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Article Title: Is it Still “In the Game”, or has Amateurism Left the Building? NCAA Student-Athletes’ Perceptions of Commercial Activity and Sports Video Games

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Running Head: Student-Athletes & Commercial Activity

Is it Still “In the Game”, or has Amateurism Left the Building?

NCAA Student-Athletes’ Perceptions of Commercial Activity and Sports Video Games

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Abstract

The NCAA maintains a balance between amateurism and the increasing need for generating revenue. In this balancing act, there are various policy considerations and legal constraints. These legal and policy entanglements bore such class action suits as *Keller v. Electronic Arts, National Collegiate Athletic Association, and Collegiate Licensing Company* (2009) and *O’Bannon v. National Collegiate Athletic Association and Collegiate Licensing Company* (2009), which question current revenue generating practices of the NCAA. The purpose of this study was to examine the perceptions of NCAA Division I men’s football and basketball student-athletes toward amateurism and the particular use of student-athletes’ likenesses in college sports video games. Findings point to a lack of clarity and understanding of the agreements and consent forms student-athletes sign annually. Respondents demonstrated confusion in regard to financial aid opportunities, parameters of their scholarships, and whether they endorse commercial products. A majority of respondents expressed the desire to receive additional compensation. Recommendations include clarification and focused rules’ education from compliance and financial aid officers, as well as introducing new amateurism policy, concurrently avoiding costly litigation.

The world of United States’ collegiate athletics “... has grown from a cottage industry in which local clubs competed against each other to a global industry... with its orderly contests, stable membership, and elaborate governance infrastructure” (Washington & Ventresca, 2008, p. 30). The application of National Collegiate Athletic Association Division I (NCAA DI) amateurism policy has evolved to a significantly different interpretation of amateurism, when compared to the 19th Century definition of the term and the underpinnings of the NCAA, through its history in the 20th Century (Allison, 2001; Byers, 1995; Crowley, 2006; Falla, 1981; Glader, 1978; Kaburakis, 2007; Pierce, Kaburakis, & Fielding, 2010; Sack & Staurowsky, 1998; Smith, 1993; Thelin, 1996; Watterson, 2000; Wheeler, 2004). The “old” amateurism was a much stricter interpretation, in which financial aid was not to be rendered contingent on athletic ability. For example, the “Sanity Code,” adopted in 1948 and repealed in 1956, disallowed “athletic scholarships” (Byers, 1995; Crowley, 2006; Falla, 1981). Progressively, the “new” amateurism evolved from merely providing athletically-related financial aid for participating student-athletes, to continuous amendments in amateurism bylaws and flexible interpretations. Thus, the “new” amateurism permitted several exceptions that allowed the alignment of college sport with new global sport conditions, where the adjective “amateur” in its original and “pure” 19th Century meaning is becoming inapplicable, or even irrelevant (Allison, 2001; Kaburakis, 2007; Pierce, Kaburakis, & Fielding, 2010; Wheeler, 2004). Namely, the “old” amateurism, in which “student participation in intercollegiate athletics is an avocation...” (Bylaw 2.9, NCAA, 2011a), conflicts with the “new” and flexible amateurism allowing for deviations from the original definition of the term. The incompatibility and disconnect between the “old” and “new” amateurism are underscored by the advent of recent technological tools to promote (and benefit from) college

sports competitions, as well as increased commercial activity, such as sport video games. The recent *In Re Student Athlete Name and Likeness Licensing Litigation* (2010), consolidating class action suits in *Keller v. Electronic Arts, National Collegiate Athletic Association, and Collegiate Licensing Company* (2009) and *O’Bannon v. National Collegiate Athletic Association, and Collegiate Licensing Company* (2009), brought forth significant media coverage surrounding the use of student-athletes in commercial activities. Specifically at issue is the use of student-athletes’ likenesses within Electronic Arts (EA) Sports *NCAA Football* and *Basketball* games. As EA Sports’ motto declares (“... It’s in the Game”), the realistic depictions of all aspects of a college sports game, including student-athletes’ likenesses, are an inherent part of these video games’ popularity.

Research has analyzed the legal implications of such use (e.g. Cianfrone & Baker, 2010; Kaburakis et al. 2009). Heretofore, however, there is a dearth of empirical research on the student-athletes’ own perceptions and understandings of NCAA amateurism policy, and the regulatory framework that defines such use. Indeed, there have been research studies surveying student-athletes’ perceptions and experiences (Barringer, 2002; Beam, Serwatka, & Wilson, 2004; Cross & Vollano, 1999; Cullen & Latessa, 1996; Ellenbogen, Jacobs, Derevensky, Gupta, & Paskus, 2008; Hart, 1997; Holmes, McNeil, Adorna, & Procacciono, 2008; Kang, Lee, & Lee, 2010; Kimball, 2007; Lawrence, Merckx, & Hebert, 2009; Morris & Merckx, 2006; NCAA, 2004, 2008; Paule & Gilson, 2010, 2011; Pauline, 2010; Popp, Hums, & Greenwell, 2009, 2010; Popp, Love, Kim, & Hums, 2010; Potuto & O’Hanlon, 2006, 2007; Zimbalist, 1999), yet none focused on student-athletes’ perceptions of commercial activity and NCAA amateurism.

It is advisable in view of forthcoming adjudication in the pending cases to collect data from student-athletes as evidentiary support for legal arguments, which may prove dispositive

toward final resolution of the cases, as well as ensuing amateurism policy amendments.

Quantitative analysis is instrumental for contemporary intellectual property litigation that reaches trial (Kaburakis et al., 2009). In fact, the absence of such analytics has been held as a shortcoming in the context of some intellectual property litigation. “Sports law analytics” research is increasingly sought after by industry stakeholders, legal counsel, and federal courts hearing related cases (Rodenberg & Kaburakis, 2011). For example, the second prong of Section 46 of the Restatement (Third) of Unfair Competition (1995) sets the burden of proof for establishing a violation of right of publicity as “identity has commercial value.” This prong has been traditionally decided after consideration of marketing research surveys attempting to establish whether there is indeed commercial value. Such research investigates whether consumers can sufficiently identify the plaintiff and, in turn, make the clear connection between the plaintiff and the digital expression in a video game (Kaburakis et al., 2009).

Therefore, the purpose of this study was to examine student-athletes’ perceptions of contemporary uses of images and likenesses in commercial video games, which bore the pending federal class action suits. Further, this research investigates student-athletes’ perceptions of athletic scholarships and currently available financial aid, in relation to commercial activity in intercollegiate athletics. This contribution is valuable for many stakeholders, including student-athletes; NCAA staff and governance constituents in member conferences and institutions; college athletic departments (especially compliance and financial aid officers); university administrators in executive, development, marketing, licensing, media, and principally general counsel positions; as well as practitioners in the burgeoning sport and entertainment industry, particularly those in digital gaming and commercial sponsorship of college sports. In addition,

empirical legal research and data-driven policy analysis and recommendations are meaningful and very promising for ensuing sport management literature.

Legal Theory and NCAA Policy

Right of Publicity, NCAA Amateurism Policy, and Consent

Prior research on intellectual property theory and application in student-athletes’ cases, in particular the use of their likenesses in video-games (Cianfrone & Baker, 2010; Kaburakis et al. 2009), yields useful insight on possible outcomes of the pending cases. In sum, current and former student-athletes possess rights of publicity over the use of their images and likenesses. The key legal questions analyzed in prior research and currently pending before the Federal courts in California are whether such use by the NCAA and its licensees infringes upon student-athletes’ rights, or whether these rights are preempted by student-athletes’ consent and the nature of their participation in amateur collegiate athletic competitions.

Commercial publicity rights have been represented by a number of malleable concepts on which there is no uniformity of acceptance, no federally codified law, and jurisdictions across the U.S. have been split (Kaburakis et al., 2009). Section 46 of the Restatement (Third) of Unfair Competition (1995) sets the burden of proof for establishing a violation of a right of publicity as: (i) use of the plaintiff’s identity; (ii) identity has commercial value; (iii) appropriation of commercial value for purposes of trade; (iv) lack of consent; and (v) resulting commercial injury. The fourth prong is at issue in the video game litigation, as the NCAA’s defense may include a claim that the student-athletes depicted in the interactive games provided *de facto* consent to such licensing via their scholarship agreement, letter of intent, or other related document. Thus, data determining whether student-athletes realized they provided the pertinent consent may be decisive. Former student-athletes moreover may argue that even if they were held to consent to

the present use of their identities in the video games, their consent does not extend beyond the point at which they exhausted their intercollegiate athletics eligibility. Hence, future research may focus on former student-athletes’ claims and whether consent is present in their case. Furthermore, future research may investigate the use of student-athletes’ identities and whether consumers do recognize them sufficiently in the video games, which would be translated to commercial value for video game manufacturers (Kaburakis et al., 2009).

Presently, there is no specific treatment in NCAA policy for the use of student-athlete likenesses in EA Sports video games. Applicable Bylaws to the use of student-athletes in video games, next to the Association’s Constitutional Principles in Bylaw 2 (e.g. Bylaw 2.8, The Principle of Compliance, by which student athletes need to comply with the Association’s regulations, and Bylaw 2.9, The Principle of Amateurism) among others are:

- 12.1.2: Amateur status is lost if the student-athlete uses athletics skill for pay
- 12.5.1.1: Institution may use a student-athlete’s name, picture, or appearance to support charitable, educational, and activities incidental to participation... provided...
 - (g) name, picture, or appearance not used to promote commercial ventures of non-profit agency
 - (h) items with names, *likenesses*, or pictures of multiple student-athletes may be sold only at the institution or controlled outlets. Items with individual name, picture or *likeness* (name on jersey, likeness on doll) other than informational items, *may not be sold*
- 12.5.2.1: A student-athlete is ineligible if compensated for advertisement, commercial promotion, endorsement

- 12.5.2.2: Use of name or picture without knowledge or permission carries the simultaneous burden for the student-athlete and the institution to take steps to stop use
- 14.01.3: Intercollegiate athletics eligibility is contingent upon compliance with all applicable rules of the Association, institution, and conference (NCAA, 2011a, emphasis added).

Additionally, NCAA form 10-3a, an annual form student-athletes have to sign in order to participate in their institutions’ competitions, contains important sections:

- You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.
- You affirm that your institution has provided you a copy of the Summary of NCAA Regulations or the relevant sections of the Division I Manual and that your director of athletics (or his or her designee) gave you the opportunity to ask questions about them.
- You affirm that you meet the NCAA regulations for student-athletes regarding eligibility, recruitment, financial aid, amateur status and involvement in gambling activities...
- You affirm that you have read and understand the NCAA amateurism rules.
- By signing this part of the form, you affirm that, to the best of your knowledge, you have not violated any amateurism rules... (NCAA, 2010b).

In summary, there is no treatment in present NCAA policy for the use of student-athletes’ likenesses in EA Sports video games, but rather an amalgam of interpretations and variable applications (Kaburakis et al., 2009).

Federal Law Claims and False Endorsement

In addition to state-level common law or statutory right of publicity claims, plaintiffs in licensing-related cases often pursue a false endorsement claim under the Federal Trademark (Lanham) Act §43(a) (2011). Lanham Act plaintiffs must prove that: (i) the mark is legally protectable; (ii) the mark is owned; and (iii) the defendant’s use of the mark to identify its good or service is likely to create confusion concerning the plaintiff’s sponsorship. Marks include a person’s image, likeness, voice, and generally any indicia of identity. The “likelihood of confusion” standard in the Lanham Act is frequently litigated and decided pursuant to quantitative research (Kaburakis et al., 2009). In relation to a forthcoming Lanham Act §43(a) claim, which thus far has not been raised, it would be particularly interesting and influential for a court and jury to determine whether the student-athletes themselves perceived their participation in these video games via the use of their likeness as an endorsement of the products.

Fair Use and Attitudes

As intellectual property litigation research from several jurisdictions in the U.S. finds (Cianfrone & Baker, 2010; Kaburakis et al., 2009), courts may also be interested in whether or not the student-athletes have a positive or negative attitude toward the questionable use of their identities, likenesses, and images featured in the video games (stated otherwise, if they “like being in the game”). Closely, courts will attempt to gauge whether student-athletes believe the use of their identities, likenesses, and images is fair. Should positive attitudes and fair use be established, courts may find that plaintiffs’ burden of proof was not met, student-athletes at least tacitly consenting to the present use.

Perception of Scholarships in Relation to Commercial Activity

Lastly, courts and NCAA decision makers may be interested in student-athletes’ perceptions of their athletically-related financial aid in relation to intercollegiate sports’ commercial activity. In other words, it is important to examine whether student-athletes hold the opinion that their scholarships, as permissible and available at present, suffice in exchange for the use of their identities. Claims such as the pending ones in the federal courts of California would be rendered moot (or preemptively addressed), if NCAA policy clearly articulated that contemporary uses of student-athletes’ images and likenesses featured in commercial products, including video games, were included in the overarching agreement between student-athletes and their institutions. Such NCAA policy would then provide for transparent acknowledgment that these commercial uses are compensated for via athletically-related financial aid. Currently, input from student-athletes on whether they consider their athletic scholarships sufficient in exchange for such commercial uses would fill the gap in NCAA policy, which as mentioned above does not provide resolution.

The NCAA allows institutions to provide athletes with grant-in-aid, which consists of tuition and fees, room and board, and required course-related books (Bylaw 15.02.5, NCAA, 2011a). In addition, a student-athlete may receive funding unrelated to athletics (Bylaws 15.02 and 15.1) up to the cost of attendance, which is defined as “an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution” (15.02.2, NCAA, 2011a). Per Bylaw 15.1, a student-athlete is ineligible if he or she receives financial aid above the cost of attendance (NCAA, 2011a).

Nevertheless, there are several funds and options for scholarship supplements and enhancements. Some of the latter were the result of settlements in past cases. For example, the settlement consideration in *White v NCAA* (2008) yields several options for additional financial assistance to student-athletes, who in that case claimed the value of their scholarship was far below the actual cost of attendance, and the financial aid restrictions imposed by the NCAA constituted a restraint of trade, a violation of Antitrust Law. Examples of those funds for class members (encompassing football and basketball student-athletes from conferences in this study) include a \$500 check or \$2,500 in bona fide graduate educational expenses (*White v NCAA*, 2008, pp. 10-12). Furthermore, such funding exceptions include the option of the institution providing student-athletes with comprehensive health insurance. Other supplements to scholarships include the student-athlete opportunity fund, emergency travel expenses, catastrophic injury insurance and other funding opportunities (*White v NCAA*, 2008, pp. 10-12). It could be posited that with clear understanding of opportunities to supplement their athletic scholarships, student-athletes may be more prone to interpreting that their overall financial aid compensation covers their cost of attendance; they may even consider it sufficient compensation for present commercial uses.

Summary – Research Questions

This research encapsulated four major issues concerning student-athletes, amateurism policy, and commercial activity surrounding intercollegiate athletics. First, given right of publicity law and the absence of treatment by NCAA amateurism policy of student-athletes likenesses’ uses in video games, the study examined the NCAA consent form process:

- Research Question 1a: Were collegiate athletes aware that signing the “student-athlete consent form” each year granted the NCAA permission to generate revenue from their image/likeness through the sale of video games?
- Research Question 1b: Do collegiate athletes believe there should be a separate waiver form that would help them clarify the way in which the NCAA uses their image/likeness?

Second, given the Federal Trademark (Lanham) Act provisions and potential false endorsement claims, the study investigated student-athletes’ perceptions of endorsement:

- Research Question 2: Do collegiate athletes believe they are endorsing the commercial products and video games that bear their number, name, image, likeness, or other aspects of their identity?

Third, given prospective defenses utilized in these cases and the elements of consent analyzed under the first research question, the study examined student-athletes’ perceptions of fair use of their images/likenesses and their attitudes toward such use:

- Research Question 3a: Do collegiate athletes believe the way the NCAA and video game companies use their image/likeness is fair?
- Research Question 3b: Do collegiate athletes like being featured in EA Sports’ NCAA video games?

Fourth, given the aforementioned gaps in NCAA amateurism policy, the current status of athletic scholarships, and permissible/available sources of financial aid, the study investigated student-athletes’ positions on the scope of their scholarships in relation to the use of their identity in commercial products, alternative and additional compensation options, scholarships’ balance against costs of attendance, as well as student-athletes’ knowledge of available supplemental funds:

- Research Question 4a: Do collegiate athletes believe their scholarship is sufficient in exchange for their identity?
- Research Question 4b: Do collegiate athletes believe they should receive some additional compensation in exchange for their image/likeness that is used in promotions of NCAA, conference, school, and commercial products? If so, what form should this compensation take?
- Research Question 4c: Do collegiate athletes feel their scholarship covers the majority of their costs?
- Research Question 4d: Are collegiate athletes aware of the NCAA’s supplemental funds and opportunities to enhance their scholarship?

Methods

Institutional Review Board approval was sought and obtained for the study. After randomly selecting two institutions from each of the NCAA’s 27 conferences in Division I Football Bowl Subdivision (FBS) and Division I Football Championship Subdivision (FCS), the email addresses for 50 football and seven basketball male student-athletes were randomly collected from each institution’s website. If email addresses were not publicly available for the randomly selected school, another school was chosen at random. Two institutions were selected from each conference except for the Southwestern Athletic Conference, which did not have publicly available email addresses. Men’s basketball and football players were chosen because these two programs were represented in NCAA video games (EA Sports *NCAA Football* series and EA Sports *NCAA Basketball* series).

The survey instrument was developed by the researchers and pilot tested with student-athletes at the researchers’ home institutions. The survey was also sent to a panel of 10 scholars

familiar with NCAA policy. After making minor wording revisions to the instrument, an 18-item online questionnaire (see Appendix A) was distributed via Survey Monkey to 3,215 student-athletes over a three-week period. Sixty email addresses were undeliverable. Participants were contacted via email on two occasions. A total of 272 ($N = 272$) usable surveys were returned, resulting in an 8.5% response rate. According to the NCAA (2010a), there were 31,507 athletes who participated in Division I men’s basketball and football in 2009-10 (NCAA, 2010a). Acquiring 272 surveys from this population supports the recommended sample size with a +6.3% precision level when using a 95% confidence level as recommended by Israel (1992). In general, the respondents in the sample reflected the population [e.g. scholarship v. non-scholarship ratios were 65% v. 35% in the population (NCAA, 2010a), and 64.1% v. 35.9% in the sample]. However, football players were clearly more likely to respond than basketball players (small sample size from basketball not sufficiently allowing for useful comparisons with football). FCS and Caucasian athletes were slightly more prevalent in the sample than the population. Data was imported into the Predictive Analytics Software (PASW) version 18.0 for statistical analysis. Frequencies and descriptive statistics were calculated for each opinion question. Significant correlations were calculated between each opinion question. Analysis of variance and t-tests were utilized to compare group differences based on race, playing time, scholarship status, and divisional affiliation. Cohen’s d was calculated to provide a measure of effect size, which is the measure of the strength of the relationship between two variables. Cohen’s (1988) d values of .2 (small), .5 (medium), and .8 (large) were utilized to examine the strength of effect size. Finally, an ordinal logistic regression analysis of responses establishing a preference to receive additional compensation for image use by ethnicity, scholarship, conference, and playing time was performed.

Table 1 identifies the demographic profile of the respondents. At least one athlete from each of the 26 conferences responded to the survey. FCS athletes accounted for 55.9% of the sample, and FBS athletes accounted for 44.1%. The student-athletes were primarily football players ($n = 248$; 91.2%). Caucasians accounted for 63.2% and African Americans for 27.2% of the sample. The majority (64.1%) of respondents were scholarship athletes, while two thirds (66.7%) of the respondents participated in at least half of their team’s games during the season.

Results

Research Question 1

Fifty three percent of respondents understood that signing the “student-athlete consent form” granted the NCAA permission to generate revenue from their image/likeness through the sale of video games, and 42% strongly agreed or agreed there should be a separate waiver form that would help clarify the way in which the NCAA uses their image/likeness. Those who interpreted signing the consent form as release for the NCAA to generate revenue were less likely to believe there should be a separate waiver ($r = -.216, p < .01, d = -1.7$). Student athletes who were unaware that signing the consent form allowed the NCAA to generate revenue were likely to believe their image was being used unfairly ($r = .246, p < .01, d = 1.6$).

Collegiate athletes who believed there should be a separate waiver form were likely to believe that their scholarship was insufficient in exchange for their identity ($r = .340, p < .01, d = .30$), they should receive additional compensation ($r = .407, p < .01, d = .69$), the NCAA used their image unfairly ($r = .444, p < .01, d = .68$), and they were endorsing commercial products bearing their identity ($r = -.191, p < .01, d = .39$).

Group differences were detected on the basis of divisional affiliation and scholarship status. FBS athletes ($M = 3.35, SD = 1.18$) believed there should be a separate waiver form more

strongly than FCS athletes ($M = 2.95$, $SD = 1.28$), $t(265) = 2.6$, $p < .05$. Scholarship athletes were stronger in their belief that there should be a separate waiver form ($M = 3.28$, $SD = 1.18$) than non-scholarship athletes ($M = 2.88$, $SD = 1.33$), $t(266) = 2.58$, $p < .01$.

Research Question 2

More than half of the athletes responding to the survey (53.9%) believed they were endorsing the video games bearing their image/likeness. Group differences were detected on the basis of divisional affiliation and scholarship status. FBS athletes were more likely to believe they were endorsing commercial products than FCS athletes ($\chi^2 (1, N = 267) = 8.0$, $p < .01$). Scholarship athletes were more likely to believe they were endorsing commercial products than non-scholarship athletes ($\chi^2 (1, N = 268) = 4.3$, $p < .05$). Athletes who believed they were endorsing the video games were more likely to believe the way their image was being used was unfair ($r = .151$, $p < .05$, $d = .31$), they should sign a separate waiver ($r = -.191$, $p < .01$, $d = .39$), and they should receive additional compensation ($r = -.366$, $p < .01$, $d = .79$).

Research Question 3

There was a significant correlation between athletes having a positive attitude toward being featured in the games and the belief that the way their image was being used is fair. Nearly every athlete (90%) agreed or strongly agreed that they liked being featured in EA Sports’ video games, and 66% agreed or strongly agreed that they believed the way the NCAA and video game companies use their image/likeness is fair ($r = .361$, $p < .01$, $d = -.78$). Both questions were positively correlated to believing that one’s scholarship covered the majority of one’s costs (like featured, $r = .182$, $p < .01$, $d = -.86$; fair use, $r = .123$, $p < .05$, $d = -.22$). The only group difference for either question was that FCS athletes ($M = 3.93$, $SD = 1.01$) were stronger in their

belief that the way their likeness was used in video games was fair than FBS athletes ($M = 3.52$, $SD = 1.22$), $t(265) = -2.98$, $p < .01$, $d = -.37$.

Research Question 4

Thirty one percent of athletes believed their athletic scholarship was sufficient in exchange for the use of their identity. Athletes who believed that the use of their image was unfair were likely to believe that an athletic scholarship was insufficient in exchange for their identity ($r = .431$, $p < .01$, $d = .56$). No group differences were detected.

Nearly two-thirds of respondents believed they should receive additional compensation in exchange for the use of their image/likeness; however they were split in their opinion of whether the compensation should take the form of cash (35%), a stipend (34.4%), or a fund received after college (30.6%). Athletes who believed they should receive additional compensation were likely to believe that their scholarship was insufficient in exchange for their identity ($r = -.421$, $p < .01$, $d = .77$). Scholarship athletes ($M = 3.86$, $SD = 1.13$) believed they should receive additional compensation more strongly than non-scholarship athletes ($M = 3.42$, $SD = 1.30$), $t(264) = 2.95$, $p < .01$, $d = .36$. FBS athletes ($M = 3.96$, $SD = 1.12$) believed they should receive additional compensation more strongly than FCS athletes ($M = 3.5$, $SD = 1.24$), $t(265) = 3.12$, $p < .01$, $d = .38$.

To determine if student-athletes’ desire to receive additional compensation for usage of likenesses was a function of ethnicity, scholarship, and conference level, an ordinal logistic regression was conducted. Results revealed that conference level was the only significant predictor of the preference to be compensated for image use (Table 4). This indicates FBS student athletes were significantly more likely to opt for additional compensation than FCS student-athletes.

Over 76.6% of scholarship-receiving respondents held the opinion that their scholarship covered the majority of their costs. One difference in this portion of the study was detected on the basis of race. Non-white athletes ($M = 3.91, SD = 1.42$) were stronger in their belief that their scholarship covered the majority of their costs than white athletes ($M = 3.15, SD = 1.54$), $t(257) = -3.92, p < .01$.

Few athletes recognized the supplemental funds offered through the NCAA. Only three of the respondents acknowledged they were aware of the *White* settlement funds available to them. The relatively higher percentages (though very low overall) documenting awareness of such scholarship enhancements were found in the questions referring to the prospect of receiving comprehensive health insurance (10.3%) and the student-athlete opportunity fund (12.5%). Otherwise responses ranged from 4.8% (exceptions for emergency travel expenses) to 8.8% (for the catastrophic injury insurance plan). Table 5 summarizes the percentage of student-athletes who recognized each fund.

Discussion – Policy recommendations

Arguably the most important finding from this empirical research in respect to ensuing adjudication before federal courts on the pending class action suits would be the split responses on whether student athletes felt they were endorsing the commercial products (54% thought they did) and whether they felt they were in fact granting permission to NCAA and third parties to use their images and likenesses for commercial purposes by nature of their annual release form (53.4% were aware). Another valuable result from this study is the strong correlation between student-athletes who did not realize signing the consent form allowed for revenue generation via commercial products including video games, and the belief their image was being used unfairly. Very closely, courts may consider another finding dispositive as approximately two-thirds of

respondents held that they should receive additional compensation for the particular use of their images and likenesses in the sports video games. Intriguingly, and perhaps contrary to popular belief that college students and student-athletes are eager to receive immediate compensation, only 35% preferred cash (useful for comparable research to ensure both cash and check are included in the respective option, as some students may be confused and distinguish between the two). The fact that 34.4% prefer an additional stipend may be due to the nature of that option, being tied to their athletic scholarship, which thus appears reasonable according to the NCAA regulations and compliance education they may have received. Arguably surprising is the fact that 30.6% were willing to wait to receive the extra compensation via a fund set up for their post-college days. One could argue remnants of the amateurism ideal may exist in these respondents; alternatively, they may simply be forward-thinking and forecasting that there would not be enough money available in the front end of policy reform, thus they would be willing to defer their compensation (possibly via an investment fund) for a later day. Future research may wish to examine whether student-athletes believe in the amateurism ideal, whether they hold the NCAA applies amateurism in a fair, clear, and consistent manner, and what alternatives they may propose to the current intercollegiate athletics model. Irrespective of the form of such additional compensation according to student athletes’ responses, a court will focus on the great number of respondents who essentially acknowledge that they were not consulted and did not agree to the precise use of their likenesses in the video games (*Facenda v. NFL Films*, 2008; Kaburakis et al., 2009; *Pesina v. Midway*, 1996; *White v. Samsung*, 1992).

Questions remain in regard to whether student athletes’ responses would have been different had they been more fully educated and informed of the several contemporary means of supplementing their financial aid packages via bona fide graduate education expenses,

comprehensive health insurance, catastrophic insurance plans, emergency travel costs, etc. It was somewhat surprising to observe the low rates of awareness of these funds’ existence. This is precisely where athletic departments’ and institutional personnel, particularly administrators in financial aid and compliance, may be instrumental in clarifying these aspects for student-athletes to fully realize the opportunities their athletic scholarships encompass. Moreover, the *White* settlement’s consideration included the process by which the Association would make the settlement funds available (*White v NCAA*, 2008, pp. 10-12); it becomes apparent from survey findings that the message was not clearly disseminated to the key administrators on each campus. Perhaps the NCAA’s website content referring to the process of *White* settlement funds’ disbursement is not sufficiently clear (not available on any submenus as of the new NCAA website’s creation in 2011, and only accessible via a keyword search) (NCAA, 2011b). Future research may focus on compliance and financial aid administrators, who bear the responsibility of educating student-athletes on available funds and applications’ procedural steps. If these officials are not aware of the means to apply for available funds and did not receive sufficient information from their professional associations and the NCAA National Office staff, then it would appear logical that student-athletes would be highly unlikely to discover available funds on their own volition. According to the settlement:

The NCAA will establish and maintain throughout the three-year period a website that describes these benefits and the terms on which they are available and the process by which eligible Class Members may submit their applications for such benefits together with any necessary documentation and provides links to the application forms for such

benefits. The website will also provide an address to which Class Members may submit any questions they may have about the claims process... (*White v NCAA*, 2008, p. 11, §§ 15-25).

In contrast to these findings, approximately 76.6% of the respondents, who were receiving athletically-related financial aid, felt that their scholarships covered the majority of their expenses, and two thirds responded that they felt the use of their images and likenesses by the NCAA, institutions, and third party partners has been fair. These findings balance the aforementioned ones and will give some ammunition to defendants’ attorneys in respect to the legal handling of the pending class action suits. Future research, however, may need to delve deeper into the distinctions between respondents’ demographics. The fact this research finds non-white respondents more likely to believe their scholarships cover most of their costs compared to white respondents lends itself to further investigation. It may be argued that white student-athletes spend more because they have more access to capital, family support, whereas non-white student-athletes may need to budget more carefully due to non-existent resources. Fundamentals of economics and finance, possibly through business education and core courses in each institution, may be instrumental in achieving some balance in student-athletes’ budgets, and more prudent use of athletic funds.

Additional findings of note in view of NCAA policy progress include certain distinctions in reference to respondents’ divisional affiliation and demographics. FBS athletes believed more strongly than FCS athletes that they were endorsing commercial products, that they should have signed a separate waiver clarifying the way their likeness would be used, and that they should receive additional compensation. Similarly, FBS athletes were less likely to consider the way their likeness was used in video games as fair compared to FCS athletes. Similar trends were

noted when comparing scholarship to non-scholarship athletes. These results indicate that athletes at higher profile institutions or in higher profile roles on the team have stronger beliefs about the ways in which their images are utilized. Arguably these responses point toward a much stronger identification of these student-athletes with high profile competitive professional sports (emulating norms of endorsements, separate licensing agreements, and appropriate compensation for each use), rather than a complementary component to the overall educational experience. Such findings are problematic given that one of the NCAA’s main areas of focus and future emphasis for policy intervention is the contentious issue of “integration” (NCAA, 2006, p. 31 et seq.), “putting the student back into the student-athlete” (Wheeler, 2004), and generally maintaining “intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body” (NCAA, 2011a, Bylaw 1.3.1. Basic Purpose, p. 1).

Although the above findings point to differences in respect to divisional affiliation and scholarship status, there is likely not going to be significant hardship for class certification in view of the consolidated class action suits. As analyzed by Kaburakis et al. (2009), good guidance may be found in the *White* class certification case. In *White*, the elements of Federal Rule of Civil Procedure (Rule) 23 (a), numerosity, commonality, typicality, and adequacy were established for a class of student-athletes “having received GIAs from major college football and basketball programs from a particular point in time through the present...” (Kaburakis et al. 2009, pp 28-29). The aforementioned discrepancies in regard to divisional affiliation may give rise to some concerns in regard to whether the element of commonality is met, however: “The commonality requirement is generally construed liberally; the existence of only a few common legal and factual issues may satisfy the requirement... the class members’ claims derive from a common core of salient facts, and share many common legal issues...” (Kaburakis et al., 2009, p.

29). Still, scholars need to consider the recent decision by the Supreme Court of the United States in *Wal-Mart v. Dukes* (2011), in which the Supreme Court reaffirmed the “rigorous analysis” standard. The latter entails an inquiry into the merits of plaintiffs’ underlying claims, deemed necessary to the extent merits issues overlap with class issues, an overlap which occurs “frequently” (*Wal-Mart v. Dukes*, p. 10). This decision was welcomed by industry stakeholders as controlling a wave of class action suits; however, it remains to be tested in intellectual property settings or in antitrust cases (Garcia & Caseria, 2011). Further, Rule 23 (b) contains several tests to maintain class status, and future research may undertake empirical investigations attempting to measure financial impact of present practices and damages suffered by the class. Closely, “plaintiffs may wish to use potential claims by NCAA/EA as offensive weapons; e.g., where the NCAA argues that the NLI and GIA entail contracts with full compliance, including amateurism policy, the plaintiffs can exploit the common themes of the NLI/GIAs for the purposes of class certification under Rule 23(b)(3)” (Kaburakis et al., 2009, p. 29).

This research yields insight which may guide particular recommendations for intercollegiate athletics administrators. Given the intricacies of Bylaw 12 and amateurism exceptions that are permissible under NCAA legislation, also considering the student-athletes’ age and the workload of athletic departments’ personnel, a focused and well-planned education effort on distinctions between impermissible endorsements and permissible promotional activities appears necessary. In addition, the relationships between NCAA member institutions, the student-athletes, and commercial partners/sponsoring entities for the Association and each institution need to be clarified and precise parameters set. This has been the object of several legislative efforts in the course of previous policy cycles for the NCAA. However, clarification efforts and balanced policy between upholding amateurism and continuing the revenue-

generating streams for NCAA member institutions stirred enough controversy for most of these proposals to be tabled or defeated (Kaburakis et al., 2009; Kaburakis, 2011).

The Knight Commission on Intercollegiate Athletics, in 2010, published a report entitled “Restoring the balance: dollars, values, and the future of college sports” (Knight Commission, 2010). This report proposes that collegiate athletes should be treated as students and not professional athletes. Further, the report mentions that in order to reform college sport, the NCAA should prevent use of athletes’ identities promoting commercial entities or products. The report states: “As amateurs, college athletes cannot benefit financially from the commercial use of their names or images. NCAA rules should not allow commercial sponsors or other third parties to use... the athletes’ identities for financial gain or to promote commercial entities” (Knight Commission, 2010, p. 19). The criticism of this position understandably encompasses, in great part, significant financial considerations, as NCAA constituents, member institutions, corporate partners, and the thousands of related workers would suffer significant damages in already difficult economic conditions. One may even argue that with dwindling institutional budgets, there might be a future situation where preservation of a stricter (closer to the “old”) amateurism would be unattainable, as it would compromise the feasibility and practicality of institutions offering comprehensive athletic programs. This is precisely where the NCAA’s regulatory evolution (Kaburakis, 2007) attempts to attend to the balance between the “old” and “new” amateurism.

Most recently, Proposal 2010-26 attempted to implement recommendations resulting from the work of the NCAA Task Force on Commercial Activity in Division I Intercollegiate Athletics (Kaburakis et al, 2009). This proposal would have attended to the use of student-athletes’ names and likenesses in commercial products, and “was developed in the spirit of

balancing the importance of commercial sponsors in maintaining a comprehensive athletics program and the importance of protecting student-athletes from being exploited by commercial entities” (Kaburakis, 2011, § 17 “Rationale”). According to the proposal’s rationale it would provide for “flexibility in developing relationships with commercial entities that benefit athletics programs, while maintaining the principle prohibiting commercial exploitation of student-athletes” (Kaburakis, 2011, § 17 “Rationale”). Proposal 2010-26 would have practically allowed institutions to license commercial products and use student-athletes likenesses provided several conditions were met (agreement in writing by the athletic director, no alcohol, tobacco, or gambling products, clear indication that the student-athletes are not endorsing the commercial products, etc.) As with past proposals (Kaburakis et al., 2009), the critique of this pragmatic and shrewd policy, preemptively attending to further legal challenges, is that instead of dealing with the problem of commercial influences and economic utilization of student-athletes’ performances for profit of many stakeholders, it attempts to justify and perpetuate college sports’ commercialization. Importantly, embedded in Proposal 2010-26 was the prospect of a new release statement the student-athletes would have to sign, which is a recommendation that directly stems from this research as well.

Such an amended version of the release the student-athletes currently sign in Form 3a would clarify the scope of the use of student-athletes’ names, images, likenesses, identities, and any digital expression thereof. Further, provisions which would balance the revenue-generating necessities of the NCAA membership with the educational mission each institution promotes may result in student-athletes having a clearer as well as more positive overview of such agreements. For example, such provisions may focus on minimizing missed class time for promotional activities and commitments related to commercial purposes, apportioning a

significant percentage of those funds toward educational purposes (e.g. scholarships, resources for students’ learning and professional preparation, etc.), and securing comprehensive health insurance for all student-athletes. Procedurally, such a carefully drafted release (with a non-exhaustive list of potential uses, including video-games’ use), by which student-athletes would knowingly release the use of their images and likenesses, would preemptively treat legal claims such as the ones currently pending due to the legally ambiguous nature of Form 3a.

The Association and member institutions’ staff may need to undertake a substantial educational effort, considering findings of this research in regard to student-athletes’ positions on whether their athletic scholarships were sufficient in exchange for the present use of their images/likenesses, whether they should receive additional compensation, and their appreciation of supplemental funds and opportunities to embolden their financial aid packages. Compliance and financial aid personnel may assist in this process disseminating consistent updates on financial aid legislation, exemptions, and opportunities for supplemental funds, bona fide educational grants, and other sources of financial aid on-campus and via state and federal outlets. Three proposals in the 2010-2011 legislative cycle (2010-62, 2010-63, and 2010-64) treated related problems by adopting, in the spring of 2011, need and merit-based exemptions to NCAA-allowed financial aid limits. Financial aid officers on each campus in particular have an instrumental role to play in this educational effort and outreach for student-athletes’ benefit. Conceivably, regional rules’ seminars for financial aid officers may be a prudent approach, emulating currently available seminars for compliance professionals.

Closely, given that student-athletes were mostly not aware of *White* settlement funds and alternative opportunities to receive expenses and bona fide costs (graduate education, career pursuit-related expenses, student-athlete opportunity funds, etc.), both the aforementioned

educational efforts on campus, as well as the online presence of a transparent mechanism to access these financial opportunities, would speak volumes for student-athletes in this research. Additionally, the Knight Commission, in 2008, heard recommendations on alternative models for student-athletes’ educational opportunities’ financing and there were proposals for postgraduate “exceptional student-athlete funds” and trust funds for which student-athletes would be eligible under certain criteria (Inside Higher Ed, 2008; Isenberg, 2008).

Conclusion

The purpose of this study was to examine student-athletes’ understanding of NCAA DI amateurism policy issues impacting their participation in intercollegiate athletics, focusing on perceptions of contemporary uses of images and likenesses particularly in video games, which bore the pending federal class action suits. The study sheds light onto student-athletes’ appreciation of their scholarship relationships with their institutions and the level of familiarity with the crucial concepts current NCAA DI amateurism policy and financial aid parameters pose on their participation in college sport.

In important findings for ensuing deliberations in court or in view of potential settlements of these cases, 54% of student-athletes responded that they believed they were actually endorsing the commercial products, and 53.4% understood that the signing of the student-athlete consent form (3a) granted the NCAA and member institutions permission to generate revenue through the sale of video games. While all but 10% of athletes agreed that they were fond of being in EA Sports’ video games and all but 33% agreed that they believed the way the NCAA and video game companies use their image/likeness is fair, just one-third of athletes believed that their athletic scholarship was sufficient in exchange for the use of their identity, and two-thirds believed they should receive additional compensation in exchange for their image/likeness. The

athletes were split with regards to whether such compensation should take the form of cash, stipend, or post-college fund. Additionally, the small percentages of student-athletes (1-12.5%) who were aware of available supplementary funds and ways to enhance their financial aid, which are permissible by means of NCAA policy or pursuant to prior legal settlements, allow for important determinations in respect to educational efforts for student-athletes and college administrators.

In conclusion, it is imperative for future intercollegiate athletics policy to receive feedback and contributions from the individuals impacted more directly by any ensuing policy amendments, the student-athletes, be it via their current representation mechanisms (Student-Athlete Advisory Councils/Committees in each institution and conference) or through new, more representative and inclusive input means. Amateurism proposals have frequently generated controversy and have not been adopted by the Association (most recently with the defeat of Proposal 2010-26 and tabling of its amendments). Related regulatory reform efforts have not been successful within the key constituencies of NCAA governance. Considering significant resistance to policy change, it would be anticipated that further challenges and legal action may ensue, absent key action on these matters. This research yields insight on the key stakeholders of any further policy progress, NCAA student-athletes, who may become more involved in policy research and proposals, in hopes that with the concurrent contributions of faculty and administrators NCAA policy will serve them in a fair and balanced way.

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Table 1. Frequency Analysis of Demographic Questions

Variable	Category	N	%	Cumulative %
Ethnicity	African-American	74	27.2	27.2
	Caucasian	172	63.2	90.4
	Hispanic	5	1.8	92.3
	Native American	1	0.4	92.6
	Native Haw./Pacific Islander	4	1.5	94.1
	Other	2	0.7	94.9
	Two or more races	14	5.1	100
	U.S. Citizen	Yes	267	98.2
No		5	1.8	100.0
Scholarship Athlete	Yes	173	64.1	64.1
	No	97	35.9	100
Conference	Pioneer	15	5.5	5.6
	MEAC	1	.4	5.9
	I-AA Independent	3	1.1	7.0
	ACC	12	4.4	11.5
	Big 12	11	4.0	15.6
	Big East	15	3.5	21.1
	Big Sky	9	3.3	24.4
	Big South	13	4.8	29.3
	Big Ten	24	8.8	38.1
	CAA	14	5.1	43.3
	Conference USA	5	1.8	45.2
	Great West	4	1.5	46.7
	I-A Independent	10	3.7	50.4
	Ivy	21	7.7	58.1
	Mid American	5	1.8	60.0
	Missouri Valley	4	1.5	61.5
	Mountain West	11	4.0	65.6
	Northeast	6	2.2	67.8
	Ohio Valley	6	2.2	70.0
	Pacific 10	8	2.9	73.0
Patriot	23	8.5	81.5	
SEC	6	2.2	83.7	
Southern	15	5.5	89.3	
Southland	8	2.9	92.2	
Sunbelt	12	4.4	96.7	

Variable	Category	<i>N</i>	%	Cumulative %
	WAC	9	3.3	100.0
Football Subdivision	FBS	118	43.4	43.7
	FCS	152	55.9	100.0
Sport	Basketball	22	8.1	8.1
	Football	248	91.2	100.0
Number of Football Games Started	0-6 games	50	33.3	33.3
	7-11 games	63	42.0	75.3
	12+ games	37	24.7	100

Table 2. Frequency Analysis and Descriptive Statistics for Likert Scale Opinion Questions

Question	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	<i>M</i>	<i>SD</i>	<i>N</i>
I like being featured in EA Sports video games.	68.4%	21.2%	7.4%	.4%	2.6%	4.52	0.86	269
I believe there should be a separate waiver form.	14.5%	27.5%	28.6%	15.6%	13.8%	3.13	1.25	269
I believe the way the way the NCAA and video game companies are using my image/likeness is fair.	27.9%	38.7%	18.6%	9.7%	5.2%	3.74	1.12	269
My athletic scholarship is sufficient in exchange for the use of my identity.	7.6%	23.4%	26.2%	24.1%	18.6%	2.77	1.22	145
My scholarship covers the majority of my costs.	46.2%	30.4%	8.8%	7.6%	7.0%	4.01	1.22	171
I believe that I should receive some additional compensation in exchange for my image.	30.3%	33.7%	18.7%	10.1%	7.1%	3.7	1.21	267

Table 3. Frequency Analysis of Dichotomous Opinion Questions

Question	Yes	No	N
Do you think you are endorsing the commercial products that bear your identity?	53.9%	46.1%	269
Were you aware that signing the “student-athlete consent form” grants the NCAA permission to generate revenue from your image/likeness through the sale of video games?	53.4%	46.6%	268

Table 4. Ordered Logistical Regression for Student-Athletes’ Preference towards Additional Compensation for Use of likeness by Ethnicity, Conference Level, and Scholarship Level

	β	SE	Wald	df	Sig	OR
Ethnicity (white)	-.276	.224	1.522	1	.217	---
Ethnicity (non-white)						
Conference Level (FBS)	.585	.238	6.035	1	.014	0.56
Conference Level (FCS)						
Scholarship Athlete	.326	.242	1.824	1	.177	---
Non-scholarship athletes						

Sig = Significance

OR = Odds Ratio

Table 5. Student-Athletes Recognizing NCAA Supplemental Funds

Fund	<i>N</i>	Percentage
Student-Athlete Opportunity Fund	34	12.5%
Comprehensive Health Insurance	28	10.3%
Catastrophic Injury Fund	24	8.8%
Academic Enhancement Fund	19	7.0%
Special Assistance Fund	19	7.0%
Emergency Travel Fund	13	4.8%
<i>White</i> Settlement Fund	3	1.1%

Appendix A

Survey Questions

Demographic Questions

1. What is your ethnicity?
2. Are you a scholarship athlete?
3. In what conference do you participate?
4. In which sport do you participate in varsity athletics?
5. How many football games did you start last year?
6. How many minutes per game did you average this basketball season?
7. Are you a United States citizen?
8. What state do you consider to be your home state?

Opinion Questions on 1-5 Likert Scale

9. I like being featured in EA Sports’ NCAA video games.
10. I believe there should be a separate waiver form that would help me clarify the way in which the NCAA will be using my image/likeness.
11. I believe the way the NCAA, institutions, and video game companies are using my image/likeness in video games is fair.
12. My athletic scholarship is sufficient in exchange for the use of my identity.
13. My scholarship covers the majority of my costs.
14. I believe that I should receive some additional compensation in exchange for my image/likeness that is used in commercial promotions of NCAA, conference, school, and commercial products (for instance, video games)

Opinion Questions Dichotomous Option (Yes/No)

15. Michael Jordan and LeBron James have endorsed companies like Nike, Coke, and Gatorade. Do you think you are endorsing the commercial products and video games that bear your number, name, image, likeness, or other aspects of your identity?
16. Were you aware that when you sign the “student-athlete consent form” each year, you are granting the NCAA permission to generate revenue from your image/likeness through the sale of video games?

Multiple Choice Response Questions

17. Which of the following supplemental funds do you recognize (check all that apply)
18. In what form should you receive this compensation (if yes to 14 above).
(Cash, additional athletic stipend, fund that you can receive after college, other)