

March 2014

I'm the One Making the Money, Now Where's My Cut? Revisiting the Student-Athlete as an "Employee" Under the National Labor Relations Act

John J. Leppler
University of Baltimore School of Law

Follow this and additional works at: <https://digitalcommons.pace.edu/pipself>



Part of the [Education Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Intellectual Property Law Commons](#), and the [Labor and Employment Law Commons](#)

Recommended Citation

John J. Leppler, *I'm the One Making the Money, Now Where's My Cut? Revisiting the Student-Athlete as an "Employee" Under the National Labor Relations Act*, 4 Pace. Intell. Prop. Sports & Ent. L.F. 73 (2014).
Available at: <https://digitalcommons.pace.edu/pipself/vol4/iss1/4>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Intellectual Property, Sports & Entertainment Law Forum by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

I'm the One Making the Money, Now Where's My Cut? Revisiting the Student-Athlete as an "Employee" Under the National Labor Relations Act

Abstract

This Article argues why the National Collegiate Athletic Association's (NCAA) Big-Time Division I College Football and Men's Basketball student-athletes are legally "employees" and why these student-athletes are inadequately compensated for their revenue-producing skills.

Part II of this Article sets forth the common law "right of control" test and the National Labor Relation Act's (NLRA) special statutory test for students in a university setting, and shows how the National Labor Relations Board (NLRB) and the judiciary determine whether a particular person, specifically a university student, meets these standards and is legally an "employee". Moreover, the NCAA asserts it does not have to compensate these student-athletes above their grant-in-aid because their relationship with their universities is an educational one. Part II also discusses the right of publicity tort to show that the relationship between these particular student-athletes and the NCAA is predominantly an economic one and not an educational one.

Part III of this Article applies two tests, the common law "right of control" test and the NLRB's special statutory test it developed and applied to university students in *Brown* to show that these particular "student-athletes" are legally "employees." As such, they should be compensated more than the grant-in-aid they already receive from the NCAA for their revenue-producing skills. This section also discusses Texas A&M Quarterback Johnny Manziel, and why Texas A&M University is reaping major financial benefit for the misappropriation of Manziel's "likeness." Part III also discusses NCAA Proposal 26 and how the NCAA and its member schools are continuing to invent innovative ways to misappropriate student-athletes' "likenesses" for financial gain without compensating them. Additionally, this section illustrates that former student-athletes in addition to current athletes recognize that the NCAA is exploiting them for commercial gain without compensation. This section concludes with three potential solutions to how the NCAA could pay the student-athletes and at the same time advances the NCAA's amateurism dogma in college athletics. The NCAA can no longer use its affirmative defense of "amateurism," and should develop a payment method to compensate the services rendered by student-athletes who are the true moneymakers for its lucrative commercial enterprise.

Keywords

NCAA, football, students, athletes, NLRA, student athlete, Manziel

PACE UNIVERSITY
SCHOOL OF LAW

PACE INTELLECTUAL PROPERTY,
SPORTS & ENTERTAINMENT
LAW FORUM

Volume 4

Winter 2014

Issue 1

Article

**I'm the One Making the Money,
Now Where's My Cut?
Revisiting the Student-Athlete as
an "Employee" Under the National
Labor Relations Act**

*John J. Leppler**

* J.D. Candidate 2014, University of Baltimore School of Law

Abstract

This Article argues why the National Collegiate Athletic Association's (NCAA) Big-Time Division I College Football and Men's Basketball student-athletes are legally "employees" and why these student-athletes are inadequately compensated for their revenue-producing skills.

Part II of this Article sets forth the common law "right of control" test and the National Labor Relation Act's (NLRA) special statutory test for students in a university setting, and shows how the National Labor Relations Board (NLRB) and the judiciary determine whether a particular person, specifically a university student, meets these standards and is legally an "employee". Moreover, the NCAA asserts it does not have to compensate these student-athletes above their grant-in-aid because their relationship with their universities is an educational one. Part II also discusses the right of publicity tort to show that the relationship between these particular student-athletes and the NCAA is predominantly an economic one and not an educational one.

Part III of this Article applies two tests, the common law "right of control" test and the NLRB's special statutory test it developed and applied to university students in *Brown* to show that these particular "student-athletes" are legally "employees." As such, they should be compensated more than the grant-in-aid they already receive from the NCAA for their revenue-producing skills. This section also discusses Texas A&M Quarterback Johnny Manziel, and why Texas A&M University is reaping major financial benefit for the misappropriation of Manziel's "likeness." Part III also discusses NCAA Proposal 26 and how the NCAA and its member schools are continuing to invent innovative ways to misappropriate

student-athletes' "likenesses" for financial gain without compensating them. Additionally, this section illustrates that former student-athletes in addition to current athletes recognize that the NCAA is exploiting them for commercial gain without compensation. This section concludes with three potential solutions to how the NCAA could pay the student-athletes and at the same time advances the NCAA's amateurism dogma in college athletics. The NCAA can no longer use its affirmative defense of "amateurism," and should develop a payment method to compensate the services rendered by student-athletes who are the true moneymakers for its lucrative commercial enterprise.

Table of Contents

INTRODUCTION.....		76
I. BACKGROUND.....		80
A. <i>The Common Law Test and a Statutory Test to Establish the "Employee" Status of College Students</i>		82
1. The "Employee" Under the National Labor Relations Act		83
2. The NLRB's Statutory Test from <i>Brown</i> for Students Seeking Status as Employees		88
B. <i>Tort: Right of Publicity</i>		90
C. <i>The NCAA National Letter of Intent</i>		91
1. Student-Athlete Statement – Division I Form 08-3a Section IV		91
D. <i>NCAA Proposal 26-2010</i>		92
II. DISCUSSION		94
A. <i>Applying the NLRA Common Law Test and the Federal Labor Standards Act</i>		94
1. The Right of Control Test		94
2. The Economic Reality Test		96

B.	<i>Applying the Brown Statutory Test</i>	103
1.	Interpreting the Fourth Factor in <i>Brown</i>	103
C.	<i>The Predominantly Economic Relationship Between Grant-in-Aid Student-Athletes and Their Colleges</i>	106
1.	Johnny Manziel's Right of Publicity: The Misappropriation of His Likeness for the Commercial Benefit of Texas A&M University	107
D.	<i>NCAA Proposal 26: An Attempt to Further Disguise the NCAA "Money Machine" by Exploiting Student-Athletes' Likenesses</i> . 117	
1.	Student-Athlete Permission	118
2.	Athletic Director Approval	119
E.	<i>Recognition of the NCAA's Manifest Disregard and Exploitation of Student- Athletes</i>	122
1.	<i>O'Bannon v. NCAA</i> and Student- Athlete Statement Division I Form 08- 3a Section IV.....	124
2.	What the Future May Hold for the NCAA as a Result of the Forthcoming <i>O'Bannon</i> Decision	126
F.	<i>Possible Methods of Compensation for Student-Athletes</i>	128
	CONCLUSION.....	131

INTRODUCTION

Every year student-athletes who compete in revenue generating sports, such as Big-Time College Football and Division I Men's Basketball, produce billions of dollars which are funneled directly to the

National Collegiate Athletic Association (NCAA).¹ The idea of paying these particular student-athletes is an ongoing debate. The large revenue generated from the BCS Championship football series and “March Madness” created a clamoring for compensating Big-Time College Football and Division I Men’s Basketball players beyond that of an athletic scholarship, or what the NCAA calls a grant-in-aid.² While operating in a purely capitalistic and professional atmosphere, the NCAA continues to endorse its amateurism concept in college athletics. These particular student-athletes realize that the NCAA commercialized the industry and generates billions of dollars in revenue from doing so. Even though the NCAA asserts the value of amateurism in college athletics, the student-athletes are now attempting to get a bigger piece of the pie.³

The NCAA initially created the term “student-athlete” to stop workers’ compensation lawsuits against it in the 1950s and 1960s,⁴ and to obscure the

¹ Nicholas Fram & Thomas Frampton, *College Athletes Deserve Employee Status*, SF GATE, (March 25, 2012, 4:00 AM), <http://www.sfgate.com/opinion/article/College-athletes-deserve-employee-status-3430855.php>.

² *Athletic Financial Aid Rules Mandated by the National Collegiate Athletic Association (NCAA)*, WASH. STATE UNIV., <http://finaid.wsu.edu/media/675179/Athletic-Financial-Aid-Rules-finaid-website.pdf> (explaining athletic grant-in-aid “consists of tuition, books, fees and room & board,” however, “note that transportation and miscellaneous are not included”).

³ Dennis A. Johnson & John Acquaviva, *Point/Counterpoint: Paying College Athletes*, SPORT J. (June 15, 2012, 9:48 AM), <http://thesportjournal.org/article/pointcounterpoint-paying-college-athletes>.

⁴ Jared Wade, *How the NCAA Has Used the Term “Student-Athlete” to Avoid Paying Workers Comp Liabilities*, NAT’L L. REV. (Sept. 14, 2011), <http://www.natlawreview.com/article/how->

reality of the university-student-athlete employment-relationship.⁵ Part I of this Article sets forth the common law “right of control” test⁶ and the National Labor Relation Act’s (NLRA) special statutory test for students in a university setting,⁷ and shows how the National Labor Relations Board (NLRB) and the judiciary determine whether a particular person, specifically a university student, meets these standards and is legally an “employee.” Moreover, the NCAA asserts it does not have to compensate these student-athletes above their grant-in-aid because their relationship with their universities is an educational one. This part also discusses the right of pub-

ncaa-has-used-term-student-athlete-to-avoid-paying-workers-comp-liabilities.

⁵ Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete As Employee*, 81 WASH. L. REV. 71, 86 (2006).

⁶ St. Joseph News-Press, 345 N.L.R.B. 474, 478 (2005) (“[w]hile we recognize that the common-law agency test described by the Restatement ultimately assesses the amount or degree of control exercised by an employing entity over an individual, we find insufficient basis for the proposition that those factors which do not include the concept of ‘control’ are insignificant when compared to those that do. Section 220(2) of the Restatement refers to 10 pertinent factors as ‘among others,’ thereby specifically permitting the consideration of other relevant factors as well, depending on the factual circumstances presented Thus, the common-law agency test encompasses a careful examination of all factors and not just those that involve a right of control To summarize, in determining the distinction between an employee and an independent contractor under Section 2(3) of the Act, we shall apply the common-law agency test and consider all the incidents of the individual’s relationship to the employing entity.” (quoting *Roadway Package System*, 326 N.L.R.B. 842, 850 (1998))).

⁷ *Brown Univ.*, 342 N.L.R.B. 483, 489 (2004).

licity tort⁸ to show that the relationship between these particular student-athletes and the NCAA is predominantly an economic one and not an educational one.

Part II of this Article applies the common “right of control” test and the NLRB’s special statutory test, developed in *Brown*,⁹ to student-athletes. Both tests show that these particular student-athletes are legally employees and should be compensated by more than the grant-in-aid they already receive from the NCAA for their revenue producing skills. Also, this part will discuss Texas A&M Quarterback Johnny Manziel, and why Texas A&M University is reaping major financial benefit through the misappropriation of Manziel’s likeness.

Part II will also discuss NCAA Proposal 26 and how the NCAA and its member schools are continuing to invent innovative ways to misappropriate their student-athletes for financial gain, without compensation. Part II further shows that former student-athletes, in addition to current athletes recognize the NCAA is exploiting them for commercial

⁸ RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977) (“The common form of invasion of privacy under the rule here stated is the appropriation and use of the plaintiff’s name or likeness to advertise the defendant’s business or product, or for some similar commercial purpose. Apart from statute, however, the rule stated is not limited to commercial appropriation. It applies also when the defendant makes use of the plaintiff’s name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one. Statutes in some states have, however, limited the liability to commercial uses of the name or likeness.”).

⁹ *Brown Univ.*, 342 N.L.R.B. at 487.

gain without compensation.¹⁰ Finally, this part offers three solutions as to how the NCAA could compensate student-athletes, while simultaneously advancing the NCAA's "amateurism" dogma in college athletics.

This Article concludes that the NCAA can no longer use its affirmative defense of "amateurism." Instead, the NCAA should develop a payment method to compensate the services rendered by student-athletes, who are the true moneymakers for its lucrative commercial enterprise.

I. BACKGROUND

The NCAA is a voluntary association of approximately 1,200 colleges and universities. The NCAA's philosophy as it relates to the student-athlete is to promote amateurism.¹¹ In the NCAA Division I Manual, the first stated purpose is "[t]o initiate . . . and improve intercollegiate athletics programs for student-athletes and to promote . . . athletics participation as a recreational pursuit."¹² Despite the prominence of this assertion, the NCAA has failed to further this purpose for athletes in the most commercially lucrative sports, Big-Time College Football (i.e., Division I Football) and Division I Men's Basketball.¹³

¹⁰ O'Bannon v. Nat'l Collegiate Athletic Ass'n, Nos. C 09-1967 CW, C 09-3329 CW, C 09-4882 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010).

¹¹ Matthew Stross, *The NCAA's "No-Agent" Rule: Blurring Amateurism*, 2 MISS. SPORTS L. REV. 167 (2012); see also NCAA DIV. I MANUAL Bylaw art. 12.01.3 (2013), available at <http://www.ncaapublications.com/productdownloads/D114.pdf>.

¹² See NCAA DIV. I MANUAL Const. art. 1.2(a) (2013).

¹³ Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?* 86 OR. L. REV. 329 (2007).

The NCAA Division I football season culminates with the Bowl Championship Series (BCS) National Championship game. The NCAA Division I Men's basketball season culminates with "March Madness" and the Final Four, with the national champion being crowned.¹⁴ Both events are big business.

The University of Alabama played in the BCS National Championship Game in 2012, resulting in a total payout of \$18.3 million dollars.¹⁵ Alabama received \$2 million from the NCAA for directly participating.¹⁶ The remaining \$16.3 million was divided into 13 shares equally distributed into shares of approximately \$1.26 million among the 12 member Southeastern Conference ("SEC") schools and the SEC office.¹⁷ In addition to compensation for simply participating, Alabama received a hefty payout for winning the BCS National Championship in 2013.¹⁸

Similarly, the University of Kentucky received a large payout for winning the NCAA Men's Basketball Championship in 2012. In its most recent contract agreement with the television network CBS, the NCAA \$10.8 billion for the March Madness broadcasting rights for the next fourteen years.¹⁹ The direct value of the NCAA Division I Men's Bas-

¹⁴ Fram & Frampton, *supra* note 1.

¹⁵ Jon Solomon, *Profit from BCS National Championship Game Won't Be a Big Windfall*, BIRMINGHAM NEWS (Jan. 5, 2010, 9:01 PM), http://blog.al.com/birmingham-news-stories/2010/01/profit_from_bcs_national_champ.html.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Chris Smith, *The Money Behind The BCS National Championship*, SPORTSMONEY (Jan. 7, 2013, 4:09 PM), <http://www.forbes.com/sites/chris-smith/2013/01/07/the-money-behind-the-bcs-national-championship/>.

¹⁹ Fram & Frampton, *supra* note 1.

ketball Tournament comes from the NCAA's Revenue Distribution plan, which explains that payouts are "to be distributed to the Division I Men's Basketball Championship over a six-year rolling period."²⁰ "That six-year payment period means that games played in the 2012 March Madness tournament will not count towards annual conference payouts until 2017."²¹

To better understand the NCAA's revenue distribution model for March Madness, consider the revenue generated by the Kentucky Wildcats in 2012. Kentucky played in six tournament games in 2012, five of which are included in the NCAA's count of games played, as championship games are not included.²² The NCAA revenue distribution model calculates each game as a "game unit," and each "game unit" for the 2012 tournament was \$278,820.²³ Kentucky generated approximately \$1.4 million for the South Eastern Conference as a whole due to their tournament success in 2012.²⁴

A. The Common Law Test and a Statutory Test to Establish the "Employee" Status of College Students

"Division I athletic grant-in-aid students in college football and men's basketball can be considered 'employees' under both the National Labor Rela-

²⁰ Chris Smith, *March Madness: A Trip to The Final Four is Worth \$9.5 Million*, FORBES (Mar. 14, 2012, 9:45AM), <http://www.forbes.com/sites/chris-smith/2012/03/14/march-madness-a-trip-to-the-final-four-is-worth-9-5-million/>.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

tions Act and under most applicable state laws.”²⁵ If a person is deemed an employee under the NLRA, those employees are granted the rights to gather amongst themselves and discuss their wages and working conditions even if they are not part of a union.²⁶ However, the NLRA only applies to employees who work in most private sectors and specifically excludes protection to persons employed by Federal, state, or local government.²⁷ The question of whether a particular person is an employee has been essential in the development of American labor law.²⁸ The National Labor Relations Board (NLRB) and the judiciary have developed different legal standards in determining a person’s employee status. Thus, there are several approaches the NLRB or the judiciary can take in determining whether these particular student-athletes in Division I college football and basketball are legally employees.²⁹

1. The “Employee” Under the National Labor Relations Act

The federal rights granted to employees, and only to employees, under the NLRA are “the rights to self-organization; to form, join, or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in other

²⁵ McCormick & McCormick, *supra* note 5, at 86.

²⁶ *Employee Rights*, NAT’L LABOR RELATIONS BOARD, <http://www.nlr.gov/rights-we-protect/employee-rights> (last visited Jan. 17, 2014).

²⁷ *See id.*

²⁸ McCormick & McCormick, *supra* note 5, at 87; *see also* ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 37-38 (2d ed. 2004) (describing courts’ early efforts to distinguish between employees under the Act and other persons).

²⁹ McCormick & McCormick, *supra* note 5, at 88.

concerted activities for the purpose of collective bargaining or other mutual aid or protection.”³⁰ Since these collective bargaining rights are granted exclusively to employees under the statute, determining whether a particular person is or is not an employee is of paramount importance.³¹

The central issue with the NLRA when first administered was that it defined both “employer”³² and “employee”³³ by reference only to each other, and it used those definitions to distinguish the status of a particular person in the same way. Because the statutory language by itself fails to demarcate the pronounced characteristics of either “employer” or “employee” from other classes of entities or persons, the judiciary and the NLRB have been guided mainly by common law doctrines when determining the meaning of the term “employee.”³⁴ Relying solely on common law principles, the NLRB interpreted the NLRA’s definition of “employee” and developed the “right of control” test.³⁵ Under this legal standard, the important factor in distinguishing an employee

³⁰ 29 U.S.C. § 157 (2012).

³¹ McCormick & McCormick, *supra* note 5, at 89.

³² 29 U.S.C. § 152(2) (2012) (“The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly. . .”).

³³ 29 U.S.C. § 152(3) (2012) (“The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, . . . but shall not include any individual . . . having the status of an independent contractor, or any individual employed as a supervisor . . .”).

³⁴ *E.g.*, McCormick & McCormick, *supra* note 5, at 89; Klement Timber Co., 59 N.L.R.B. 681, 683 (1944).

³⁵ Field Packing Co., 48 N.L.R.B. 850, 852-53 (1943) (holding that truck drivers were employees and, therefore, not independent contractors because the employer had not fully divested itself of the right to control drivers’ work); GORMAN & FINKIN, *supra* note 28, at 38.

from an independent contractor was the level of control the alleged employer maintained over the working life of the employee.³⁶ The Court first applied the 'right of control test' in *NLRB v. United States Insurance Co. of America*.³⁷ The Court in its decision noted that the term "employee" excludes "any individual having the status of an independent contractor."³⁸ The Court went on and held general agency principles will be applied in a case-by-case basis in distinguishing an employee from an independent contractor."³⁹

Congress further endorsed the common law "right of control" test as the proper interpretation of the statute through the addition of the 1947 Taft-Hartley Amendments to the NLRA.⁴⁰ The Amendments expressly excluded independent contractors from the definition of employee. The common law, as well as the NLRB and the judiciary, have long used the term "independent contractor" to distinguish cer-

³⁶See *Nat'l Freight, Inc.*, 146 N.L.R.B. 144, 145-46 (1964). The right of control test was derived from the common law doctrine of *respondet superior*, which determines whether a master might be liable for the torts of his servant. Under this measure, a person who performs a particular task by his own methods, not subject to the control of the alleged employer, is an independent contractor, while a person who is subject to the control of the employer, not only as to the ends to be accomplished, but also as to the methods and means of performing the work, is an employee. See *Carnation Co.*, 172 N.L.R.B. 1882, 1888 (1968); GORMAN & FINKIN, *supra* note 28, at 38.

³⁷ *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968).

³⁸ *Id.* at 256.

³⁹ See *id.*

⁴⁰ 29 U.S.C. §152(3) (2012) ("The term 'employee' . . . shall not include any individual . . . having the status of an independent contractor.").

tain workers from employees, applying the right of control standard to draw that distinction, referring to the right of control standard as the basic measure for determining whether individuals are employees under the NLRA.”⁴¹

The U.S. Supreme Court has expressly upheld the NLRB’s interpretation of employee and its reliance on the “right of control” standard. The Court most recently upheld the NLRB’s interpretation of an employee in *National Labor Relations Board v. Town & Country Electric, Inc.*⁴² In this case Town & Country Electric, Inc., a non-union company, sought to fill several positions for a construction job in Minnesota.⁴³ Town & Country received applications from union staff, but refused to interview any of the applicants except one, who was eventually hired and fired soon thereafter.⁴⁴ These individuals applied with the intention to organize Town & Country and were to remain on union payroll during their time of employment.⁴⁵ The union, the International Brotherhood of Electrical Workers, filed a complaint with the National Labor Relations Board claiming that Town

⁴¹ McCormick & McCormick, *supra* note 5, at 157; *see, e.g.*, *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir. 1948) (stating that “the employer-employee relationship exists when the person for whom the work is done has the right to control and direct the work, not only as to the result accomplished by the work, but also as to the details and means by which that result is accomplished”); *Teamsters Nat’l Auto. Transp. Indus. Negotiating Comm.*, 335 N.L.R.B. 830, 832 (2001) (“[T]he contracting employer must have the power to give the employees the work in question--the so-called ‘right of control’ test.”) (footnote omitted).

⁴² *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995).

⁴³ *Id.* at 87.

⁴⁴ *Id.*

⁴⁵ *Id.* at 88.

& Country had refused to interview or retain the workers because of their union affiliation, a violation of the National Labor Relations Act.⁴⁶ The Board held that the 11 individuals met the definition of employees under the Act and rejected Town & Country's claims that the individuals had been refused for other reasons.⁴⁷

The U.S. Court of Appeals for the Eighth Circuit reversed on the ground that the term "employee" does not include those individuals who remain on union payroll during their time of employment with another company.⁴⁸ The central question that the U.S. Supreme Court dealt with on certiorari was: Does a worker qualify as an "employee" under the NLRA if, while working, he is simultaneously paid by a union to help the union organize a company?⁴⁹

In a unanimous decision, the U.S. Supreme Court ruled for the Board and held that individuals can meet the definition of employee even if they are paid by a union to organize a non-union company while on company payroll.⁵⁰ The Court found this result consistent with the language and purpose of the Act as well as the dictionary definition of employee.⁵¹ The Court also reasoned that the language of the Act seemed to specifically take into account the possibility of workers who are paid by union organiz-

⁴⁶ *Id.* at 87.

⁴⁷ *Id.* at 87-88; *see also* Town & Country Elec., Inc. v. N.L.R.B., 106 F.3d 816, 819 (8th Cir. 1997).

⁴⁸ Town & Country Elec., Inc. v. NLRB, 34 F.3d 625, 629 (8th Cir. 1994).

⁴⁹ NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 87 (1995).

⁵⁰ *Id.*

⁵¹ *Id.* at 90.

ers.⁵²

Since the Supreme Court decision in *NLRB v. Town & Country*, the NLRB has further relied on that decision in defining employee, as “[u]nder the common law . . . a person who performs services *for another* under a contract of *hire*, subject to the other’s control or right of control, and *in return for payment*.”⁵³

2. The NLRB’s Statutory Test from *Brown* for Students Seeking Status as Employees

University students who receive academic scholarships and perform services as teaching or research assistants appear to satisfy the common law test for “employee.” The NLRB recognized the low threshold the common law test presents to distinct classes of persons attempting to be regarded as “employees” under the NLRA.⁵⁴

The NLRB in *Brown* developed a new requirement. In order for university students to be treated as employees and granted collective bargaining rights under the NLRA, they must satisfy both the common law “right of control” test and the NLRB’s additional special statutory test developed in *Brown*.⁵⁵ In that case, Brown University filed a peti-

⁵² *Id.* at 93.

⁵³ *Brown Univ.*, 342 N.L.R.B. 483, 490 n.27 (2004) (citing *Town & Country Elec., Inc.*, 516 U.S. at 94); *see also* *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152, 160 (1999) (quoting *Town & Country Elec., Inc.*, 516 U.S. at 91-93).

⁵⁴ *See Brown Univ.*, 342 N.L.R.B. at 491.

⁵⁵ *See id.* at 487 (stating that “attempting to force the student-university relationship into the traditional employer-employee framework” is problematic and that “principles developed for use in the industrial setting cannot be ‘imposed blindly on the academic world’”) (quoting *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680-81 (1980)).

tion with the NLRB, asking the Board to reconsider and overturn the Board's decision in *NLRB v. New York University*.⁵⁶ New York University dealt with graduate student assistants who were admitted into but not hired by the university. The central question was whether the graduate student assistants' supervision of teaching and research was an integral component of their academic development. The NLRB in *Brown* held that the "financial support" the graduate student assistants received in order to attend Brown University made the relationship between the graduate student assistants and the university primarily an educational one rather than an economic one.⁵⁷

The NLRB's decision in *Brown* is currently the legal standard for determining whether a university student is a statutory employee. In that decision the NLRB majority acknowledged that the right to control standard must be satisfied as a general requirement.⁵⁸ The NLRB further held that another specific requirement for students was that unless the relationship between the school and the student was "primarily economic," rather than "primarily educational," then the students were not employees.⁵⁹ Therefore, when students' efforts are predominantly

⁵⁶ See *Brown Univ.*, 342 N.L.R.B. at 483.

⁵⁷ See *id.* at 486.

⁵⁸ See *id.* at 490 ("Even assuming arguendo that this is so [i.e., that graduate student employees are employees at the common law], it does not follow that they are employees within the meaning of the Act. The issue of employee status under the Act turns on whether Congress intended to cover the individual in question. The issue is not to be decided *purely* on the basis of older common-law concepts.") (emphasis added). Moreover, the Board has certainly applied the common law "right of control" test since its 2004 *Brown* decision in determining whether workers were employees under the NLRA.

⁵⁹ *Brown Univ.*, 342 N.L.R.B. at 487-89.

educational and not economic, then those individuals are not employees within the meaning of the NLRA.⁶⁰ From that test it logically follows that when a student who works for a university performs services that are not primarily educational or academic and the relationship to the university with respect to those services is an economic one, the student may be an employee under the NLRA, provided that he also meets the common law test for that term.

B. Tort: Right of Publicity

To assert a claim for the tort of right of publicity, a person must demonstrate that one or more of his or her protected attributes that are reasonably deemed private were appropriated by another party for that party's own use or benefit without his or her consent.⁶¹ The Restatement (Second) of Torts specifically notes that a person who appropriates the name or likeness of another for his or her own use or benefit is subject to liability to the other for invasion of privacy.⁶² The "own use" or "benefit" of another person's protected attributes has been interpreted in some states to mean a commercial benefit.⁶³ Other states however, have applied it to instances where a person uses another's name or likeness for his or her own purposes and benefit even though the use is not a commercial or pecuniary benefit.⁶⁴

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² RESTATEMENT (SECOND) OF TORTS § 652C (1977) ("Appropriation of Name or Likeness: One 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.").

⁶³ *Hart v. Elec. Arts, Inc.*, 717 F.3d 141 (3d Cir. 2013).

⁶⁴ RESTATEMENT (SECOND) OF TORTS § 652C cmt. b (1977).

C. The NCAA National Letter of Intent

The National Letter of Intent, signed by the potential student-athlete, is a binding contract between the individual and the university that the student-athlete attends.⁶⁵ If the individual is under the age of 21, a parent or registered guardian must co-sign the agreement.⁶⁶ A coach or representative of the coaching staff cannot be present when the individual is signing.⁶⁷ Once the Letter of Intent is signed no other school can recruit that person. The agreement is for a period of one year.⁶⁸ Usually the individual receives a scholarship towards tuition and a stipend for room and board.⁶⁹ If for any reason the student does not meet the academic or chosen sport performance expectations the school has the right to terminate the agreement.⁷⁰ After one year the student-athlete's scholarship or stipend is continued if he or she has met academic and sport performance expectations.⁷¹ The sequence carries forward for a four-year matriculation at the chosen school.⁷²

1. Student-Athlete Statement – Division I Form 08-3a Section IV

Before the student-athlete is allowed to participate in practice, he or she must sign various sections of Form 08-3a, the Student-Athlete Statement. Sec-

⁶⁵ *Barile v. Univ. of Virginia*, 441 N.E.2d 608, 615 (Ohio 1981).

⁶⁶ *Signing a Letter of Intent*, VARSITYEDGE.COM, <http://www.varsityedge.com/nei/varsity.nsf/main/national+letter+of+intent>.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

tion IV of the statement contains wording which allows a student-athlete's name or picture to promote the NCAA and the school he or she is attending. The exact wording is as follows:

You authorize the NCAA (or 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.⁷³

If student-athletes do not sign the Student-Athlete Form, they are deemed ineligible for practice and competition until the form is signed and completed. This is the same form that the NCAA references in their claim that they have the right to license the likeness and image of former student-athletes.⁷⁴ The legal question then becomes: does the form govern former student-athletes, enabling the NCAA and its member schools to use former student-athletes' likeness for its own commercial and promotional purposes?⁷⁵

D. NCAA Proposal 26-2010

A controversial proposal by the NCAA would broaden the way companies are allowed to use college athletes in advertising campaigns, giving athletic departments more opportunities to trade on play-

⁷³ In re NCAA Student-Athlete Name & Likeness Litig., No. C 09-1967 CW, 2011 WL 1642256, at *2 (N.D. Cal. May 2, 2011).

⁷⁴ *Id.* at *4.

⁷⁵ *Id.* at *5.

ers' popularity.⁷⁶

Athletics officials who support the proposal say that they are not seeking to exploit athletes, and that the changes would align outdated NCAA rules with today's technologies.⁷⁷ Some players also supported the amendment.⁷⁸

Contrarily, opponents of the proposal say that the changes are overreaching. It allows sponsors to expand their reach without compensating players for the use of their likeness in commercial promotions.⁷⁹ While players would continue to earn nothing for the use of their likenesses, their colleges, conferences, or the NCAA would reap profits from the advertisers.⁸⁰

Up until the time of the proposal, corporate sponsorship companies were allowed to include pictures or images of college athletes in their advertisements as long as the athletes did not promote commercial ventures. In addition, companies were permitted to show only their corporate logos and names, not their products.⁸¹

Under the proposal, corporate sponsorship companies would now be allowed to advertise their products and services in association with pictures or images of college athletes, as long as the players did not specifically endorse the products.⁸² The person-

⁷⁶ Lauren Smith, *Controversial NCAA Proposal Would Allow Colleges to Cash In on Players' Images*, CHRON. HIGHER EDUC. (Oct. 5, 2007), <http://chronicle.com/article/NCAA-Proposal-Would-Let/2881>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Cabinet Sponsors Possible Amendments to Likeness Proposal*, NCAA (Mar. 9, 2011), <http://fs.ncaa.org/Docs/NCAANewsArchive/2011/march/cabinet>

nel who have the authority to make the proposal, a powerful NCAA committee made up of athletics officials and faculty members, said that it provides colleges, conferences, and the NCAA greater flexibility in developing relationships with commercial entities that benefit the athletics program.”⁸³ Ellen J. Staurowsky, a professor and chair of the graduate program in the Department of Sport Management and Media at Ithaca College said, “There is a little bit of disingenuousness in this. Until the players are compensated, these kinds of things are problematic.”⁸⁴

II. DISCUSSION

A. Applying the NLRA Common Law Test and the Federal Labor Standards Act

1. The Right of Control Test

Under the common law tests in determining if a particular person is an employee, the case for college student-athletes employee status is strong. “Their labor and talent generate huge revenues for universities, just like the services rendered by professional athletes for their leagues.”⁸⁵ These particular student-athletes are employees from the standpoint of the common law “right of control” test: school officials directly control their labor and exercise a level of oversight over players’ lives far greater than that of most employees in the United States.⁸⁶

%2B sponsors %2B possible %2B amendments %2B to %2B likeness %2B proposal df30.html; Smith, *supra* note 76.

⁸² *Id.*

⁸³ Smith, *supra* note 76.

⁸⁴ *Id.*

⁸⁵ Fram & Frampton, *supra* note 1.

⁸⁶ *Id.*

Critics argue that paying college athletes is only providing them with additional compensation on top of the already valuable compensation they get from universities in the form of scholarships.⁸⁷ One key principle from *Brown* was that the NLRB asserted that graduate student assistants, whether in an instruction or research role, were primarily there for educational purposes and the scholarships they received to perform their duties were requisite to obtaining their higher education degrees.⁸⁸ No one would argue that playing college football or men's basketball is a prerequisite to obtaining an undergraduate or graduate degree.⁸⁹

Federal law, which dictates the requirement of a university student to meet the standard "right of control" test and the *Brown* statutory test to be considered an employee, only applies to students in private institutions.⁹⁰ University student-athletes competing at private institutions will probably be able to satisfy both tests, but college athletes playing for public institutions will be subject to state labor law, which has generally been more favorable to student-employees.⁹¹ Over the last ten years, undergraduate student-employees have successfully formed unions consisting of dining hall workers, clerical assistants, and dormitory advisors.⁹² Like such student-employees, student-athletes also render services to their universities by filling stadiums and arenas and

⁸⁷ McCormick & McCormick, *supra* note 5, at 157; *see, e.g.*, *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 986 (7th Cir. 1948).

⁸⁸ *Id.*

⁸⁹ Fram & Frampton *supra* note 1.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

generating revenue. State labor law has already held that students who are employed as dining hall workers, clerical assistants, and dormitory advisors meet the legal standard for an employee.⁹³ If a university student meets the legal standard of an employee by being employed as a food server in dining halls, answering telephone calls as a telemarketing fund raiser, or as a student advisor, then it logically follows that the student whose scholarship requires that he compete in college football or basketball meets the same standard and should be recognized as an employee.⁹⁴ This question has been debated at length, but to this point there has been no definitive answer.

2. The Economic Reality Test

In determining an employee under the Federal Labor Standards Act (FLSA) the U.S Supreme Court applied the “economic reality” test in *United States v. Silk*.⁹⁵ The five-factor “economic reality” test would be useful in determining whether or not student-athletes are actually employees. The factors are as follows:

- (1) the degree of control exercised by the alleged employer;
- (2) the extent of the relative investments of the [alleged] employee and employer;
- (3) the degree to which the “employee’s” opportunity for profit and loss is determined by the “employer”;
- (4) the skill and initiative required in performing the job; and

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *United States v. Silk*, 331 U.S. 704, 713 (1947).

(5) the permanency of the relationship.⁹⁶

To examine if student-athletes are employees under the “economic reality” test, I interviewed a current University of Connecticut (“UCONN”) Division I Varsity Football player, who had just completed his third season as a linebacker for the UCONN football team.⁹⁷ Like all other Division I College Football players, his Monday through Saturday in-season and off-season schedules are structured by his football coaches and are strictly regimented.⁹⁸ The football player explained that the athletic department tailors his academic class schedule around his mandatory practice sessions.⁹⁹ He explained that the football coaches require the players to eat every meal throughout the day together as a team, including a midmorning and an afternoon snack together. The linebacker coach uses this lunchtime as a film viewing session to review game UCONN campus dining hall.¹⁰⁰ Following breakfast, the football player attends his first class from 11:00 to 11:50 a.m. He stated that the athletic program requires him “to make sure that he gets classes that don’t cut into practice time or conflict with any of the UCONN football team’s workouts.”¹⁰¹

The football player attends his second class from 1:00 to 2:15 p.m. In between the first and sec-

⁹⁶ Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042 (5th Cir. 1987) (citing United States v. Silk, 331 U.S. 704, 715).

⁹⁷ Interview with a Univ. of Conn. Div. I Varsity Football player (Jan. 29, 2013). Interviewee requested to remain anonymous.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

ond class, he reports to the dining hall for a team lunch exclusively for linebackers.¹⁰² The linebacker plays and strategies.¹⁰³ The football player said, “Coach Wholley will usually make us watch a video of our last opponent and tells us what we will be doing, and what he wants to see out of us in our afternoon practice.”¹⁰⁴ From 3:00 to 5:30 p.m., the football player participates in an on-the-field practice that consists of football drills and conditioning.¹⁰⁵ Following the afternoon practice, he reports for the team dinner and then attends an evening class.¹⁰⁶ Additional requirements include that he must room with other members of the team, sit in the front row of the classroom for each of his classes, comply with a bedtime curfew six nights of the week, and the night before each game he must sleep in the campus hotel with the other players.¹⁰⁷

Applying the UCONN football player’s situation to the first factor of the “economics reality” test, it shows that there is a high degree of control that the football player’s coaches whom are hired by the University of Connecticut have over him.

The second factor deals with the extent of the relative investments between the student-athletes and their respective schools. Division I college football programs, barring any NCAA penalties or sanctions against them, are allowed 85 scholarships per year to be given out to student-athletes. The scholarships granted to those 85 individuals are good for one year, and the amount of scholarship granted to

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

each student-athlete is contingent upon their athletic and academic performance at the university.¹⁰⁸ A grant-in-aid is a transfer of money from the federal government to a state or local government or individual person for the purposes of funding a project or program.¹⁰⁹ Grant money is not a loan, and does not have to be repaid, but it does have to be spent according to the federal government's guidelines for that particular grant.¹¹⁰

Applying this to the football player's situation, the federal government gives a fund to the University of Connecticut (an academic institution funded by the state government) for the specific purpose of furthering the UCONN football program.¹¹¹ The student-athlete, in this case, the football player, gets the grant-in-aid for one year with the expectation that his athletic performance will help the football team. If enrolled at an NCAA member school and to remain eligible to compete in NCAA intercollegiate competition, the student-athlete must adhere to academic performance standards, set forth by the school itself, the NCAA athletic conference the school is member

¹⁰⁸ Lynn O'Shaughnessy, *7 Things You Need to Know About Sports. The College Solution*, U.S. NEWS & WORLD REP. (Jun. 22, 2010), <http://www.usnews.com/education/blogs/the-college-solution/2010/06/22/7-things-you-need-to-know-about-sports-scholarships>.

¹⁰⁹ *Grant-In-Aid Definition*, INVESTOPEDIA, <http://www.investopedia.com/terms/g/grant-in-aid.asp> (last visited Jan. 18, 2014).

¹¹⁰ *See id.*

¹¹¹ Steve Berkowitz, Jodi Upton & Erik Brady, *Most NCAA Division I Athletic Departments Take Subsidies*, USA TODAY (Jul. 1, 2013, 12:48 PM), <http://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/>.

of, and the NCAA's rules.¹¹² A general rule for student-athletes to remain eligible is they must be accepted for enrollment in compliance with the school's rules, eligible to practice under the conference and NCAA rules, and be registered for at least 12 credit hours for each academic term.¹¹³

The NCAA allows a student-athlete to remain eligible for five years of athletic competition within five calendar years of the athlete's full-time enrollment.¹¹⁴ Student-athletes must earn at least six credit hours each term to be eligible for the following term, in addition to meeting minimum GPA requirements for graduation.¹¹⁵ For example, at UCONN, the football player must maintain a GPA of at least 1.8, and if he falls below the criteria he would be placed on academic probation.¹¹⁶

To summarize, the football player must meet the requirements of academic standing as well as the rigorous time commitment for his chosen sport. This includes on field practice and team meetings, mandatory team wide strength and conditioning sessions, and the actual games. In return for assurance of the football player's effort for optimum performance on the field and in the classroom, the school gave him grant-in-aid of \$26,562 for the year. In addition, for each academic term the football player received an

¹¹² UNIV. OF CONN. 2013-2014 STUDENT-ATHLETE HANDBOOK 6-7, available at http://grfx.cstv.com/photos/schools/conn/genrel/auto_pdf/2013-14/misc_non_event/SAHandbook.pdf.

¹¹³ See *id.* at 7.

¹¹⁴ See *id.* at 14, 16.

¹¹⁵ *Remaining Eligible: Academics*, NCAA, <http://www.ncaa.org/remaining-eligible-academics> (last visited Jan. 18, 2014).

¹¹⁶ UNIV. OF CONN. 2013-2014 STUDENT-ATHLETE HANDBOOK, *supra* note 112, at 34.

additional \$1,650 to cover the cost of student fees, housing, on/off campus meal plans, books, supplies and transportation. This illustrates that the “relative investments” between the student-athlete and the school, the alleged employee and employer, have been met. The football player as the employee gives up much of his time and is controlled, scheduled, and enforced by his coaches (employees of the University of Connecticut) and in return, he receives a one-year stipend.

The relationship between the football player and UCONN could also be considered an “employee at-will” relationship, due to the fact that if he fails to meet the academic eligibility requirements, or does not comply with the rules in the “Division I Student-Athlete Statement,” UCONN can, after his first full academic year as a Division I student-athlete, deny him grant-in-aid for the upcoming year.

The third factor of the “economic reality” test, that the employee’s opportunity for profit and loss is determined by the employer,¹¹⁷ is easily met. The football player is required to attend every practice and strength and conditioning workout set up by the coaching staff. The football player says that due to the time commitment, although not expressly stated in the Division I Student-Athlete Statement, it is impossible for him to hold a part-time job.¹¹⁸ His daytime hours are filled with academics and his commitment to the team activities.¹¹⁹ It would be reasonable to argue that his participation in UCONN’s football program is a job in itself (through

¹¹⁷ Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042 (5th Cir. 1987) (citing United States v. Silk, 331 U.S. 704, 715).

¹¹⁸ Interview with a Univ. of Conn. Div. I Varsity Football player (Jan. 29, 2013).

¹¹⁹ *Id.*

daily preparation leading to performance at football games) and the school compensates him for this.

As to the fourth factor,¹²⁰ the skill required to handle the football player's job is limited to a certain few gifted athletes. For any Division I College Football player in the Football Bowl Subdivision, it is a rare combination of size, speed, and strength that enable an individual to successfully compete at that level. This football player, who received high school and college All-American honors for his football skills, must continue to train daily to maintain his optimum athletic ability.

Finally, the fifth factor, "the permanency of the relationship,"¹²¹ could be reasonably argued to be an "employee at will" agreement. UCONN, at any time, can deny the football player an additional year of grant-in-aid. Before deciding to commit to playing football at UCONN, the football player had to sign the "NCAA National Letter of Intent" and the "Division I Student-Athlete Statement" that details all of the NCAA guidelines, including his full commitment to the UCONN football program.

If for any reason the football player fails to comply with the terms set forth in both forms, the school could deny him a second grant-in-aid year. Also, it is at the school and the coaches' discretion whether the football player is "deserving" of an additional grant-in-aid year. The football player said that the school can deny him an additional grant-in-aid year if, "The coaches don't think I am cutting it."¹²² In other words, whether or not the football player re-

¹²⁰ *Mr. W Fireworks*, 814 F.2d at 1042 (citing *United States v. Silk*, 331 U.S. 704, 715).

¹²¹ *Id.*

¹²² Interview with a Univ. of Conn. Div. I Varsity Football player (Jan. 29, 2013).

ceives an additional grant-in-aid is in the hands of the coaches and how they view his performance on the football field.

B. Applying the Brown Statutory Test

The NLRB in *Brown* examined four criteria to decide whether graduate assistants were employees in line with the NLRA. The four criteria were: (1) “the status of graduate assistants as students,” (2) “the role of graduate student assistantships in graduate education,” (3) “the graduate student assistants’ relationship with the faculty,” and (4) “the financial support they receive to attend Brown.”¹²³

The first three criteria from the *Brown* Board as it relates to student-athletes as employees are easily met. It is merely impossible to argue against the first criterion because student-athletes, like graduate assistants, routinely attend class to receive an academic degree. The second factor goes to the role of the graduate student assistantships predominately for educational purposes and as a prerequisite to an educational degree.¹²⁴ Playing Big-Time College Football or Division I Men’s Basketball is certainly not a prerequisite to obtaining a higher education degree. The third factor has been analyzed and it has been shown that coaches of Division I athletic teams’ exercise a great degree of regulation over their student-athletes.

1. Interpreting the Fourth Factor in *Brown*

The logic underlying the fourth factor of the *Brown* analysis is flawed. Even if the fourth factor was logical, Big-Time College Football and Men’s

¹²³ *Brown Univ.*, 342 N.L.R.B. 483 (2004).

¹²⁴ *Id.* at 483.

Basketball student-athletes would still be NLRA employees.¹²⁵ The *Brown* Board relied upon a fourth element concluding that the graduate assistants were primarily students and not employees.¹²⁶ The financial rewards graduate assistants received were not compensation for teaching and research services performed, but were merely financial aid to permit attendance at Brown University.¹²⁷ In support of its conclusion, the NLRB underscored two aspects of graduate assistants' financial packages. First, the amount provided to teaching assistants (TAs) and resident assistants (RAs) was the same as that provided to graduate fellows for whom no teaching or research activity was required.¹²⁸ Second, the fact that the financial aid awarded to graduate assistants was unrelated to the quality or value of services they rendered, indicated that the payment was not compensation for their services, but was financial assistance to attend school.¹²⁹

The *Brown* Board improperly analyzed the fourth factor of its own analysis. The proper analysis in determining whether a payment is compensation for services rendered, as opposed to financial aid, is whether the payment to the particular person would cease if the services were stopped.¹³⁰ It is inconceiv-

¹²⁵ See generally McCormick & McCormick, *supra* note 5.

¹²⁶ Brown Univ., 342 N.L.R.B. 483 (2004).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ The NCAA requires schools to refer to the agreement between the university and the athlete as a "grant-in-aid" or scholarship, rather than as an employment contract providing pay or other compensation. Article 12.1.1 of the Division I Manual makes it clear that an athlete is not permitted to receive "pay" for athletic services: "An individual loses amateur status and thus shall not be eligible for intercollegiate

able to believe that if TAs and RAs were to withhold their services either collectively or individually, they would continue to receive full scholarships and stipends. It follows logically that the financial aid given to such personnel must be compensation for their services to the university.

Even if this proper analysis of the *Brown* fourth factor was looked at in regards to student-athletes, athletic grants-in-aid are never given without the requirement of athletic services being rendered.¹³¹ Even third or fourth string personnel on a college football team or a 12th man on a Division I Men's Basketball team must still attend all practices, abide by team rules, undertake the required and "voluntary" strength and conditioning, and perform all activities identical to their grant-in-aid superstar counterparts. Further, the NCAA makes it clear that no third parties receive grants-in-aid without having to participate in the athletic program as a condition in order to continue being granted the "scholarship" for their athletic services.¹³²

Finally, comparing the athletic scholarship with the merit-based or need-based scholarship awarded to a non-athlete undergraduate or a graduate assistant also shows that the former is compensation.¹³³ Athletic scholarships are granted only if

competition in a particular sport if the individual: (a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport." NCAA DIV. I MANUAL Bylaw art. 12.1.2 (2013), available at

<http://www.ncaapublications.com/productdownloads/D114.pdf>. And under NCAA bylaws, the grant-in-aid is not considered "pay" and thus is permitted. See *id.* Bylaw art. 12.01.4 (2013).

¹³¹ *Id.* Bylaw art. 12.01.1.

¹³² *Id.* Bylaw art. 15.01.2.

¹³³ McCormick & McCormick, *supra* note 5, at 155.

the athlete provides athletic services while merit-based or need-based scholarships awarded to non-athletes require no such reciprocity.¹³⁴ Merit-based and need-based scholarships are given to enable students to attend universities, but the universities have the option to discontinue scholarships if the student-athletes do not compete for them.¹³⁵

C. The Predominantly Economic Relationship Between Grant-in-Aid Student-Athletes and Their Colleges

Applying the NLRB's test in *Brown* to grant-in-aid Big-Time College Football and Division I Men's Basketball student-athletes shows that they are not average students and their relationship with their universities is an economic one.¹³⁶ In order to show that a university-athlete relationship is predominantly economic in nature, the standard in the past was to demonstrate that the relationship was

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Academic ability is independent of athletic talent.

Consequently, a university program that screens admissions applications based upon potential academic success necessarily excludes many talented athletes, leaving a team on the playing field with diminished athletic potential. As former NCAA Executive Director Byers remembered:

The big timers--building a national entertainment business--wanted the great players on the field, whether or not they met customary academic requirements. In the new open-door era, [in which virtually all high school seniors were academically "eligible" for college athletics because of the wholesale abrogation of academic entrance requirements,] victory-minded coaches sensed a potential recruiting paradise.

McCormick & McCormick, *supra* note 5 at 136.

not primarily academic.¹³⁷ “The NCAA academic standards are designed to serve the employers’ enormous commercial interests, enabling universities to recruit and retain gifted athletes rather than to promote true academic achievement.”¹³⁸ These “student-athletes” are not primarily students.¹³⁹ The majority of these individuals are inadequately prepared to handle the academics at their respective universities and thus unable to adequately further their education.¹⁴⁰ The NCAA denotes these individuals as student-athletes in order to disguise their legal status of employees in the commercial college sports entertainment industry.¹⁴¹

The Board in *Brown* decided that the relationship between graduate assistants is primarily an academic one as opposed to an economic one.¹⁴² If the relationship was found to be for a university’s commercial benefit, then the decision may have gone the other way. The Board refused to “assert jurisdiction over relationships that are primarily educational.”¹⁴³

1. Johnny Manziel’s Right of Publicity: The Misappropriation of His Likeness for the Commercial Benefit of Texas A&M University

If an NCAA student-athlete uses his or her likeness for his or her own commercial benefit, it may result in that athlete’s ineligibility. When this same student-athlete makes his debut onto the cam-

¹³⁷ *Id.* at 135.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 157 (citing interviews with various college athletes about the secondary emphasis placed on academics).

¹⁴¹ *Id.* at 135.

¹⁴² *Brown Univ.*, 342 N.L.R.B. 483, 489 (2004).

¹⁴³ *See id.*

pus field or court and performs at a high level, the NCAA and the athlete's school recognize that they can reap commercial benefits from the athlete's performance, which is actually exploiting the student-athlete.¹⁴⁴ This poses a legal question for the NCAA and its relationship with the current student-athlete. Exploiting the student-athlete for a commercial benefit actually undermines the NCAA's amateurism dogma.

Texas A&M Quarterback Johnny Manziel and his family recognized the intent of the NCAA and began to take steps to trademark his coveted name, "Johnny Football."¹⁴⁵ A trademark is "a word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others. . . . In effect, a trademark is the commercial substitute for one's signature."¹⁴⁶ Texas A&M University did not hesitate to try and reap the commercial benefit from Manziel's star status. "Texas A&M is working in concert with the Manziel family to trademark the nickname," said Shan Hinckley, who is an Assistant Vice President of Business Development at the school and runs the Texas A&M University Aggies' licensing program.¹⁴⁷

The news was reported to the NCAA less than two weeks after the investment organization filed for

¹⁴⁴ Joye Pruitt, *NCAA: Why Student-Athletes Should Be Paid for Achievements in College*, BLEACHER REP. (Mar. 21, 2011), http://bleacherreport.com/articles/650687-ncaa-why-student-athletes-should-be-paid-for-achievements-in-college?comment_id=4313772.

¹⁴⁵ Darren Rovell, *A&M, Family Covet 'Johnny Football'*, ESPN (Nov. 11, 2012), http://espn.go.com/college-football/story/_/id/8619087/johnny-manziel-family-trademark-johnny-football.

¹⁴⁶ BLACK'S LAW DICTIONARY 1630 (9th ed. 2009).

¹⁴⁷ Rovell, *supra* note 145.

the “Johnny Football” trademark.¹⁴⁸ The lawyer who filed the trademark did not comment after the investigation but a university official confirmed the lawyer was not working with Texas A&M University or the Manziel family.¹⁴⁹ The NCAA made it known that in order for Johnny Manziel to keep his eligibility, neither Texas A&M nor his family could sell products that in any way hint of a connection to the Texas A&M quarterback Johnny Manziel.¹⁵⁰ Also, the NCAA notified Texas A&M to ensure that the school prohibits vendors from selling products hinting to the moniker “Johnny Football.”¹⁵¹

The Manziel family may have to wait two more years to attempt to own the trademark “Johnny Football” for licensing and merchandising deals, since Manziel just finished his freshman football season.¹⁵² NCAA regulations require that a Division I football player remain in school for at least three years. In order for Manziel to maintain his athletic eligibility at Texas A&M the NCAA asserted that neither the university or Manziel and his family can sell products that connect ‘Johnny Football’ to

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Kenny Ryan, *While NCAA Rules Prohibit Manziel from Profiting from His Own Success, It Can't Stop Others*, Daily Times (Dec. 15, 2012), http://dailytimes.com/manziel/article_d469e192-4691-11e2-8554-0019bb2963f4.html.

¹⁵² See generally *Brookfield Commc'ns, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1047 (1999). A party can rebut the presumption that a registered trademark is valid and that registrant is entitled to exclusive use of mark by showing that the party used the mark in commerce first, since a fundamental tenet of trademark law is that ownership of an inherently distinctive mark is governed by priority of use.

Manziel himself.¹⁵³ Moreover, the NCAA put Texas A&M on notice that they must take reasonable affirmative steps to stop vendors from doing the same.¹⁵⁴ Once the NCAA told the school to enforce this policy against vendors, Texas A&M took appropriate steps in October and November 2012.¹⁵⁵ However, Manziel's number 2 jersey was available at the school's bookstore on Friday, November 9, 2012. The bookstore completely sold out his jersey over that weekend and another shipment of his number 2 jersey arrived on Monday November 12, 2012.¹⁵⁶ From that point on it was a revolving door of number 2 Texas A&M football jerseys being shipped to the store and purchased by consumers. Before that, the only two Texas A&M football jerseys on the shelves in the Texas A&M bookstore that were available for purchase bore the numbers 1 and 12.¹⁵⁷ There was never a Texas A&M football jersey with the number 2 on it in the bookstore available for purchase before Manziel's jersey.¹⁵⁸

Since Manziel's name, image or the moniker "Johnny Football" was not placed anywhere on the Texas A&M football jersey that had the number 2 on it, the NCAA and Texas A&M University would argue that they are in no way exploiting Manziel's likeness. The school would say that it never attached

¹⁵³ Joseph Jacobsen, *Google and Stanford Help Texas A&M Save Its Football Season, Capture the "Johnny Football" Asset, and Begin to Realign Student-Athlete Rights*, 22 TEX. ENT. & SPORTS L.J. 7 (2013), available at <http://teslaw.org/wp-content/uploads/2012/02/TESLAW-Journal-Fall2013.pdf>.

¹⁵⁴ *See id.*

¹⁵⁵ Ryan, *supra* note 151.

¹⁵⁶ Telephone interview with a Texas A&M Merchandise Representative (Oct. 15, 2012).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

Johnny Manziel's name, image, or likeness to the sold commercial merchandise and thus never exploited him for the school's financial gain.

However, once a person is well-known entity and a drawing card for revenue generating public consumption, a person's likeness is not limited to name, moniker, and image. A person's likeness can also be an identifiable mark or trait of a person. This is evident in the California Court of Appeal case, *Motshenbacher v. R. J. Reynolds Tobacco Co.*¹⁵⁹

In *Motshenbacher*, Lothar Motshenbacher was a Formula I race driver who had his car painted in esoteric color designs so that they would stand apart from the other cars.¹⁶⁰ R. J. Reynolds created a commercial with cars on the track and the plaintiff's car in the foreground. The plaintiff's image was scrambled so he could not be identified and some of the car's characteristics were changed.¹⁶¹ The car's number was changed from 11 to 71, and a wing spoiler was added to the back of the car.¹⁶² The red color and the white pinstripes remained, however, giving the illusion that Motshenbacher was driving the car.¹⁶³ The initial decision of the trial court found in favor of the defendant, with the court finding that (1) the person driving the car was unrecognizable and therefore unidentifiable, and (2) a reasonable inference could not be drawn that the driver was Motschenbacher, or any other driver.¹⁶⁴ But the California Court of Appeal reversed the trial court's

¹⁵⁹ *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 (1974).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 822.

¹⁶⁴ *Id.* at 822.

decision and stated that the fact that the likeness of the driver (alleged to be Motschenbacher) was unrecognizable in the commercial, the number of the racing car had been changed from 11 to 71 and the fact that car now had an added spoiler did not preclude a finding that the driver was identifiable as Motschenbacher in view of the distinctive decorations on the car. The California Court of Appeal for those reasons held that the use of the car was a misappropriation of an identifiable attribute of Motschenbacher, thus violating his right of publicity.¹⁶⁵

Applying the California Court of Appeal's reasoning to the Texas A&M number 2 football jersey, when a Texas A&M student, alumni member, or general college football fan walks into the Texas A&M bookstore, a more than reasonable inference will be drawn that the player who wears that Texas A&M number 2 football jersey on Saturdays is Johnny Manziel. First, it is the Texas A&M Football Team jersey and second, the number 2 is on the jersey and the inference can be made that the jersey is that of Johnny Manziel. In view of the distinctive commercial object, the number 2 Texas A&M Football jersey is identifiable by the majority of the public as Johnny Manziel's jersey. For these reasons, the NCAA and Texas A&M's use of the number 2 Texas A&M football jersey on it is a misappropriation of an identifiable attribute of Johnny Manziel for the sole advantages of the NCAA and Texas A&M University advantage, thus violating Manziel's right of publicity.

Additionally, Texas A&M knows that it can make money indirectly from Johnny Manziel by selling jerseys, T-shirts and hats with the signature

¹⁶⁵ *Id.* at 827.

number 2 placed on them, but they're not permitted to use Manziel's name, likeness or "Johnny Football" moniker.¹⁶⁶ That did not stop Texas A&M from doing what they are allowed to do within the NCAA rules.¹⁶⁷ Over the course of the 2012-2013 college football season, 2,500 Texas A&M Replica Football jerseys and 1,400 t-shirts with the number 2 were sold at the Texas A&M campus store.¹⁶⁸ Another shipment of T-shirts was made to the Texas A&M campus store sometime in early December after the T-shirts sold out.¹⁶⁹

Football helmets signed by Manziel, (or at least advertised as signed by him, as Texas A&M University officials say many of the items are fake), have sold for more than \$400.¹⁷⁰ One seller on eBay who claims to be selling the original "Johnny Football" shirt boasts in his listing that he has sold 625 footballs and helmets.¹⁷¹ Also listed is a version of a pullover-hooded sweatshirt with a new phrase growing in commercial popularity, "HEISMANZIEL."¹⁷² Other items listed for commercial consumption were bumper stickers, trading cards, custom figurines, iPhone cases, and mugs.¹⁷³

Scenarios like the one with Johnny Manziel have been an ongoing commercial benefit for the

¹⁶⁶ Darren Rovell, *Will Johnny Manziel Ever Cash In?*, ESPN (Dec. 7, 2012, 10:47 AM), http://espn.go.com/blog/playbook/dollars/post/_id/2547/will-johnny-manziel-ever-cash-in.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

NCAA member schools for several years. It would be unreasonable to think that the University of Florida did not make a small fortune by selling University of Florida football jerseys with the number 15 when Tim Tebow was the quarterback for the Gators. It is also reasonable to believe that the University of Texas increased its revenue by selling the University of Texas football jerseys with the number 10 the year Vince Young was playing quarterback for the Longhorns. However, there will be much larger revenues generated for Texas A&M University with respect to sales of the football jerseys with the number #2 over the next two years. Texas A&M's Vice President John Cook said, "Frankly, we're not doing anything that hasn't been done before. The difference is he's [Quarterback Johnny Manziel] a freshman."¹⁷⁴ It is an important difference. Johnny Manziel flourished as a star quarterback as a true freshman. Under the NCAA bylaws, Manziel will be forced to play at the Division I College Football level for at least two more years before becoming eligible to enter the National Football League draft.¹⁷⁵

In all likelihood Johnny Manziel will play his second and third year of Division I college football eligibility as quarterback for the Texas A&M Aggies and the money at the campus bookstore will continue to flow in. The average price of a replica football jersey, whether college or professional, is between \$60 and \$70. Replica T-shirts sell for approximately \$20 each.¹⁷⁶ Furthermore, one can speculate that other merchandise will be sold at Texas A&M given the fact the school officials will surely think of innovative

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

ways to try and disguise the inference of Manziel's name, image or likeness. It is more than reasonable to infer and conclude that the revenue Texas A&M University will generate from the sales of commercial merchandise while Johnny Manziel is still playing quarterback for the Aggies during the 2013-2014 and 2014-2015 college football seasons will be similar if not greater than in the 2012-2013 season.

The amount of potential revenue that Manziel will generate for the school is certainly substantial. Yet it is simply incomprehensible that under the current NCAA bylaws, Manziel will not receive any monetary compensation for any item sold bearing a resemblance to him. Texas A&M will certainly cash in big if it continues to sell commercial merchandise carrying the number 2, and continuing to misappropriate Johnny's Manziel's likeness for its own commercial benefit.

NCAA President Mark Emmert feels that it is a non-issue that Manziel can market his image and likeness while enrolled at an NCAA member school. Although an athlete like Manziel can generate future profits for himself through his image and likeness, it does not mean he should be able to do so while enrolled at Texas A&M. He further contends that one of the reasons it is hard to figure an appropriate monetary compensation for Manziel is because it is not known how much Manziel himself helped to sell any item, whether a Football Jersey, T-shirt, football, Texas A&M helmet, etc. President Emmert said,

The position of the NCAA has always been that when a student is playing for their university, they are getting the full advantage of being part of that university. They are able to build on that popularity,

and when they go pro, they are extraordinarily well-positioned to monetize their brand. And why will Johnny Manziel be able to do that? Because he played at Texas A&M and was successful and perhaps won the Heisman.¹⁷⁷

President Emmert further contends, "It's not just that it's a No. 2 [jersey], . . . [i]t's a Texas A&M No. 2. I can't parse out the value of the number on one side and the university on the other. They go together."¹⁷⁸

However, this statement does not focus on the reality of why there would be such substantial sales of Texas A&M number 2 jerseys and T-shirts. The reason is that the number 2 is a recognizable attribute as Johnny Manziel's Texas A&M football jersey number. It is a difficult inference to make that the success Johnny Manziel experienced as freshman college football quarterback would automatically lead him to the National Football League, enabling him to reap the benefits of his brand "Johnny Football."¹⁷⁹ What if Manziel suffers a career ending injury while in college or suffers an injury that will weaken his playing ability as a quarterback for the remainder of his career?

Emmert, in his assertion, is guaranteeing that Manziel will have a successful professional career in the National Football League, or other professional football league, after his time at Texas A&M. This is a risky assumption to make in a violent game like football where injuries occur often and unexpectedly.

¹⁷⁷ *Id.* (citations omitted).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

D. NCAA Proposal 26: An Attempt to Further Disguise the NCAA "Money Machine" by Exploiting Student-Athletes' Likenesses

Technological advancements, such as the improvement of video game graphics, have forced the NCAA to change its rules that govern corporate sponsorship attaching themselves to student-athletes. For example, the NCAA's current rules allow a corporate sponsor, such as NIKE, to attach its brand name to current student-athletes, where those same athletes appear at NCAA sanctioned events. Moreover, the current rules allow corporate sponsors to attach themselves to student-athletes and advertise their brand, as long as it is contemporaneous with "promoting NCAA athletic competitions or other NCAA sanctioned events."¹⁸⁰

The NCAA is continuously testing the waters in this respect. In March 2011, the NCAA Cabinet sponsored possible amendments to its likeness proposal.¹⁸¹ The Cabinet, in an article posted on the NCAA website, stated,

Prop[osal] No. 2010-26, aims to accommodate advancements in technology and facilitate more authentic promotions associating schools with their sponsors while maintaining the Association's fundamental principles that prohibit commercial exploitation of student-athletes.¹⁸²

The proposal that follows the principles developed by the 2008 Presidential Task Force on Com-

¹⁸⁰ *Cabinet Sponsors Possible Amendments to Likeness Proposal, supra* note 82.

¹⁸¹ *Id.*

¹⁸² *Id.*

mercial Activity in Division I Athletics continues many of the safeguards contained within the current legislation, which allows the use of student-athlete's name or likeness for "promotions, advertisements and media activities if specific conditions are met."¹⁸³ "Among current conditions carried over into the new legislation" of Proposal No. 2010-26 are: (1) student-athlete permission and (2) athletic director approval for each activity. Additionally the new proposal takes those two core requirements and adds a refinement:

Promotional activity by a sponsor of an institution, conference or the NCAA must clearly identify the commercial entity's sponsor affiliation (for example, an official sponsor of the institution or event) when student-athlete images are shown.¹⁸⁴

The two current conditions in Proposal 2010-26 are tainted and represent legal issues for the NCAA. In regard to a student-athlete's permission to use their likeness for the NCAA's purported commercial purposes, the NCAA would be able to do this even if they never approached the athlete for consent to use his image for the association's own commercial purposes.¹⁸⁵ Technically, the student-athlete had already consented to this by signing the NCAA's Student-Athlete Form 08-3a found in the NCAA Division 1 National Letter of Intent.

1. Student-Athlete Permission

As previously mentioned, before the student-

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

athlete is allowed to participate in practice he or she must sign various sections of Student-Athlete Statement Form 08-3a, which contains the language referring to the use of their images and likeness to promote NCAA championships, activities, events, or other programs. The wording is vague and ambiguous. This could present a legal dilemma for the NCAA. As mentioned earlier, the student-athletes must sign Form 08-3a in order to participate in team practices and games, NCAA athletic competitions, among other NCAA member institutions.

These student-athletes are essentially left with no reasonable alternative but to sign Form 08-3a. It is unreasonable to argue that a student-athlete would refuse to sign Form 08-3a, and thus voluntarily pass up their NCAA athletic eligibility because of their preference for the NCAA not to use their name, image, or likeness to further promote the association.

2. Athletic Director Approval

Proposal 26 arose from a debate. Some NCAA athletic directors supported the idea of attaching a brand, such as NIKE, to a current student-athlete. Some athletic directors approved this because they each recognize that attaching a corporate sponsor to a current student-athlete's name image or likeness would create a new source of revenue to college sports programs.¹⁸⁶ Given the way the purported amendments in Proposal 26 are drafted, athletic directors will now search for imaginative ways to gen-

¹⁸⁶ Jerry Briggs, *Caution Advised on NCAA Legislation Over Likenesses: Potential Revenue Source Could Lead to Controversy*, MY SAN ANTONIO (Jan. 16, 2011), <http://www.mysanantonio.com/sports/article/Caution-advised-on-NCAA-legislation-over-959224.php>.

erate revenue for their athletic department by attaching brands to well-known student-athletes' names, images, or likeness.¹⁸⁷ University of Texas San Antonio Athletic Director Lynn Hickey argued if the NCAA wants to use the student-athletes' images and likeness for promotion it should be done in a way to help them rather than exploit them.¹⁸⁸ Athletic Director Hickey then added,

It would be great to do something that would give the kids more visibility or to give more credit to the program," Hickey said. "But how are you going to determine if you're just not producing revenue for the corporate group vs. the university's interests?"¹⁸⁹

It is hard to say, but it is more likely than not that the NCAA has created a new source of revenue generation for itself and is exploiting the student-athletes for its own commercial benefit. Moreover, some athletic directors of the NCAA's member schools already recognize student-athletes as a drawing card to the public, thus attaching a brand to well-known student-athletes would create a huge revenue stream.

Proposal 26 is aimed at avoiding the exploitation of current student athletes while broadening the scope of what sponsors can do with promotions. Aside from the already mentioned current rules in the legislation, athletes would not endorse commercial products. The current proposal combines these three core requirements of student-athlete permis-

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* (internal quotations omitted).

sion, athletic director approval, and non-commercial products and adds refinements, including: "A promotional activity by a sponsor of an institution, conference or NCAA must clearly identify entity's sponsor affiliation."¹⁹⁰ This raises issues and demonstrates why these student-athletes should be compensated for their revenue producing skills. Mike Rodgers, the faculty athletics representative at Baylor University, argued for this new refinement set forth in Docket No. Proposal 2010-26 to the NCAA Division I Amateurism Cabinet.¹⁹¹

There have been several arguments for paying student-athletes in the past. A common argument that several officials have made is generally summarized as follows, "Why would we not pay these student-athletes? They are the people that draw 111,000 paid spectators for Saturday football games at the Big House (The University of Michigan Football Stadium). They are the people who sell out Cameron Indoor Field House for every Duke University Home Basketball Game."

But now the NCAA and some of its member schools' athletic directors want to attach corporate sponsorships to these student-athletes' names, images, and likeness to make more money, without giving the athletes any portion of the revenue. It would be difficult for the NCAA to argue that a decision to use these student-athletes' images or likenesses in any way that it or its member schools saw fit, would center around the student-athlete's welfare as opposed to the exploitation of these athlete for their own commercial benefit.

¹⁹⁰ *Id.*

¹⁹¹ *Cabinet Sponsors Possible Amendments to Likeness Proposal, supra* note 82.

In the year 2014, it is a realistic fact that high level student-athletes are a huge attraction to the general public.¹⁹² There is no problem with the NCAA and its member institutions attaching current student-athletes to corporate sponsorships, but if this is the NCAA's projected future of how it will operate its commercial enterprise, the NCAA must begin to compensate these student-athletes, because failing to do so would clearly be exploiting these athletes' names, images, and likeness for its sole commercial benefit.¹⁹³

E. Recognition of the NCAA's Manifest Disregard and Exploitation of Student-Athletes

Big-Time College Football and Division I Men's Basketball have both transformed into revenue-generating machines.¹⁹⁴ The college football teams who participate in different Bowl Games receive a hefty payout. The majority of the money is distributed equally to that conference's member institutions in addition to a windfall for the teams competing in the Bowl Games.¹⁹⁵ Division I Men's Basketball fares relatively well as well, with the NCAA licensing the rights to CBS and its member channels for 14 years to exclusively broadcast the March Madness tournament for \$10.8 billion.¹⁹⁶

These statistics, along with the financial aid these student-athletes get specifically to compete in

¹⁹² Briggs, *supra* note 186.

¹⁹³ *Id.*

¹⁹⁴ Fram & Frampton, *supra* note 1.

¹⁹⁵ Jon Solomon, *Profit from BCS National Championship Game Won't Be a Big Windfall*, BIRMINGHAM NEWS, (Jan. 5, 2010 at 9:01 PM), http://blog.al.com/birmingham-news-stories/2010/01/profit_from_bcs_national_champ.html.

¹⁹⁶ Fram & Frampton, *supra* note 1.

NCAA competitions, shows that they are getting compensated for their athletic services rendered to their universities. It has been demonstrated, but not held to date by the NLRB or the judiciary, that the Big-Time College Football and Division I student-athlete-university relationship is predominantly an economic and not an educational one.¹⁹⁷ Therefore, they should be considered employees under the NLRB legal standards. Additionally, both former and current Big-Time College Football and Division I Men's Basketball student-athletes have acknowledged that the NCAA has turned into a "money making machine" for its own commercial benefit.¹⁹⁸

The lawsuit filed by former University of California Los Angeles (UCLA) Men's Basketball player Ed O'Bannon,¹⁹⁹ demonstrates that former student-athletes recognize that the NCAA misappropriates their likenesses for its own commercial benefit, and fails to compensate these once NCAA student-athletes even though these athletes are no longer enrolled in college. Several former Big-Time College Football and Division I Men's Basketball players attempted to join O'Bannon's lawsuit in a consolidated class action Complaint filed in July 2013.²⁰⁰ The players received a class action certification for the lawsuit against the NCAA, and the lawsuit is set for trial in early 2014.

¹⁹⁷ Fram & Frampton, *supra* note 1.

¹⁹⁸ See John J. Leppler, Is the Unauthorized Use of Former Collegiate Student-Athletes' "Likeness" a Violation of Their Right of Publicity? 26-27 (Nov. 2012) (unpublished manuscript) available at http://works.bepress.com/john_leppler/1/.

¹⁹⁹ O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C 09-1967 CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010).

²⁰⁰ In re NCAA Student-Athlete Name & Licensing Litig., No. C 09-019667 CW, 2013 WL 3810438 (N.D. Cal. July 19, 2013)

1. *O'Bannon v. NCAA* and Student-Athlete Statement Division I Form 08-3a Section IV

O'Bannon, barring a settlement, will most likely be tried in 2014²⁰¹ and may ultimately foreclose that the relationship between these student-athletes and their universities is purely an economic one, and therefore student-athletes should be compensated for their athletic services rendered to their universities.

Ed O'Bannon, a former college basketball player for UCLA, filed the aforementioned class action lawsuit in July 2009 against the NCAA, CLC, and EA claiming that the defendants were conspiring to use former collegiate players' images and likenesses for commercial benefit in perpetuity, because the former players had relinquished their personal attribute rights by signing the Student-Athlete Statement Division I Form 08-3a Section IV.²⁰² EA sought a dismissal, arguing that the company was simply following the rules laid down by the NCAA: former athletes' rights were relinquished and they did not have to be compensated for the use of their images or likenesses.²⁰³ Judge Claudia Wilken of the US District Court of Northern California agreed with EA, Inc. and granted the company a dismissal in May 2011.²⁰⁴ In doing so, Judge Wilken stated:

²⁰¹ Dennis A. Johnson & John Acquaviva, *Point/Counterpoint: Paying College Athletes*, SPORT J. (June 15, 2012, 9:48 AM), <http://thesportjournal.org/article/pointcounterpoint-paying-college-athletes>.

²⁰² *O'Bannon*, 2010 WL 445190, at *2; see Leppler, *supra* note 198 at 23.

²⁰³ In re NCAA Student-Athlete Name & Likeness Litig., No. CV-09-1967-CW, 2013 WL 5402512 (N.D. Cal. Sept. 27, 2013).

²⁰⁴ In re NCAA Student-Athlete Name & Likeness Litig., No. C 09-1967 CW, 2011 WL 1642256 (N.D. Cal. May 2, 2011).

This purported conspiracy involves 'Defendants' concerted action to require all current student-athletes to sign forms each year that purport to require each of them to relinquish all rights in perpetuity for the use of their images, likeness and/or names' and to deny any compensation 'through restrictions in the [NCAA] Bylaws.' The Consolidated Amended Complaint, however, does not contain any allegations to suggest that EA agreed to participate in this conspiracy.²⁰⁵

But Judge Wilken left the door open for the plaintiff to introduce evidence that would show that EA was involved with a conspiracy to use the former athletes for commercial benefit without compensation.²⁰⁶ O'Bannon's attorney Jon King later argued that the rules that apply to current student-athletes should not govern former student-athletes in relation to compensation if their images or likenesses are used for commercial benefit, and that EA conspired with the NCAA and CLC not to pay them.²⁰⁷

If the plaintiffs win *O'Bannon*, the decision will not only forever affect the way the NCAA conducts its commercial business but may also prove the relationship between these particular student-athletes and their universities is predominantly an economic one, leading to the conclusion that the student-athletes should be compensated by more than just a financial aid package.

²⁰⁵ *Id.* at *6 (citation omitted).

²⁰⁶ In re NCAA Student-Athlete Name & Likeness Litig., No. C 09-1967 CW, 2011 WL 1642256 (N.D. Cal. May 2, 2011).

²⁰⁷ In re NCAA Student-Athlete Name & Likeness Litig., No. C 09-1967 CW, 2011 WL 1642256 (N.D. Cal. May 2, 2011).

2. What the Future May Hold for the NCAA as a Result of the Forthcoming *O'Bannon* Decision

Regardless of whether the Manziel family eventually receives the “Johnny Football” football trademark, the Manziel family recognizes the NCAA’s restriction of student-athletes to license their likenesses, so that the NCAA is the only entity currently allowed to use each student-athlete’s likeness for its own commercial benefit. This demonstrates the economic nature of this relationship between student-athletes and the NCAA.

One further point with respect to the *O'Bannon* case, U.S. District Court Judge Alfred Covello has ordered ESPN to provide Ed O'Bannon and his attorneys with its television and licensing contracts for Division I Men's Basketball and Football since 2005.²⁰⁸ The order sets the table for O'Bannon to gain a much better understanding of how much the NCAA profits from current and former players' names, images and likenesses.²⁰⁹ The order also highlights how the *O'Bannon* case threatens not only the NCAA and its member institutions, but also companies that have profited from Division I Men's Basketball and football through contracts with the NCAA and members.²¹⁰ Judge Covello's ruling is a

²⁰⁸ Michael McCann, *Judge Orders ESPN to Turn Over Contracts in Ed O'Bannon Case*, SPORTS ILLUSTRATED (Oct. 2, 2012, 4:26 PM), http://sportsillustrated.cnn.com/2012/writers/michael_mccann/10/02/Ed-O-Bannon-ESPN/index.html.

²⁰⁹ *Id.*

²¹⁰ *Id.*

O'Bannon claims that, among other things, Form 08-3a and Article 12.5.1.1 enable NCAA to enter into licensing agreements with companies that distribute products containing student athletes' images . . . and [the athletes] do not re-

reminder that the *O'Bannon* case presents real financial and legal risk for the NCAA, CLC or any of the NCAA's member institutions.²¹¹

The information that ESPN was enjoined to disclose by Judge Covello, which ESPN considered privileged, is nowhere near the biggest worry.²¹² Regardless of whether the plaintiffs win, the NCAA, CLC, EA, and any other entity (including ESPN) will be forced to surrender its own private knowledge of just how much it has profited from the labor of Big Time College Football and Division I Men's Basketball student-athletes.²¹³ If the plaintiffs in fact win in 2014, it follows that the court will hold that the NCAA wrongly profited from the names, images, and likenesses of the student-athletes.²¹⁴ If the NCAA did this knowingly, then the companies connected

ceive compensation for the use of their images. *O'Bannon* Compl. ¶ 80. O'Bannon asserts that NCAA's and CLC's actions excluded him and other former student athletes from the collegiate licensing market. He claims that, because NCAA has rights to images of him from his collegiate career, it, along with its co-conspirators, fix the price for the use of his image at 'zero.' *O'Bannon* Compl. ¶ 86. He maintains that this conduct 'has artificially limited supply and depressed prices paid by Defendants and their co-conspirators to Plaintiff and the members of the Class for use of their images after cessation of participation in intercollegiate sports.' *O'Bannon* Compl. ¶ 182.

O'Bannon, 2010 WL 445190, at *3.

²¹¹ McCann, *supra* note 208.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*; see also *O'Bannon*, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010).

with the NCAA have arguably done the same.²¹⁵

Regardless of the outcome of *O'Bannon*, it is no longer a secret as to how much the NCAA benefits from these particular student-athletes.²¹⁶ If the plaintiffs lose, it is only a matter of time as to when the judiciary and the NLRB will come to conclude that the relationship between the schools and their grant-in-aid Big-Time College Football and Division I Men's Basketball student-athletes is predominantly an economic one, and therefore student-athletes should be compensated by the school for their services rendered.

A. Possible Methods of Compensation for Student-Athletes

The cornerstone of the NCAA's argument is that it wants to instill the notion of amateurism in college athletics.²¹⁷ Since the beginning of college athletics, student-athletes have played for pride and for the love of the game, without being compensated for their performance on the fields and courts. However, the time has come for the NCAA to shy away from this ancient hallmark, and begin to pay players. Wallace Renfro, an NCAA Senior Policy analyst, commented on the NCAA's economic model that redistributes money from revenue generating sports to other parts of the athletic department at a university.²¹⁸ Renfro drafted a memo to NCAA President, Mark Emmert, noting that the term student-athlete

²¹⁵ McCann, *supra* note 208.

²¹⁶ *Id.*

²¹⁷ Pruitt, *supra* note 144.

²¹⁸ Tom Farrey, 'Student-Athlete' Term in Question, ESPN (Sept. 19, 2012, 8:31 PM), http://espn.go.com/espn/otl/story/_/id/8396753/ncaa-policy-chief-proposes-dropping-student-athlete-term.

is one that “Walter Byers created to counter the criticism that we are paying college athletes when we began providing grants-in-aid.”²¹⁹ Walter Byers, the first executive director of the NCAA, coined the phrase grant-in-aid, and the term has been used ever since to describe an athletic scholarship.²²⁰

Renfro wrote the memo to Emmert in response to the *O'Bannon* suit's claim that the NCAA violates antitrust laws by preventing universities from allowing athletes to be compensated beyond the monetary amount of a grant-in-aid. An important quote from the memo, which Emmert has not yet responded to, is as follows:

We have always had a cradle-to-grave approach to amateurism,' Renfro wrote. 'You are born an amateur, but like innocence once lost, it cannot be regained. But our commitment to amateurism has often been based on something other than how we define amateurism in our own constitution. In the most romantic sense we think of amateurism as playing sports for the love of the game, for the camaraderie among competitors, for the pride of victory for school or colors, and then we use this romanticized sense of amateurism to define the entire enterprise of collegiate athletics.'²²¹

This quote alone speaks volumes. The NCAA

²¹⁹ *Id.* (internal quotations omitted).

²²⁰ *Id.*

²²¹ *Id.* (internal quotes omitted); see Eamonn Brennan, *First Wave of NCAA Documents Arrive*, ESPN (Sept. 19, 2012, 1:05 PM),

<http://m.espn.go.com/general/blogs/blogpost?blogname=collegebasketballnation&id=64203&wjb=>.

understands that the amateurism veil is pierced, and the NCAA must move forward and leave behind the antiquated notion that the student-athlete only receives the grant-in-aid money, when evidence clearly shows that the student-athletes deserve more or at least “a cut of the pie” from the revenue they generate for the NCAA from their services rendered.²²²

However, there are ways to compensate the student-athletes and at the same time promote the amateurism of college athletics, even if the student-athlete and NCAA relationship is predominantly an economic one.²²³ There are three different possibilities.

First, the NCAA should set up an escrow account for each student-athlete, where money earned from NCAA licensing and merchandising deals with respect to each player will be deposited.²²⁴ Having this type escrow account for each student-athlete would be more effective than the potential of having the NLRB regulate the distribution of the licensing and merchandising revenue. The marketplace will determine what each student-athlete earns – the same scheme used in professional sports leagues.²²⁵

Second, the NCAA could pay players based on their merit and performance in games. In this scenario, the financial situation would not be determined by the celebrity status of the student-athlete.²²⁶ From a performance standpoint, compen-

²²² Steve Haywood, *Top College Athletes Deserve a Piece of the Pie*. ONMILWAUKEE.COM (May 14, 2008, 6:53 PM), <http://onmilwaukee.com/myOMC/authors/stevehaywood/haywoodblog051408.html>.

²²³ Farrey, *supra* note 218.

²²⁴ Pruitt, *supra* note 144.

²²⁵ *Id.*

²²⁶ *Id.*

sating student-athletes for their athletic performances would lead to a stronger work ethic. This in turn would motivate both the superstar just out of high school, and the third or fourth stringer to work harder to obtain loftier goals.²²⁷ This would ultimately provide a better showcase of the student-athletes' talents and provide a greater financial contribution to their team and their university.²²⁸

With respect to the "merit" stipulation, if the NCAA were to compensate athletes based on a certain grade point averages, greater academic excellence would be encouraged.²²⁹ Most NCAA member institutions reward athletes for their athletic standing and fail miserably when overseeing and evaluating h student-athlete performance in the classroom.²³⁰ If the NCAA truly feels that the relationship between it and the student-athlete is predominantly an educational one, and would not want the NLRB to get involved, then it would be best at this stage to pay the student-athlete and also provide the student-athlete with incentive to work hard to perform well in academics.

CONCLUSION

Grant-in-aid student-athletes that compete in the two revenue-generating sports, Big-Time College Football and NCAA Division I Men's Basketball are not student-athletes as the NCAA asserts, but are employees under the NLRA.²³¹ Student-athletes meet both the common law test and the statutory test applicable to university students, and they

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ Pruitt, *supra* note 144.

²³⁰ *Id.*

²³¹ McCormick & McCormick, *supra* note 5, at 92.

should be compensated for their athletic services rendered to the university.²³²

The NCAA refers to these athletes as “student-athletes” which leads to significant legal implications.²³³ The term signifies that student-athletes are amateurs who should not expect any form of reward after participating in NCAA collegiate sports. However, the reality is these students are employees under the NLRA because they meet the common law “right of control” test and the NLRA’s statutory employee standard.²³⁴ From an economic standpoint, Big-Time College Football and Division I Men’s Basketball both generate millions of dollars each year.²³⁵

The NCAA provides the media with programming material for advertising and directly retains all profits, yet it insists that the persons generating the revenue are amateurs.²³⁶ Moreover, the revenues generated benefit only the NCAA and its member institutions. The NCAA’s decision to repeatedly deny student-athletes payment from a legal and economic standpoint is no longer justifiable. Grant-in-aid Big-Time College Football and Division I Men’s Basketball student-athletes should not be referred to as amateurs because the NCAA has commercialized the industry and has led to the exploitation of those student-athletes for its own commercial benefit.²³⁷

“Once the innocence is lost, it can never be regained.”²³⁸ It is no longer a secret that the NCAA cannot claim its affirmative defense of amateur-

²³² *Id.*

²³³ *Id.* at 86.

²³⁴ *Id.*

²³⁵ Fram & Frampton, *supra* note 1.

²³⁶ *Id.*

²³⁷ McCormick & McCormick, *supra* note 5.

²³⁸ Farrey, *supra* note 218.

ism.²³⁹ The NCAA should accept that these particular student-athletes are the moneymakers for its lucrative commercial enterprise, and should develop a payment method for fair compensation, above the grant-in-aid, for their services rendered and the revenue produced for their school, the NCAA, and its member institutions.

²³⁹ *Id.*