

PUBLICATION

Your Image Here: The NCAA Settles with Athletes Over Rights of Publicity

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We're all familiar with video games involving computer-generated depictions of real-life athletes; they are a multi-billion dollar industry. Under pressure from consumers to make such games more and more realistic, software companies like Electronic Arts, Inc. have mined team rosters to allow gamers to field virtual versions of their favorite sports teams: a virtual Peyton Manning with the same height, weight, jersey and number, skill set and even facial features as the real Peyton Manning can be fielded alongside the rest of the virtual Denver Broncos®. The NFL Players Association receives roughly \$35 million annually from EA to compensate NFL players for consumers' ability to tackle a virtual Tom Brady with a virtual Terrell Suggs. Video games depicting college athletes and teams similarly utilize the likenesses and characteristics of those athletes. Unlike the pros, though, student athletes are not paid for this.

That is, until last week, when a class-action suit brought by several NCAA athletes settled against the last remaining defendant, the NCAA, for \$20 million. Last week's settlement followed a \$40 million payout by EA and the Collegiate Licensing Co., the organization authorized to manage licensing rights on behalf of NCAA institutions.

The landmark settlement concludes the first of its kind case in which non-professional, student athletes have attempted to be compensated for the commercialization of their individual likenesses to sell video games. The payout resolves the student athletes' claims that defendants had violated their "rights of publicity", a state law right held by every person to control the commercial use of his or her identity, by using their likenesses in EA's "NCAA Football" and "NCAA Basketball" video game series. One of the most expansive rights of publicity exists under the Indiana Code, a violation of which the plaintiff-athletes asserted as one of their many claims, where the publicity right extends to an individual's name, voice, signature, photograph, image, likeness, distinctive appearance, gestures and mannerisms.

While this case will not redefine the boundaries of the rights of publicity doctrine, it is indeed precedential as to the context in which that doctrine is applied. The resolution of the athletes' intellectual property claims also implicates many aspects of the current and lately heavily scrutinized NCAA model, including whether the settlement funds will be deemed "payment" to sufficient to disqualify the athletes from NCAA eligibility or to entitle them to employment benefits. A parallel antitrust suit involving the same basic parties went to trial on Monday.