characteristics of the car – unique to Motschenbacher – remained. The court held that the "distinctive decorations appearing on the car . . . caused some persons to think the car in question was plaintiff's . . . ."[192] In essence, the distinctive and recognizable nature of the car had commercial value that was affixed to the identity of Motschenbacher. The right of publicity did not allow the defendants in this case to be unjustly enriched by appropriating this commercial value without Motschenbacher's consent.[193]

These cases demonstrate that it is possible for something other than one's name or likeness to have commercial value. The law will protect against commercial exploitation and unjust enrichment. A star player's jersey is inextricably linked to his fame and thus the commercial value attaches to his identity. Therefore, the law's pro-

186. *See Motschenbacher,* 498 F.2d at 825 (including symbol as part of person's identity).

187. *See id.* at 827 (expanding definition of identity beyond previous rigid name or likeness definition).

188. *See id.* at 822 (recounting facts of case).

189. *Id.* (identifying how plaintiff "individualized" his cars).

190. *Id.* (providing another example of how plaintiff differentiated his car from other race-cars).

191. *See id.* at 822 (identifying differences between plaintiff's car and car depicted in defendant's advertisement).

192. *Id.* at 827 (finding, despite defendant's alterations, people identified car in advertisements as plaintiff's car).

193. *See id.* (stating holding of case).

tection should extend further than name and likeness in the NCAA context. The NCAA and its licensed institutions should not be shielded from the law by the sly maneuver that prohibits the use of a star player's name on a numbered jersey.

B. Video Games

The student-athlete's right of publicity claim in connection with video games is an easier application of the tort. Not only are their virtual jerseys utilized in the video games, but the likenesses of current student-athletes are also included with remarkable accuracy. Electronic Arts (EA) Sports has three different video games involving NCAA athletics: *NCAA March Madness*, *NCAA Football*, and *NCAA Baseball*.[194] The video games come out with new versions each year containing updated and improved graphics and features.[195]

NCAA Football 2007 alone is "expected to produce millions for EA Sports and six-figure paydays for some institutions whose football teams are traditionally strong."[196] With advanced gaming consoles, the "games are loaded with rich graphic detail."[197] Although the NCAA does not permit player's names to be used in the game, these virtual NCAA student-athletes sport their uniform numbers and are otherwise accurately depicted based on physical attributes such as height, weight, hairstyle, skin tone, facial hair, tattoos, and other identifying characteristics such as head bands or wrist bands.[198] Also, the virtual players' athletic capabilities, such as speed and agility, are represented.[199]

Unlike the obligations EA Sports faces when making video games involving professional sports – "in which the players are identifiable by name and must be compensated accordingly," – there is no such obligation to pay the student-athletes for the use of

194. *See* Electronic Arts, http://www.easports.com (last visited May 1, 2008) (listing video games manufactured by company).

195. *See* Carter Strickland, *The Best Video Game; NCAA Football; Is it Better Than the Real Thing?*, ATLANTA J. & CONST., Aug. 27, 2006, at Q10 (reporting *NCAA Football 2007* has new feature called "campus legend mode" allowing gamer to "create a freshman player and take him through all phases of college life – even selecting a major").

196. Carter, *supra* note 9, at Sports-1 ("*NCAA Football 2006* generated more than $79 million in revenues . . . up $65 million from the revenues produced by the 2001 version of the game.").

197. *Id.*

198. *See* EA Sports, March Madness 2006, Screenshots, *supra* note 10 (illustrating detail of videogame's graphics through screenshots).

199. *See* Carter, *supra* note 9, at Sports-1 (explaining video game copies individual, athletic traits of NCAA athletes).

their likenesses and identity.[200] NCAA Bylaws prohibit student-athletes from taking any payment – other than tuition, room and board – based on their athletic skill, including "compensation for the use of their names and images."[201] Eric Fisher, a writer for the *Sports Business Journal*, believes that these video games are yet "another way for the NCAA to profit off its athletes."[202] Fisher remarked that "[t]his is just another iteration of the whole conflict that separates amateurism and big-time college sports. It's sort of just a different flavor of the merchandising angle. Putting these guys in a video game is a new form of an old debate."[203]

EA Sports has a well-known and well-publicized slogan: "It's in the Game."[204] This slogan is derived from the idea that whatever is contained in the real-life version of the sport is also included in EA Sports' virtual creation of that sport. True to form, EA Sports has not left out the reality that NCAA student-athletes' identities are commercially exploited. If you play the video games you are participating in the exploitation – it's in the game.

Even without using the student athletes' names or photographic likenesses in the video games, the law should protect the identity of players from this type of exploitation. In *White v. Samsung Electronics America, Inc.*, the court held that an advertisement using a robot constructed in the likeness of Vanna White – longtime hostess of "Wheel of Fortune," one of the most popular television game shows in history – was a violation of White's right of publicity.[205] In *White*, the advertisement featured a "female-shaped robot . . . wearing a long gown, blond wig, and large jewelry."[206] The robot was turning a block letter on "what looks to be the Wheel of Fortune game show set."[207] The court found that viewed as a whole, the advertisement infringed upon Vanna White's exclusive right to exploit the commercial value associated with her identity.[208] The court went on to say that "[c]onsiderable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit . . . [and t]he law protects the celebrity's sole

200. *See* Matzkin, *supra* note 163, at 228 (contrasting compensation for professional athletes versus student-athletes for inclusion in videogames).

201. *Id.* (restricting types of permissible compensation for student-athletes).

202. Carter, *supra* note 9, at Sports-1.

203. *Id.*

204. Electronic Arts, *supra* note 194.

205. *See* 971 F.2d 1395, 1399 (9th Cir. 1992) (holding district court erred in rejecting White's right of publicity claim).

206. *Id.* (describing features of female-shaped robot).

207. *Id.* (describing background of advertisement).

208. *See id.* (comparing defendant's robot in advertisement to Vanna White).

right to exploit this value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof."[209]

The *White* court also posed a hypothetical that relates to this Comment:

> Consider a hypothetical advertisement which depicts a mechanical robot with male features, an African-American complexion, and a bald head. The robot is wearing black hightop Air Jordan basketball sneakers, and a red basketball uniform with black trim, baggy shorts, and the *number 23* (though not revealing "Bulls" or "Jordan" lettering). The ad depicts the robot dunking a basketball one-handed, stiff-armed, legs extended like open scissors, and tongue hanging out. Now envision that this ad is run on television during professional basketball games. Considered individually, the robot's physical attributes, its dress, and its stance tell us little. Taken together, they lead to the only conclusion that any sports viewer who has registered a discernible pulse in the past five years would reach: the ad is about Michael Jordan.[210]

This hypothetical is analogous to the video games featuring NCAA student-athletes. Like the Jordan hypothetical, the names of the student-athletes are not included in the video games, but this is the only aspect of the student-athletes that is not represented. The depiction of the virtual student-athletes – particularly the high-profile athletes whose video game images are largely unmistakable – satisfies even the strictest interpretation of whether an infringement of one's right of publicity has occurred. Under the strict interpretation one must appropriate the name *or* likeness of the individual. In these video games, there is no doubt that the student-athletes' likenesses are being appropriated for the commercial value that goes along with their identities. Under any reading of *White*, this conclusion is underscored.

Whether it is the sale or marketing of authentic jerseys featuring the numbers of star-players, or the video games created by EA Sports, NCAA student-athletes are exploited for the commercial value associated with their identities. The NCAA's practice of not using student-athlete names (on jerseys, accessories, and in video games) does not mask the identity of the player. The NCAA's spurious practice of prohibiting the names of current student-athletes to

209. *Id.*

210. *Id.* (emphasis added).

be included with these products provides no protection against actionable claims for the violation of student-athletes' right of publicity.

C. J.J. Morrison's Prima Facie Case

Based on the discussion above, J.J. Morrison has an actionable right of publicity claim against the NCAA and its licensees for the appropriation of the commercial value of his identity. In order to put on a prima facie case, J.J. Morrison must prove 5 basic elements: (1) the NCAA's and its licensees' (the defendants') use of the plaintiff's identity, (2) his identity has commercial value, (3) the defendants have appropriated that commercial value for purposes of trade, (4) lack of consent, and (5) resulting commercial injury.[211]

First, J.J. Morrison's identity is contained in any Gonzuke sports merchandise featuring the number three. This includes basketball jerseys, t-shirts, and other accessories. As discussed, J.J.'s contribution of basketball skill and athletic prowess to the Gonzuke merchandise featuring the number three is closely and uniquely associated with J.J.'s identity. J.J.'s identity, and even likeness, is also contained in EA Sports' *NCAA March Madness* video game. The video game's characterization of J.J. is amazingly accurate, and his virtual image is prominently displayed while advertising the video game. Consumers know that the game depicts J.J.

A Gonzuke employee in charge of the school's merchandise sales stated, "[a]nything with the No. 3 on it we could sell. [J.J. Morrison is] just hugely popular."[212] Another licensee – in a description next to the online picture of a Gonzuke #3 basketball jersey – uses the caption, "NCAA rules prohibit the use of a player's name, but we all know who wears this one!"[213] Yet even another official licensee included the caption "J.J. Morrison Jersey" above the picture of a Gonzuke #3 basketball jersey in connection with an online sales website. There is no doubt that the NCAA and its licensees are using the identity of J.J. Morrison.

Second, J.J. Morrison's identity has commercial value. An ordinary sandwich – half-eaten by Britney Spears – sold on EBay for

211. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION §§ 46-49 (1995) (listing elements of right of publicity case).

212. Little, *supra* note 19, at A1.

213. Husky Wear, LLC - Jerseys, *supra* note 24.

over $500.[214] J.J. Morrison's star persona amid a yearly multi-billion dollar demand for college sports merchandise indicates that his commercial value is more than substantial.

Third, the defendants have appropriated J.J.'s commercial value for purposes of trade. His identity is used for purposes of trade when it is "used in advertising the user's goods . . . or . . . placed on merchandise marketed by the user."[215] EA Sports has used his identity in advertising its video game, and the NCAA and its licensees – including EA Sports – have placed his jersey number, and thus his identity, on college sports merchandise. Without a right of publicity, the commercial value of his identity will continue to be exploited, unjustly enriching the appropriators. Both the law and policy favor the protection of the commercial value of one's identity based on the principle that people should be able to reap what they sow.

Fourth, J.J. Morrison has not consented to his identity being exploited. This is the element of J.J.'s prima facie case that will receive the most contention. The NCAA and its licensees will argue that at the moment one agrees to become a student-athlete, the athlete agrees to be bound by all of the NCAA's rules and regulations.[216] The NCAA Manual clearly states that "[o]nly an *amateur* student-athlete is eligible for intercollegiate athletics participation in a particular sport."[217] The rules further provide that the student-athlete will lose amateur status upon accepting remuneration in connection with the advertisement, promotion, and sale of commercial products.[218] J.J.'s counterattack is that this consent to allowing the commercial exploitation of his identity is invalid because it was not freely given, and the scholarship contract agreement is an unconscionable contract of adhesion. This argument is discussed thoroughly in Part VI of this Comment.[219]

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214. *See The Buzz*, ROCKY MTN. NEWS (Denver, Colo.), Sept. 12, 2006, at 6D (reporting on online auction which garnered $520 for half-eaten sandwich by Britney Spears).

215. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 (1995) (outlining "purposes of trade" requirement).

216. For a further discussion of the documents that form the athletic scholarship and the incorporation of the NCAA regulations into these documents, see *infra* notes 273-80 and accompanying text.

217. NCAA DIVISION I MANUAL, *supra* note 1, art. 12.01.1, at 65 (emphasis added) (restricting eligibility to amateur athletes).

218. *See id.* art. 12.5.2.1, at 78 (identifying student athlete can loses amateur status by accepting remuneration).

219. For a further discussion arguing that a scholarship contract is a contract of adhesion, see *infra* notes 333-67 and accompanying text.

Fifth, the appropriation of J.J. Morrison's identity tramples upon his "right of publicity," resulting in commercial injury. One of the NCAA's main principles is that "[s]tudent-athletes . . . should be protected from exploitation by professional and commercial enterprises."[220] Yet rather than forbidding the exploitation, the NCAA actively participates in the exploitation. The NCAA and other appropriators receive a windfall at the expense of the student-athletes. This unjust enrichment causes commercial injury to J.J. Morrison. Clearly, the NCAA and its licensees are exploiting J.J. Morrison's identity as a nationally recognized star college athlete without his true consent – thereby resulting in financial injury.

Upon a successful showing of all five elements, J.J. Morrison will be entitled to either: (1) injunctive relief to prevent "a continuing or threatened appropriation of the commercial value of [J.J. Morrison's] identity,"[221] or (2) monetary relief in the amount of Morrison's pecuniary loss, or in the defendants' gain, whichever amount is greater.[222] Furthermore, if Morrison can demonstrate that the defendants acted in "willful disregard of the plaintiff's rights," Morrison may be entitled to punitive damages.[223] Reality dictates that it is both unlikely, and undesirable, for the manufacture, promotion, sale and use of these products to be enjoined. It is necessary, however, to compensate the student-athlete whose unique contribution added value to these products.

While it is true that several star student-athletes go on to the professional ranks and are richly compensated for their athletic skill, the argument that star student-athletes' are unsympathetic plaintiffs is unpersuasive. The vast majority of NCAA student-athletes do not make their way into the professional ranks. These athletes are cheated out of the commercial value of their identities at the time when their identities have value. The NCAA rules should not be allowed – in the name of preserving amateurism – to provide NCAA institutions and their licensees with a free ticket to exploit the commercial value of star student-athletes' identities.

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220. NCAA DIVISION I MANUAL, *supra* note 1, art. 2.9, at 5 (purporting to protect amateur athletes from exploitation).

221. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 48 (1995) (listing one form of relief for right to publicity claim).

222. *See id.* § 49 (listing one form of relief for right to publicity claim).

223. *See id.* (noting punitive damages are available in some circumstances).

VI. NCAA's CONSENT DEFENSE FAILS – THE ATHLETIC SCHOLARSHIP IS AN UNCONSCIONABLE CONTRACT OF ADHESION

In Dean Prosser's famous law review article, *Privacy*, he recognized that "[c]hief among the available defenses is that of the plaintiff's consent to the invasion, which will bar his recovery as in the case of any other tort."[224] Undoubtedly, the NCAA's defense to J.J. Morrison's right of publicity claim will be no different. The NCAA will assert that J.J. Morrison waived his right of publicity while a student-athlete, granting the NCAA exclusive rights to license and control the merchandise utilizing J.J. Morrison's identity.[225] According to the NCAA, this waiver of rights, as required under the mandates of the NCAA rules, operates as consent. When a student-athlete enters into an athletic scholarship agreement, the contractual documents incorporate all of the NCAA rules and regulations by reference.[226] The NCAA Division I Manual is a 467-page document. We contend that this so-called consent is invalid because the athletic scholarship contract is an unconscionable contract of adhesion.

The elements of oppression, unfair surprise, and terms unreasonably favoring the NCAA member institution create an unconscionable contract of adhesion between the aggrieved student-athlete and the institution granting the athletic scholarship. Prior to analyzing the doctrine of unconscionability and its relation to athletic scholarships, a brief overview of modern-day contract law is necessary. After an overview of contract law, this Comment will demonstrate the courts' recognition of athletic scholarships as contracts.

A. The Law of Contracts: An Overview

"A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law

224. Prosser, *supra* note 96, at 419 (recognizing consent as chief defense).

225. *See* NCAA DIVISION I MANUAL, *supra* note 1, art. 31.6, at 430-32 (outlining NCAA's exclusive rights to control goods and services featuring its marks). Article 31.6 of the NCAA Division I Manual states:

> The NCAA shall maintain control over the nature and quality of the goods and services rendered under the marks; therefore, no use of the marks by others will be permitted in advertising, in association with commercial services or related to the sale of merchandise without the specific approval of the NCAA.

Id.

226. For a further discussion on the incorporation of the NCAA rules in the NLI and Financial Aid statement, see *infra* notes 279-80 and accompanying text.

in some way recognizes as a duty."[227] Therefore, the principal function of contract law is to provide a framework for the enforcement of promises.[228] In most instances, a contract cannot be formed without the presence of consideration, which is a bargained-for exchange or the suffering of a legal detriment.[229] There are some situations, however, where a contract will be enforceable without consideration when equitable principles so require.[230] As previously mentioned, the institution of sports reflects as well as shapes

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227. RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981).

228. *See* Timothy Davis, *Balancing Freedom of Contract and Competing Values in Sports*, 38 S. TEX L. REV. 1115, 1118 (1997) (noting purpose of contract law is to enforce promises).

229. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981) (stating that formation of contract requires bargain in which there is manifestation of mutual assent to exchange and consideration). The Restatement (Second) of Contracts § 71 (1981) states:

> (1) To constitute consideration, a performance or a return promise must be bargained for.
> (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
> (3) The performance may consist of
> (a) an act other than a promise, or
> (b) a forbearance, or
> (c) the creation, modification, or destruction of a legal relation.
> (4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

Id.; *see also* Michael J. Riella, Note, *Leveling the Playing Field: Applying the Doctrines of Unconscionability and Condition Precedent to Effectuate Student-Athlete Intent Under the National Letter of Intent*, 43 WM. & MARY L. Rev. 2181, 2188-2189 (2002) (reiterating purpose of contract law).

230. *See* RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981) (providing rule for "past consideration"). Section 86 of the Restatement describes:

> (1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
> (2) A promise is not binding under Subsection (1)
> (a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
> (b) to the extent that its value is disproportionate to the benefit.

Id. See also RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (discussing contracts without consideration). Section 90 states:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.
> (2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

Id. See also Riella, *supra* note 229, at 2189 (recognizing equitable principles may permit contract to exist without consideration).

society's value system.[231] Similarly, contract law, and the law in general, also reflect and certainly contribute to shaping our society's culture and values.[232]

Contract law has evolved from a classical model to a neoclassical model, a detailed discussion of which is beyond the scope of this Comment.[233] The classical model of contract law emerged in the nineteenth century. It involved a freedom of contract ideology with an emphasis on "individual autonomy and noninterference by the state."[234] The judiciary's function was to "mechanically apply abstract formal rules in order to limit judicial intrusion into individual autonomy."[235] Conversely, the neoclassical or modern model of contract law has strived to balance the conflicting values of individual autonomy with public concerns through a "flexible and pragmatic" methodology.[236] This methodology allows the judiciary to give weight to "social factors, public policy, and community standards of morality."[237] Under classical contract law, the belief is that parties express every important term in their contracts.[238] Conversely, neoclassical or "[m]odern contract law assumes and often expects parties not to incorporate expressly into the agreement every understanding and expectation."[239]

Critics of the neoclassical model argue that allowing courts to analyze several outside factors not expressly found in the contract

231. *See* Davis, *supra* note 228, at 1128-29 (advancing idea that sports represent "microcosm of [American] society"). The fundamental values of American society are not only reflected through the institution of sports, but the sports world also helps to shape these values. *See id.* (highlighting interplay between sports and society); *see also* D. STANLEY EITZEN & GEORGE H. SAGE, SOCIOLOGY OF NORTH AMERICAN SPORT 17, 55, 182-85 (5th ed. Wm. C. Brown Co. 1993) (detailing interplay of sports and society).

232. *See* Kellye Y. Testy, *An Unlikely Resurrection*, 90 NW. U. L. REV. 219, 228 (1995) ("Contract, as does law in general, reflects the value system of the culture in which the legal system is embedded. The tensions and ambivalence of society are played out in law.").

233. For a further discussion of the background of the classical model of contract law and the emergence of today's neoclassical model of contract law, see Davis, *supra* note 228, at 1118-28.

234. *See generally* Davis, *supra* note 228, at 1118-21 (discussing classical model of contract law).

235. *Id.* at 1121 (promoting individual autonomy in classical model of contract law).

236. *See id.* at 1123-24 (quoting Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1286-87 (1990) and discussing neoclassical method of contract interpretation).

237. *Id.* at 1123.

238. *See id.* at 1124 (suggesting classical method of contract interpretation focuses on parties' agreement).

239. *Id.*

results in a body of law that is unintelligible.[240] Advocates for the modern contract recognize that the neoclassical system is more complex, but feel that any hindrance caused by the complexity is outweighed by the results.[241] The neoclassical model of contract law provides results that balance individual autonomy (in allowing and valuing the formation of private agreements) while ensuring some degree of fairness (by looking into outside social factors, public policy and community values).[242] Doctrines that have developed as a result of the neoclassical contract law evolution are: promissory estoppel, *unconscionability*, condition precedent, and good faith, to name a few.[243]

Professor Carol M. Rose[244] provides an excellent analogy that supplements the above discussion in her law review article, *Crystals and Mud in Property*.[245] Professor Rose recognizes that legal rules tend to fall along a spectrum and follow a predictable cycle.[246] On one end of the spectrum are "hard-edged or crystal" rules that are mechanically applied and involve a few simple facts that attach legal consequences.[247] These crystal rules would be synonymous to the classical model of contract law. On the other end of the spectrum are rules that allow outside social factors, desirable to our society, to apply when interpreting a rule.[248] Rose refers to these as "mud rules" which are identical to the neoclassical model of contract law.[249] Legal rules tend to begin as crystal rules and over time evolve into mud rules; however, if the legal rules become too

240. *See id.* (identifying criticism of neoclassical method of contract interpretation); *see generally* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (describing classical model of contract law as body of "crystal rules," and neoclassical or modern contract law as "mud rules").

241. *See* Davis, *supra* note 228, at 1126 (providing counterargument to criticism of neoclassical method of contract law).

242. *See id.* (suggesting neoclassical method balances individual autonomy and fairness).

243. *See id.* (noting genesis of unconscionability doctrine).

244. *See* Yale Law School - Faculty - Carol M. Rose, http://www.law.yale.edu/faculty/CRose.htm (last visited May 1, 2008) (providing biographical and professional information).

245. *See generally* Rose, *supra* note 240 (analogizing classical and neoclassical models of contract law to crystal and mud rules in property law).

246. *See id.* at 580-87 (providing three examples of property rules which started as crystal rules, moved to mud rules, and reverted back to crystal rules).

247. *See id.* at 590-93 (discussing advantages of crystal rules).

248. *See id.* at 593 (describing mud rules).

249. *See generally id.* (suggesting mud rules take into account fairness and social policy).

muddy, the rules are likely to slide back toward the crystal end of the spectrum.[250]

The suitability of any rule depends on how well it realizes preferred social policy.[251] The crystal rules, while providing clarity and certainty in predicting how the law will be applied, may unfairly expose people to the deceitfulness of others because they know what the law will permit.[252] Alternatively, mud rules, designed to protect goodness and altruistic efforts, admittedly involve many factors and it becomes more difficult to interpret definitively how these rules will be applied in a court of law.[253]

Professor Rose recognized a similar argument also advanced by Professor Laurence Tribe,[254] discussing how judges make decisions not only based on the "rational calculations of the actors and people similarly situated to the actors" but also based on an attempt to mold the society in which we live.[255] Professor Tribe believes that "decisions . . . are constitutive, and it would corrode our moral understanding of ourselves as a society if we were to permit gross unfairness to reign simply for the sake of retaining clear rules and rational ex ante planning, particularly if those rules covertly serve the wealthy and powerful."[256]

B. Athletic Scholarship Recognized as a Contract

In regard to the NCAA and student-athletes, courts have consistently determined that the athletic scholarship is a contract, and thus recognize a student-athlete's right to assert a breach of contract action against the college institution.[257] The first case holding

250. *See generally id.* (tracing evolution of rules along crystal to mud spectrum).

251. *See generally id.* (outlining contrast between application of crystal rules and mud rules relative to area of law applied to).

252. *See id.* at 592 (commenting on weakness of crystal rules).

253. *See id.* (addressing potential difficulties encountered when applying mud rules).

254. *See* Harvard Law School, Faculty Directory, http://www.law.harvard.edu/faculty/directory/facdir.php?id=74 (last visited May 1, 2008) (providing biographical information of Professor Laurence Tribe).

255. *See* Rose, *supra* note 240, at 593 (referencing Tribe's argument regarding effect of judicial decisions on society); *see also* Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 592-93 (1985) (providing rebuttal to Frank Easterbrook's view that fairness is secondary consideration in judicial decisions).

256. Rose, *supra* note 240, at 593 (summarizing Tribe's criticism of crystal rules).

257. *See, e.g.,* Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992) ("[I]t is held generally in the United States that the 'basic legal relation between a student and a private university or college is contractual in nature. The catalogues,

that an athletic scholarship is a contract was *Taylor v. Wake Forest University*.[258] In *Taylor*, a student receiving an athletic scholarship was held in breach of his contractual duties owed to the university when he refused to participate in athletics in order to focus on his academics.[259] Taylor - a football player for Wake Forest - sought, along with his father, recovery of educational expenses after the university terminated his athletic scholarship.[260] Taylor claimed that the Wake Forest coaches breached an oral agreement that Taylor could restrict or eliminate his involvement in athletics in order to maintain reasonable academic progress.[261] After his freshman football season, Taylor opted out of athletic participation to focus on his struggling academic performance.[262] As a result, the university terminated his athletic scholarship, or Football Grant-in-Aid.[263] The court held that Taylor accepted a Football Grant-in-Aid that was "awarded for academic and athletic achievement" and that in failing to participate in athletics, Taylor had breached his contractual obligations.[264]

When the university makes identifiable contractual promises to the student-athlete, it breaches its contractual obligations if it fails to make a good faith effort to perform those promises.[265] In *Ross v. Creighton*, a men's basketball player who promised to attend and

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bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.'" (quoting Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Cal. Ct. App. 1972))). "Indeed, there seems to be 'no dissent' from this proposition." *Id.* (quoting Wickstrom v. N. Idaho Coll., 725 P.2d 155, 157 (Idaho 1986)); s*ee also* Taylor v. Wake Forest Univ., 191 S.E.2d 379, 382 (N.C. Ct. App. 1972) (finding student-athlete on athletic scholarship not to be "complying with his *contractual* obligations") (emphasis added). Commentators also attribute the contractual relationship arising from the National Letter of Intent, Statement of Financial Aid, and university bulletins and catalogues. *See* Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1290 (1989) (identifying documents which form contract between university and student-athlete).

258. *See* 191 S.E.2d at 382 (stating holding).

259. *See id.* (providing background on case).

260. *See id.* (describing premise of Taylor's suit).

261. *See id.* (claiming school representatives agreed that "[i]n the event of any conflict between educational achievement and athletic involvement, participation in athletic activities could be limited or eliminated to the extent necessary to assure reasonable academic progress.").

262. *See id.* at 380 (indicating Taylor's grade point average of 1.0 out of 4.0 was below school minimum of 1.35 after freshman year).

263. *See id.* at 381 (describing procedure followed prior to termination of scholarship).

264. *See id.* at 382 (finding in favor of university).

265. *See* Ross v. Creighton Univ., 957 F.2d 410, 416-17 (7th Cir. 1992) (describing one possible way universities can breach contractual obligations with student-athletes).

play basketball for Creighton University sued the university, alleging the university failed to perform its promises to provide academic benefits.[266] The *Ross* court, similar to the *Taylor* court,[267] held that a contractual relationship exists between student-athletes and their university.[268]

Yet in order to state a contractual claim against the university, the student-athlete "must point to an identifiable contractual promise that [the university] failed to honor."[269] While recognizing the contractual relationship between student-athletes and their universities, this narrow holding implicitly requires the student-athlete to bargain for specific contractual terms, a practice simply not allowed with the NCAA contractual documents pertaining to student-athletes' athletic scholarships.[270] Furthermore, this narrow holding has the effect of eliminating a student-athlete's capability to assert a contractual claim based on a failure to perform implied promises.[271] In fact, application of this holding would allow coaches and university officials to make countless oral, express promises that would be unenforceable unless those promises were found in the standard boilerplate NCAA and university forms.[272]

Courts have recognized the National Letter of Intent ("NLI") and the Statement of Financial Aid as the two main documents that form a contract between the student-athlete and the university or college. The courts have also identified other documents, such as recruitment letters and university bulletins and catalogues, as part of the contract.[273] The NLI is "applicable only to prospective stu-

266. *See id.* at 412 (summarizing facts of case).

267. *Compare Taylor*, 191 S.E.2d 379, 382 (finding contractual relationship to exist between student-athlete and university), *with Ross*, 957 F.2d 410, 416 (finding contractual relationship to exist between student-athlete and university).

268. *See Ross*, 957 F.2d at 416 (stating holding of case).

269. *Id.* at 417 (noting why plaintiff-student's suit must fail against defendant-university).

270. *See* Davis, *supra* note 228, at 1144 (discussing *Fortay v. University of Miami*, in which court found contractual relationship between student-athlete and university arising from National Letter of Intent ("NLI"), Statement of Financial Aid and various recruitment letters); *see also* Cozzillio, *supra* note 257, at 1290 (suggesting relationship between student-athlete and university is based on express contract that consists of NLI, Statements of Financial Aid and university bulletins and catalogues).

271. *See Ross*, 957 F.2d at 416-17 ("To state a claim for breach of contract, the plaintiff must do more than simply allege that the education was not good enough. Instead, he must point to an identifiable contractual promise that the defendant failed to honor.").

272. *See id.* (reading holding to suggest breach of contract of oral promise would not be proper basis of breach of contract claim under *Ross*).

273. *See id.* at 416 (acknowledging other documents also included in contract between student-athlete and university).

dent-athletes who will be entering four-year institutions for the first time as full-time students."[274] This includes high school students and students attending junior colleges. In order for the NLI to be valid, the prospective student-athlete must also sign the institution's Statement of Financial Aid.[275] Both of these contracts will be considered null and void if the express terms and conditions are not satisfied.[276] The NLI is only signed one time by the potential student-athlete and only for one school.[277] On the other hand, upon each renewal of the one-year athletic scholarship, the student-athlete is required to sign the Statement of Financial Aid form.[278] In addition to the terms and conditions found on both of these documents, the language subtly incorporates by reference the requirement of compliance with the rules and regulations of the NCAA.[279] Thus, NCAA rules and regulations are also contractually binding on

274. National Letter of Intent - Text of the National Letter of Intent, http://www.national-letter.org/guidelines/nli_text.php, ¶ 1 (last visited May 1, 2008).

275. *See id.* at ¶ 2 (discussing financial aid offer component).

276. *See id.* (stating NLI will be null and void if conditions required by financial aid offer are not met).

277. *See id.* at ¶ 8 (identifying two exceptions to one time signing rule of NLI). While it is generally true that the NLI is only signed one time, there are two exceptions under provision 8 of the NLI which read as follows:

> [8]a. Subsequent signing year. If this NLI is rendered null and void under Provision 7, I remain free to enroll in any institution of my choice where I am admissible and shall be permitted to sign another NLI in a subsequent signing year.
>
> [8]b. Junior College Exception. If I signed a NLI while in high school or during my first year of full-time enrollment in junior college, I may sign another NLI in the signing year in which I am scheduled to graduate from junior college. If I graduate, the second NLI shall be binding on me; otherwise, the original NLI I signed shall remain valid.

Id.

278. *See, e.g.,* UNIV. OF TULSA DEP'T. OF INTERCOLLEGIATE ATHLETICS, FINANCIAL AID AGREEMENT, at conditions 4, 6 (copy on file at Univ. of Tulsa Dep't. of Intercollegiate Athletics) (outlining required financial aid form) [hereinafter *Tulsa Financial Aid Agreement*]. Condition 4 states, "[t]his Tender is not automatically renewed. Your eligibility for a renewal of this Tender is subject to the University of Tulsa's renewal policies at the end of its term and if you are academically eligible under University, [Conference], and NCAA legislation." *Id.* at condition 4. Condition 6 states, "[i]f you wish to accept this Tender, you must return two signed copies of this Tender to the Department of Athletics by [due date]." *Id.* at condition 6.

279. *See generally* National Letter of Intent, *supra* note 274 (illustrating incorporation of NCAA rules). For an example of an NLI, *see, e.g., Tulsa Financial Aid Agreement*, *supra* note 278. Condition 2 requires compliance with the receipt of financial aid under NCAA legislation, Condition 4 requires academic eligibility compliance under NCAA legislation, Acceptance 2 requires compliance with NCAA amateur rules, Bylaw 12 and financial aid rules, Bylaw 15, and Acceptance 4 requires any modification or cancellation to be in compliance with NCAA legislation. *See generally id.*

both the university officials and the student-athletes.[280] In the context of intercollegiate athletics, there is judicial reluctance to recognize the relevance of any information not expressly contained in the signed contractual documents.[281] As such, the courts use a classical model of contract law, mechanically applying the rule to keep the freedom of contract ideology alive and reinforcing this model's premise that courts do not make contracts for the parties involved.[282] While this position should apply to negotiated contracts, it hardly seems fair to apply such a rigid approach to athletic scholarship contracts, which are non-negotiable standard-form agreements.[283] A refusal to apply the neoclassical model to these non-negotiable agreements "uses contract[s] as a means of maintaining the powerlessness of student-athletes."[284]

C. Athletic Scholarships as Unconscionable Contracts of Adhesion

> [I]s there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other? These principles are not foreign to the law of contracts.[285]

An adhesion contract is defined as "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."[286] Oftentimes, a standardized form contract can create an

280. *See, e.g.,* National Letter of Intent, *supra* note 274 (binding both student-athlete and university under NCAA rules).

281. *See* Davis, *supra* note 228, at 1141-46 (providing overview of courts' reluctance to imply terms).

282. *See id.* at 1145 (suggesting courts' unwillingness to imply terms in this setting represents classical approach to contract law).

283. *See id.* ("[G]iving primacy to the bargain principle fails to accept the reality that student-athlete/university contracts are not negotiated but constitute standard form agreements").

284. *Id.*

285. U.S. v. BETHLEHEM STEEL CORP., 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting).

286. BLACK'S LAW DICTIONARY 342 (8th ed. 2004) (defining adhesion contract).

inequitable situation where one party can "impose terms on another unwitting or even unwilling party."[287] Farnsworth discusses three factors that lead to this unbalanced situation.[288] The first factor involves the advantages of time and expert planning by the party offering the contract.[289] The second factor recognizes that the other party has little or no experience with the contract, or only a general understanding of its contents.[290] The third factor relates to the disparity of bargaining power between the two parties.[291]

Thus, the party drafting the contract has as much time as necessary to create the document with the aid of expert advice, regularly leading to a contract heavily favoring the drafting party.[292] The other party typically has little time to fully read the contract, and has less time to completely understand the fine print and complicated clauses commonly contained in these form agreements.[293] Usually, these contracts are not between parties with equal bargaining power.[294] In fact, adhesion contracts regularly deny one party any bargaining power whatsoever. For example, these adhesion contracts may be used by an "enterprise with such disproportionately strong economic power that it simply dictates the terms."[295] Another reoccurring form of adhesion contracts is the take-it-or-leave-it agreement. In a take-it-or-leave-it contract, the party's "only alternative to complete adherence is outright rejection."[296]

Adhesion contracts will not automatically be considered "unconscionable *per se*, and all unconscionable contracts are not contracts of adhesion."[297] The fact that it is an adhesion contract, however, will give substantial weight to a claim for unconscionabil-

287. E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.26, at 557-58 (3d ed. 2004).

288. *See id.* (identifying three factors which suggest adhesion contract).

289. *See id.* at 558 ("First, the party that proffers the form has had the advantage of time and expert advice in preparing it, almost inevitably producing a form slanted in its favor.").

290. *See id.* ("Second, the other party is usually completely or at least relatively unfamiliar with the form and has scant opportunity to read it—an opportunity often diminished by the use of fine print and convoluted clauses.").

291. *See id.* ("Third, bargaining over terms of the form may not be between equals or, as is more often the case, there may be no possibility of bargaining at all.").

292. *See id.* at 558 (expounding on first factor).

293. *See id.* (expounding on second factor).

294. *See id.* (expounding on third factor).

295. *Id.*

296. *Id.*

297. RESTATEMENT (SECOND) OF CONTRACTS § 208 reporters notes, cmt. a (1981).

ity due to its standardized nature and the lack of bargaining power it affords the other party.[298]

1. *The Doctrine of Unconscionability*

Section 2-302 of the Uniform Commercial Code (U.C.C.) not only "recognizes a doctrine of unconscionability,"[299] but has also set the standard that if a contract is found to be unconscionable, it is unenforceable as a matter of law.[300] In subsection one of section 2-302, the U.C.C. provides:

> If the court as a matter of law finds the contract or any clause or term of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause or it may so limit the application of any unconscionable clause or term as to avoid any unconscionable result.[301]

Thus, this section of the U.C.C. allows courts to "police explicitly against the contracts or terms which the court finds to be unconscionable."[302] Prior to this section, courts dealing with unconscionable contracts had to arrive at the equitable result so desired by "an adverse construction of language, by manipulation of the rules of offer and acceptance, or by a determination that the clause is contrary to public policy or to the dominant purpose of the contract."[303] U.C.C. section 2-302 allows "court[s] to pass directly on the unconscionability of a contract,. . . and to make a conclusion of law as to its unconscionability."[304] Consequently, Karl Llewellyn referred to this section as "perhaps the most valuable section in the entire Code."[305]

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298. *See id.* (commenting on relationship of adhesion contracts to doctrine of unconscionability); *accord* U.C.C. § 2-302 cmt. 1 (1998) ("Courts have been particularly vigilant when the contract at issue is set forth in a standard form.").

299. FARNSWORTH, *supra* note 287, § 4.28 at 577.

300. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981) ("[L]ike the obligation of good faith and fair dealing, the policy against unconscionable contracts or terms applies to a wide variety of types of conduct.").

301. U.C.C. § 2-302 (1998); *accord* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

302. U.C.C. § 2-302, cmt. 1 (1998).

303. *Id.*

304. *Id.*

305. FARNSWORTH, *supra* note 287, § 4.28 at 578 (quoting Llewellyn, who has been "credited with the authorship of U.C.C. § 2-302").

U.C.C. article 2 only applies to "transactions in goods."[306] As a result, section 2-302 is technically only applicable to contracts involving the sale of goods.[307] Yet, this section of the U.C.C. has been persuasive in non-sales cases and has been used by analogy or because of the overriding sense of fairness it represents, outweighing the statutory limitation applying only to the sale of goods.[308] Due to its wide acceptance in non-sales cases, *Restatement (Second) of Contracts* section 208 reflects U.C.C. section 2-302, applying the doctrine of unconscionability to all contracts generally.[309]

The determination of unconscionability is made in "light of [the contract's] setting, purpose, and effect."[310] The court rather than the jury makes this determination.[311] When unconscionability is asserted, the parties must be allowed to present evidence that will help the court make the final determination.[312] In addition, the party raising the claim of unconscionability has the burden of proving it.[313]

Neither the U.C.C. nor the Restatement has provided a specific definition for unconscionability, but the U.C.C. does provide a basic test to lend some general guidance.[314] "The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the term or

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306. U.C.C. § 2-102 (1998).

307. *See id.* (limiting application of U.C.C. Article 2).

308. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 reporters notes, cmt. a (1981) (expanding reach of U.C.C. 2-302 beyond transactions involving sale of goods).

309. *See* Farnsworth, *supra* note 287, § 4.28 at 579 (noting that in addition to Section 208 of RESTATEMENT (SECOND) OF CONTRACTS, several uniform laws began to incorporate doctrine of unconscionability).

310. RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. a (1981).

311. *See* FARNSWORTH, *supra* note 287, § 4.28 at 579 (citing U.C.C. § 2-302 cmt. 3 (1998) and explaining court determines unconscionability because of history of remedy as equitable).

312. *See* U.C.C. § 2-302(2) (1998) ("[P]arties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination."); *accord* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. f (1981) ("[P]arties are to be afforded an opportunity to present evidence as to commercial setting, purpose and effect to aid the court in its determination.").

313. *See* Guaranteed Foods of Neb., Inc. v. Rison, 299 N.W.2d 507, 512 (Neb. 1980) (holding that party asserting unconscionability must also plead it).

314. *See* FARNSWORTH, *supra* note 287, § 4.28 at 581 (acknowledging that unconscionability defies easy definition, but noting that general test for unconscionability is included in comments to UCC § 2-302).

contract involved is so one-sided as to be unconscionable under the circumstances existing *at the time of the making of the contract.*"[315]

2. *Procedural and Substantive Unconscionability*

A majority of the courts today still rely on the two-part test set forth in *Williams v. Walker-Thomas Furniture Co.*[316] That test provides that "unconscionability has generally been recognized to include an *absence of meaningful choice* on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."[317] As a result, most cases of unconscionability include, and frequently require, some combination of the following two categories: (1) procedural unconscionability, which considers whether there was an absence of meaningful choice for one of the parties, and (2) substantive unconscionability, which focuses on the actual contract terms and whether those terms are unreasonably favorable to the drafting party.[318] Furthermore, it is a generally applied and accepted rule that if more of one of the categories is present, then less of the other is required.[319]

Procedural unconscionability focuses on oppression and unfair surprise.[320] The oppression element considers two factors: whether

315. U.C.C. § 2-302 cmt 1 (1998) (emphasis added); *see also* FARNSWORTH, *supra* note 287, § 4.28 at 581 (identifying test for unconscionability).

316. *See* 350 F.2d 445, 450 (D.C. Cir. 1965) (setting forth two-part test).

317. *Id.* at 449 (emphasis added) (noting first case to establish unconscionability test). The description of unconscionability established in *Williams v. Walker-Thomas Furniture Co.* has remained basically unchanged over the decades since the case was decided. *See* FARNSWORTH, *supra* note 287, § 4.28 at 582 (suggesting test of unconscionability in *Williams v. Walker-Thomas Furniture Co.* remains intact).

318. *See, e.g.,* Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 666 (6th Cir. 2003) ("[U]nder Ohio law, the unconscionability doctrine has two components, both of which must be present: (1) substantive unconscionability, i.e., unfair and unreasonable contract terms, and (2) procedural unconscionability, i.e., individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible."). *See also* Little v. Auto Stiegler, Inc., 63 P.3d 979, 983-84 (Cal. 2003) ("The doctrine of unconscionability has both a 'procedural' and 'substantive' element, the former focusing on oppression or surprise due to unequal bargaining power, and the latter on overly harsh or one-sided results." (quoting Armendariz v. Found. Health Psychare Servs., 6 P.3d 669 (Cal. 2000))).

319. *See* FARNSWORTH, *supra* note 287, § 4.28 at 585 (identifying case holding that when contract is more substantively unconscionable, less procedural unconscionability is required) (citing *Armendariz*, 6 P.3d at 767).

320. *See* Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 145 (Cal. Ct. App. 1997) (defining unconscionability); *accord* Navellier v. Sletten, 262 F.3d 923, 940 (9th Cir. 2001) ("[T]he procedural aspect [of unconscionability] is manifested by[:] (1) 'oppression', which refers to an inequality of bargaining power resulting in no meaningful choice for the weaker party, or (2) 'surprise', which occurs when the supposedly agreed-upon terms are hidden in a document." (citing A&M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114 (1982))).

an inequality in bargaining power existed such that no real negotiation occurred between the two parties and whether there was an absence of meaningful choice for one of the parties.[321] The unfair surprise element examines whether the supposedly agreed-upon terms are hidden or concealed in the document.[322] "In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power."[323]

Substantive unconscionability examines the actual contractual terms to determine if the terms are unreasonably favorable to the more powerful party.[324] Factors considered include whether the integrity of the bargaining process is damaged, or if it is contrary to public policy.[325] Substantively, unconscionable terms may generally be regarded as unfairly one-sided[326] or as an "overly harsh allocation of risks or costs which is not justified by the circumstances under which the contract was made."[327] While unconscionability normally requires a finding of both procedural and substantive elements, the substantive element "alone may be sufficient to render the terms of the provision at issue unenforceable,"[328] particularly if the sum total of the substantive provisions is grossly unfair and "drive[s] too hard a bargain."[329]

3. *Application of Unconscionability to Athletic Scholarship Contracts*

As previously mentioned, courts have found the NLI and the Statement of Financial Aid to be the two main contractual documents between the university and the student-athlete.[330] NCAA

321. *See Stirlen*, 60 Cal. Rptr. 2d at 145 (discussing oppression element of procedural unconscionability).

322. *See id.* at 1532 (outlining unfair surprise element of procedural unconscionability); *see also* Svalina v. Split Rock Land & Cattle Co., 816 P.2d 878, 882 (Wyo. 1991) (providing list of six factors to aid in identification of procedural unconscionability, including "was one party in some manner surprised by fine print or concealed terms").

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

324. *See* 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 2004) (discussing substantive unconscionability).

325. *See id.* (identifying factors to be considered in substantive unconscionability analysis).

326. *See* Little v. Auto Stiegler, Inc., 63 P.3d 979, 1071 (Cal. 2003) (defining substantive unconscionable terms).

327. Navellier v. Sletten, 262 F.3d 923, 940 (9th Cir. 2001).

328. Brower v. Gateway 2000, Inc., 246 A.D.2d 246, 254 (N.Y. App. Div. 1998).

329. United Companies Lending Corp. v. Sargeant, 20 F. Supp. 2d 192, 206 (D. Mass. 1998).

330. *See* Davis, *supra* note 228, at 1144 (discussing what courts consider to be contractual documents of athletic scholarship).

rules and regulations are incorporated by reference in both of these documents.[331] As a result, courts must not only look to the four corners of the NLI and Statement of Financial Aid, but must also look at the incorporated NCAA rules and regulations.

A student-athlete asserting a claim of unconscionability bears the burden of proving both procedural and substantive unconscionability before a court will find the athletic scholarship contract to be an unconscionable contract of adhesion.[332] The student-athlete must show: (1) an inequality of bargaining power between the institution granting the athletic scholarship and the student-athlete, (2) a lack of meaningful choice or alternative for the student-athlete, (3) supposedly agreed-upon terms hidden or concealed in the contract, and (4) terms that unreasonably favor the institution.[333]

a. Procedural Unconscionability: Elements of Oppression and Unfair Surprise

The athletic scholarship contract is oppressive because there is no meaningful choice for the student-athlete entering into the contractual agreement. In order to receive an athletic scholarship, student-athletes must sign both the NLI and the institution's Statement of Financial Aid, both of which are standard-form adhesion contracts.[334] While the student-athlete can choose which institution to attend, the contractual documents the student-athlete must sign are the same form agreements from school to school.[335]

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331. *See* National Letter of Intent, *supra* note 274 (incorporating NCAA rules by reference in National Letter of Intent as well as athletic department's Statement of Financial Aid).

332. *See* Guaranteed Foods of Neb., Inc. v. Rison, 299 N.W.2d 507, 512 (Neb. 1980) (holding party asserting unconscionability must also plead it); *see also* Little v. Auto Stiegler, Inc., 63 P.3d 979, 1071-72 (Cal. 2003) ("The doctrine of unconscionability has both a 'procedural' and 'substantive' element, the former focusing on oppression or surprise due to unequal bargaining power, and the latter on overly harsh or one-sided results." (quoting Armendariz v. Found. Health Psychare Servs., 6 P.3d 669 (Cal. 2000))).

333. For a further discussion of the elements a student athlete must show if asserting unconscionability, see *supra* notes 316-29 and accompanying text (listing elements of doctrine which must be proven to prevail on unconscionability claim).

334. *See* BLACK'S LAW DICTIONARY, *supra* note 286, at 342 (explaining both NLI and institution's Statement of Financial Aid are "standard-form contract[s] 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"). In fact, the student-athlete has no choice about the terms found in the contractual agreement proffered by the NCAA and its member institutions. *See* National Letter of Intent, *supra* note 274 (discussing take-it-or-leave-it approach of university and NCAA documents).

335. *See* National Letter of Intent, *supra* note 274 (suggesting no alternative to NLI exists).

Thus, the student-athlete is deprived of any meaningful choice and is compelled to enter into and accept the agreement as stipulated.

The athletic scholarship contract will also be viewed as oppressive by the courts because of the gross inequality of bargaining power between the two parties.[336] For example, gross inequality of bargaining power may exist when the stronger party (NCAA) has knowledge that the weaker party (student-athlete) "is unable to protect his interest by . . . [an] inability to understand the language of the agreement."[337] Stemming from the gross inequality of bargaining power, the student-athlete has no opportunity to negotiate, change, or delete any of the provisions. This is explicitly set forth in the NLI.[338] Similarly, an institution's Statement of Financial Aid also has a provision severely limiting the student-athlete's bargaining power, stating that any changes or modifications must be in compliance with the university, its athletic conference rules, and NCAA legislation.[339] In addition to bargaining power, there is almost always a vast imbalance in knowledge between the two parties regarding the terms and provisions of the contract, particularly with regard to the NCAA rules.[340]

The NLI and the institution's Statement of Financial Aid are take-it-or-leave-it contracts of adhesion.[341] Professor E. Allan Farnsworth appropriately recognized that, when dealing with take-it-or-leave-it adhesion contracts, "the only alternative to complete adher-

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336. *See* Roussalis v. Wyo. Med. Ctr., Inc., 4 P.3d 209, 247 (Wyo. 2000) (listing factors of procedural unconscionability). The *Roussalis* court outlined:

> "[P]rocedural unconscionability includes: deprivation of meaningful choice as to whether to enter into the contract, compulsion to accept terms, opportunity for meaningful negotiation, such gross inequality of bargaining power that negotiations were not possible, characteristics of alleged aggrieved party (underprivileged, uneducated, illiterate, easily taken advantage of), and surprise by fine print or concealed terms."

Id.

337. U.C.C. § 2-302 (1998).

338. *See* National Letter of Intent, *supra* note 274, at ¶¶ 15, 18 (stating in paragraph 15, "No additions or deletions may be made to this NLI or the Release Request Form," and stating in paragraph 18, "My signature on this NLI nullifies any agreements, oral or otherwise, which would release me from the conditions stated within this NLI").

339. *See, e.g., Tulsa Financial Aid Agreement*, *supra* note 278, at acceptance 4 ("Any modification or cancellation of this Tender must be in compliance with University, [Conference] and NCAA legislation.").

340. For a further discussion of the inequality in knowledge between the student-athlete and the university officials in regards to NCAA rules, see *infra* notes 346-51 and accompanying text.

341. *See* BLACK'S LAW DICTIONARY, *supra* note 286, at 342 (defining adhesion contract). The NLI and the Statement of Financial Aid fall arguably within definition of adhesion contract.

ence is outright rejection."[342] As a result of the NCAA and its member institutions' grossly disproportionate bargaining power, even the freedom of contract ideology will not prevent the courts from declaring the contract void as against public policy.[343]

Procedural unconscionability also includes an unfair surprise element where supposedly agreed-upon terms are hidden or concealed.[344] Both the NLI and the Statement of Financial Aid incorporate NCAA legislation by reference. In so doing, the most important terms affecting the lives of student-athletes are not just hidden in these documents, but are completely concealed. The NCAA manual is a 476-page document containing rules that are often found to be difficult and convoluted.[345]

NCAA member institutions have employees within their athletic departments whose sole purpose is to ensure NCAA compliance.[346] The job of a compliance director involves the difficult task of attempting to "master the intricacies of NCAA rules."[347] Many of the NCAA rules are either "too abstract to be read literally or must be interpreted by the NCAA even when they appear to be clear."[348] Thus, even persons most qualified to handle NCAA rules experience difficulty.[349]

Accordingly, student-athletes and their guardians are not given a reasonable opportunity to read and understand the NCAA terms of the athletic scholarship contract.[350] Moreover, even if the NCAA

342. FARNSWORTH, *supra* note 287, at 558.

343. *See* Shell Oil Co. v. Marinello, 307 A.2d 598, 601 (N.J. 1973) (determining freedom of contract to be non-existent when parties' bargaining power is grossly disproportionate).

344. For a further discussion of procedural unconscionability, see *supra* notes 320-23 and accompanying text (outlining factors of procedural unconscionability); *see also* Blackistone, *supra* note 86, at 1B ("There ought be a law against this sort of thing. Or, at least, the fine print ought to be bolder. . . . NCAA by-law 15.3.5.1 . . . allows colleges to take away an athletic scholarship for, basically, whatever reasons.").

345. *See generally* NCAA DIVISION I MANUAL, *supra* note 1 (containing 476 pages).

346. *See* Vahe Gregorian, *The NCAA Honor System*, ST. LOUIS POST-DISPATCH, July 20, 2003, at D1 (discussing job of compliance director).

347. *Id.* (stating NCAA compliance director's job is "inherently thorny, beginning with the call to master the intricacies of the NCAA rules, which are voted upon and implemented by member institutions").

348. *Id.* (stating, "in recent years many institutions have turned to attorneys" to interpret NCAA's rules).

349. *See id.* (suggesting even NCAA compliance directors have difficulty interpreting NCAA rules).

350. *See* Woodhaven Apartments v. Washington, 942 P.2d 918, 925 (Utah 1997) ("Procedural unconscionability addresses whether the party had a reasonable opportunity to read and understand the terms of the contract").

terms were conspicuously placed on the documents to be signed it is not reasonable to believe that the student-athlete and their parents would understand those terms.[351]

b. Substantive Unconscionability: Terms Unreasonably Favorable to NCAA and Member Institutions

The athletic scholarship contract is substantively unconscionable because it is one-sided, overly harsh, and the "sum total of its contractual terms drives too hard a bargain."[352] The NCAA rules governing amateurism exemplify this notion. NCAA rule 12.01.1 provides that only amateur student-athletes will be eligible for athletic participation.[353] NCAA rule 12.1.2 lays out ways in which one's amateur status may be lost, including any receipt of payment – directly or indirectly – that can be linked in any way to the student-athlete's athletic skill.[354] NCAA rule 12.1.2 even states that amateur status will be lost if the student-athlete "[a]ccepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation."[355] Searching for a solution to the problem posed by this Comment, commentators have suggested a "have-your-cake-and-eat-it-too" approach whereby a trust would be created, allowing student-athletes the ability to preserve their amateur status while their athletic eligibility remains.[356] The money generated through the use of the commercial value of their identity would be placed in a trust until the expiration of their athletic eligibility. If implemented, a trust system would greatly alleviate the egregious commercial injuries to star student-athletes under the current substantive provisions of the NCAA Manual. Unfortunately, the trust proposal is unlikely to pass muster under NCAA rule 12.1.2(b) because it would constitute a promise of pay to be

351. For a further discussion regarding why the NCAA rules are hard to understand, see *supra* notes 346-50 and accompanying text.

352. United Companies Lending Corp. v. Sargeant, 20 F. Supp. 2d 192, 206 (D. Mass. 1998); *see also* State v. Brown, 965 P.2d 1102, 1110 (Wash. Ct. App. 1998) (finding clause or term will be substantively unconscionable if "one-sided or overly harsh").

353. *See* NCAA DIVISION I MANUAL, *supra* note 1, art. 12.01.1, at 65 (limiting NCAA eligibility to amateur student-athletes).

354. *See id.* art. 12.1.2(a), at 66 (providing situations where student-athlete would lose amateur status).

355. *Id.* art. 12.1.2(b), at 66.

356. *See, e.g.,* Belo, *supra* note 4, at 154-56 (offering one solution which would permit student-athletes to share in royalties generated by using their identity without destroying their amateur status); *see also* Mueller, *supra* note 163, at 87-88 (proposing trust to hold money earned by student-athletes until graduation).

received upon the completion of intercollegiate athletics participation.[357]

Moreover, NCAA rule 12.5.2.1 revokes athletic eligibility if a student-athlete receives any remuneration for the use of his name or photograph to be used in connection with any commercial product or service.[358] Two points of interest arise from this rule. First, NCAA eligibility is revoked under this rule if the student-athlete simply *allows* his name or photograph to be used even if the student-athlete receives no money for the use of his name or photograph. Second, a literal reading of the rule causes one to notice that it only addresses *name* or *photograph*. If one views the plain meaning of this rule as allowing the student-athlete to receive monetary benefit from the use of his *identity* as a star player, such as with items featuring the star player's number, think again. Attempting to squeeze through this potential loophole simply sends you back to NCAA rule 12.1.2 – providing that any pay, whether direct or indirect, linked to the star player's athletic skill will result in the student-athlete losing amateur status.[359]

With respect to EA Sports, and its *NCAA March Madness* video game, it also appears that the NCAA licenses other ways to infringe on the student-athletes' right of publicity. NCAA rule 12.5.1 deals with permissible promotional activities.[360] For example, as long as certain conditions are satisfied,[361] "[i]nstitutional, [c]haritable, [e]ducation[al], or [n]onprofit [p]romotions . . . may use a student-athlete's name, picture, or appearance . . . ."[362] NCAA rule 12.5.1.1(h), however, states:

> Any *commercial items* with names, *likenesses* or pictures of *multiple student-athletes* . . . may be sold only at the member institution at which the student-athlete is enrolled, institutionally controlled (owned and operated) outlets or out-

357. *See* NCAA DIVISION I MANUAL, *supra* note 1, art. 12.1.2(b), at 66 (prohibiting student-athlete from accepting compensation even if compensation is received in future).

358. *See id.* art. 12.5.2.1, at 78 (listing impermissible promotional activities for student-athletes).

359. *See id.* art. 12.1.2, at 66 (listing seven ways student-athlete can lose amateur status).

360. *See id.* art. 12.5.1, at 75 (permitting certain institutions and groups to use student-athlete's name and picture under certain conditions).

361. *See id.* art. 12.5.1.1(a)-(i), at 75 (listing nine conditions in conjunctive form). If any of the conditions are not satisfied, the promotional activity is no longer permissible. *See id.* (providing conditions that must be met for permissible promotional use of student-athlete's name, picture, or appearance).

362. *Id.* art. 12.5.1.1, at 75.

> lets controlled by the charitable or educational organization . . . . Items that include an individual student-athlete's name, picture, or *likeness* (e.g. name on jersey, name or *likeness* on a bobblehead doll), other than informational items (e.g. media guide, schedule cards, institutional publications), *may not be sold*.[363]

Under a reading of both *White* and *Ali*, the virtual likenesses of the student-athletes depicted in the commercial video games would constitute a finding that EA Sports – officially licensed by the NCAA – commercially exploits student-athletes without their consent.

The rules governing amateurism are substantively unfair to the student-athlete, disregarding the legally accepted right of publicity. The rules are contrary to the policy of "prevent[ing] the unjust enrichment of others seeking to appropriate that value for themselves."[364] Therefore, the sum total of the NCAA provisions governing amateurism is one-sided, overly harsh, and "drives too hard a bargain."[365]

Consequently, the combination of oppression and unfair surprise directed towards student-athletes leaves no doubt that athletic scholarship contracts are procedurally unconscionable. Additionally, the terms and provisions of athletic scholarship contracts are unreasonably favorable to the NCAA and its member institutions, providing ample evidence as to its substantive unconscionability. Therefore, athletic scholarship contracts are unconscionable contracts of adhesion.

c. Remedies

Courts have declined to allow for the recovery of damages in unconscionability suits.[366] Yet if courts find unconscionability, they will have "broad discretion in further proceedings."[367] The courts may find the entire contract to be void or they may refuse to en-

363. *Id.* art. 12.5.1.1(h), at 75.

364. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 cmt. c (1995).

365. State v. Brown, 965 P.2d 1102, 1110 (Wash. Ct. App. 1998) (stating clause or term will be substantively unconscionable if it is "one-sided or overly harsh"); *see also* United Companies Lending Corp. v. Sargeant, 20 F. Supp. 2d 192, 206 (D. Mass. 1998) (noting substantive unconscionability will be found if "sum total of the provisions of a contract drives too hard a bargain").

366. *See* FARNSWORTH, *supra* note 287, § 4.28 at 595 (citing cases which have declined to award monetary damages).

367. Bracey v. Monsanto Co., 823 S.W.2d 946, 950 (Mo. 1992) ("[I]t may refuse to enforce contract, it may enforce remainder of contract, free from provisions deemed to be unconscionable, or may limit application of offending clause in order to avoid unconscionable result.").

force or limit the application of the term or clause found to be unconscionable.[368] Consequently, once the court recognizes unconscionability, the provisions under the NCAA rules and regulations that supposedly provided consent by the student-athlete would be unenforceable. As such, the NCAA would have no defense to the right of publicity claim asserted by the aggrieved student-athlete. Furthermore, upon a finding of unconscionability, the contradictory nature of the mission of the NCAA can be presented to further demonstrate the unfairness, allowing the court to reach an equitable decision "in light of the contract's setting, purpose, and effect."[369] Courts have even interpreted their authority as to allow them to add terms to unconscionable agreements.[370] In order to make an equitable decision, courts should either refuse to enforce the unconscionable terms and clauses of the athletic scholarship contract, or they should add terms to change the unconscionable results.

VII. CONCLUSION

The NCAA and its licensees should not be allowed to use an athlete's identity and star persona solely for their financial gain. This results in a windfall, or unjust enrichment, without any compensation to the athlete who is responsible for creating this financial gain. But this is exactly what happens with the sale of college sports merchandise, namely jerseys and other items featuring the numbers of star-players and video games displaying the virtual likenesses of the student-athlete. This market for collegiate sports merchandise is a multi-billion dollar industry that exploits the commercial value of star-players' identities without their consent, and without providing any compensation to these student-athletes. This practice has been going on for years under the guise of preserving amateurism. Using the identity of an NCAA star-athlete for

368. *See* FARNSWORTH, *supra* note 287, § 4.28 at 594 (noting two ways in which courts deal with unconscionable contracts); *see also Bracey*, 823 S.W.2d at 950 (giving trial court broad discretion in further proceedings if contract is found to be unconscionable).

369. U.C.C. § 2-302(2) (1998). "[P]arties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination." *Id. Accord* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. f (1981) ("[P]arties are to be afforded an opportunity to present evidence as to commercial setting, purpose and effect to aid the court in its determination.").

370. *See* FARNSWORTH, *supra* note 287, § 4.28 at 595 (referencing case where court added term to unconscionable contract (citing Vasquez v. Glassboro Serv. Assn, 415 A.2d 1156 (N.J. 1980))).

commercial advantage is not appropriate – it is appropriation – and it violates the student-athlete's right of publicity. Until the NCAA makes major changes to its current system, many student-athletes have actionable right of publicity claims against the NCAA and its licensees.