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EA Sports: It's in the Federal Legislation

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* J.D. Candidate, 2023, University of California, Hastings College of the Law; B.A., 2020, University of Southern California. Special thanks to Comm/Ent's fantastic staff editors for their hard work in editing this Note, and to Maddie Giles for spearheading the process seamlessly. This Note is dedicated to my father for tolerating my many late-night phone calls, to Alaura McGuire and Mary Saade, who couldn't care less about sports but let me rant about it anyway, and to Reggie Bush, who continues to fight for what's rightfully his.

I. INTRODUCTION

At a press conference held on May 18, 2022, the University of Alabama's head coach, Nick Saban, accused Texas A&M University (Texas A&M) of "buying" every player in its top-ranked college football recruiting class through "name, image, and likeness" ("NIL") deals.[1] Less than twenty-four hours later, Texas A&M's head coach, Jimbo Fisher, hosted an impromptu press conference of his own, retorting that "there are no [NIL] violations," because "nothing was promised" to players in exchange for their commitment to play football at Texas A&M.[2] But beyond his eleven-minute, arguably entertaining, rant about Saban, Fisher drew attention to a glaring issue in intercollegiate athletics: "There never has been parity."[3] Put in the context of NIL, college athletes can now *permissibly* receive what the Southeastern Conference (SEC) has provided its players with for years: compensation.[4]

Historically, the National Collegiate Athletic Association (NCAA) prohibited collegiate athletes from the commercialization of their NIL, affording itself the exclusive right to license and use student-athlete NIL. The NCAA's uncompensated use of student-athlete NIL prompted numerous legal challenges against the NCAA and its rules barring compensation, with players alleging misappropriation of their right of publicity and violations of federal antitrust law.[5]

Entangled in the litigation concerning student-athletes' right of publicity was video game developer and manufacturer, Electronic Arts, Inc. ("EA").[6] For nearly twenty years, EA produced an annual NCAA-branded college football video game, wherein users could control digital avatars

1. *See* Alabama Crimson Tide, *Nick Saban: Texas A&M 'Bought Every Player' in No. 1 Recruiting Class*, *Alabama 'Didn't Buy One'*, YOUTUBE (May 18, 2022), https://www.youtube.com/watch?v=0oxZKXBvbOI.

2. TexAgs, *Watch: Jimbo Fisher Holds Press Conference to Respond to Nick Saban*, YOUTUBE (May 19, 2022), https://www.youtube.com/watch?v=R4L0MhfCV04.

3. *Id.*; *see also* Jesse Simonton, *Jimbo Fisher vs. Nick Saban: Best Bars and Burns from an All-Time Press Conference*, ON3 (May 19, 2022), https://www.on3.com/news/jimbo-fisher-vs-nick-saban-the-best-quotes-press-conference-nil/.

4. For purposes of transparency, it should be noted that this statement is largely speculation. However, recent tweets calling out Alabama's recruiting "tactics" seem to corroborate this sentiment. *See, e.g.*, Leon O'Neal Jr. (@WakeEmUp9), TWITTER (May 18, 2022, 8:18 PM), https://twitter.com/WakeEmUp9/status/1527126565187792896 ("Every player there had a [Scat Pack] [Hellcat] before NIL I was in a Nissan Maxima lol"); Su'a (@iammsuzy), TWITTER (May 19, 2022, 7:52 AM), https://twitter.com/iammsuzy/status/1527301080119291904 ("I've worked out with a few guys during off-seasons that literally would say I was making more at Bama than the current PSquad they're on.").

5. *See* discussion *infra* Sections III.A.1-4.

6. *About*, ELEC. ARTS, INC., https://www.ea.com/about (last visited Apr. 11, 2022). The NCAA-branded video games were sold under "EA Sports." For purposes of this Note, "EA" is used synonymously with EA Sports.

representing college football players in simulated matches.[7] EA designed *NCAA Football* with the goal of providing consumers with a realistic college football experience.[8] To accomplish this, every real-life college football player had a unique digital avatar in the video game.[9] Although the digital avatars did not identify the players by name, they possessed the same identifying attributes, including their playing position and uniform number.[10] However, per the NCAA's rules, EA did not compensate players for its use of their NIL. In the aftermath of the lawsuits, and much to the dismay of fans, EA stopped producing *NCAA Football* in 2013.[11] While the circuit courts ultimately recognized student-athletes' right to their NIL, the outcomes of these lawsuits required little to no change on the NCAA's behalf.[12] Simply, the NCAA's restrictions remained intact, and student-athletes remained uncompensated.

Then came *NCAA v. Alston*,[13] a ruling that divested the NCAA of its antitrust immunity and its "ample latitude" to preserve "the revered tradition of amateurism in college sports."[14] Following its unanimous defeat at the Supreme Court, on July 1, 2021, the NCAA adopted an interim policy that suspended its preexisting NIL restrictions. This allowed intercollegiate athletes to profit off their NIL in commercial advertisements, sponsorships, and endorsements.[15] The policy, however, did not provide detailed rules or regulations for states and institutions to enforce.

Prior to the interim policy, in February 2021, EA announced it would be bringing back the beloved NCAA Football video game franchise as *EA Sports College Football*.[16] The NCAA's suspension of its rules against

7. *See In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1271 (9th Cir. 2013). Avatars are personalized, graphic representations of real-life persons or users in two or three-dimensional forms, commonly as characters in interactive digital games. *See Definition – Avatar*, TECHOPEDIA, https://www.techopedia.com/definition/4624/avatar (last updated Aug. 22, 2018).

8. *In re NCAA Student-Athlete Name & Likeness Licensing*, 724 F.3d at 1271.

9. *Id.*

10. *Id.* These personal attributes included the same jersey number, home state, height, weight, build, skin tone, and hair color. *Id.* Additionally, EA replicates the real-life players' playing styles and athletic abilities by sending detailed questionnaires to team equipment managers. *Id.*

11. Darren Rovell, *EA Sports Settles with Ex-Players*, ESPN (Sept. 26, 2013), https://www.espn.com/college-football/story/_/id/9728042/ea-sports-stop-producing-college-football-game; *see also* Maureen A. Weston, *Gamechanger: NCAA Student-Athlete Name & Likeness Licensing Litigation and the Future of College Sports*, 3 MISS. SPORTS L. REV. 77, 90 (2013) ("In July 2013, the NCAA announced it would not renew its video game contract with EA Sports, which was set to expire at the end of 2013.").

12. *See* discussion *infra* Sections III A.1-3.

13. 141 S. Ct. 2141 (2021); *see also* discussion *infra* Section III A.4.

14. *See* NCAA v. Bd. of Regents, 468 U.S. 85, 120 (1984).

15. Michelle Brutlag Hosick, *NCAA Adopts Interim Name, Image, and Likeness Policy*, NAT'L COLLEGIATE ATHLETIC ASS'N (June 30, 2021, 4:20 PM), https://www.ncaa.org/news/2021/6/30/ncaa-adopts-interim-name-image-and-likeness-policy.aspx.

16. *Press Release Details – Electronic Arts & CLC to Bring Back College Football Video Games*, ELEC. ARTS, INC. (Feb. 21, 2021), https://ir.ea.com/press-releases/press-release-details/2021/Electronic-Arts—CLC-to-Bring-Back-College-Football-Video-Games/default.aspx.

student-athlete NIL compensation seemingly clears the path for EA's video game to feature real-life college football players.[17] However, while student-athletes may be signing individual deals, almost every level of the NIL marketplace faces uncertainty. The NCAA's failure to implement national NIL standards created a patchwork of state laws and policies. By deferring NIL regulations to state legislatures, the NCAA "waived a white flag," leaving schools, companies, and student-athletes to navigate through unsettled state laws in a commercial marketplace coined as the "Wild West."[18] Ultimately, the lack of uniformity manufactured an uneven playing field, making it difficult for companies to navigate NIL deals with a host of student-athletes and for student-athletes to fully capitalize on the commercialization of their NIL.

To produce EA's video game, there needs to be a licensing mechanism for aggregating student-athlete NIL rights across state lines.[19] Thus, the question remains: how can companies seeking to create multi-player product lines approach licensing with student-athletes in an equitable and efficient manner under a patchwork of varying state NIL laws? This Note addresses the challenges posed by the current NIL regulatory scheme and proposes federal legislation, accompanied by the creation of a third-party licensing entity, as a solution.

Part II of this Note provides an overview of the purpose of the NCAA and the bylaws impacting student-athletes' ability to earn compensation for their NIL, specifically, the NCAA's long-standing principle of "amateurism" in intercollegiate sports. Part III examines the relevant litigation challenging the use of student-athletes' NIL in EA's video games under state publicity law and the NCAA's restrictions on compensation under federal antitrust law. This Part will then discuss the subsequent impact of the monumental legal challenges on the NCAA's amateurism rules, resulting in the suspension of NCAA rules prohibiting student-athletes from monetizing their NIL.

In wake of the newfound NIL policies, Part IV articulates how the lack of a uniform NIL policy results in a series of inconsistencies between states, making it difficult for companies to facilitate broad NIL deals for multi-player product lines. It will address potential licensing mechanisms and the problems that lie therein, demonstrating the need for NIL reform. Part V addresses the pressing need for federal legislation to enact a uniform NIL

17. *Electronic Arts & CLC to Bring Back College Football Video Games*, BUS. WIRE (Feb. 2, 2021), https://www.businesswire.com/news/home/20210202005894/en/.

18. KC Ifeanyi, *How NCAA Athletes Are Taking Creative Control in the Wild West of Name, Image, Likeness Deals*, FAST CO. (Mar. 3, 2022), https://www.fastcompany.com/90725103/ncaa-athletes-creative-control-wild-west-name-image-likeness-deals-march-madness.

19. Owen S. Good, *NCAA Ruling Means EA Sports Can Pay Real Players to Be in College Football Game*, POLYGON (July 1, 2021, 6:04 PM), https://www.polygon.com/22559909/ncaa-college-football-nil-rules-pay-players-ea-sports-video-game.

landscape that maximizes the NIL rights of student-athletes and renders efficiencies for NIL negotiations. After briefly summarizing the current federal bill proposals, this Part recommends that Congress create an independent NIL entity to facilitate group licensing in intercollegiate sports. As will be explained, an independent entity provides the most efficient way for companies to engage in broad NIL deals with student-athletes while adhering to the NCAA's restrictions against unionizing student-athletes and "pay-for-play." Finally, returning to *EA Sports College Football*, Part VI outlines what EA needs to do to move forward with the revival of its beloved college football video game franchise, beginning with obtaining licenses for student-athletes' NIL rights.

II. THE NCAA AND AMATEURISM

The NCAA is a private, non-profit organization founded in 1906 to address the need for a uniform set of rules for intercollegiate athletics.[20] Today, it is the governing body for college sports, consisting of roughly 1,100 member institutions and over 500,000 student-athletes across 24 sports.[21] The NCAA is organized into three divisions based on the university size, athletic program funding, public appeal, and quality of opportunities the schools provide student-athletes to participate in collegiate athletics.[22] Division I programs consist of the largest student bodies, manage extensive athletic programs, and are actively involved in most NCAA-related litigation.[23]

The NCAA exists to ensure a level playing field in collegiate athletic competitions and to administer championships.[24] Its basic purpose is "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between intercollegiate athletics and professional sports."[25] To this end, the NCAA has historically enforced an "amateurism" policy,[26] which states: "[s]tudent athletes shall be amateurs in

20. *History*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/sports/2021/5/4/history.aspx (last visited Apr. 11, 2022).

21. *Overview*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/sports/2021/2/16/overview.aspx (last visited Apr. 11, 2022).

22. *Id.*

23. *Id.*

24. *Overview*, *supra* note 21.

25. NAT'L COLLEGIATE ATHLETIC ASS'N, 2021-22 NCAA DIVISION I MANUAL § 1.3.1, at 1 (2021), https://www.ncaapublications.com/productdownloads/D122.pdf [hereinafter NCAA MANUAL].

26. In 2010, the NCAA punished the University of Southern California (USC) for violations made by former football player Reggie Bush (i.e., the greatest college football player of all time). *See NCAA Delivers Postseason Football Ban*, ESPN (June 10, 2010), https://www.espn.com/los-angeles/ncf/news/story?id=5272615. After a multi-year investigation, the NCAA concluded that Bush accepted more than $100,000 of "improper benefits" from agents, as prohibited by the NCAA's amateurism rules. *Id.* Despite its lack of involvement, the NCAA sanctioned USC with four years'

an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[27]

In furtherance of this policy, the NCAA's bylaws limited the amount of compensation that a student-athlete may receive for their participation in intercollegiate athletics.[28] Among other things, these prohibitions extended to bar student-athletes from earning income off their NIL.[29] Specifically, Bylaw 12.5.2.1 dictated that student-athletes could not accept compensation for the use of their name or picture to directly advertise, recommend, or promote the sale or use of a commercial product or service, or receive compensation for promoting a commercial product or service.[30] Under these rules, student-athletes possessed no right to use their NIL for commercial purposes.

The NCAA, however, retained the exclusive right to use student-athlete NIL to promote NCAA championships, events, activities, or programs.[31] As a prerequisite for eligibility, the NCAA required student-athletes to sign the Form 08-3a "Student Athlete Statement" prior to competing in intercollegiate athletics.[32] Part IV of the form expressly authorized the NCAA and Collegiate Licensing Committee ("CLC") to use their NIL in accordance with Bylaw 12.5.[33] By signing, student-athletes relinquished all rights in the NCAA's use of their NIL. Consequently, the bylaws set forth that NCAA student-athletes are prohibited from using their own NIL for commercial gain, while the NCAA itself

probation, a loss of thirty scholarships over three years, a two-year bowl ban, and vacated fourteen wins from the 2004 and 2005 seasons, including its 2004 National Championship title. *Id.*

27. NCAA MANUAL, *supra* note 25, § 2.9, at 3.

28. *See generally id.* § 12.1, at 62-68.

29. *Id.* § 12.5.2.1, at 77. An individual's NIL makes up the legal concept known as the "right of publicity," or the right of the individual to control the commercial use of one's identity. *See* NAT'L COLLEGIATE ATHLETIC ASS'N, NAME, IMAGE AND LIKENESS POLICY – QUESTION AND ANSWER 1 (2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_QandA.pdf.

30. NCAA MANUAL, *supra* note 25, § 12.5.2.1, at 77.

31. *See id.* § 12.5.1.1, at 74 ("[a]n institution or recognized entity thereof . . . a conference or a noninstitutional charitable, educational or nonprofit agency may use a student-athlete's name, picture or appearance to support its charitable or educational activities or to support activities considered incidental to the student-athlete's participation in intercollegiate athletics").

32. NCAA, FORM 08-3A, NCAA DIVISION I STUDENT-ATHLETE STATEMENT 1 (2011), https://www.liberty.edu/media/1912/compliance/newformsdec2010/currentflames/compliance/SA%20Statement%20Form.pdf.

33. *Id.* at 4 ("You authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.").

III. THE LEGAL BACKGROUND FOR STUDENT-ATHLETE NIL

The NCAA justified its restrictions against student-athlete compensation by citing the need to protect student-athletes from commercial exploitation and to preserve the "sanctity" of intercollegiate sports.[34] For decades, courts displayed a degree of deference to the NCAA and its self-defined principles of amateurism. However, as this Part demonstrates, recent decisions signaled a shift in the tides. Section A examines the litigation surrounding student-athletes' fight for their NIL rights under previously enforced Division I NCAA bylaws. Section B picks up where Section A leaves off, summarizing the current state of student-athlete NIL rights and compensation.

A. LITIGATION UNDER PREVIOUS NIL POLICIES

The NCAA is no stranger to litigation regarding the validity and enforceability of its amateurism rules. Historically, most litigation focused on allegations that the NCAA's rules violate antitrust laws.[35] Over time, current and former student-athletes fought for their right to compensation, making progress through the following noteworthy cases, presented in the sequence in which they were decided.

1. Keller v. Electronic Arts, Inc.

In 2009, Samuel Keller, a former quarterback for Arizona State University (ASU) and the University of Nebraska, sued the NCAA, EA, and the CLC in the Northern District of California, alleging that the defendants' use of his NIL in NCAA Football video games constituted a commercial misappropriation of his likeness without his consent or payment.[36]

Keller addressed whether EA had a First Amendment defense against Keller's right-of-publicity claims under California's anti-SLAPP statute.[37] Applying the "transformative use" test developed by the California Supreme Court,[38] the Ninth Circuit determined[39] EA's digital avatars lacked

34. *See* Laura Freedman, *Note, Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 673, 675-76 (2003).

35. Notable antitrust cases include NCAA v. Bd. of Regents, 468 U.S. 85 (1984) and *In re* NCAA 1-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144 (W.D. Wash. 2005).

36. Keller v. Elec. Arts, Inc., No. C 09-1967 CW, 2010 WL 530108, at *2 (N.D. Cal. Feb. 8, 2010). Keller claimed that the video game's virtual avatars were "nearly identical to their real-life counterparts: they share the same jersey numbers, have similar characteristics and come from the same home state." *Id.* at *1.

37. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268, 1272 (9th Cir. 2013); *see also* Cal. Civ. Code § 425.16.

38. *See* Comedy III Prods., Inc. v. Gary Saderup, Inc., 25 Cal. 4th 387, 391 (2001) (defining the transformative use test as "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation.").

39. EA appealed the district court's ruling denying its motion to dismiss. *See In re NCAA Student-Athlete Name & Likeness Licensing*, 724 F.3d at 1284.

significant transformative elements because the characters are represented as exact depictions of real-life student-athletes doing exactly what they do as college football players.[40] Consequently, the appellate court held that "EA's use of the likenesses of college athletes like Samuel Keller in its video games [was] not, as a matter of law, protected by the First Amendment."[41] *Keller* thus held that the First Amendment has limits as a defense in video games where the likeness of another is used without their permission. In the context of student-athletes, *Keller* established that video game developers must obtain permission from the student-athletes to use their NIL.[42]

2. Hart v. Electronic Arts, Inc.

Around the same time as *Keller*, Ryan Hart, a former football player at Rutgers University, sued EA in the District of New Jersey, alleging that EA violated his publicity rights by misappropriating and incorporating his NIL for commercial purposes in its NCAA Football video games.[43]

The district court granted EA's motion for summary judgment, holding that the First Amendment barred Hart's right of publicity claim because EA's right to free expression outweighed Hart's right of publicity.[44] The court reasoned that, because the game permits users to alter the virtual avatar's physical characteristics, the malleability of the real-life player's image served as an "art imitating-life starting point for the game playing experience."[45] As such, EA sufficiently passed muster under the transformative use test.[46]

The Third Circuit reversed, holding that EA's use of Hart's likeness in its video games failed the transformative use test.[47] The appellate court concluded that a user's ability to alter a player's digital avatar is insufficient to override the fact that Hart's digital avatar is the default character within the game, and it is the heightened realism of the avatars that draws users to

40. *Id.* at 1284; *see also* No Doubt v. Activision Publ'g, Inc., 192 Cal. App. 4th 1018, 1034 (2011) ("[T]hat the avatars appear in the context of a videogame that contains many other creative elements[ ] does not transform the avatars into anything other than exact depictions of No Doubt's members doing exactly what they do as celebrities.").

41. *In re NCAA Student-Athlete Name & Likeness Licensing*, 724 F.3d at 1284.

42. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA BOARD OF GOVERNORS FEDERAL AND STATE LEGISLATION WORKING GROUP FINAL REPORT AND RECOMMENDATIONS 1, 11 (2020), https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf [hereinafter NCAA REPORT].

43. Hart v. Elec. Arts, Inc., 808 F. Supp. 2d 757, 760 (D.N.J. 2011).

44. *Id.* at 794.

45. *Id.* at 787.

46. *Id.* Addressing *Keller*, the *Hart* court commented that *Keller* "fail[ed] to address that the virtual image may be altered and that the EA artists created the various formulations of each player." *Id.*

47. *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 166 (3d Cir. 2013) ("The digital Ryan Hart does what the actual Ryan Hart did while at Rutgers: he plays college football, in digital recreations of college football stadiums, filled with all the trappings of a college football game.").

playing the game.[48] Because the video game failed to alter or transform Hart's identity in any meaningful way, EA did not sufficiently transform Hart's likeness to amount to an expressive work.[49]

3. O'Bannon v. NCAA

Keller and *Hart* concerned publicity rights claims under state law. *O'Bannon v. Nat'l Collegiate Athletic Ass'n* broadened the scope of legal challenges that could be brought against the NCAA by challenging the NCAA's restrictions on student-athletes' publicity rights under federal antitrust law.[50]

In 2009, Ed O'Bannon, a former basketball player for the University of California, Los Angeles (UCLA), sued EA, the NCAA, and the CLC in the Northern District of California after recognizing himself as a digital avatar in EA's *NCAA Basketball 2009* video game.[51] O'Bannon joined with then-current and former NCAA men's football and basketball players to challenge the NCAA's amateurism rules and attack its use of players' images in video games.[52] The court considered whether, in the absence of the NCAA's prohibition on student-athletes profiting off their NIL, student-athletes would have profited from the use of their NIL in EA's video games.[53] The district court held that the NCAA's prohibition against student-athletes accepting compensation beyond the limitations of grant-in-aid scholarships[54] unreasonably restrained their right to license their NIL in a group license to videogame developers.[55] Specifically, the use of student-athletes' NIL "increased the attractiveness of college sports video games to consumers, creating a demand for players' NILs."[56] Absent the NCAA's prohibitions, "[v]ideogame developers would seek to acquire group licenses to use the names, images, and likenesses of FBS football and Division I basketball players" if players could receive compensation for such licenses.[57]

On appeal, the Ninth Circuit affirmed, concluding that plaintiffs were "injured in fact as a result of the NCAA's rules having foreclosed the market

48. *Id.* at 168.

49. *Id.* at 170.

50. 7 F. Supp. 3d 955, 965 (N.D. Cal. 2014). For much of their time in court, *Keller* and *O'Bannon* were consolidated as *In re* NCAA Student–Athlete Name & Likeness Licensing Litig. ("*Keller*"), 724 F.3d 1268 (9th Cir. 2013). In June 2014, *O'Bannon* and *Keller* were deconsolidated, and the antitrust claims against the NCAA at issue in *O'Bannon* went to trial in the Northern District of California. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1056 (9th Cir. 2015).

51. *O'Bannon*, 802 F.3d at 1055.

52. *O'Bannon*, 7 F. Supp. 3d at 962.

53. *Id.* at 965.

54. "Grant-in-aid" is defined as "financial aid that consists of tuition and fees, room and board, and required course-related books." *Id.* at 971.

55. *Id.* at 968.

56. *O'Bannon*, 802 F.3d at 1057.

57. *O'Bannon*, 7 F. Supp. 3d at 970.

for their NILs in video games."[58] The appellate court noted that "the NCAA's rules [had] been more restrictive than necessary to maintain its tradition of amateurism," but it nevertheless held that preserving amateurism had procompetitive benefits, and distinguished between payments tied to educationally-related activities and those unrelated.[59]

As a secondary matter, the Ninth Circuit declined to answer whether the Copyright Act preempted plaintiffs' publicity rights in video games, labeling the issue as "tangential" and "irrelevant."[60] It noted that, under "the NCAA's interpretation of the Copyright Act, professional football and basketball players have no enforceable right-of-publicity claims against video game makers either—yet EA currently pays NFL and NBA players for the right to use their NILs in its video games."[61] Thus, the appellate court reasoned that "there is every reason to believe that, if permitted to do so, EA or another video game company would pay NCAA athletes for their NIL rights rather than test the enforceability of those rights in court."[62]

Following the Ninth Circuit's decision in *O'Bannon*, EA paid a $60 million settlement to the aggregate plaintiff class of more than 100,000 student-athletes.[63] The named plaintiffs—Ed O'Bannon, Ryan Hart, and Sam Keller—received the most money, estimated to be around $15,000 each.[64] The lawsuit ultimately resulted in the discontinuation of the college sports video game franchise, making *NCAA Football 2014* the last version produced.[65]

O'Bannon provided landmark precedent for student-athlete compensation. The Ninth Circuit ultimately determined that video games depicting student-athletes' NIL require licenses to those student-athletes' NIL rights. On its face, this proved a "win" for student-athletes—but when applied, it required no changes to the NCAA's NIL policies.[66] From a legal standpoint, the NCAA's regulations against player compensation held sound following *O'Bannon*. Nevertheless, the NCAA's policies on player compensation soon met greater opposition, forcing the NCAA to reevaluate its amateurism rules.

58. *O'Bannon*, 802 F.3d at 1067.

59. *Id.* at 1079.

60. *Id.* at 1068.

61. *Id.* at 1069.

62. *Id.*

63. EA issued a single settlement for all three cases (i.e., *Keller*, *Hart*, and *O'Bannon*) to college football and basketball players whose NIL appeared in EA's college sports video games from 2003 through 2014. *See* Darren Rovell, *Athletes Whose Likenesses Appeared in Electronic Arts Games Will Share a $60 Million Settlement*, ESPN (Mar. 15, 2016), https://www.espn.com/college-sports/story/_/id/14980599/college-football-basketball-players-receive-average-1600-settlement-electronic-arts.

64. *Id.*

65. *Id.*

66. Carly Sirota, *How the States and the NCAA Are Changing the Landscape of Collegiate Name, Image, and Likeness Compensation*, 24 U. DENV. SPORTS & ENT. L.J. 1, 9 (2019).

4. NCAA v. Alston

O'Bannon established that student-athletes could use federal antitrust law to "prove" that there are better ways of preserving amateurism than current NCAA rules. *Nat'l Collegiate Athletic Ass'n v. Alston* went a step further, addressing whether the NCAA's compensation eligibility rules violated federal antitrust law.[67] Although *Alston* focused more on the NCAA's compensation limitations itself, it implicates intellectual property rights that student-athletes may have in their NIL. The Supreme Court's unanimous decision sent waves into the intercollegiate sports landscape by sending the NCAA a warning that any attempts to restrict NIL activities could be viewed as violations of federal antitrust law.[68]

In 2014, a class of then-current and former Division I student-athletes (collectively, "Alston") filed a class action lawsuit against the NCAA in the Northern District of California, challenging the NCAA's compensation system.[69] The student-athletes alleged that the NCAA's restrictions on the non-cash education-related benefits[70] that colleges may offer student-athletes violated § 1 of the Sherman Act.[71] Applying federal antitrust law's "rule of reason" analysis,[72] the district court held that the NCAA's rules limits on education-related benefits unreasonably constrained trade.[73] At the same time, however, the district court concluded that the NCAA could limit cash or cash-equivalent awards for non-academic purposes, finding that limits on compensation unrelated to education did not violate the Sherman Act.[74] Nonetheless, the court issued a permanent injunction that the NCAA make its compensation rules less restrictive for student-athletes.[75] The Ninth Circuit affirmed the district court's decision, and the injunction took effect in August 2020.[76]

67. 141 S. Ct. 2141 (2021).

68. *Id.* at 2144.

69. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1062 (N.D. Cal. 2019).

70. *See id.* at 1088 (defining education-related benefits as "computers, science equipment, musical instruments and other items not currently included in the cost of attendance calculation but nonetheless related to the pursuit of various academic studies.").

71. *Id.* at 1062.

72. *See* 15 U.S.C. § 4302. The "rule of reason" analysis is used for determining whether a restraint is undue for purposes of the Sherman Act. Under this standard, a defendant's restraint on competition violates the test if the practice's harm to competition outweighs its procompetitive effects. Courts typically analyze this balancing standard under a burden-shifting framework, requiring the plaintiff to show the restraint produces significant anticompetitive effects within a relevant market before turning to the defendant to produce evidence of the restraint's procompetitive effects. f it reaches this point, the court will only find against the restraint if the plaintiff shows that any legitimate objectives can be achieved in a substantially less restrictive manner. *See O'Bannon*, 7 F. Supp. 3d at 985.

73. *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust*, 375 F. Supp. 3d at 1062.

74. *Id.* at 1109.

75. *Id.* at 1110.

76. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1244 (9th Cir. 2020).

The NCAA appealed to the Supreme Court, arguing that its compensation rules should be reviewed deferentially if some justification for its procompetitive restraints can be provided.[77] The NCAA asserted that amateurism is essential to the "product" offered by the NCAA—being amateur college sports—and that its procompetitive activity preserves that product.[78] From the NCAA's standpoint, its amateurism rules should be upheld because they are designed to maintain the character of amateur college sports.[79]

The Court held that the district court properly applied the "rule of reason" in determining that the NCAA's enjoined rules were unlawful restraints of trade under the Sherman Act.[80] Under the "rule of reason" analysis, the student-athletes carried their burden by showing that the restraints produced significant anticompetitive effects, that only some of the challenged NCAA rules served the procompetitive purpose of preserving amateurism, and any legitimate objectives could be achieved in a substantially less restrictive manner.[81] Subsequently, the Court upheld the injunction prohibiting the NCAA from enforcing its rules limiting education-related benefits that conferences and schools may provide to student-athletes.[82] However, the Court permitted the NCAA to continue to limit cash awards for academic achievement, but only if those limits are no lower than the cash awards currently allowed for athletic achievement.[83]

Alston addressed the legality of the NCAA's restraints on student-athlete compensation under the Sherman Act—yet the Court's ruling extended beyond the realm of antitrust law. While the Court narrowly focused on "education-related benefits," the subject-matter drew scrutiny to the NCAA's amateurism rules as a whole. Thus, the practical effect of *Alston* left the NCAA with two options: modify its amateurism rules or remove them altogether. As Section B reveals, the NCAA took a slightly different approach.

B. THE MODERN STATE OF STUDENT-ATHLETE NIL

Backed into a corner, the NCAA took action. On June 30, 2021, following the Supreme Court's ruling in *Alston*, all three NCAA divisions adopted a uniform, interim policy that suspended the NCAA's amateurism rules prohibiting student-athletes from monetizing the commercial use of their NIL.[84] The NCAA's Interim NIL Policy is as follows:

77. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2155 (2021).
78. *Id.* at 2157.
79. *Id.* at 2158.
80. *Id.* at 2144.
81. *Id.* at 2162.
82. *Id.* at 2144.
83. *Id.* at 2164-65.
84. Hosick, *supra* note 15.

> [E]ffective July 1, 2021, and until such time that either federal legislation or new NCAA rules are adopted, member institutions and their student-athletes should adhere to the guidance below:
>
> 1. NCAA Bylaws, including prohibitions on pay-for-play and improper recruiting inducements, remain in effect, subject to the following:
>
>   - For institutions in states without NIL laws or executive actions or with NIL laws or executive actions that have not yet taken effect, if an individual elects to engage in an NIL activity, the individual's eligibility for intercollegiate athletics will not be impacted by application of Bylaw 12 (Amateurism and Athletics Eligibility).
>
>   - For institutions in states with NIL laws or executive actions with the force of law in effect, if an individual or member institution elects to engage in an NIL activity that is protected by law or executive order, the individual's eligibility for and/or the membership institution's full participation in NCAA athletics will not be impacted by application of NCAA Bylaws unless the state law is invalidated or rendered unenforceable by operation of law.
>
>   - Use of a professional services provider is also permissible for NIL activities, except as otherwise provided by a state law or executive action with the force of law that has not been invalidated or rendered unenforceable by operation of law.
>
> 2. The NCAA will continue its normal regulatory operations but will not monitor for compliance with state law.
>
> 3. Individuals should report NIL activities consistent with state law and/or institutional requirements.[85]

State recognition of student-athlete NIL rights quickly unfolded, and a multitude of states enacted NIL statutes outlining the procedures and limitations for student-athletes to license their NIL.[86] To date, twenty-nine states have passed NIL legislation—with twenty-four laws currently in effect and the remainder scheduled to take effect by July 1, 2023—and at least another ten states with proposed or pending legislation.[87] Schools and

85. NAT'L COLLEGIATE ATHLETIC ASS'N, INTERIM NIL POLICY (2021), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/NIL_InterimPolicy.pdf.

86. W. Drew Kastner & Monica P. Matias, *Name, Image & Likeness (NIL): Three Key Legal Issues Facing Businesses in College Athlete Endorsement Deals to Date*, MARTINDALE (Dec. 29, 2021), https://www.martindale.com/legal-news/article_schnader-harrison-segal-lewis-llp_2552576.htm.

87. *See, e.g.*, Christopher P. Conniff et al., *NCAA NIL Update: With a Semester of NIL Opportunities in the Books, Trends Emerge and Confusion Reigns*, ROPES & GRAY (Mar. 1, 2022), https://www.ropesgray.com/en/newsroom/alerts/2022/March/NCAA-NIL-Update-With-a-Semester-of-

student-athletes in states with NIL legislation are governed by state law, subject to the NCAA's rules against pay-for-play and impermissible inducements.[88] For states without NIL laws, schools and student-athletes are subject only to the NCAA's interim NIL policy.[89]

The NCAA interim policy eliminated the restriction on student-athletes earning compensation for NIL but did not implement consistent NIL norms or rules.[90] Under the interim policy, some opportunities will be restricted, but the types of restrictions will vary based on state laws and policies created by individual schools. In January 2022, the NCAA decided to adopt a new constitution, which included no fundamental revisions to the interim NIL policy.[91] As a result of the lack of federal law, NCAA NIL rules, and NCAA enforcement precedent under the interim policy, NIL activities and limits differ widely by state and institution. The NCAA interim policy will remain in place until new NCAA rules or federal legislation is adopted.[92]

IV. COLLEGE ATHLETES CAN PROFIT OFF THEIR NIL: NOW WHAT?

It's a new era for intercollegiate athletics. For the first time in NCAA history, student-athletes may permissibly commercialize their NIL rights—and in the months since the NCAA suspended its amateurism rules, the NIL marketplace continues to flourish. However, the largest opportunities with participation by major companies have yet to unfold.[93] The problem isn't that most companies lack the financial ability to pay student-athletes for the use of their NIL, or that athletes lack the right to license their NIL. Rather, the problem is *how* to orchestrate broad NIL deals in an efficient and equitable manner.

The NCAA enacted an interim policy that opened a new market for NIL, but implemented no national standard governing NIL activities, leaving much of the NIL landscape open to interpretation.[94] While this proved a

NIL-Opportunities-in-the-Books-Trends-Emerge-and-Confusion-Reigns; Ezzat Nsouli & Andrew King, *How US Federal and State Legislatures Have Addressed NIL*, SQUIRE PATTON BOGGS (July 13, 2022), https://www.sports.legal/2022/07/how-us-federal-and-state-legislatures-have-addressed-nil/.

88. Conniff et al., *supra* note 87.

89. *Id.*

90. INTERIM NIL POLICY, *supra* note 85.

91. Corbin McGuire, *NCAA Members Approve New Constitution*, NAT'L COLLEGIATE ATHLETIC ASS'N (Jan. 20, 2022, 6:12 PM), https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx.

92. INTERIM NIL POLICY, *supra* note 85.

93. Darren Heitner, *Group Licensing Is Starting to Take Shape for College Athlete NIL Deals*, OUTKICK (July 22, 2021), https://www.outkick.com/group-licensing-is-starting-to-take-shape-for-college-athlete-nil-deals/.

94. *See* Brooks Pierce & Noah Hock, *Navigating the Uncertain Terrain of NIL Deals for Student Athletes*, JD SUPRA (Dec. 3, 2021), https://www.jdsupra.com/legalnews/navigating-the-uncertain-terrain-of-nil-1728873/. This Note will not dissect the differences between NIL state laws, rather it will discuss

substantial step, the NCAA and a patchwork of state NIL laws still pose a hurdle for companies seeking a widespread aggregation of student-athlete NIL and for student-athletes hoping to maximize their earning potential for products like *EA Sports College Football*. This Note discusses three licensing models and their respective problems, specifically focusing on how each impacts the facilitation of broad, multi-player NIL deals. Individual licensing, co-branding, and group licensing are discussed in Sections A through C below.

A. INDIVIDUAL LICENSING AND NIL VALUATION

Individually licensing with a large population often involves high transactional costs in the expense and time required to directly identify, locate, and negotiate agreements with each person.[95] While these burdens are somewhat "expected," the current intercollegiate NIL landscape poses an additional "complication" when it comes to licensing with student-athletes: how can companies determine the value of an individual student-athlete's NIL for use in multi-player product lines? Notably, some states[96] require—or give colleges the discretion to require—that any compensation received by student-athletes in exchange for their NIL correspond with fair market value.[97] "Fair market value" is generally defined as the price currently offered for an asset (e.g., NIL rights) in an open and competitive marketplace.[98] The fair market value of an asset can generally be determined by the price on which other buyers and sellers have agreed upon in similar negotiations, and the value they yielded in the past.[99]

Determining what "fair market value" means in the context of student-athlete NIL may be controversial. The novelty of student-athlete NIL compensation, and the limited number of previous dealings for large-scale product lines, results in a lack of data available for a market approach to

specific components of NIL state laws to demonstrate the inconsistencies which may require further legislation or updated NCAA policies to alleviate.

95. *See* Amber Jorgensen, *Why Collegiate Athletes Could Have the NCAA, et al. Singing a Different Tune*, 33 CARDOZO ARTS & ENT. L.J. 367, 392 (2015).

96. States with mandated restrictions include Florida, Georgia, and Mississippi, while North Carolina defers to individual colleges. *See* FOLEY & LARDNER LLP, NATIONWIDE NAME, IMAGE, AND LIKENESS ("NIL") TRACKER: A COMPENDIUM OF COLLEGE SPORTS NIL LAWS IN THE U.S. 1, 6-7 (2022), https://www.foley.com/-/media/files/insights/publications/2022/04/nationwide—nil—tracker-22mc38248aprilv2.pdf?la=en.

97. For example, Florida's NIL law requires that compensation earned by college athletes must correspond with the fair market value of the authorized use of their NIL, whereas California's NIL law omits the term "market value," or any similar term, from its language. *Compare* S.B. 646, 2020 Leg., Reg. Sess. (Fla. 2020), *with* S.B. 206, 2019 Cal. Leg., Reg. Sess. (Cal. 2019).

98. James Chen, *Fair Market Value (FMV): Definition and How to Calculate It*, INVESTOPEDIA, https://www.investopedia.com/terms/f/fairmarketvalue.asp (last updated July 1, 2022). This value measures what informed parties, acting in their own interest with ample time to decide, would pay in such a transaction. *Id.*

99. *Id.*

valuation. In theory, valuation could be based on the factors currently utilized for most sponsorship and endorsement deals, thus providing some data available from existing arrangements.[100] However, the use of a player's NIL for integration into products isn't for sponsorship or endorsement purposes. Interested companies seek to obtain licenses for the right to use student-athlete NIL in the *creation* of their products, forming a marketplace outside the realm of commercial endorsements. Consequently, there is no straightforward financial model for determining whether a student-athlete's compensation is commensurate with "fair market value" to guide companies looking to facilitate broad NIL deals, as the marketplace is largely untested in intercollegiate sports.

As a result of these inconsistencies, licensing agreements can vary widely in the compensation offered because each agreement is unique to the rules and regulations of the student-athlete's state and school.[101] For instance, student-athletes at schools in states without applicable NIL state laws are bound only to the NCAA's interim policy, which makes no reference to fair market value or similar "caps" on compensation.[102] Similarly, student-athletes in states like California—whose NIL laws exclude "fair market value"—are not bound by policies requiring their NIL compensation to commensurate with fair market value.[103] Negotiating agreements in these states is more beneficial to star players and third parties alike, as companies will have greater discretion when it comes to structuring NIL deals and these student-athletes have the potential to earn more money. Conversely, in states dictating that student-athlete compensation must correspond with fair market value, a star player's compensation may be lower than it would be if they played at a school in a state without "fair market value" limitations.

States requiring that student-athlete NIL compensation be commensurate with "fair market value" create unnecessary ambiguities. Because the "market value of an asset can be defined as whatever the current

100. *See* Patrick Rishe, *NIL Earnings: The Factors Impacting How Much a College Athlete Can Make from Endorsements*, FORBES (July 4, 2021, 8:22 PM), https://www.forbes.com/sites/prishe/2021/07/04/nil-earnings-the-factors-impacting-how-much-a-college-athlete-can-make-from-endorsements/?sh=7b27c9ac75dd. Though there is no rigid formula, NIL valuation is generally based on the following factors:

1. The student-athlete's athletic performance and accomplishments.
2. The size and quality of the student-athlete's social media presence and following.
3. The quality of brand management surrounding the student-athlete.
4. The size and financial ability of the student's university and athletics department, and their ability to offer branding mentorship.
5. The "market size" of the city where the student-athlete's school is located.
6. The NIL rules for the state, school, or conference that the student-athlete competes in.
7. The student-athlete's sport.

101. *See* Pierce & Hock, *supra* note 94.

102. INTERIM NIL POLICY, *supra* note 85.

103. *See generally* S.B. 206, 2019 Cal. Leg., Reg. Sess. (Cal. 2019).

price is for that product in the marketplace," whatever someone is willing to pay for the use of a student-athlete's NIL is the market value and, by definition, a "fair" price.[104] Notably, in states both with and without laws requiring fair market value, the compensation offered to lesser-known student-athletes may be negatively impacted by the lack of valuation guidelines, as their "worth" will be dictated by a company's negotiating powers.[105] Without uniformity across the NIL landscape, it is not possible to have one standard applicable to all student-athletes, making equity unachievable.

B. THE BAR AGAINST CO-LICENSING AND CO-BRANDING

Much like the varying restrictions on compensation, many states prohibit—or give colleges the discretion to prohibit—student-athletes from using their school's intellectual property (e.g., institutional logos and marks) in NIL activities.[106] "Co-branding," also known as "co-licensing," is a derivative of individual NIL rights that, in the intercollegiate context, allows student-athletes and schools "to combine the market strength, brand awareness, positive associations, and cachet of two or more brands to compel consumers to pay a greater premium for them."[107] Such an arrangement is a form of group licensing, wherein "all college athletes in that sport would receive an equal share of revenue" from product sales.[108] By maximizing the value of complementary intellectual property rights, co-branding "reduces the potential for individual [intellectual property] holders to exploit bargaining power advantages in licensing negotiations."[109]

While many schools and states are reluctant to permit athletes access to utilize school intellectual property, others have enacted open policies to facilitate these opportunities. Among the first to do so was the University of North Carolina at Chapel Hill (UNC).[110] UNC partnered with The Brandr

104. Timothy Winkler, *The End of an Error: Reforming the NCAA Through Legislation*, 90 UMKC L. REV. 219, 243 (2021).

105. Bob Wallace, Jr. & Matthew Misichko, *A Look at Recent Student Athlete Name, Image and Likeness Legislation*, THOMPSON COBURN LLP (July 7, 2020), https://www.thompsoncoburn.com/insights/publications/item/2020-07-07/a-look-at-recent-student-athlete-name-image-and-likeness-legislation.

106. States with laws prohibiting a student-athletes from using college intellectual property in NIL dealings include Arizona, Arkansas, Louisiana, Mississippi, and South Carolina. States that give colleges the discretion to make this determination include Connecticut, Illinois, Kentucky, Montana, North Carolina, Pennsylvania, and Tennessee. *See* FOLEY & LARDNER LLP, *supra* note 96.

107. Will Kenton, *Co-Branding*, INVESTOPEDIA, https://www.investopedia.com/terms/c/cobranding.asp (last updated June 19, 2020).

108. *NIL FAQS: Group Licensing*, KNIGHT COMMISSION ON INTERCOLLEGIATE ATHLETICS, https://www.knightcommission.org/nil-faqs-group-licensing/ (last visited Apr. 11, 2022).

109. Jeffrey F. Brown et al., *A Proposal for Group Licensing of College Athlete NILs*, 12 HARV. J. SPORTS & ENT. L. 1, 15 (2021).

110. *UNC and The Brandr Launch Group Licensing Program for Current Student-Athletes*, U.N.C. CHAPEL HILL ATHLETICS (July 20, 2021), https://goheels.com/news/2021/7/20/general-unc-and-the-brandr-launch-group-licensing-program-for-current-student-athletes.aspx.

Group ("Brandr") to invite "all of UNC's current student-athletes to join a voluntary group licensing program, which will allow them to benefit from their NIL in conjunction with UNC's official trademarks and logos."[111] Through this program, companies can orchestrate three or more student-athletes' NIL into products featuring UNC's logos, such as t-shirts with players' names and numbers on them.[112] However, for states and schools without permissive laws or policies, student-athletes and schools are barred from striking such "joint licensing" deals,[113] meaning that products featuring both institutional intellectual property and student-athlete NIL are prohibited.[114] This limits the pool of student-athletes who could benefit from the new NIL policies because lesser-known athletes may depend on the association with their respective institution to secure NIL opportunities.[115]

Relevant here, the varying laws pose a challenge for licensees looking to create products that combine school intellectual property and student-athlete NIL. For example, EA's college football video games "feature teams from a majority of the Division I schools, simulating intercollegiate competition" between teams and their respective players.[116] To obtain the rights to use schools' intellectual property in its video games, EA negotiates a license with the CLC and its affiliate teams.[117] The digital avatars—designed to depict real student-athletes—wear uniforms featuring their school's institutional marks. Given the digital nature of EA's product, it is uncertain whether licensing with student-athletes for use of their NIL in conjunction with teams' intellectual property runs afoul to such rules.

To create *EA Sports College Football*, it is likely that co-branding between student-athletes' NIL and schools' intellectual property is required. However, because EA's college football video games feature a selection of schools from different states, co-branding may not be permitted by every

111. *Id.*

112. *See id.* ("Carolina fans can own merchandise and other products featuring their school's logo and the names and numbers of their favorite Tar Heels.").

113. In addition to the restrictions created by state laws, the NCAA views the use of institutional marks in conjunction with student-athlete NIL deals as creating a "joint deal" wherein the schools are directly paying student-athletes in violation of its rules against "pay-for-play." *See* LEAD1 Association, *LEAD1 Forum: Group Licensing -Now, Later, or Never? The Debate Continues…*, YOUTUBE (Oct. 12, 2020), https://www.youtube.com/watch?v=mvoaVwM0EkQ&t=8s. This Note does not examine the separate issue of "pay-for-play," rather the issue is mentioned here to provide further context surrounding the NCAA's concerns with co-branding and group licensing.

114. Alex Kirshner, *How College Athletes Are Making 'Massive Decisions' in the NIL Era*, GLOB. SPORTS MATTERS (Dec. 7, 2021), https://globalsportmatters.com/business/2021/12/07/college-athletes-massive-decisions-nil-era/.

115. Taylor P. Thompson, *Maximizing NIL Rights for College Athletes*, 107 IOWA L. REV. 1347, 1383 (2022); *see generally* Jeremy M. Evans, *Student-Athlete Brands in the Age of Name, Image, and Likeness*, A.B.A. (Dec. 1, 2020), https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/november-december/student-athlete-brands-age-name-image-likeness/.

116. Weston, *supra* note 11.

117. *See Press Release Details*, *supra* note 16.

team. In the absence of national guidelines for the use of student-athlete NIL in conjunction with school intellectual property, certain teams may lose the opportunity to be included in *EA Sports College Football*.

C. A "TEAM" WITHOUT GROUP LICENSING

It is most efficient for companies to negotiate one deal for a bundle of student-athletes' NIL rights via group licensing. An NIL group licensing deal would consist of student-athletes pooling their NIL rights together and licensing them collectively as a group to third parties interested using the players' NIL in connection with its product (e.g., video games). Through this, group licensing maximizes the value of complementary intellectual property rights and "reduces the potential for individual [intellectual property] holders to exploit bargaining power advantages in licensing negotiations."[118] Ultimately, group licensing facilitates "one-stop shopping" for student-athletes' NIL rights while maximizing student-athletes' earning potential by creating arrangements that otherwise would not be tenable absent group licensing.[119]

Herein lies the challenge for companies and student-athletes hoping to participate in centralized NIL group licensing deals: the NCAA remains adamant against the group licensing and co-branding of student-athlete NIL. In a report released by the NCAA Board of Governors on April 17, 2020, the NCAA outlined its recommendations on NIL regulations.[120] As part of its considerations, a designated "working-group" addressed the possibility of group licensing approach for student-athlete NIL under the models used in professional sports settings.[121] The group concluded that group licensing programs in professional sports benefit from legal structures "unavailable" to the NCAA and its member schools.[122] More specifically, it noted that the NCAA lacks a players' union to serve as a bargaining unit for the athletes.[123] From the NCAA's perspective, a group licensing agreement may push the NCAA too close to an employee-employer relationship with its student-athletes because group licensing typically occurs by means of a players' union.[124] This "employee debate" is the primary root of the NCAA's resistance to grant group licenses.[125]

118. Brown et al., *supra* note 109.

119. *NIL FAQS*, *supra* note 108.

120. NCAA REPORT, *supra* note 42, at 1.

121. *Id.* The NCAA Board of Governors created the Federal and State Legislation Working Group in 2019 to investigate possible responses to proposed state and federal legislation regarding the commercial use of student-athlete NIL. *Id.*

122. *Id.* at 7.

123. *Id.* at 7.

124. *Id.*

125. This Note acknowledges that there is a broader question concerning whether student athletes should be considered employees. In limiting the discussion to the intellectual property and legislative concerns surrounding NIL, this Note does not attempt to tackle issues of employment law.

The NCAA's stance against group licensing poses yet another potential roadblock for student-athletes, especially those athletes who are not well-known enough to reap the benefits of their NIL rights outside of a group environment. However, the NCAA is misinformed, as group licensing can, and does, exist within the confines of the association's rules.

The NCAA operates under the assumption that such agreements would create a players' union, thus labeling student-athletes as "professional athletes." Contrary to this belief, unless institutions directly pay student-athletes to play their sport, student-athletes working together on a business opportunity does not turn them into professional athletes.[126] That is, there does not need to be a players' union to reap the benefits of a collective group rights licensing program: there need only exist a third-party entity to facilitate and execute group licensing deals.

Commercial group licensing agencies are popping up across the country, with structures and strategic partnerships in place to mimic the role of a legislative entity. Of those agencies, OneTeam Partners ("OneTeam") is well known for representing the commercial business interests of several professional players' associations.[127] OneTeam negotiates the group licensing rights of professional athletes in product categories like video games, trading cards, merchandise, and more by maximizing the collective value of their NIL rights.[128] In 2021, OneTeam announced the creation of its group licensing program for college athletes, extending its expertise and group licensing services to intercollegiate sports.[129]

Around the same time the NCAA updated its NIL policies, OneTeam established partnerships with other major platforms in the NIL market, each of which offers specialization in a particular area therein. For example, OneTeam joined forces with Opendorse to implement a tech-based way to deliver group licensing opportunities to collegiate athletes via Opendorse's "Deals" athlete marketplace.[130] To determine fair market value, OneTeam partnered with INFLCR for valuation software based in data collected from schools and social media metrics.[131] For guidance on NIL compliance,

126. THE DRAKE GROUP, CRITICISM OF APRIL 29 NCAA BOARD OF GOVERNORS' GUIDELINES FOR FUTURE NCAA AND FEDERAL NIL LEGISLATION 4 (May 11, 2020), https://www.thedrakegroup.org/wp-content/uploads/2020/05/May-8-NCAA-NIL-Position.pdf.

127. *See* ONETEAM, https://joinoneteam.com (last visited Apr. 12, 2022).

128. *Welcome to College Athlete Group Licensing*, ONETEAM, https://joinoneteam.com/gla.html (last visited Apr. 12, 2022).

129. *See* Emily Caron, *OneTeam, Opendorse Deal to Bring Group Licensing to College Athletes*, YAHOO! (June 29, 2021), https://www.yahoo.com/video/oneteam-partners-opendorse-bring-group-130046734.html.

130. Opendorse provides technology to the athlete endorsement and sponsorship industry. *See About*, OPENDORSE, https://opendorse.com/about/ (last visited Apr. 14, 2022). The company provides services to support athletes, including "educating, assessing, planning, sharing, creating, measuring, tracking, disclosing, regulating, listing, browsing, booking, and more." *Id.*

131. Karen Weaver, *Determining an Athlete's Fair Market Value Is the Next Hurdle for NIL Rights. These Two Companies Could Solve That*, FORBES (May 25, 2021, 8:30 AM),

OneTeam also partnered with Altius Sports Partners, an NIL advisory and education firm, to provide consulting services to student-athletes and schools.[132] Finally, OneTeam invested a significant amount into Brandr,[133] bolstering OneTeam's access to schools and student-athletes via Brandr's expansive client roster and group marketing services.[134] These partnerships demonstrate OneTeam's ability to provide "full package" services for NIL group licensing opportunities.

Notably, OneTeam has already succeeded in orchestrating multi-player NIL deals. In July 2021, Panini America announced an exclusive, multi-year agreement with OneTeam, giving Panini the ability to produce, distribute, promote, and sell college trading cards featuring the NIL of current men's and women's student-athletes.[135] To be featured on a Panini trading card, student-athletes need to simply sign up with OneTeam and opt-in to the agreement via its deals platform.[136] In exchange, Panini pays a royalty rate for the group player rights, divided equally amongst all student-athletes included in the program.[137]

As the commercial landscape continues to develop for student-athletes, agencies like OneTeam are positioned to maximize student-athletes' value through lucrative group licensing agreements. However, while these agencies can *facilitate* NIL deals under the current NIL landscape, they are limited in scope and ill-equipped to solve the lingering legislative uncertainties. In other words, these entities lack the ability to make legislative change to the patchwork of state laws, and their services are barred in states with more restrictive laws. Additionally, because schools have the discretion to partner with commercial agencies, the "playing field" across intercollegiate sports remains uneven. Thus, competitive advantages that exist for programs in states with less restrictive NIL laws "may be exacerbated by additional expenditures to help athletes retain the most

https://www.forbes.com/sites/karenweaver/2021/05/25/determining-an-athletes-fair-market-value-is-the-next-hurdle-for-nil-these-two-companies-could-solve-that/?sh=738f026019e2.

132. *What We Do*, ALTIUS SPORTS PARTNERS, https://www.altiussportspartners.com/what-we-do (last visited Apr. 12, 2022).

133. Brandr is a third-party agency that "work[s] with licensees to create and market co-branded college products utilizing group licensing rights." *See* THE BRANDR GROUP, https://www.thebrandrgroup.com (last visited May 24, 2022).

134. Michael Smith, *SBJ College: OneTeam Partners Looks to Get Ahead of NIL*, SPORTS BUS. J. (Apr. 15, 2021), https://www.sportsbusinessjournal.com/SB-Blogs/Newsletter-College/2021/04/15.aspx.

135. *Panini America and OneTeam Partners Announce Exclusive Landmark Agreement to Include College Athlete NIL on Trading Cards*, PANINI AM.: BLOG (July 22, 2021), https://blog.paniniamerica.net/panini-america-and-oneteam-partners-announce-exclusive-landmark-agreement-to-include-college-athlete-nil-on-trading-cards/.

136. *Welcome to College Athlete Group Licensing*, *supra* note 128.

137. Kristi Dosh, *New Group Licensing Deal Gives Student Athletes Their Own Trading Cards*, FORBES (July 22, 2021, 11:00 AM), https://www.forbes.com/sites/kristidosh/2021/07/22/new-group-licensing-deal-gives-student-athletes-their-own-trading-cards/?sh=d47bb70d92bf.

profitable endorsement contracts," further perpetuating inequities among student-athletes.[138]

A uniform, centralized group licensing system is necessary for the revival of EA's college football video game franchise and other multi-player products featuring student-athletes from different states. An indvidual student-athlete's NIL is more valuable as part of a group because, for example, EA wants to depict an entire team or league in its video games without the hassle of negotiating with athletes on an individual basis. And for many student-athletes, group licensing may be the only way to "score" NIL compensation. Consider a starting offensive lineman or a rotating defensive back. Under organized group licensing deals, these players will receive a cut for the use of their NIL, or at least an annual check from EA.[139] In exchange, EA gathers the intellectual property needed to develop its video game in a cost-effective and "simple" fashion. Simply put, group licensing creates opportunities for both student-athletes and companies hoping to reap the benefits of NIL.

In sum, individual NIL rights promote a marketplace wherein many student-athletes can capitalize off their NIL value—however, just as many student-athletes may be left out without group licensing. With the lack of an efficient licensing scheme, where does this leave companies hoping to develop national, multi-player product lines? As discussed in Part V, federal legislation is the key to avoiding mass confusion, instilling national uniformity, and facilitating equitable licensing opportunities between companies and student-athletes.

V. FEDERAL LEGISLATION IN THE ENDZONE

The NCAA's hands-off approach perpetuates an uneven playing field for student-athletes engaging in NIL activities. Furthermore, the inconsistency in state laws undermine any NCAA response that seeks to impose a uniform set of rules across the states. The uncertainty stemming from a lack of uniformity creates a major barrier to predictability, making it harder for companies to obtain individual licenses from student-athletes and for student-athletes to have access to NIL opportunities.

The overarching question is whether intercollegiate sports can continue operating in a structure where every institution and state abides by a different set of NIL rules and regulations.[140] Licensing with student-athletes across different states and schools, and adhering the NIL policies enforced within

138. Thompson, *supra* note 115, at 1377-78.

139. Malaika Underwood, *The Rising Tide: Why and How Cobranded Group Licensing Works*, ATHLETICDIRECTORU, https://athleticdirectoru.com/articles/the-rising-tide-why-and-how-cobranded-group-licensing-works/ (last visited Apr. 12, 2022).

140. LEAD1 ASSOCIATION, NAME, IMAGE, AND LIKENESS ("NIL") INSTITUTIONAL REPORT 1, 17 (Oct. 2021), https://lead1association.com/wp-content/uploads/2021/10/LEAD1-NIL-Report-Issue-3.pdf [hereinafter LEAD1 REPORT].

each, is unnecessarily burdensome. Beyond the nuances of navigating differing NIL laws, the "default" licensing scheme (i.e., individual negotiations with each student-athlete) gives rise to imbalance, as some players may not have the opportunity to license their NIL rights, much less receive fair compensation. With these complications in mind, a uniform set of rules is necessary to integrate student-athlete NIL into licensed products in a meaningful way.[141] In other words, there is a pressing need for congressional action.

A federally regulated scheme would absolve most of the problems created by a patchwork of state laws and promote a uniform NIL landscape. The solution is simple: there needs to be federal legislation that preempts state law and implements a licensing structure to facilitate broad NIL deals. Section A briefly summarizes a select number of current federal bill proposals, limiting the discussion to "relevant" provisions regarding oversight and NIL compensation within each. Section B recommends the creation of an independent NIL entity enacted by Congress, designed to operate on behalf of student-athletes, function as a regulatory committee, and facilitate new products and services with large companies by means of group licensing.

A. PENDING FEDERAL BILL PROPOSALS

Intervention by Congress is necessary to create an efficient system for monitoring and administering student-athletes' licensing activities, and for "sewing" the patchwork of varying state law. Multiple federal bills have been introduced in the Senate and the House.[142] However, at the time of this Note, none have been passed. This Section discusses the following five bill proposals: the Fairness in Collegiate Athletics Act of 2020, Student-Athlete Level Playing Field Act, Collegiate Athlete Compensation Rights Act, College Athlete Bill of Rights, and College Athlete Economic Freedom Act.[143]

Senator Marco Rubio's (R-Fla.) Fairness in Collegiate Athletics Act ("Fairness Act") provides that the NCAA must permit student-athletes to "earn compensation from a third party as a result of the use of the name, image or likeness of such student-athlete."[144] However, rather than outline a

141. *NIL FAQS*, *supra* note 108.

142. At the time of this Note, seven bills have been introduced. *See, e.g.*, Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019); Fairness in Collegiate Athletics Act, S. 4004, 116th Cong. (2020); Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020); Collegiate Athlete Compensation Rights Act, S. 5003, 116th Cong. (2020); College Athletes Bill of Rights, S. 5062, 116th Cong. (2020); College Athlete Economic Freedom Act, S. 238, 117th Cong. (2021); Amateur Athletes Protection and Compensation Act of 2021, S. 414, 117th Cong. (2021).

143. This Section will not address Congressman Mark Walker's (R-N.C.) Student-Athlete Equity Act or Senator Jerry Moran's (R-Kan.) Amateur Athletes Protection and Compensation Act of 2021.

144. S. 4004, 116th Cong. § 3(1)(a) (2020).

detailed national NIL policy, the Fairness Act remains broad, and defers all rulemaking authority to the NCAA.[145] Rubio's bill is perhaps among the most NCAA-friendly ones, giving the association the power to create rules deemed necessary to preserve the amateur status of student-athletes and granting it immunity from litigation over student-athletes' right of publicity.[146] It does not provide for NIL group licensing or an independent NIL entity.

A second bill proposal, Congressman Emanuel Cleaver's (D-Mo.) and Congressman Anthony Gonzalez's (R-Ohio) Student Athlete Level Playing Field Act ("Playing Field Act"), seeks to maintain the NCAA's principle of amateurism, while prohibiting universities, conferences, and the NCAA from restricting student-athletes' NIL opportunities.[147] These prohibitions include endorsements pertaining to "illicit" categories, such as tobacco, alcohol, and gambling.[148] The Playing Field Act would create a thirteen-member commission comprised of current and former athletes, coaches, directors, and administrators, "whose role would be to recommend ways for legislators to change the law as the nascent marketplace for college athletes becomes [clearer] and any unintended consequences emerge."[149] This congressional oversight committee would implement balance into the NIL quandary by giving "NIL stakeholders" a say in legislative recommendations for all things NIL.[150] The Federal Trade Commission (FTC) would then be tasked with the responsibility of NIL enforcement.[151]

Senator Roger Wicker (R-Miss.) introduced the Collegiate Athlete Compensation Rights Act ("Compensation Act").[152] The bill's fundamental purpose is "[t]o protect the rights of student-athletes, to provide for transparency and accountability with respect to student-athlete name, image, and likeness agreements, and to establish an independent entity for intercollegiate athletics."[153] The NCAA, "a conference, or an institution may not adopt or maintain a contract, rule, regulation, standard, or other requirement that prevents or unduly restricts a student-athlete from earning" NIL compensation for the use of their NIL.[154] The compensation must be

145. Gregory Marino, *Federal NIL Laws: Future or Fantasy?*, SPORTS BUS. J. (Oct. 13, 2021), https://www.sportsbusinessjournal.com/SB-Blogs/COVID19-OpEds/2021/10/13-Marino.aspx.

146. Michael D. Fasciale, Comment, *The Patchwork Problem: A Need for National Uniformity to Ensure an Equitable Playing Field for Student-Athletes' Name, Image, and Likeness Compensation*, 52 SETON HALL L. REV. 899, 919-20 (2022).

147. H.R. 8382, 116th Cong. § 2(a)(1) (2020).

148. *Id.* § 2(a)(2).

149. Fasciale, *supra* note 146, at 920-21.

150. *State and Federal NIL Legislation Breakdown*, ATHLETICDIRECTORU, https://athleticdirectoru.com/sanil/state-and-federal-nil-legislation-breakdown/ (last visited May 24, 2022).

151. H.R. 8382, § 2(b).

152. S. 5003, 116th Cong. (2020).

153. *Id.*

154. *Id.* § 4(a)(1).

"commensurate with market value" and "[a]n institution may not, directly or indirectly, provide covered compensation to a student-athlete."[155] Schools must publish annual reports regarding all student-athletes' NIL deals, including each agreement's effective date, terms, and covered compensation.[156]

Importantly, the Compensation Act provides that an "independent entity for intercollegiate athletics shall be a private, independent, self-regulatory, nonprofit corporation."[157] The entity's purpose would be to develop rules and standards "to maintain fairness and integrity in amateur intercollegiate athletics and the principle of amateurism in intercollegiate athletic competition."[158] The FTC would be assigned with choosing the makeup of the group and would have final approval over any rules or standards promogulated by the entity, in addition to the authority to enforce those rules.[159]

Perhaps the most widely publicized bill, sponsored by Senator Cory Booker (D-N.J.), along with Senator Richard Blumenthal (D-Conn.), Senator Kirsten Gillibrand (D-N.Y.), and Senator Brian Schatz (D-Haw.), is the College Athletes Bill of Rights ("CABOR"), introduced in 2020.[160] CABOR addresses issues beyond NIL rights, making it "the most player-friendly proposal to date."[161] The bill would establish a federal commission "to be known as the Commission of College Athletics" ("Commission").[162] The Commission would be a "federally chartered corporation" with a nine-member board of directors, five of whom are required to be former intercollegiate athletes.[163] Its purpose would be to "act for the benefit of all college athletes," and "protect the economic interests of college athletes[]" among other things.[164] The Commission's responsibilities would be largely regulatory, handling things like setting endorsement contract criteria, distributing NIL reports, and providing a venue for NIL disputes.[165]

CABOR provides that student-athletes can earn NIL compensation through group licensing deals and enter into co-branding agreements with schools for the use of institutional intellectual property in NIL activities.[166]

155. *Id.* §§ 3(a)(1), 4(c).
156. *Id.* § 5(d).
157. *Id.* § 6(a).
158. *Id.* § 6(e)(1)(A)(ii).
159. *Id.* § 6(b)(1), (e)(1)(D).
160. S. 5062, 116th Cong. (2020).
161. *State and Federal NIL Legislation Breakdown*, *supra* note 150. This Note does not dissect those additional rights and benefits.
162. *See generally* S. 5062, §§ 11, 12.
163. *Id.* § 11(c)(1)(A), (c)(1)(D)(ii)(I).
164. *Id.* § 11(a)(1), (a)(2).
165. *See generally id*. § 11(d).
166. *Id.* § 3(a)(1), (a)(4). An institution reserves the right to license its intellectual property at its discretion. *See generally id.* § 3(a).

Additionally, CABOR imposes a substantial revenue sharing component, requiring that "the institution of higher education associated with the covered sports team shall transfer" fifty percent of all "commercial sports NIL revenue"[167] to student-athletes.[168] Royalties may be distributed "directly" to student-athletes by the institution.[169] This definition adopts a broad understanding of NIL benefits, and closely resembles true "pay-for-play" as it presumably includes all earnings athletic departments make.[170]

Finally, Senator Chris Murphy (D-Conn.) and Congresswoman Lori Trahan (D-Mass.) proposed the College Athlete Economic Freedom Act ("Freedom Act").[171] The bill explicitly provides that the NCAA and schools cannot restrict "college athletes or prospective college athletes, individually or as a group, from marketing the use of their names, images, likenesses, and athletic reputations."[172] Further, the Freedom Act provides student-athletes with the right to "collective representative to facilitate group licensing agreement[s]."[173] The Freedom Act is the "only federal bill that does not give the NCAA or any other body an ability to regulate the products athletes endorse."[174] Much like other bills, the FTC is responsible for enforcement of these rights.[175]

A common theme amongst the federal bill proposals is guaranteed NIL rights for student-athletes. Each of these bills, if signed into law, would allow student-athletes to earn NIL compensation under a national framework. This would prohibit the undue restrictions on NIL earning opportunities and preempt the patchwork of state NIL laws currently in force. Regardless of what Congress might ultimately pass, the proposed bills paint a picture of what the future of NIL looks like. At the time of this Note, however, further congressional action remains nonexistent.

B. HAIL MARY: AN INDEPENDENT, THIRD-PARTY LICENSING ENTITY

An independent NIL licensing entity (the "entity") created by Congress can serve the best interests of student-athletes while complying with NCAA rules pertaining to player unionization and "pay-for-play." The current

167. "Commercial sports NIL revenue" refers to "the amount of total annual revenue generated from the athletic program at an institution of higher education." *Id.* § 5(a)(2)(A).

168. *Id.* § 5(b)(1)(A)(i), (b)(2)(A). Once split in half, "the amount of grant-in-aid the institution of higher education awards to eligible college athletes that participate on the covered sports team" is subtracted from the commercial sports NIL revenue. *Id.* § 5(b)(1)(A)(ii). This number is then divided by "the number of eligible college athletes that participate in the division during the applicable reporting year." *Id.* § 5(b)(2)(B).

169. *Id.* § 5(b)(3)(A).

170. Thompson, *supra* note 115, at 1369.

171. S. 238, 117th Cong. (2021).

172. *Id.* § 3(a)(1).

173. *Id.* § 3(a)(3).

174. *State and Federal NIL Legislation Breakdown*, *supra* note 150.

175. S. 238, 117th Cong. § 5 (2021).

federal bill proposals are either silent on the creation of an NIL licensing entity or only designate the FTC oversight over NIL activities. Though legislation may include the protection of student-athletes, the FTC's inexperience in dealing with the relationships among student-athletes, schools, and the NCAA is questionable.[176] Additionally, the bills circumscribe that "the FTC would only be delegated enforcement power to oversee violations of NIL laws, making it entirely prescriptive rather than active."[177] This Section outlines the structure of an NIL entity with oversight powers, whose primary purpose would be to negotiate on behalf of student-athletes for group licensing and co-branding opportunities while enforcing compliance with NIL laws.

1. Formation and Oversight

An independent entity charged with negotiating NIL deals on of student-athletes' behalf is necessary to fully achieve student-athletes' NIL earning potential and maintain an "even playing field" in intercollegiate sports. This entity would serve to expand business opportunities between student-athletes and companies. Instead of unionizing college athletes, wherein collective bargaining agreements would dictate compensation, the entity would function like a players' association in managing the collective rights of its members to compensate student-athletes for the commercialization of their NIL rights.[178] Because contracts would be negotiated "on a per-deal basis," the entity would overcome "the collective action problem and avoid[] the [NCAA's] pay-for-play concerns of private negotiation."[179]

Individual student-athletes would retain the right to license outside of the entity and may pursue valuable endorsement opportunities by virtue of their value as an individual.[180] In other words, they are not strictly bound to the entity like a players' association. Regardless of whether a student-athlete opts for individually negotiated deals, the entity would provide a regulated structure in which these transactions could be efficiently organized through the maintenance of a database of NIL activities, licensing agreements, royalties, and other relevant information.[181]

Beyond serving as a negotiating party, the independent entity would monitor NIL activities for compliance with NCAA rules and applicable laws.[182] Operating under a single standard, the entity would "simplify the

176. Katie Gallop, Comment, *Timeout: A Case for Using Nil Legislative Momentum to Extend the Authority of the Department of Education to Regulate the NCAA*, 74 ADMIN. L. REV. 161, 187 (2022).

177. *Id.*

178. *See* Jorgensen, *supra* note 95, at 391.

179. Brown et al., *supra* note 109, at 27.

180. *Id.* at 28.

181. *Id.* at 30.

182. *Id.* at 8.

administrative and compliance-related demands of group licensing."[183] The entity would have the authority to resolve disputes among student-athletes, the NCAA, companies, and other affected third parties as directed by Congress.[184] Designating this regulatory authority to the NCAA under its present compliance regime—or lack thereof—would further perpetuate the already-existing hostility between member institutions and the NCAA. Thus, the governmental oversight afforded by an independent entity both preserves the relationship between the NCAA and student-athletes and enforces uniform NIL regulations—while leaving the NCAA to manage compliance with its own bylaws.[185]

2. Group Licensing and Royalty Distribution

Many of the current NIL proposals fail to adequately address group licensing or are silent on the issue altogether. Although the College Athletes Bill of Rights would provide federal legislation ensuring group licensing rights, an independent NIL entity would *facilitate* group licensing and promote the development of team-based products.[186] The entity's primary role would be to negotiate licenses through market-based transactions without interference from the NCAA and its member institutions.[187] In doing so, the entity would enable efficiencies in activities such as licensing and royalty administration, increasing NIL licensing opportunities for student-athletes and balancing concerns about competitive equity.[188]

While the entity would be enacted via legislation, the entity's *licensing scheme* would not be legislatively mandated (e.g., compulsory licensing).[189] Compulsory licensing exists through "a statutory mandate" and provides "that the [intellectual property] rights must be licensed to all comers willing

183. *Id.* at 30.

184. *Id.* at 8.

185. For example, the NCAA recently addressed its concerns with "NIL collectives" in intercollegiate sports. *See generally* NAT'L COLLEGIATE ATHLETIC ASS'N, INTERIM NAME, IMAGE AND LIKENESS POLICY GUIDANCE REGARDING THIRD PARTY INVOLVEMENT (May 2022), https://ncaaorg.s3.amazonaws.com/ncaa/NIL/May2022NIL_Guidance.pdf. Collectives are "associations of school-specific boosters that pool resources to offer payments to recruits and/or current players" purportedly operating independent of a school. Nicole Auerbach, *College Leaders 'Extremely Concerned' with NIL Collectives' Direction: Survey*, THE ATHLETIC (May 4, 2022), https://theathletic.com/news/athletic-directors-ncaa-nil-survey/wA4u5Y8rqf8P/. This Note does not address collectives or the problems associated therein, rather, collectives serve as an example of NIL-related matters that the NCAA would continue to handle in its role.

186. *See supra* Part V.A.

187. Brown et al., *supra* note 109, at 8.

188. *Id.*

189. "Compulsory licensing" is a government-granted authorization to use a copyright or patent without the patent holder's or copyright owner's permission. *See Compulsory Licenses: Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/compulsory-licenses (last visited May 29, 2022).

to pay the pre-set price."[190] Licensing under this statutory scheme may reduce transaction costs through predetermined contract terms—however, it takes a "one-size-fits-all" approach to contracting, regardless of the unique rights at issue.[191] Accordingly, the proposed entity would function like a Collective-Rights Organization (CRO).[192] CROs operate outside of legislation and differ from compulsory licensing schemes in that contracts "are the product of internal negotiations by knowledgeable people in the [relevant] industry," acknowledging that licenses often vary and may require terms or pricing unique to each arrangement.[193]

Congress can draw on two notable examples of CROs—patent pools and Performing Rights Organizations (PROs)—in formulating a group licensing solution specific to student-athlete NIL rights.[194] Patent pools are defined as "an agreement between two or more patent owners to license one or more of their patents to one another or to third parties," wherein the patent rights of multiple patent holders are aggregated into a single portfolio.[195] The portfolio is then "made available to member and non-member licensees and typically the pool allocates a portion of the licensing fees it collects to each member in proportion to each patent's value."[196] Through yielding intellectual property assets via a patent pool, companies may develop new products, "negotiate fair and reasonable royalties," and reduce transaction costs by mitigating "the need for individual licensing agreements."[197]

Similarly, in the music industry, PROs serve as an intermediary between copyright holders and parties who wish to use copyrighted works in public places.[198] PROs ensure that "songwriters and publishers are paid for the use of their music by collecting royalties on behalf of the rights owner," and distributing them accordingly.[199] To accomplish this, PROs aggregate music copyrights into a single portfolio and negotiate portfolio licenses on behalf of copyright holders (e.g., musicians, songwriters, and publishers).[200]

190. Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1295 (1996).

191. *Id.*

192. *See id.* at 1328.

193. *Id.* at 1300.

194. Brown et al., *supra* note 109, at 7.

195. WORLD INTELLECTUAL PROPERTY ORG., PATENT POOLS AND ANTITRUST – A COMPARATIVE ANALYSIS 3 (2014), https://www.wipo.int/export/sites/www/ip-competition/en/studies/patent_pools_report.pdf.

196. *Id.*

197. *Id.*; *see also* Brown et al., *supra* note 109, at 8.

198. Desi Thorne, *Music Licensing 101: What Is a Performing Rights Organization?*, BANDZOOGLE: THE BANDZOOGLE BLOG (Sept. 11, 2015), https://bandzoogle.com/blog/music-licensing-101-what-is-a-performing-rights-organization.

199. *Id.*

200. Walter McDonough, *What Are the Performing Rights Organizations Doing to Protect Songwriters and Musicians?*, FUTURE OF MUSIC COALITION (Feb. 26, 2002), http://futureofmusic.org/article/what-are-performing-rights-organizations-doing-protect-songwriters-and-musicians.

Absent a PRO, licensors would need to contact each licensee and negotiate individual licensing agreements with each person or entity.[201] Accordingly, PROs exist to alleviate the burdens of transactional costs, and time, associated with collecting individual licenses.

Akin to patent pools and PROs, the proposed independent entity would provide a method for companies to license the collective NIL rights of all players on a team without the difficulties of individual player valuation.[202] By organizing things from the student-athletes' side, licensees aren't faced with hundreds of one-off agreements when assembling broad NIL deals and student-athletes can maximize their earnings.[203] This structure appeals to the majority of student-athletes because it allows revenues to be shared among all athletes in the relevant group. Under this group licensing method, player valuation is straightforward, bypassing the complexities of determining player compensation in an underdeveloped marketplace. Royalty payouts for group licensing arrangements could either vary by contract, demand equal payouts for all contracts, or use a weighted distribution approach.[204] For individualized products like jerseys or trading cards, compensation would be based on the sales of products containing the student-athlete's NIL, and student-athletes would receive a share specific to those sales.[205] If it is not possible to identify individual sales, as is the case with team-branded products like video games, then revenue would be divided evenly among the athletes included in each licensing program.[206]

The reality is, less than two percent of student-athletes will go on to play professionally, and it is those student-athletes that can readily capitalize on their NIL.[207] For student-athletes that lack the popularity to sign individual NIL deals, group licensing presents the greatest opportunity to generate the highest NIL income. This is especially true for women's college athletes, as group licensing has been demonstrated to increase women's professional athletes' income.[208] Accordingly, NIL legislation may only yield valuable earnings if student-athletes are permitted to reap the benefits of group licensing as facilitated through an independent entity.

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201. *Id.*

202. Caron, *supra* note 129.

203. *NIL: All of a Sudden, but a Long Time Coming*, LICENSING INT'L (July 6, 2021), https://licensinginternational.org/news/nil-all-of-a-sudden-but-a-long-time-coming/.

204. Brown et al., *supra* note 109, at 31-32.

205. ONETEAM, *supra* note 128; *see also* Brown et al., *supra* note 109, at 32 (noting that, as a condition, "[the NIL licensing entity] would deduct its fee from the royalties it collects and distribute the net payment to the college athlete.").

206. ONETEAM, *supra* note 128.

207. LEAD1 REPORT, *supra* note 141, at 16.

208. Alicia Jessop, *Fool Me Once, Shame on You; Fool Me Twice, Shame on Me: Why Congress Must Grant NCAA Athletes Group Licensing and Organization Rights in Name, Image and Likeness Legislation*, HARV. J. SPORTS & ENT. L. (Aug. 31, 2020), https://harvardjsel.com/2020/08/fool-me-once-shame-on-you-fool-me-twice-shame-on-me-why-congress-must-grant-ncaa-athletes-group-licensing-and-organization-rights-in-name-image-and-likeness-legislation.

3. Co-Branding School Intellectual Property with Student-Athlete NIL

The same efficiencies and equity group licensing apply to co-branding. Federal legislation permitting the use of institutional logos and other forms of school intellectual property in dealings between companies and student-athletes further optimizes the benefits of NIL compensation. Drawing from the provisions proposed in CABOR, federal legislation should preempt state laws and provide that student-athletes are permitted to enter into co-branding agreements with schools for the use of institutional intellectual property in NIL dealings.[209] However, Congress should aim to preserve schools' discretionary rights to license their intellectual property. A possible concession could be to consolidate the use of school intellectual property and institutional marks only "for co-branding products such as video games and jersey sales."[210] This provides that schools retain control over their intellectual property rights while removing the state-implemented legal barriers preventing certain schools from co-branding in the first place.

Through its group licensing function, an independent NIL entity would represent student-athletes in NIL dealings between companies and schools to develop licensing opportunities for the concurrent use of student-athlete NIL and school intellectual property. This "joint venture" allows both student-athletes and schools "to capitalize on revenues from video games, jerseys, sports merchandising, advertisements, and other licensing products," respectively.[211] For example, the National Football League Players Association (NFLPA)[212] group licensing program works to provide licensees with a total of six or more National Football League (NFL) players' NIL on or in conjunction with retail items like EA's Madden NFL Games.[213] In addition to contracting with the NFLPA, EA negotiates a license with the NFL and its teams to utilize their trademarks, logos, and other intellectual property in the video game.[214] Once royalties are collected, the NFLPA distributes equal payments amongst all member-athletes and the NFL receives its own portion of the revenues.[215] A similar arrangement could be made between the NCAA, its member schools, and student-athletes to revive EA's college football video game franchise—and with royalty distributions

209. *See* discussion *supra* Part V.A; *see also* S. 5062, 116th Cong. § 3(a) (2020).

210. Thompson, *supra* note 115, at 1383.

211. *Id.*

212. The NFLPA is a labor union that represents NFL players. *See How the NFLPA Works*, NFLPA, https://nflpa.com/about (last visited May 24, 2022). The NFLPA "[r]epresents all players in matters concerning wages, hours and working conditions and protects their rights as professional football players" and "[e]nhances and defends the image of players and their profession on and off the field," among other things. *Id.*

213. *See Licensing*, NFLPA, https://nflpa.com/partners/licensing (last visited May 24, 2022).

214. *NIL FAQS*, *supra* note 108.

215. The current royalty distribution for Madden 21 is unknown; however, "[t]he 2017 active player payment [was] $17,662 and 2018 payment [was] $16,966." *See* Tom Pelissero (@TomPelissero), TWITTER (Mar. 21, 2020, 12:29 PM), https://twitter.com/TomPelissero/status/1241446751439118337.

coming from the entity, not the schools themselves, the NCAA's rules against "pay-for-play" remain intact.

The interest in uniform NIL laws has sparked a slew of legislative proposals. While the attempts to pass federal legislation is headed in the right direction, further efforts are needed to make meaningful change to NIL. As the intercollegiate NIL landscape continues to develop on an uneven playing field, the creation of an independent NIL entity by Congress would mitigate the mass confusion stemming from a patchwork of state NIL laws. Such an entity is best equipped to solve the inequalities across the current NIL regulatory scheme and encourage orderliness in NIL licensing negotiations, specifically for companies seeking multi-player product or promotional lines. Until then, student-athletes, schools, and companies must continue to advocate for their interests.

VI. TOUCHDOWN: EA SPORTS COLLEGE FOOTBALL

Last year, EA announced its plans to move forward with the development of *EA Sports College Football*—and as of June 17, 2022, the game is scheduled for release in July 2023.[216] But in the two-year window EA afforded themselves for game development, the intercollegiate sports landscape has and will continue to rapidly evolve.

The announcement came prior to the NCAA rule changes permitting student-athletes to commercialize their NIL, and it was uncertain whether student-athletes would be featured in the video game. Following the Supreme Court's decision in *Alston*, EA released the following statement:

> We are watching the recent developments regarding student-athlete name, image and likeness very closely. It's still very early stages at this point, and we plan to explore the possibility of including players in EA SPORTS College Football. For now, our development team is focused on working with our partners at CLC to ensure the game authentically showcases the great sport of college football and the more than 100 institutions signed on to be featured in our game.[217]

According to the most recent proposal, dated February 25, 2022, the deal between EA and CLC includes licenses for nearly 120 FBS schools' intellectual property—such as logos, stadiums, mascots, and fight songs—as

216. *See* Anthony Puccio, *EA Sports to Bring Back NCAA Football in July 2023*, FRONT OFF. SPORTS (June 17, 2022, 4:00 PM), https://frontofficesports.com/ea-sports-to-bring-back-ncaa-football-in-july-2023/?utm_medium=social&utm_source=linkedin&utm_campaign=article.

217. Brian Jones, *EA Sports Makes Announcement on NCAA Football Video Game Following NIL Ruling*, POPCULTURE (July 1, 2021, 3:36 PM), https://popculture.com/sports/news/ea-sports-makes-announcement-ncaa-football-video-game-nil-ruling/.

well as licenses for athletic conferences and bowl games.[218] EA is currently working on securing "team-specific audio assets," like student-section chants and band songs, from the institutions, suggesting that EA "is seeking to recreate the stadium experience as closely as possible for each school."[219] While EA continues to "collect game assets and develop game play to meet market demands,"[220] the question remains: what does EA intend to do about the player-avatars?

To maximize the realistic feel of the gameplay, there must be a resemblance between the player-avatars in *EA Sports College Football* and their real-life counterparts. The appeal of EA's college-branded video games is that consumers can play as college football players on their favorite team.[221] If EA's model is to encourage consumers to purchase the game each year, the strategy fails to work if the video game is premised solely on the use of schools' logos and stadiums.[222] Should EA create a game that includes virtual players who look and "feel" nothing like real players, consumer interest will be lost.[223] In other words, EA needs to integrate student-athletes' NIL in its video game to have a successful reboot.

Accordingly, EA *must* secure the rights to student-athletes' NIL for use in *EA Sports College Football* if it wants its video game to not only be successful, but free of any potential claims for misappropriation of student-athletes' right of publicity. A game with nameless avatars who happen to have the same physical characteristics, jersey numbers, and skills as their respective real-life players inevitably leads to litigation over the misappropriation of student-athletes' NIL—and EA need look no further than previous litigation to reach this determination.[224] However, it is likely that EA is not ignorant of this reality, and publicly addressed the inclusion of student-athletes in *EA Sports College Football*. On a conference call with EA's investors in August 2021, CEO Andrew Wilson addressed the company's development plans for the video game franchise.[225] Wilson believes it is "likely very possible for [EA] to integrate name image and

218. Matt Brown, *Here's Everything I Know About EA Sports College Football, with Updated Info:*, EXTRA POINTS (June 17, 2022), https://www.extrapointsmb.com/heres-everything-i-know-about-ea-sports-college-football-with-updated-info/.

219. *Id.*

220. Puccio, *supra* note 216 (internal quotations omitted).

221. Olga Kharif, *What's Going on with EA Sports College Football?*, BLOOMBERG (Aug. 27, 2021, 3:45 AM), https://www.bloomberg.com/news/newsletters/2021-08-27/ea-sports-college-football-what-s-the-latest.

222. *Id.*

223. Darren Heitner, *The Complexity of EA Sports College Football Without Athlete Group Licensing in Place*, ABOVE THE L. (Feb. 3, 2021, 4:47 PM), https://abovethelaw.com/2021/02/the-complexity-of-ea-sports-college-football-without-athlete-group-licensing-in-place/.

224. *Id.*; *see also* discussion *supra* Sections III.A.1-4.

225. *See Electronic Arts, Inc. (EA) CEO Andrew Wilson on Q1 2022 Results – Earnings Call Transcript*, SEEKING ALPHA (Aug. 4, 2021, 11:43 PM), https://seekingalpha.com/article/4445193-electronic-arts-inc-ea-ceo-andrew-wilson-on-q1-2022-results-earnings-call-transcript.

likeness with athletes according to whatever rule sets may emerge as to how they may engage with [EA] in that context."[226] While promising, EA has taken no further steps to demonstrate its commitment to licensing with student-athletes, as it merely continues to "keep tabs on" the ever-changing collegiate NIL landscape.[227]

It should be noted that EA *wants* to include student-athlete NIL in its video game, and is more than willing to pay players for the right to do so.[228] The remaining hurdle for EA to overcome is navigating group licensing.[229] For the reasons articulated above,[230] it is difficult to navigate individual licensing with a large student-athlete population without an entity organizing them as one unit.[231] In lieu of a players' association, an independent NIL entity established by Congress would assume the role of facilitating and negotiating an agreement on behalf of all players featured in the video game, in addition to distributing royalty payments thereafter. Much like the Ninth Circuit noted in *O'Bannon*, there is little reason to think that a group licensing arrangement could not be facilitated to create *EA Sports College Football*—especially with an independent, congressional entity providing the mechanism for EA to proceed with negotiations.[232]

Acknowledging that Congress will likely be the final peacemaker of conflicting state laws and NCAA guidelines, this Note presents what the future of NIL could resemble for *EA Sports College Football*. EA should stop "explor[ing] the possibility of including players in EA SPORTS College Football," and start preparing for NIL negotiations with student-athletes.[233] In the meantime, NCAA Football fans must continue to patiently wait for the pieces to come together.

226. *Id.* Wilson also added: "[a]nd we are building the architecture of the game with a database structure so that if and when that comes online, we'll be able to add back to the game very seamlessly." *Id.*

227. Jones, *supra* note 217.

228. *See* Brown, *supra* note 218.

229. Despite the progress being made, one of the lingering holdouts for many institutions is that "there is not currently an established mechanism for paying athletes for their likenesses to appear in the game." Brown, *supra* note 218.

230. *See* discussion *supra* Part IV.

231. Brandr recently announced its plans to execute and develop the company's video games strategies. Pete Nakos, *Brandr Group Extending Group Licensing Program into Video Games*, ON3 (July 18, 2022), https://www.on3.com/nil/news/the-brandr-group-group-licensing-program-video-games-partnerships-nil-ea-sports-ncaa-football-14/. This deal would seem to create a framework for EA to create a college football video game group license deal. However, as discussed *supra*, this isn't enough, as not all institutions have Brandr's services available as an option, and state laws continue to pose a challenge for the efficiency of its plan.

232. *See* O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1069 (9th Cir. 2015) (noting that "[T]here is every reason to believe that, if permitted to do so, EA or another video game company would pay NCAA athletes for their NIL rights.").

233. *See* Jones, *supra* note 217.

VII. CONCLUSION

Individual endorsements and sponsorships are being signed left and right—but some of the largest NIL deals have yet to come to fruition. Absent a system for reaching a broad population of student-athletes, navigating licensing agreements for multi-player product lines proves challenging, and many student-athletes may be unable to capitalize on the value of their NIL as individuals. This Note recommends Congress promulgate an independent NIL entity to oversee NIL licensing deals and establish uniform NIL rules. An independent entity is best equipped to promote a landscape wherein student-athletes can earn substantially more revenue from commercializing their NILs and consumers can obtain the products they want.

While Nick Saban and Jimbo Fisher may not see eye to eye, they can agree on one thing: "[the rules] just need[] to be uniform[] across the board and it's hard because the government's [going to] have to get involved with it."[234] In other words, the current intercollegiate NIL landscape and patchwork of state laws governing NIL compensation require federal legislative intervention. *EA Sports College Football* is back: it just needs student-athletes, and Congress, in the game.

234. TexAgs, *supra* note 2. Similarly, Saban remarked that "we got to get an antitrust or whatever it is from a federal government standpoint [because] [NIL] is not going to change." *See* Alabama Crimson Tide, *supra* note 1.

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