Sports Litigation Alert

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In re NCAA Student-Athlete Name & Likeness Licensing Litigation: Former Athletes Seek A Share Of NCAA Licensing Profits

By Daniel Brown and Dante DiPasquale

The National Collegiate Athletic Association ("NCAA") profits handsomely from the increasingly lucrative collegiate licensing and merchandising market—estimated to be worth $4 billion annually. Yet, current and former NCAA athletes do not share in these licensing fees. Two ways that the NCAA has accomplished this arguably unfair result are by requiring NCAA athletes to sign away their licensing rights, and by refraining from licensing players' names to popular products such as video games. However, all of that may change as a result of related class action lawsuits filed by former Arizona State and Nebraska quarterback Sam Keller and former UCLA basketball star Ed O'Bannon.

In these two cases, now consolidated in the U.S. District Court for the Northern District of California, plaintiffs attack NCAA licensing practices as violations of antitrust laws and the players' rights of publicity. As damages, plaintiffs seek to force the NCAA to compensate former (and possibly current) student-athletes for the use of their images or likenesses in commercials, video games, television rebroadcasts and various other sorts of merchandise.

Keller v. NCAA, CLC and EA Sports

On May 5, 2009, Samuel Keller filed a class action complaint against Electronic Arts Inc.'s ("EA Sports"), the NCAA and the Collegiate Licensing Company ("CLC") (No. 09-1967 CW) (N.D. Cal.). Keller alleges, inter alia, that NCAA athletes have been deprived of their rights of publicity because "[p]ursuant to and in furtherance of its unlawful conspiracy with the NCAA and the CLC, [EA Sports] has used and continues to use Plaintiff's and class members' names, images, likenesses and distinctive appearances without their consent in connection with and for the purposes of advertising, selling and soliciting purchases of its videogames . . . ." Specifically, Keller alleges that while popular sports video games by EA Sports avoid displaying a player's name, and even though NCAA licensing agreements prohibit the use of student-athletes' names and likenesses, the virtual football players more than just coincidentally resemble real-life college football athletes, including himself. Indeed, these virtual players are nearly identical to their real-life counterparts, sharing the same jersey numbers, physical characteristics and home state. In addition, while EA itself omits the athletes' names from its games, consumers can download team rosters from online services and upload the athletes' names into the games.

In its motion to dismiss, EA Sports relied on cases that strike a balance between the right of publicity on one hand and the First Amendment and the public's interest in obtaining accurate information about sports on the other—the scales often tipping in favor of the latter. For its part, the NCAA argued that it did not "use" players' names and likenesses because they merely licensed "team logos, uniforms, mascots and [] school stadiums—all of which belong to the schools in question, not to [Keller] or any other student-athlete." The NCAA also claimed that Keller's likeness lacks

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"commercial value" apart from his connection to the NCAA and thus fails to allege a violation of his right of publicity.

On Feb. 8, 2010, the court denied EA Sports' motion to dismiss Keller's right of publicity claim under California law, and also denied each of the defendants' motions to dismiss plaintiff's conspiracy claims. Keller v. Elec. Arts, Inc., No. 09-1967 CW, 2010 WL 530108 (N.D. Cal. Feb. 8, 2010). The Court rejected EA Sports' "transformative use" defense because unlike Kirby v. Sega of Am., Inc., 144 Cal. App. 4th 47 (2006), where a plaintiff musician and dancer was depicted in a video game as a news reporter in the future, the video game's "setting is identical to where the public found [Keller] during his collegiate career." The Keller Court also rejected a "public interest defense" because the NCAA sports games "provides more than just the players' names and statistics; it offers a depiction of the student athletes' physical characteristics."

O'Bannon v. NCAA and CLC

Within months after Keller filed his complaint, on July 21, 2009, Edward C. O'Bannon, Jr., a former UCLA basketball star, filed his own class action on behalf of former-NCAA athletes against the NCAA and CLC (No. 09-3329 BZ) (N.D. Cal.). On Jan. 15, 2010, the court ordered that the Keller and O'Bannon actions, and other related cases, be consolidated onto a single bearing the name In re NCAA Student-Athlete Name & Likeness Licensing Litigation.

O'Bannon's complaint also concerns his right to profit from the use of his likeness, but his claims are based on alleged violations of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Specifically, O'Bannon cites NCAA Bylaw 12.5.1.1.1, which requires all NCAA athletes, before obtaining eligibility and without the right to counsel, to sign Form 08-3a, a "Student-Athlete Statement," which authorizes the NCAA "to use [their] name or picture to generally promote NCAA championships or other NCAA events, activities or programs." O'Bannon alleges that the NCAA essentially exploits its players' images and likenesses in perpetuity by entering into lucrative licensing deals, through CLC, in which the players receive no compensation. Thus, O'Bannon alleges that the NCAA, CLC and the individual universities and conferences have agreed to artificially fix prices paid to class members for use and sale of their images at "zero," limit the output of licensed images, and boycott and refuse to deal with class members. O'Bannon also asserts that the consolidation of universities for licensing purposes restrains trade by limiting the number of licenses available.

The NCAA moved to dismiss O'Bannon's complaint, arguing that the "Student-Athlete Statement" is not a "perpetual release" and in no way restrains trade or prevents O'Bannon, or other former college athletes, from attempting to market their own images. The NCAA also argued that O'Bannon's belief that he is owed money for the NCAA's use of his image "is simply not antitrust injury."

On Feb. 8, 2010, the court, construing O'Bannon's complaint in his favor as is required at the pleading stage, held that O'Bannon stated a claim under Section 1 of the Sherman Act. O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. 09-1967 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010). The claim withstood a motion to dismiss because O'Bannon sufficiently alleged that an agreement in restraint of trade existed between the NCAA and its members related to licensing images of former student-athletes in the collegiate licensing market.

The Ramifications Of A Win By Keller And O'Bannon

A final ruling in favor of the NCAA athlete plaintiffs would surely have major implications for both the NCAA/student-athlete relationship and the way that business is done in the collegiate licensing market. At a minimum, the NCAA may need to determine how to pay royalties to college athletes on a going forward basis if it wishes to continue licensing NCAA athlete's images and likenesses. While the NCAA may be less inclined to enter into such agreements if it is required to share profits with athletes, such a result is doubtful considering the tremendous value to these deals.

There is also potential concern for the consumer, and particularly for the many consumers of EA Sports' video games. If the NCAA is forced to share licensing proceeds with its athletes, it might demand higher fees, which could result in higher prices for consumers of NCAA-licensed products. Similarly, EA Sports might discontinue its practice of designing its sports games to be as accurate as possible—resulting in a less appealing product for consumers.

A world in which each student-athlete is in charge of licensing his or her own name and likeness for use in NCAA-related products would be a radical departure from the current state of affairs. And, while arguments for maintaining the value and uniqueness of amateur sports may be a strong enough pro-competitive benefit to withstand calls for merchandise and broadcast revenue sharing with current student-athletes, O'Bannon correctly alleges that the shield of amateurism is not as strong once a student-athlete has graduated. It has therefore been suggested that the NCAA place payments from merchandising and licensing deals in a trust fund to be proportionately paid on a yearly basis to former student-athletes. Such a solution, and distinction between current and former college athletes, may still allow the NCAA to maintain its amateurism argument in future antitrust lawsuits challenging the NCAA's various operations (see, e.g., NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984) (discussing the protection of amateurism as a justification for alleged antitrust violations under a rule of reason analysis)). Ultimately, if the Keller/O'Bannon court requires the NCAA to share license and merchandise revenue with student-athletes, the line between the amateurism of college sports and professional sports could blur to a point of being indistinguishable.

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