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Ex-college athletes file suit over uncompensated use of likenesses

By DAN FITZGERALD

In 1995, Ed O'Bannon carried the University of California at Los Angeles through the NCAA men's basketball tournament to a national championship. His 30 points and 17 rebounds led UCLA to an 89-78 victory over the defending national champion University of Arkansas and the obligatory cutting down of the nets at the Kingdome in Seattle.

O'Bannon, named the Most Valuable Player of the NCAA tournament, was the unquestioned star of March Madness — 1995's version of UConn's Kemba Walker. In time, however, O'Bannon may be remembered less for his on-court accomplishments and more for his willingness to lead a class

action against the NCAA concerning the use of the images and likenesses of former players.

Sixteen years after starring in the NCAA tournament, O'Bannon is the lead plaintiff in *O'Bannon v. NCAA* (also referred to as *In Re NCAA Student-Athletes Name & Likeness Licensing Litigation*), a lawsuit pending in U.S. District Court for the Northern District of California. After his professional basketball career ended, O'Bannon grew frustrated that various entities continued to profit from his and his teammates' collegiate success at UCLA while they received nothing. O'Bannon was connected with Sonny Vac-

caro, who is credited with introducing commercialism to college basketball through his marketing efforts on behalf of sneaker companies. Vaccaro, now an outspoken advocate for the rights of student-athletes, connected O'Bannon with an international law firm experienced in dealing with high-profile class action suits. A lawsuit ensued.

O'Bannon v. NCAA is brought on behalf of former NCAA student-athletes against the NCAA and its licensing arm, the Col-

Licensing Company and video game developer Electronic Arts Inc., often referred to as EA Sports. The action survived the defendants' Motion to Dismiss and has been consolidated with *Keller v. Electronic Arts*, a similar lawsuit brought by former Arizona State and Nebraska quarterback Sam Keller.

Improper Licensing

The plaintiffs in *O'Bannon v. NCAA* assert two central claims. First, they claim that the defendants violate the Sherman Antitrust Act. Second, the plaintiffs claim that the defendants improperly license and/or use players' likenesses in violation of their right of publicity. This article provides a brief snapshot of the right of publicity issue, which has implications for past, present and future student-athletes, as well as the NCAA's concept of amateurism.

The phrase "right of publicity" was introduced by Judge Jerome Frank in *Haelan Laboratories v. Topps Chewing Gum*, a suit over a contract that provided the plaintiff with the exclusive right to use a baseball player's photograph on baseball cards:

[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 authoring advertisements, popularizing their countenances, displayed in newspapers, magazines, buses, trains and subways.

Since its introduction, the right of publicity has become a common subject of lawsuits brought by professional athletes attempting to control the use of their likenesses and the revenue that often flows from such use. Although laws regarding an individual's right to publicity vary among states, the general rule is that a person's name or likeness may

not be used without consent in a commercial endeavor.

In *O'Bannon v. NCAA*, the plaintiffs allege that EA uses the likenesses of student-athletes in contravention of NCAA bylaws, which generally prohibit the commercial use of a student-athlete's image or likeness. The plaintiffs allege that EA does not use the names of players in its games, but identifies players by jersey number, height, weight, build, home state, skin tone and hair color.

The plaintiffs further allege that EA improperly circumvents prohibitions on the commercial use of student-athletes' names by omitting player names, but allowing gamers to upload entire rosters, including the players' names and other identifying information. The plaintiffs argue that the NCAA and the Collegiate Licensing Company have sanctioned the use of student-athletes' likenesses to increase royalties in the increasingly popular market. In their Consolidated Complaint, the plaintiffs state that as "the NCAA, CLC and EA know, heightened realism in NCAA videogames translates directly into increased sales." The plaintiffs' claims are not limited to EA's video games and also include other media and broadcast agreements, such as the rebroadcast of classic games, which use the images of former student-athletes.

NCAA's Defense

The foundation of the NCAA's defense is an agreement that each Division I student-athlete must sign prior to commencing participation in NCAA athletics. The Student-Athlete Statement, a seven-page form document, covers items such as eligibility, amateur status, drug tests and previous involvement in NCAA rules violations.

It also includes a section entitled "Promotion of NCAA Championships, Events Activities or Programs" at the bottom of the fourth page. Under this heading, the following statement appears, requiring the student-athlete's signature directly below: "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 and picture in accordance with Bylaw 12.5, including to promote NCAA championships or other NCAA events, activities or programs."

The legal arguments for both sides have

been covered by the media in detail, including on the recent PBS "Frontline" feature "Money and March Madness." It is anticipated that the NCAA will argue that this section

of the Student-Athlete Statement agreement provides it, and the Collegiate Licensing Company with authority to license the images of its past and present student-athletes to companies such as EA and other multimedia entities that deal in classic sports.

The plaintiffs in *O'Bannon v. NCAA* will likely attack the NCAA's interpretation of this vague agreement on a number of levels. First and foremost, they will challenge the scope of the NCAA's asserted right to license student-athletes' likenesses. As Vaccaro, once stated, "When did it become the right of the NCAA to sell me into perpetuity?" The Student-Athlete Statement does not mention the duration of the authorization and does not specifically state that that the NCAA can use a student-athlete's name and picture after he or she leaves school.

Even if the federal court finds that the Student-Athlete Agreement does allow the NCAA to license the rights of student-athletes for video gaming and other media purposes while they are in school, there is an argument that this agreement expires once a student-athlete ceases to be a student. The consideration received for the Student-Athlete Agreement is eligibility to participate in Division I athletics. Once the student-athlete's collegiate career is over, he or she receives nothing from the NCAA. Accordingly, there appears to be no post-eligibility consideration for the NCAA's use of the likeness of the student-athlete to produce licensing revenue.

Second, the Student-Athlete Statement authorizes the NCAA or a third party such as a host institution, conference or local or-



ganizing committee, to use a student-athlete's name or picture in connection with the promotion of NCAA championships, events and activities. However, the plaintiffs aptly point out that EA is not a third party acting on behalf of the NCAA and is not promoting NCAA championships, events or activities.

Lastly, the plaintiffs will likely argue that a 17- or 18 year-old student athlete has no concept of the rights that they are signing away. After all, student-athletes typically do not have the opportunity to consult with an attorney before signing the Student-Athlete Statement. But what choice do the student-athletes have? If they refuse sign the agreement, they won't receive a scholarship and or won't be eligible to compete. The agreement

appears to be a classic contract of adhesion that may be void on the grounds that it is contrary to public policy.

The NCAA is in a precarious position. The NCAA Constitution states that "student-athletes should be protected from exploitation by professional and commercial enterprises." Yet, according to Steve Wieberg of *USA Today*, the NCAA basketball tournament generates more than \$771 million per year in television rights alone. Typically, in dealing with lawsuits brought by present student-athletes, the NCAA has significant leverage. Protracted litigation can cost a student-athlete his or her eligibility and adversely impact his or her prospects to compete professionally. But *O'Bannon v. NCAA*

only involves former players, removing from the equation the important factor of time. Moreover, Ed O'Bannon, likeable and engaging, appears to be the perfect plaintiff to lead this class action.

If successful, *O'Bannon v. NCAA* would allow former players to be compensated for the use of their images and likenesses. Although the lawsuit does not involve present players, *O'Bannon v. NCAA* could trigger other lawsuits by current players challenging the NCAA's right to profit from student-athletes. Ultimately, this case could be the first in a series of events that reshape the landscape of big-time collegiate athletics. Once again, all eyes are on Ed O'Bannon. ■