Student-Athletes' Right of Publicity Legal Issue and Implications

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ABSTRACT

The purpose of this dissertation was to examine the National Collegiate Athletic Association (NCAA) student-athletes right of publicity legal issue and provide recommendations to the future students-athletes' right of publicity management. Student-athletes' right of publicity is a unique research area. On the one hand, the law of right of publicity protects a person's right to profit from the commercial use of his or her identities by another. On the other hand, the NCAA amateur rule disallows student-athletes to be compensated for commercial activities. To examine this conflict and find solutions, this dissertation conducted a law review to understand the law of the right of publicity and set out the legal rules. Qualitative interviews with NCAA Division I institutions' Athletics Directors (n = 7), college sports scholars and commentators (n = 6), and attorneys and legal scholars (n = 11) were further conducted to evaluate the current student-athletes' publicity rights management and provide new recommendations to the future student-athletes' publicity rights management. Findings from this dissertation define the student-athletes' right of publicity, present a model for student-athletes right of publicity management, and recommend increases in the athletics scholarships to cover the full cost of attendance and the provision of proper legal counsel representations for student-athletes.

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Chapter I: Introduction

Background of the Problem

The former University of California – Los Angles All-America basketball star Ed O'Bannon, former Arizona State University quarterback Samuel Keller and a group of other former and current student-athletes filed a class action lawsuit in 2009 against the National Collegiate Athlete Association (NCAA), Collegiate Licensing Company (CLC), and video game manufacturer Electronic Arts (EA). They claimed the NCAA violated anti-trust law by restraining their abilities to market and profit from their names and likenesses, and their likeness had been misappropriated without compensation in the EA's college basketball and football video games (*O'Bannon v. Nat'l Collegiate Athletic Ass'n [NCAA]*, 2009). This case is well-known as the *O'Bannon* case.

EA Sports and CLC settled with the plaintiffs in Fall 2013, which left the NCAA as the only defendant of the case (McCann, 2013). After four years and over 20 pre-trial hearings, in November 2013, the California District Court Judge Claudia Judge Wilken certified the class action, but denied the damage on the past use of student-athletes' images and likenesses on television and in video games. The *O'Bannon* case finally went to trial in June 2014. After three weeks of trial, Judge Wilken delivered the verdict that the NCAA violated the anti-trust law, the NCAA could not set a cap less than $5,000 per year per student to compensate the student-athletes for using their publicity rights, and a student-athlete's trust fund should be established (*O'Bannon v. NCAA*, 2014). The NCAA appealed the trial court decision to the upper level federal appellate court in California. On December 16th, 2015, the Ninth U.S. Circuit Court of Appeals affirmed that the NCAA's rules limiting what athletes could receive while playing NCAA sports were

illegal, but the court dismissed the deferred payment plan and refused to rehear the ruling (Berkowitz, 2015; *O'Bannon v. NCAA*, 2015). The student-athletes appealed the appellate court decision to the United State Supreme Court in March 2016 (*O'Bannon v. NCAA*, 2016). The Supreme Court has not made final decision on this case at the time of the submission of this dissertation.

The *O'Bannon* case started when the formers and current student-athletes' names, likenesses and personal information were used in the EA Sports' college football and basketball video games without the student-athletes' permission. Student-athletes claimed the virtual players in the game matched the attributes of actual players, and therefore their publicity rights were misappropriated by the NCAA and EA sports (*O'Bannon*, 2009). This research focused on discussing the law of right of publicity and its implications to the NCAA student-athletes situation. This study is not a case forecast on the *O'Bannon* case. The O'Bannon case is used as the background information in the study.

The use of student-athletes' publicity rights for commercial purposes by the NCAA and its member institutions is not a new issue. Some articles and research discussed the use of student-athletes' names or likenesses in jerseys, trading cards and video games (Hanlon & Yasser, 2008; Matzkin, 2001; Thompson, 1994). However, student-athletes' right of publicity issue exists in a unique situation. It concerns both the law of right of publicity and the NCAA amateur regulations. According to the law of right of publicity, student-athletes should be compensated for using their publicities rights by another for commercial purposes. At the same time, the NCAA's amateur rules prohibit student-athletes receiving any endorsement money, which also means that student-athletes will lose their eligibilities to play college sports, if they receive

reimbursement for using their identities in commercial settings (NCAA, 2008a). In addition, the NCAA required student-athletes to sign the eligibility form each academic year prior to first compete. The form included the term that student-athletes gave the NCAA and its member institutions authorization to use their names and likenesses for college sports promotional activities (NCAA, 2008b). Here, in the *O'Bannon* case, student-athletes signed this form and authorized the NCAA to use their names and likenesses. Based on the language of the term, third parties on behalf the NCAA could also use the student-athletes' names and likenesses. Because student-athletes signed their names and pictures' rights to the NCAA via the eligibility form, the issue of using student-athletes' publicity rights also have some contract law concerns. In addition, the NCAA will continue marketing and promoting college sports, which means the NCAA will not stop using student-athletes' names or likenesses in their promotional activities. Therefore, both the law of right of publicity and the NCAA amateur rules encourage to find a viable solution to compensate student-athletes without violating the NCAA bylaw.

Statement of Problem

The commercialism and the amateurism conflicts of college sports. Student-athletes' right of publicity issue reflects the conflict between commercialism and amateurism of college sports. The NCAA operates as a non-profit organization (NCAA, 2013a). The NCAA establishes its own rules to regulate college sports and its member institutions. The NCAA states in section 1.3.1 basic purpose that the NCAA is "to maintain intercollegiate athletics as an integral part of the educational program and the athletes as an integral part of the student body and, by doing so, retain a clear line of demarcation between intercollegiate athletics and professional sports" (NCAA, 2013b).

On the other hand, college sports has become a big business after over a hundred years of development. For example, top 25 NCAA Division I institutions' athletic revenue was over $3 billion in the 2013-2014 season (Fuhrmeister, 2015). Deford (2011) described the NCAA and college sports as "the charity sports still operate on the luxurious revenue sport model." An economist professor Andrew Zimbalist called the student-athletes were "unpaid professionals" (Zimbalist, 1999). The conflict between commercialism and amateurism has become more and more notable in current college sports. The NCAA emphasizes that college sports are not professional sports, and student-athletes stay amateur status (NCAA, 2015a). This shows the conflict between the commercialism and the amateurism of college sports.

The balance and the *O'Bannon* case. Some solutions have been proposed to resolve the conflict between the commercialism and the amateurism include policy drafting, academic exercises, as well as via litigation (Kaburakis, Pierce, Fleming, Clavio, Lawrence, & Dziuba, 2009). However, the NCAA prefers to stick to the current model of amateurism rather than make any dramatic change. The *O'Bannon* case happened under this background. Plaintiffs claimed the NCAA had unlawfully foreclosed class members from receiving compensation in connection with the commercial exploitation of their images (*O'Bannon*, 2009). In the complaint, student-athletes requested to establish a trust fund for the benefit of class members and for the purpose of holding student-athletes' licensing revenues that the NCAA had unlawfully diverted. Student-athletes also claimed that the NCAA had deprived student-athletes' ability to exploit their right of publicity, which was protected by the law of right of publicity. This study focused on the law of right of publicity and its implications to the student-athletes'

situation. The findings and results of this study could be a supplement to the *O'Bannon* case.

Purpose of Study/Significance of the Study

This study investigated the use of the NCAA student-athletes' identities for commercial purposes. The study reviewed the law of right of publicity and some related contract law areas. Besides, the researcher also conducted interviews to Athletics Directors, college sports researchers and commentators, and attorneys and legal scholars. This study investigated the current use of student-athletes' publicity rights, whether the NCAA violated student-athletes' right of publicity, and also provided the recommendations for future student-athletes' publicity right management. The purpose of this study is to interpret student-athletes' publicity rights in the intercollegiate athletics context, create student-athletes publicity rights management model, and offer administrative recommendations for student-athletes' publicity rights management. The research of college student-athletes' right of publicity has significant academic and practical values.

Academic values. First, this research defined and interpreted the student-athletes' publicity rights in the college sports context. College student-athletes' names, likenesses and images have been commonly used in merchandises, trading cards, media broadcastings, video games and so on. Due to the unique context of the amateur intercollegiate athletics, the right of publicity of student-athletes is different from the general right of publicity of a person. Although there are some articles about the student-athletes' right of publicity use, no scholar or commentator proposed the definition of student-athletes' right of publicity. Therefore, in order to better understand student-

athletes' publicity rights, this study provided the definition and interpretation of student-athletes' right of publicity based on the law of right of publicity and interviews to selected research participants.

Second, this research combined both law review method and qualitative research method. The legal research focused on common law and state statutes review. The purpose of conducting the legal research was to understand the law right of publicity and the application of the law. The purpose of conducting the qualitative interview was to generated viable recommendations to the student -athletes' publicity right management by investigating and evaluating the current situation and existing proposed solutions. Majority legal research did not conduct interviews to professionals and majority sports qualitative research did not conduct law review. Therefore, the combination of two different research methods in one research would be a good addition to both the right of publicity legal research and sports qualitative research.

Practical values. First, this research helps better understand the unique situation of collegiate student-athletes' right of publicity and provides recommendations for the student-athletes' publicity rights management. Student-athletes' right of publicity situation is unique because a student-athlete could not receive compensation for the use of his/her publicity rights based on the NCAA's amateur regulations. Therefore, it is important to know what publicity rights the student-athletes signed away, what publicity rights student-athletes still retain, and how to management the future student-athletes' publicity rights use under this unique situation.

Second, the model provided in this research is a practical guide to future student-athletes' right of publicity management. The step by step model will help sports

managers understand what rights student-athletes could offer, what type of agreement that student-athletes could use to transfer their publicity rights (license or assignment), what rights student-athletes still retain, and how to properly compensate student-athletes without violating the law of right of publicity and the NCAA regulations.

In sum, the academic and practical values of this research provided both a theoretical and practical basis for future student-athletes' right of publicity research.

Research Questions

This research addressed the following research questions:

a. Do both former and current NCAA student-athletes retain their publicity rights after they contractually authorized the use of their names and likenesses to the NCAA by signing the Form 08-3a?

b. Did the NCAA violate the student-athletes' right of publicity by licensing their names and likenesses to the third parties for commercial purposes?

c. What are possible recommendations/solutions based upon this study for the NCAA to manage athletes' right of publicity in the future and what rationale is provided for these recommendations?

Definition of Terms

Right of Publicity: Right of publicity is also referred to as "publicity rights" in this study.

> The right of publicity is an inherent right of every one to control the commercial use of his or her identity and persona and recover in court for damages due to an unpermitted taking (McCarthy, 2013).

Contract: In common law legal system, a contract is an agreement having a lawful object entered into voluntarily by two or more parties, each of whom intends to create one or more legal obligations between them (McKendrick, 2005).

College Sports/Athletics: College athletics is a term encompassing the non-professional, collegiate and university-level competitive sports and games (Thelin & Edwards, n.d.).

NCAA: NCAA is a nonprofit association of 1,281 institutions, conferences, organizations and individuals that organizes the athletic programs of many colleges and universities in the United States and Canada (NCAA, 2013c).

Athletics Directors (AD): In this research, the Athletic Directors refer to NCAA Division I member institutions' Athletics Directors.

College Sports Scholars and Commentators (SC): In this research, scholars refer to college scholars/professors who conduct college sports related research and who are familiar with the *O'Bannon* case issues. Commentators refer to sports journalists or commentators who report college sports related issues and who are familiar with the *O'Bannon* case issues.

Attorney and Legal Scholars (AS): In this research, attorneys refer to those lawyers who practice the law right of publicity and who are familiar with the *O'Bannon* case. Legal Scholars refer to law professors who conduct college sports related or the right of publicity related research and who are familiar with the *O'Bannon* case issues.

Student-Athletes: A student-athlete is a student in an organized competitive sport sponsored by the educational institution in which he or she is enrolled. The

NCAA student-athletes in this research refer to the student-athletes who participate in one or more sponsored sports at a NCAA member institution.

Full Cost of Attendance: The full cost of attendance is part of a full athletics scholarship in addition to tuition, fees, books and room and board, the scholarship will also include expenses such as academic-related supplies, transportation and other similar items (NCAA, 2015c). This policy is adopted by the 65 institutions, including the Atlantic Coast, Big Ten, Big 12, Pac-12 and Southeastern.

Chapter II presents a literature review the law of right of publicity, the NCAA and its regulations, related contractual issue, existing proposed suggestions, and the theoretical concepts relevant to the study. Chapter III discusses the methodology implemented in the research process, including the research design, participant selection, data collection and data analysis. Chapter IV presents the findings of the right of publicity and the interviews, and answers to research questions. Chapter V discusses the definition of the student-athletes' right of publicity, student-athletes' right of publicity management model, contributions of this study, limitations and future research. Chapter VI is the conclusion of this study.

Chapter II: Literature Review

Right of Publicity

McCarthy (2013) describes the right of publicity as: "An inherent right of every human being to control the commercial use of his or her identity and persona and recover in court damages and the commercial value of an unpermitted taking." The right of publicity was first used as a legal term in the 1953 *Haelan* case. The court used "right of publicity" to describe the situation that prominent people who felt deprived if their likenesses were displayed in public without being compensated (*Haelan v. Topps Chewing Gum*, 1953).

The *Zacchini* case is the only case concerned right of publicity which has reached the U.S. Supreme Court (*Zacchini v. Scripps-Howard Broad. Co.*, 1977), where a local television station videotaped and broadcasted the entire 15 seconds of the "human cannonball" performance on the news. The U.S. Supreme Court held that the Free Speech of the First Amendment did not permit the television station to broadcast the entire performance as news (*Zacchini*, 1977). In the *Zacchini* case, the term "right of publicity" was constantly used by the U.S. Supreme Court as referring to a recognized and established legal principal.

Elements of infringement of the right of publicity. The test of infringement of a person's right of publicity is identifiability test (*T&T Mfg. Co. v. A. T Cross Co.*, 1978). The identifiable characters of a person include but not limit to name, likeness, voice, a distinguishing setting, appearance and mannerisms or in combination. As the Ninth Court observed: "Identification is a central element of a right of publicity claim (*Waits v. Frito-lay*, 1992)." For example, in *Abdul-Jabbar*, the court held that the use of Abdul-Jabbar's

nickname without the player's consent by General Motor in a commercial campaign was an infringing use (*Abdul-Jabbar v. General Motors Corp.,* 1996). In the *Newcombe* case, the court held the general public could identify Newcombe in Coor's magazine, although the pitcher was faceless, the hat color was different, and number on the pitcher's jersey was 39 instead of his real jersey number 36 in the advertisement (*Newcombe v. Adolf Coors Co.,* 1998).

Right of publicity's protection. The right of publicity protects the "persona" of a person, but not the "persona" of a corporation, partnership or an institution (McCarthy & Anderson, 2000).

Persona. "Persona" in right of publicity law refers to a person's identities, such as a person's name, likenesses, voices, and any identifiable characteristics or actual performances of a person (*Carson v. Here is Johnny Portable Toilets, Inc.,* 1983). For example, in *Ali,* the court held that people easily associated a drawing of a nude, black male sitting on a stool in a corner of a boxing ring with hands taped and arms outstretched on the ropes as Muhammad Ali (*Ali v. Playgirl,* 1978).

Other physical objects could possibly identify a person, including the person's manners, telephone number, a player's jersey number or biographical data about a person (*Harms v. Miami Daily News,* 1961; *Krouse v. Chrysler Canada Ltd.,* 1973; *Palmer v. Schonhorn,* 1967). In the 1974 *Motschenbacher* case, the Ninth Circuit held that the car's distinctive markings were sufficient to create a direct inference to the driver, although the race car number had been changed, a spoiler was added to the car and Motschenbacher was not recognizable as the vehicle's driver in a cigarette company's advertisement (*Motschenbacher v. R.J. Reynolds,* 1974). In *White,* the court concluded game show host

Vanna White was identifiable in the Samsung Electronics advertisement, although Samsung only used a White look-like robot in the advertisement (*White v. Samsung Elecs. Am., Inc.*, 1992).

In sum, a person's identifiable characters are broad. Even though a person's name, likeness or image is not directly used by an infringer, any identifiable characteristic of this person could help hold the infringer liable in right of publicity cases.

Copyright and right of publicity. Although the right of publicity law is usually considered as state law, federal law will sometimes protect against certain unpermitted uses of aspects of human identity if the relevant conditions are met, such as the federal Copyright Act (McCarthy, 2013). Though federal copyright has some overlaps with the right of publicity, they are not equivalent and certainly not identical. Copyright law protects all "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of machine or device (U.S.C.A. Section 102(a))." The right of publicity protects the commercial values infringed by the unpermitted use of a person's identity.

Byers has argued that copyright could do the same job of legal protection as the right of publicity (Byers, 1981). This argument means a person is the author of his or her identities and his or her identities are fixed in tangible expression. A person needs to register his or her name, and photograph first, then if others use this person's name and likeness without permission, it is an infringement.

However, the Restatement of Unfair Competition says that the right of publicity lies outside the scope of copyright, because a person's identities are not the subject

matters of federal copyright (Restatement Third, Unfair Competiton, 1995). Besides, the focus of copyright is on creative expressions, while the focus of publicity right is on the identity and "persona" of a human being (McCarthy, 2013). Nimmer also commented that the name and likeness of a person could hardly be indicated to constitute a "writing" of an "author" within the meaning of the Copyright Clause of the Constitution (Nimmer, 1978).

In the student-athletes context, Gadit (2012) argued that the student-athletes deserved to fully realize the ultimate benefit of their right of publicity because they were the original owner of their intellectual property rights. In the author's view, the NCAA had the student-athletes' publicity rights while they were playing college sports, in exchange, the student-athletes had the opportunity to develop their playing skills and gain national exposure that would otherwise be unavailable to them. The author concluded the student-athletes' right of publicity returned back to them once they graduated. On the other hand, Weston (2008) claimed although players' names and statistics may be reported in various media, the athletes themselves do not have a claim for copyright protection because their "identities" are not works that are fixed in a medium (*Nat'l Basketball Ass'n v. Motorola, Inc.*, 1997).

Infringing use of personal identity on products/merchandise. The unpermitted use of a person's identity on merchandises includes the use on T-shirt, board game, video game, fantasy sports game, poster, calendar and so on (*Kirby v. Sega of Am*, 2006; *Uhlaender v. Henricksen*, 1970). McCarthy (2013) pointed out "the place and context of unpermitted use of personal identity are crucial." Considering the *O'Bannon* case fact, the following focuses on the use of a person's identities in video and fantasy sports game.

Use on video game. The U.S. Supreme Court has ruled that video games could receive the free speech protection under the First Amendment as books and motion pictures (*Brown v. Entm't Merch Ass'n,* 2011). The issue usually is whether the accused animated character in a video game is similar enough to the plaintiff. When a person's image is twisted enough to be something new, it becomes a new expressive work and is protected under the law (*Comedy III v. Gary Saderup,* 2001). Otherwise, the use potentially violates the law (*Comedy III,* 2001). The California Court of Appeals held a rock star's right of publicity was appropriated by a rock music video game licensee who used the rock star' identities in performances without consent and the look-like avatar in the accused video game were not so "transformative" to a new expression (*No Doubt v. Activision Publishing, Inc.*, 2011).

In the college sports related setting, the New Jersey court dismissed a right of publicity case brought by Hart on summary judgment (*Hart v. Electronics Arts, Inc.*, 2011). Hart was a former college football player and he filed a complaint against college football video game producer because virtual players in the game matched the attributes of actual players. The court denied the accused video game's First Amendment protection because the game initially displayed the virtual player in an unaltered form and was not a creative aspect of video games. These attributes included the name of the team, the player's jersey number and position, physical characteristics, biographical data, uniform numbers and colors and playing records. However, in the similar *Keller* case, the court ruled the contrary (*Keller v. Electronics Arts*, 2010). The Wisconsin court held the virtual image might be altered and the defendant's artists created the various formulation of each player (*Keller,* 2010). These two court rulings show how different states may reach the

opposite decisions regarding similar fact. However, the case was dismissed and was merged into the *O'Bannon* case.

Use in Fantasy sports games. The companies that operate the fantasy leagues must use the names and identities of real world professional athletes. Such use creates the potential infringement of the professional athletes' publicity rights, because their identities are used as the ingredients of a commercial enterprise (McCarthy, 2013).

In the *C.B.C* case, Major League Baseball Advanced Media (MLBAM) did not offer C.B.C a license to continue to its fantasy baseball games, therefore, C.B.C sued to the court for asking its right to use player's names in connection with its fantasy baseball game without a license (*C.B.C Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 2007). MLBAM claimed C.B.C violated the players' rights of publicity. The court ruled for C.B.C and held that C.B.C did not need a license to use baseball player's names because baseball had a "substantial public interest" and therefore the players' names and statistics available in traditional media were public interest too.

McCarthy (2013) did not agree with the C.B.C court decision. He argued that baseball players' names and identities were a key ingredient of the game, and the court only paid attention to the statistics but ignored names. McCarthy also disagreed with the court's reasoning that baseball players were overpaid. He argued that no matter how much a baseball player was paid, it was irrelevant to the right of publicity misappropriation. Also, in 2009, Minnesota District Court ruled CBS Interactive, an operator of a fantasy sports website, needed no license to use the identity of National

Football League players in its football fantasy games for the same reason (*CBS Interactive Inc. v. Nat'l Football League Players Ass'n*, 2009).

First Amendment defense. First Amendment defense is a commonly used defense in right of publicity cases (*Comedy III*, 2001; *Kirby*, 2006; *Winter v. DC Comics*, 2003). Free Speech of the First Amendment offers the protection to the unpermitted use of identity in the communicative use, but not for the unpermitted use in a commercial setting. A "communicative" use refers to the use of a person's identities in news, commentary on public issues, fiction, parody and sarcasm, while a "commercial" use refers to the use of a person's identities is primarily commercial, such as use in advertisings and products.

Although the news usually has Frist Amendment protection, it still has certain exceptions. The U.S. Supreme Court decided in *Zacchini* (1977) that the First Amendment did not entirely shield a news outlet from a performer's state law right of publicity. The Court recognized that the broadcast of a film of Zacchini's entire human cannonball act posed a substantial threat to the economic value of that performance, since if the public could see the act free on television, it would be less willing to pay to see it at the fair (*Zacchini*, 1977).

On the other hand, for right of publicity purposes, the creative work owners could use First Amendment as their defenses, if the creative works are proved to be the owner's expressive work. Stories could be protected in any medium, such as paintings, photos, music and printed pages (*ETW Corp. v. Jireh Pub.*, 2003). Motion pictures, programs broadcast by radio and television, and live entertainment also have First Amendment

protection (*Schad v. Borough of Mount Ephraim*, 1981). Comic books and video games could enjoy free speech protection too (*Brown*, 2011; *Winter*, 2003).

Advertising is defined as a use of human identity and persona in a context only for commercial purposes, it does not, therefore, enjoy the same level of constitutional protection as news or entertainment. The unpermitted use of people's identity in commercial speech, such as advertising, may trigger infringement of the right of publicity, which usually is not protected by the First Amendment (*Matthews v. Wozencraf*, 1994; *Taylor v. National Broadcasting Co.*, 1994).

Some scholars argued that commercial speech should receive full First Amendment protection from commercial use, if the communicative messages incidentally contained commercial speech (Barnett, 1996; Koziniski & Banner, 1990). At the same time, some scholars argued publicity rights facilitated private censorship which ought to be narrowed and eliminated (Madow, 1993; Zimmerman, 1998). Some others also argued that the whole concept of right of publicity was inconsistent with free speech principles, therefore, the free speech protection should not be applied (Volokh, 2003).

Transformative test under the First Amendment. The transformative use test is created by the California Supreme Court in *Comedy III* (2001) case decision. In *Comedy III* case, the California Supreme Court applied the test to an unpermitted literal depiction of the Three Stooges on T-shirts and held that the depiction did not contain enough creative or transformative content to demand First Amendment protection. The case decision and reasoning shows that if the purpose of the unpermitted use of person's name and likeness is merely to draw attention to the work, or if the product's primary purpose

is to exploit the commercial value of an individual's identity, then the use does not qualify for the First Amendment protection.

If the work is twisted enough to be a new expression, it is not an infringement of the right of publicity. For example, in *Winter*, Winter brothers' likenesses were used to create comic characters in a comic book (*Winter*, 2003). The court found D.C. Comic transferred the brothers' images into half-human, half-worm creatures, which were qualified as new expression, therefore, the comic book depiction was protected under the First Amendment.

Transformative test's application to video games. In *Kirby*, the U.S. Second Circuit Court of Appeal held that Kirby's identities were used only as raw material in the video game and the video game producer transformed the images into a new avatar which was quite different from Kirby's persona (*Kirby*, 2006). On the other hand, in the *No doubt* case, the California Court of Appeal held that since the plaintiff performers did not license the defendant to use their identities in a video games in their license, the look-alike avatar performers in the accused video game did not contain enough "transformative" elements, so it was not qualified as a First Amendment free speech defense (*No doubt*, 2011).

There is a split over whether college football video games match the transformative test between California federal district court and New Jersey federal district court (*Hart*, 2011; *Keller*, 2010). The California court held that the video game did not sufficiently "transform" plaintiff's identity because defendant did not depict plaintiff in a different way and the plaintiff was represented as himself (*Keller*, 2010). The New Jersey court found the defendant, video game production company, met the

"transformative" test because the game included creative graphic elements apart from the players' identifying characters and the game permitted users to change any of the characters of a virtual player (*Hart,* 2011). McCarthy (2013) commented that the transformative test was subjective in application, unpredictable in outcome and fraught with ambiguity.

Assignments and licenses of right of publicity. The right of publicity can be sold or licensed to others. An assignment of rights refers to the sale of all legal and equitable title to the assignee (*Presley's Estate v. Russen*, 1981), therefore, assignee would have all the rights of assignor. In *Haelen*, the Judge specifically linked the right of publicity to the ability of a person to "grant the exclusive privilege of publishing his picture" without an accompanying transfer of business or of anything else (*Haelen*, 1953)." McCarthy (2013) argued that because right of publicity was an inherent right of a person, the person should be compensated by the party who intended to use the person's publicity right. Nimmer (1954) also commented the property rights in the right of publicity must be assignable in gross. The Restatement Third, Unfair Competition agrees the right of publicity can be assigned in gross without any accompanying business or good will (Restatement Third, Unfair Competition, 1995). Therefore, assignment grants the sale of legal and equitable title.

On the other hand, a license is only a permission to use within a defined time, context, market line or territory (McCarthy, 2013). Besides, in the license, title remains within the licensor (*Presley's Estate*, 1981), which means licensor would possess any increased publicity value in the licensor's persona created by the licensed use, instead of the licensee.

NCAA and the Use of Student-Athletes Publicity Rights

NCAA's history, purpose, principle and mission. NCAA was founded in 1906 to protect young people from the dangerous and exploitive athletics practices of the time. The association was formed because football was a very dangerous sport and 18 college and amateur players died in football games during the 1905 season alone.

The NCAA is a membership-driven organization dedicated to safeguarding the well-being of student-athletes and equipping them with the skills to succeed on the playing field, in the classroom and throughout life (NCAA.org, 2015a). Its mission is to protect student-athletes, to implement that principle with increased emphasis on both athletics and academic excellence. Since its inception in the early 1900s, the array of NCAA rules and regulations have increased exponentially to the point where the NCAA controls much of intercollegiate athletics (Hanlon & Yasser, 2008; Smith, 2000). The NCAA regulates athletic competition among its members, sets rules for eligibility to participate, establishes restrictions and guidelines for recruitment of prospective student-athletes, conducts several dozen championship events in the sports sanctioned by the association, enters into television and promotional contracts relating to these championship events, and enters into agreements to license the NCAA name and logos (Yasser, 2011).

Comments on the use of student-athletes' publicity rights. If a student-athlete's name or image appears on commercial items (e.g., T-shirts, sweatshirts, serving trays, playing cards, posters) or is used to promote a commercial product sold by an individual or agency without the student-athlete's knowledge or permission, the student-athlete (or the institution acting on behalf of the student-athlete) is required to take steps

to stop such an activity in order to retain his or her eligibility for intercollegiate athletic (Brighton, 2010; Kaburakis et al, 2009). However, the NCAA asked the student-athletes to sign an agreement and gave permission to use student-athletes' names and likenesses according to the NCAA bylaw. These bylaw terms generated interesting debate surrounding the fairness and the resulting exploitation of college athletes. Cianfrone and Baker (2010) suggested that if student-athletes could successfully prove that using student-athletes' likenesses in video games violated the NCAA bylaws, it would put the contractual relationship between EA and the NCAA in question. On the other hand, Matzkin (2001) indicated the NCAA bylaws created a safe haven for video game producers who used student-athletes' likenesses and images in the video games. Matzkin also stated that the NCAA bylaws allowed video game producers to feature genuine college stars, as long as the student-athletes' names were not specifically included in the game, therefore, video game producers did not need to pay students-athletes for the use of their names and images.

According to Hanlon and Yasser's (2008) interpretation of the NCAA bylaw Section 12.5, a student-athlete would lose his or her eligibility under the rule if the student-athlete simply allowed his or her name or image to be used, although the student-athlete did not receive any compensation from the user. If one views the plain meaning of this rule as not allowing the student-athlete to receive monetary benefit from the commercial use of his or her identity as a star player, the NCAA will simply rely on the NCAA rule 12.1.2, therefore the student-athlete will lose amateur status if they receive monetary for use of their publicity rights.

Thompson (1994) argued that student-athletes' trading cards would violate the student-athletes' rights of publicity, considering the nature of intercollegiate athletics participation. However, the author also argued that this violation would be preempted by an implied consent between the student-athletes and their institutions and the NCAA. Therefore, such agreement prohibited the student-athletes' file any common law rights of publicity claim against the misappropriation.

Hanlon & Yasser (2008) commented that the NCAA and its licensees should not be allowed to use student-athletes' identities solely for commercial purposes, which would result in a windfall or unjust enrichment. The authors also indicated the NCAA exclusively controlled student-athletes licensing rights and engaged in highly lucrative exploitation. They suggested that the NCAA should make major changes to its current regulations.

Proposed solutions by commentators. Matzkin (2001) suggested that a more effective bylaw would permit the video games to feature the names of the student athletes. The author also indicated that for many college athletes, whom would not play in professional level, saw their names in a video game might serve as adequate compensation. Similarly, Belo (1996) argued that the NCAA and the courts could recognize student-athletes' right of publicity and the NCAA should change its policy and allow payments to the athletes based on the merchandising revenue.

Mueller (2004) suggested that student-athletes entailed federal copyright preemption of state-based rights of publicity. The author proposed to establish an employer-employee relationship, under which student-athletes turned over the copyright of their works to the NCAA. On the other hand, Brighton (2010) argued that "employer-

employee" relationship was not a viable solution, because such relationship put more economic pressure on the entire system. Brighton proposed the NCAA would be forced to reevaluate its refusal to share profits with the student-athletes and a trust system would allow the NCAA and its member institutions to continue to profit from licensing arrangements while also share some of those profits with the student-athletes.

Besides Brighton, some other commentators also proposed to build trust funds to resolve the issue (Belo, 1996; Carrabis, 2010; Cronk, 2012; Mueller, 2004; Wong, 2010; Zylstra, 2009). These commentators supported the use of the trust fund to compensate amateur athletes because it had been successful in the past to preserve the principle of amateurism in International Olympic Committee. These commentators stated the compensation to student-athletes would derive only from the money obtained by the NCAA for revenue generated by the athlete's participation on the field. The money would be available for withdrawal when the student-athletes' career have ended. They also claimed the trust fund could prevent the universities unjustly enriching from student-athletes and would allow the student-athletes to recap the financial benefits of their labors, while maintaining the focus on amateur. In *O'Bannon*, the trial court ruled that a trust fund should be established and student-athletes would receive their compensation after their eligibilities ended (*O'Bannon*, 2014). However, the panel threw out the district judge's remedy in the appellate court (*O'Bannon*, 2015).

Comments on Form 08-3a. Student-athletes authorized the NCAA to use their publicity rights via Form 08-3a (08 indicates the academic year), which the NCAA used this form to certify eligibility as required by the NCAA bylaws. Student-athletes must sign the form before their first competition each season according to NCAA Bylaw

3.2.4.6 and NCAA Bylaw 14.1.3.1 (NCAA, 2008b). Student-athletes promised to retain their amateur status by signing this form. If student-athletes did not sign this form, they were deemed ineligible for practice and competition until the form was signed and completed (Zylstra, 2009). The specific language concerning the use of right of publicity was the Part IV of the Form. "Part IV: Promotion of NCAA Championships, Events, Activities or Programs" stated:

> *"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 (NCAA, 2008b)."*

Some commentators indicated the NCAA obtained the exclusive use of the student-athlete's likeness via Form 08-3a (Brighton, 2010; Gadit, 2012; McCann, 2013; Zylstra, 2009). Corley (2013) had very strong opinion about this form, he stated that this form forced "students-athletes to relinquish in perpetuity all rights in the NCAA's licensing of their images and likenesses."

Form 08-3a required the student-athletes to give up their publicity rights during their eligibility years to the NCAA both while they were playing for the NCAA's member institutions and after graduation (Brighton, 2010; Johnson, 2012). In *O'Bannon*, student-athletes claimed Form 08-3a did not act as a permanent relinquishment, but only acted as a release form for the period of eligibility the form covered (*O'Bannon*, 2009). The actual language of "Form 08-3a, Part IV" was vague and ambiguous and it did not provide any detailed information about the general promotion use, such as on when, where, and how (Zylstra, 2009). In addition, Zylstra also criticized that the policy of the

NCAA that required student-athletes to sign the form to play was exploitative. Also, Carrabis (2010) criticized the Form was an adhesion contract.

Contract Law and the Use of Student-Athletes Publicity Rights

According to Restatement (Second) of Contract § 1 (1981), "A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." Therefore, the principal function of contract law is to provide a framework for the enforcement of promises (Davis, 1997; Wong 2010). A contract may not be enforced without the presence of a bargained for legal consideration or detriment in most instances (Restatement Second §79, 1981).

Student-athletes' contract. NCAA student-athletes must sign the National Letter of Intent ("NLI") to participate in collegiate sports. Some student-athletes who have an athletic scholarship also need to sign a Statement of Financial Aid. In the cases regarding the NCAA and student-athletes contractual relationship, courts have consistently determined that the athletic scholarship is a valid contract (Cozzillio, 1989; Hanlon & Yasser, 2008; *Ross v. Creighton Univ.*, 1992; *Taylor v. Wake Forest Univ.*, 1972; Wong, 2010). Additionally, the terms and conditions of both NIL and the athletics scholarship documents must incorporate the NCAA's rules and regulations, thus, NCAA rules and regulations are also contractually binding on both the NCAA member institutions and the student-athletes (Johnson, 2012).

All the contracts which are required to be signed by student-athletes are non-negotiable standard-form agreements. Student-athletes do not recognize the legal relevance of any information not expressly contained in the signed NCAA standardized

contracts (Davis, 1997). Hanlon and Yasser (2008) indicated, in *Ross* (1992), if student-athletes wanted to state a contractual claim against the university, the student-athletes "must point to an identifiable contractual promise that the university failed to honor." Davis (1997) indicated that courts denied the relational nature of the student-athlete and university relationship and preferred to maintain the powerlessness of student-athletes.

Contract of adhesion. Contract of adhesion is defined as "A type of contract, a legally binding agreement between two parties to do a certain thing, in which one side has all the bargaining power and uses it to write the contract primarily to his or her advantage (Westlaw Definition, 2008)." Adhesion contracts regularly deny one party's bargaining power (Hanlon & Yasser, 2008). Adhesion contracts may be used by an enterprise with such disproportionately strong economic power that it simply dictates the terms (Farnsworth, 2004). Another reoccurring form of adhesion contracts is the take-it-or leave-it agreement. In this type of contract, the party's only alternative to complete adherence is outright rejection (Farnsworth, 2004). If an adhesion contract is showed substantially weighted to one party, and the other party is showed substantially lacking bargaining power, the contract is so unfair to the weaker party and thus is unenforceable.

Student-athletes gave their publicity rights to the NCAA and its partners via contract. Johnson (2012) argued that the key question, however, was whether the student-athletes' consent was legally effective and binding. Form 08-3a might create an inequitable situation where the NCAA might impose terms on student-athletes who might have a weak bargaining power (Carrabis, 2010). Gadit (2012) stated that student-athletes were in a weaker bargaining position when they signed the NIL and athletic scholarship

contract with NCAA member institutions because they lacked the ability to adequately exploit the value of their publicity rights.

The doctrine of unconscionability and Form 08-3a. A doctrine of unconscionability sets the standard that if a contract is found to be unconscionable, it is unenforceable as a matter of law (Farnsworth, 2004). When there is an absence of meaningful choice on the part of one of the parties, the contract terms is unconscionable (*Williams v. Walker-Thomas Furniture Co.*, 1965). If the whole substantive provision is grossly unfair and "drives too hard a bargain, then the contract could be considered as unconscionable contract (*Brower v. Gateway 2000, Inc.*, 1998; *United Companies Lending Corp. v. Sargeant*, 1998)."

Carrbais (2010) and Hanlon and Yasser (2008) argued that NCAA Form 08-3a was oppressive and there was no meaningful choice for the student-athlete because student-athletes must sign Form 08-3a annually if they wanted to compete in NCAA games. The authors also argued that Form 08-3a was unconscionable because it was one-sided, overly harsh, contractual terms against the student athlete, and was offered to student-athletes on a take-it-or-leave-it basis by a party which was in powerful bargaining position. Besides, the NCAA prepared the form, and the common situation was that student-athletes sign the form without the advice of counsel, which also indicated the form was oppressive (Wong, 2010). In addition, the language of Form 08-3a were completely vague and ambiguous and difficult to be understood by student-athletes and their guardians (Hanlon & Yasser, 2008; Wong, 2010).

On the other hand, Johnson (2012) argued a student-athlete should be fully aware of the relevant terms of the agreement, because each clause required an individual

signature, which meant that the student-athlete must specifically acknowledge the clause in question. The author also argued that student-athletes had access to compliance staff and the NCAA to help clarify any confusion. In addition, Johnson (2012) claimed that the Form 08-3a contract was not always substantively unconscionable in publicity issues, because student-athletes received considerable compensation in the form of scholarships, training, and other benefits in exchange for the nonexclusive use of their images, which was a fair deal. Therefore, Johnson (2012) concluded Form 08-3a was not unconscionable.

Theoretical Framework

A theoretical framework is the structure that holds or supports a theory of a research study (Swanson, 2013). The theoretical framework introduces and describes the theories which explain why the research problems exist. Theories are formulated to explain, predict, and understand phenomena. Two theoretical frameworks are used in this research.

Autonomous self-definition theory. McKenna (2005) offered a framework of autonomous self-definition to analyze right of publicity cases. Autonomous self-definition means an individual bears uniquely any costs attendant to the meaning of her identity, and she has an important interest in controlling uses of her identity that affect her ability to author that meaning (McKenna, 2005). Under this theory, unauthorized use of a person's identity interferes with her autonomy because the third party takes at least partial control over the meaning associated with this person.

Autonomous self-definition theory is used in this research to guide student-athletes right of publicity investigation. Under this theory, a student-athlete has an

important interest in controlling the use of his/her identities and bears the costs how his/her identity is used by the third party. Here, student-athletes should have a control of their publicity rights, but they lost the control due to the authorization they gave to the NCAA. Therefore, they cannot control where and how their publicity rights are used by the NCAA. For example, in the *O'Bannon* case, student-athletes had no control for whether or not their names, likenesses and images should be used in the college football and basketball video games and how their names, likenesses and images were used in the video games. Due to the loss of control over their publicity rights, student-athletes cannot be compensated for the use of their publicity rights by EA Sports. Therefore, in this research, autonomous self-definition theory guided the researcher to look for solutions to protect student-athletes' autonomy over the use of their publicity rights.

Critical theory. Critical theory guides this research's discussion in the imbalance position between the NCAA and the student-athletes, which also reflects the conflict between the law of right of publicity and the NCAA amateur regulation. The theory guided the research to look for the solution to diminish this imbalance power and properly compensate student-athletes for the use of their publicity rights. Critical theory focuses on the various ways social relationships and belief systems that are embedded in power and privilege (Fiske, 1993). A critical theory framework is concerned with questions of power, control, and epistemology as social constructions with benefits to some people but not to others (Muffoletto, 1993). A critical theory perspective is used in sport disciplines to challenge the 'equality' in society and show how sport can help perpetuate social class and inequalities (Henry & Theodoraki, 2000). Scholars used critical theory to investigate sports issues, including examining sport structures,

ideologies, practices privileges, and the asymmetrical power embedded in broader culture, politics, and economics (Alvesson & Willmott, 2003). Some scholars adopted critical theory to examine intercollegiate athletics as a 'quasi-professional' system which made money for the universities at the expense of the educational needs of the student-athletes (Rees & Miracle, 2000). Some scholars also used the critical theory to investigate the female athletes' reaction about how they were portrayed in the media (Kane, 2011).

The critical theory is used to investigate the student-athletes' right of publicity issue for the following reason. The conflict between the compensation for using a person's publicity rights and the restriction on compensating student-athletes for using their' publicity rights reflects the conflict between the commercialism of college sports and the amateurism of student-athletes' status. The reason behind this reflection is the asymmetrical power between the NCAA and the student-athletes. On one side, the NCAA has all the power and resources, and they create all the rules, including the compensation rule and the regulation on the use of student-athletes' publicity rights. On the other side, the student-athletes do not have power over the NCAA and they must follow the NCAA rules to keep their eligibility to play college sports. Because the NCAA has much more power over student-athletes, student-athletes felt that their ability to control their own publicity rights was unreasonably restrained (*O'Bannon*, 2009). Therefore, the student-athletes' publicity rights issue reflects the asymmetrical power in college sports, which fits in the scope of critical theory study. The theory was used in this research to find solutions to diminish the asymmetrical power between the NCAA and the student-athletes on the use of student-athletes' publicity rights.

Conclusion

The literature review demonstrated the lack of scholarly research conducted to define and interpret student-athletes right of publicity under amateur collegiate athletics context. With the continuous use of the student-athletes' names, likenesses and images in the NCAA related promotions, it requires college athletics administers to better understand the unique context of student-athletes' publicity rights and properly compensate student-athletes without violating the law of the right of publicity and the NCAA bylaws.

Chapter III: Methodology

The research methodology presented in this chapter guided the research process. This study combined a legal research study method and a qualitative study method. The following discussed the research design, participant selection, data generation techniques, the procedures for data analysis, and trustworthiness in qualitative research.

Research Design

The selection of an appropriate research methodology reflects the purpose of the study and the researcher needs (Creswell, 2009; Patton, 2003). The research methodology was guided by the alternative inquiry paradigm of constructivism to determine what was occurring within this particular phenomenon of interest (Lincoln & Guba, 2000). In the investigation of student-athletes' right of publicity issue, both a law review method and a qualitative interview method were used to collect data and generate theory. The law review was used to obtain a comprehensive understanding of the law of right of publicity. The qualitative interview was used to collect interviewees' opinions, evaluations and generate recommendations to the future student-athletes' right of publicity management. The interview questions were open-ended, which encouraged the interviewees to freely express their opinions. These two research methods provided the researcher valuable help to conduct a comprehensive study on student-athletes' right of publicity.

Legal research design. Legal research method refers to the method, technique or tool employed by a researcher for collecting and processing of data, establishing the relationship between the data and unknown fact, and to arrive at a conclusion. Generally speaking most of legal research is to review statues and cases, apply the legal rules to a particular situation and predict the outcome of this particular situation, therefore, the

purpose of legal research is to interpret and apply the law in particular contexts (Chynoweth, 2009). However, although the legal rules can be found within statutes and cases, they cannot, in themselves, provide a complete statement of the law in any given situation. The gap is usually closed via deductive legal reasoning, which involves application of legal rules and making comparison between common law and case fact. This legal research approach has been used in the law of right of publicity researches by many legal scholars (Bucher, 2012; Dennie, 2009; Freedman, 2003; Hanson & Yasser, 2008; Kaburakis, et.al, 2009; Marrs, 1996; Matzkin, 2001; Muller, 2004; Thompson, 1994; Warta, 2003).

Qualitative interview design. Atkinson and Silverman (1997) stated that interviews is a fundamental activity in the society, which is crucial to people's understanding of the world. A qualitative research approach was selected because this method are particularly useful for getting the insight information from an interviewee's experiences and the interviewer can pursue in-depth information around the topic (McNamara, 1999). The qualitative research in this study involved an exploratory process utilizing a semi-structure interview. The benefit of semi-structured interviews is that help define the areas to be explored, but also allows the interviewer or interviewee to diverge in order to pursue an idea or response in more detail (Britten, 1999). Here, the interviews were conducted with selected Athletics Directors, college sports scholars and commentators, and attorneys and legal scholars to explore their insightful opinions regarding the use of student-athletes publicity rights. The interview questions were created based on the elements of right of publicity and research questions.

Participants

A total of 24 individuals (including three for the pilot study) participated in the interviews. The interview participants consisted of seven Athletics Directors, six college sports scholars and commentators, and 11 attorneys and legal scholars, and were categorized into three groups: Athletics Director Group ("AD"), Scholars and Commentators Group ("SC") and Attorneys and Legal Scholars Group ("AS"). Each interview was preceded by an informational e-mail containing general information about the purpose of the study and expectations of the process. Interviews were conducted by phone and lasted approximately 30 minutes each. Conversations were recorded and notes were taken to ensure that the key interview guide questions were addressed during the interview. Each interview participant was thanked by a follow-up e-mail.

Participants selection. Given the purpose of this study was to understand student-athletes publicity rights in college sports setting and provide recommendations to the future student-athletes publicity right management, purposeful sampling was used to select interview participants. Purposeful sampling was useful because it manifested the phenomenon of interest and purposefully selecting participants helped to better understand and illuminate the phenomenon (Creswell, 2009; Patton, 2003). Purposeful sampling was used in this study to ensure the selected interviewees could provide meaningful information regarding the use of student-athletes' right of publicity. The population of AD group refers to the Athletics Directors who are form NCAA Division I member institutions which have men's basketball program, or football programs or both. The population of SC group refers to the researchers who conduct college sports related researches and the journalists who report college sports. The population of AS group

refers to attorneys and legal scholars who practice or research the law right of publicity or who are familiar with college sports right of publicity issues. The participants were selected in the nationwide. The sampling type, selection rationale, sample size and creditability of participant selection was presented in the following.

Typical case sampling. Typical cases are usually used by professionals to describe their work to laymen (Patton, 1990). Patton stated that the participants were selected with the cooperation of key informants, such as program staff or knowledgeable participants, who could help identify what was typical. Typical means combining or exhibiting the essential characteristics of a group (Merriam-Webster, n.d.). The sample in this study is considered as typical because the participants represent the common opinion of each interview group. For example, all the AD group interviewees are from NCAA Division I institutions. These institutions share the same interest in college sports because they compete at the same NCAA Division I level. As the representatives of the institutions, their opinions represented the typical opinions of their population.

Participants' selection rationale. For the purpose of this study, selection was based on the following criteria: (a) familiar with the use of student-athletes publicity rights issue, or/and (b) having knowledge about the law of right of publicity and its implications. These criteria helped refine the typical case sampling and reevaluate the selected interview participants in this study. Involvement of O'Bannon case was not a requirement of this study, because the case is an on-going case and the related parties of this case would not be available to discuss the case.

Potential participants were confirmed through referral and online search to determine whom best met the sampling criteria. Once the appropriate participants were

identified, potential participants were contacted via e-mail, were invited to participate in the study, and were provided information about the research. If there was no response within one week, the participant was contacted again. This contact method included providing the potential participant with general study information along with interview guidelines.

Student-athletes were not included in the interview for the following reason. The student-athletes who have direct interests in the student-athletes' right of publicity issue are O'Bannon case plaintiffs. Because the case is an on-going case, the class plaintiffs would not be able to participate in interviews. Although student-athletes were not included in the interview, their interests were represented in the athletics director's work, scholar's researches, commentators' comments and attorney's legal knowledge. Therefore, the outcome of the study would not be negative influenced.

Sample size. Qualitative studies often focus on a relatively small sample size to permit analysis and understanding of an occurrence in depth (Patton, 2003). The sample size was dependent upon what the researcher wanted to know, the purpose of the study, what was at stake and what could be done with the available time and resources (Patton, 2003). The ideal sample size for a qualitative study is further defined as continuing to interview until the responses become redundant, or until the saturation point has been reached and nothing new is being discovered (DePaulo, 2000). For this research, six to seven participants were interviewed within each interview group. A total of 24 interviewees were interviewed in this study, including three pilot study interviewees. The interview process confirmed the sample size was reasonable, because interviewees from each interviewee group usually provided similar and consistent answers. For example, the

AD group interviewees gave almost the same answers to almost all the interview questions. This result satisfied with theoretical saturation of data which means more data will not lead to more information related to the research questions in the data analysis (Bowen, 2008).

Three participants from each of the three groups were initially interviewed, and data obtained from these nine interviewees were summarized into the following categories: (a) current concerns in using student-athletes publicity rights, (b) evaluation of existing management methods, and (c) new practical recommendations for future student-athletes publicity rights management. Subsequently, 15 more interviews were conducted to add in-depth information to each of the categories. After 24 interviewees were conducted, the researcher concluded that the saturation point was reached with nothing new being discovered (DePaulo, 2000) and discontinued the interview.

Credibility of participants selection. Interview participants were chosen to be consistent with focus of the research study. Encouraging and solidifying participation was critical to the success of the research. The reason to have the AD group because these Athletics Directors are the people who makes decisions on the administrative matters, rules and polices (NCAA, 2015a). The reason to have the SC group because they could provide objective opinions and they usually do not have conflict of interest in college sports, therefore, their opinion could be a good addition to the AD group. The reason to have the AS group because their ample legal knowledge and legal practice experience can provide valuable legal opinions on the use of student-athletes right of publicity. In addition, the selected interviewees from above populations represented the common opinions of each larger interview group. Here, athletics directors shared common

interests in their larger group, scholars and commentators shared similarly objective perspectives in their research and reports, and attorneys and legal scholars analyzed the issue based on the same legal standards and legal resources.

From interviewer perspective, credibility was established through initial contact with potential participants and appropriate follow-up in a timely and professional manner. Here, the researcher informed the participants that the study was part of a University of Minnesota study and approved by the Internal Review Board (IRB) in the contact email, which helped build the credibility and stressed the importance of participation. The IRB prove is presented in Appendix II. Besides, sharing with participants the role the interviewee played in the researcher's personal doctoral program emphasized how important their commitment was for the research completion.

Data Generation and Interview Guide

In-depth, semi-structured, open-ended phone interviews with Athletics Directors, college sports scholars and commentators, and attorneys and legal scholars in nationwide provided descriptive information that enriched the data. The purpose of a semi-structured interview guide was to provide the researcher with a sequence of questions that seek in-depth perceptions of current and future student-athletes publicity rights management. The semi-structured format offered the flexibility to explore multiple perspectives while still obtaining information of specific topics (Patton, 2003). Possible follow up questions were included in the interview guide to remind the researcher to ask follow-up questions to gather further information or ask for clarification.

The interview guide was comprised of five to six questions which were designed for all the interviewees or certain groups of interviewees. For example, legal questions

were asked only to the AS group. The rationale behind the construction of interview questions was addressed through the guide described next. The interview questions and interview guide see Appendix III. In generally, the elements of the law of right of publicity guided the creation of interview questions. The elements are: (a) a person's identities, (b) used by others, (c) for commercial purposes, (d) without consent or proper compensation. The questions about whether student-athletes should be paid for using their names and likeness for commercial purposes were used to explore (a), (b), and (c) elements. The questions about academic scholarship and "trust fund" were to investigate (d) elements. The interview questions about the potential influence of the student-athletes' publicity issues on NCAA college sports and solutions to this issues were created to explore new solutions/recommendations on element (d). In an effort to prompt further discussion on the current and future management, several additional questions were included in the interview guide pertaining to whether the student-athletes should be considered as the university's employees, whether the Big Five conferences (Big Ten, Big 12, Atlantic Coast Conference, Pac-12 and Southeastern Conference) would separate from the NCAA. These additional questions were asked to explore potential compensation model for the use of student-athletes publicity rights in the future.

Pilot study. A pilot study of interview questions is conducted to ensure adequacy of the interview guide and provide direction for necessary revision of the interview questions (Patton, 2003). The pilot study is also to evaluate the interview process, including the interviewer's ability to build rapport, ask follow-up questions, control the interview staying on the topic, and assess the length of the interview and other possible situations that might happen during the interview (Tashakkori & Teddlie, 1998). In this

study, three interviewees were selected for the pilot study. Each interviewee represented one of three interview participation groups. The pilot interviews were recorded both through handwritten notes and with an audio recorder. The data gathered for the three pilot study participants were organized, reviewed, and analyzed. The pilot study presented the opportunity to evaluate the interview process. Evaluation of the guide included an assessment of the interviewer's ability to draw out a range of responses and interpret the responses, assess the length of the interview, and identify ambiguous questions. Upon completion of the pilot interview evaluating process, all criteria were deemed satisfactory and no changes were made to the interview guide.

Data Collection Procedures

Legal data. There are four primary legal recourses: common law, also known as case law, statutes, constitutions, and administrative law (Spengler, Anderson, Connaughton & Baker III, 2008). The primary resource of the right of publicity are common law and state statutes. There are thirty-one states that have right of publicity statutes, or common law or both. The state statutes and common law were reviewed, analyzed and summarized in this study. The purpose of collecting legal data was to establish the legal basis, understand the elements and application of the law to various situations. The legal data is important because American legal tradition is built on precedent. This means that a court to look to past decisions and statutes for guidance on how to decide a case before it (Gale, 1997). Therefore, the legal data provided predictability, stability, fairness, and efficiency in the law.

Interview data. Qualitative researchers rely quite extensively on in-depth interviewing (Marshall & Rossman, 2006). The procedure of collecting interview data

includes: planning, which includes identifying an interviewees and determining sample size; developing, which includes developing an interview guide, such as how to build rapport, how to record interviews and preparing following-up questions; and conducting interviews (Corbin & Strauss, 2008; Creswell, 2009). In this research, a list of potential interviewees was drafted, and interview invitations or requests were sent to the potential interviewees. Then, the interview lists were decided according to the invitation feedback. The interview date and time were established at the interviewee's convenience. Procedures involved conducting and tape recording with a total of 24 participants over phone. The sample size was within the guidelines recommended by Patton (2003) and DePaulo (2000) that allowed the researcher to gather data until no new information was being discovered. Each interview was approximately 30 minutes in length.

Phone interviews were conducted as an alternative to face-to-face interviews to enable the researcher to expand data collection locations across the United States (Patton, 2003). Additionally, phone interviews were used due to logistical and financial constraints (Burke & Miller, 2001; Burnard, 1994). Although the interviewer could not physically see the interviewee, there were enough social cues such as voice inflection and intonation available to create a rapport with each participant (Uecker-Mercado & Walker, 2011). Data recording utilized an audio recorder and handwritten key points for post-interview transcription. The phone interview process concluded with discussing the option of following-up with the participant at a later time if necessary. Upon completion of each individual interview, gratitude was expressed through an e-mail thank you to personally thank each participant (Creswell, 2009; Marshall & Rossman, 2011). Each interview recording was transcribed and reviewed by the researcher repeatedly to ensure

accuracy. A final copy of the transcript was sent via e-mail to each participant for checking. After reviewing their transcripts, the study participants shared any corrections or concerns. The recommended corrections, if any, were made to the data before the data analysis processed.

Data Analysis

The purpose of legal data analysis was to understand the law and its application to specific scenarios. The purpose of qualitative data analysis was to identify common and reoccurring themes. Consistent with a constructive approach, the qualitative data analysis includes collecting, coding and analyzing descriptive information (Creswell, 2009).

Data preparation and organization. Creswell (2009) stated qualitative research often relies on multiple sources of information such as interviews and documents rather than relying on a single data source. This study included two types of data: legal data and interview data.

Preparation of legal data. First, the states which have right of publicity statutes, or common law or both were identified. Second, each state' statutes and common law were reviewed to summarize the law, the key elements and its implications to defined situations or cases. Third, the legal data was categorized based on the states, legal recourse, and key elements.

Preparation of interview data. Information was gathered through phone interviews. Then the data preparation process began with organizing the data. To achieve this, notes taken during the interview process were reviewed to ensure all questions had been addressed and relevant topics had been covered during the interview process. The recorded interviews were transcribed into a word document after the interview process

was concluded. These handwritten and transcribed notes were organized with a contact summary sheet and securely stored for each study participant.

Data analysis method and approach. During this phase, the researcher must make "sense" out of what was uncovered and compile the data into sections or groups of information. Every methodology approaches the analysis of data in a different way. Legal deductive analysis and qualitative inductive analysis were combined in this study. The interesting thing is that deductive approach and inductive approach are two opposite analysis approaches. However, the use of two opposite approaches in this study did not conflict but actually was helpful. Legal deductive approach guided the researcher to create interview questions. Qualitative inductive approach helped the researcher generate the themes and theories from the interview data.

Deductive reasoning approach to analyze legal data. Deductive reasoning (top-down logic) generally starts with one or more general statements or premises to reach a logical conclusion and it is fundamental to legal analysis (Schmedemann & Kunz, 2014). Under deductive reasoning, if the premises are true, the conclusion must be valid. It entails using a legal rule to predict the outcome of a client's situation. In legal analysis, this process builds on a careful analysis of the rule. Once the rule's elements are discerned, the framework is developed to analyze the client's situation. The next step is to match each element to the relevant facts in the client's situation.

Here, deductive reasoning was used to apply the law of right of publicity to student-athletes situation and to create interview questions. Four elements of the right of publicity were used to decide whether there was an infringement use or not. Based on these four elements, specific interview questions regarding the use of student-athletes

publicity rights were created to evaluate the soundness of current student-athletes publicity rights management and collect the interviewees' solutions.

Grounded theory to analyze interview data. The goal of qualitative data is to identify patterns and uncover conceptual relationships (Corbin & Strauss, 2008). The connections discovered in the data could help the researcher to generate a new theory. A grounded theory is used to establish such connections. Grounded theory is an inductive research approach, and this inductively systematic method is referred to as "bottom-up" from observations to a general theory or explanation (Suter, 2012). The purpose of grounded theory is to create a theory based on the common themes which are grounded in the data (Adams, Khan, Raeside & White, 2007; Charmaz & Belgrave, 2012). This requires the researcher to summarize and categorize the themes through continuous comparison and review of data. The theoretical constructs would be generated from reviewing the data, sorting the concepts and themes generated from the data into different categories, comparing the themes and categories, and developing the theories (Charmaz, 2006). The systematic procedure of the data analysis was to read the transcript, highlight the interviewee's key opinions, take margin notes, and summarize and compare the key opinions to generate themes and theories. Therefore, the researcher reaches conclusions through transcripts, codes, categories, comparison and interpretation (Suter, 2012).

Grounded theory was used in this research to generate the recommendations to the future management of student-athletes publicity rights for the following reason. Grounded theory involves the use of an intensive, open-ended, and iterative process that simultaneously involves data collection, coding (data analysis), and memo-writing (theory building) (Groat & Wang, 2002).

Grounded theory is primarily used as a quantitative research method to analyze the content of media text to enable similar results to be established across a group of text coders (Priest, Roberts & Woods, 2002). Kracauer (1952) advocated a qualitative approach to content analysis, in which meanings and insights can be derived from the text more holistically. Here, grounded theory helped the researcher understand the current situations of student-athletes right of publicity, interpret the student-athletes' right of publicity and collect insights from the open-ended questions to the AD group, the SC group, and the AS groups. The themes were generated and categorized from discussion about compensating student-athletes, evaluating on the soundness of current student-athletes' right of publicity management, and proposed solutions to resolve the problem. Similar ideas or phrases were repeatedly mentioned by the interviewees in their comments, evaluations and discussions, which suggested the common concepts and recommendations were embedded in the interview data. By analyzing, comparing and categorizing interview data, the researcher could generate viable and practical recommendations to the future student-athletes' right of publicity management.

Reason for not using computer based software. Computer based software was not used to assist coding process because it might interfere with the results of the research (Gilbert, 2002). According to this study, researchers had a difficult time making the transition from using paper and easily lost their focus due to the need to code the gathered data in the software. Besides, computer software may not reduce bias or improve reliability on its own (Lewins, & Silver, 2007). This study does not include large amount

interview data, therefore, it is not difficult for researcher to identify key opinions from the interview data and it would help reduce bias and improve reliability.

Data Analysis Process. The following is the discussion of how to use legal analysis and grounded theory to analyze common law, state statutes and interview data.

Legal data analysis. The legal analysis is the heart of the legal problem solving process. Legal analysis concerns what legal rules govern a specific factual situation and how the rules apply to these facts. If the pattern fits, then the rule applies and the consequences of the rule pertain. This process is also known as IRAC. IRAC is an acronym that generally stands for: Issue, Rule, Analysis, and Conclusion. It functions as a methodology for legal analysis. The IRAC commences with a statement of the issues or legal questions at hand. The Rule section is the statement of the rules pertinent in deciding the issue stated. Rules usually derive from court case precedent and statute. The Analysis section applies the rules developed in the rules section to the specific facts of the issue at hand. It is important in this section to apply the rules to the fact of the case and explain or argue why a particular rule applies or does not apply in the case presented. The Conclusion section answers the question presented in the issue section of the IRAC. This section restates the issue and provides the final answer.

In this study, the Issues here were whether student-athletes had a right of publicity and whether student-athletes still retained their publicity rights after they signed the NCAA agreements and what publicity rights would they retain. The Rule here were the law of right of publicity and contract law. The Analysis was to apply the common law and statutory right of publicity and contract rules to college student-athletes scenarios.

The Conclusion here was the definition and interpretation of the student-athletes publicity rights in intercollegiate sports context.

***Interview data analysis*.** The qualitative data analysis process involves reading and re-reading all the data to gain a general sense of the information and reflect on its overall meaning with the intent of making sense out of text and image data (Creswell, 2009). The goal of the qualitative data analysis is to describe, explain, and/or interpret qualitative patterns in representative forms. Here, information collected from each participant was examined based on their position, experience and knowledge background; the text was segmented with each segment individually labeled, or coded, to reflect the general idea of the segment.

The coding process requires the researcher to read through the data carefully multiple times and make notes as ideas arose to generate common themes through the constant comparative method to decide what codes fit the concepts suggested by the data (Glaser & Strauss, 1967; Strauss & Corbin, 1990). Data labels were analyzed to form categories and then broad patterns were generate from the categories. The themes or codes were consistent phrases, expressions, or ideas that were common among research participants (Kvale, 2007). Each code was constantly compared to all other codes to identify similarities, differences, and general patterns. Here, emerging coding process was used to develop themes of student-athletes publicity right management for further exploration. This step was guided by the grounded theory. The confirmed transcriptions were segmented by groups and each segment labeled as Athletics Directors (“AS”), Scholars and Commentators (“SC”), and Attorneys and Legal Scholars (“AS”). The analysis process involved identifying similar ideas or phrases, comparing and contrasting

the labels for each interviewee. The themes were generated to evaluate the current student-athletes right of publicity practices and provide new recommendations to the future student-athletes publicity rights management. Generated themes were grouped into similar categories based on repeated and similar responses/answers. For example, the common theme of "increase full cost of attendance" was generated from 13 codes, such as monetary compensation, stipends, college living expenses and living gap. Interviewee quotes were added to further explain each theme.

Researcher's Role and Ethical Considerations

Researcher's role. The researcher's role is critical in quality data collection and analysis within a qualitative method (Fink, 2000). The researcher is considered as an instrument of data collection in qualitative research (Christians, 2005). This means the data are mediated through the researcher's interpretation (Simon, 2011).

The role of the researcher in this study was from an outside view, more as an objective viewer. The researcher's position was to identify the issues, analyze the fact and interpret and clarify the issue based on the law as an objective viewer.

In data collection, the role of researcher mainly reflected on leading the interviewees to reveal in-depth information related to the research questions. The researcher was well prepared and continuously practiced to gain useful and accurate data. In the interview process, the researcher acted professionally in asking question, listening to answers and asking follow-up questions and clarifications.

In this study, the role of researcher also reflected in the interviewee selection, communication procedures, and interview processes. The interview questions encouraged the interviewees to share in-side and in-depth information about the NCAA student-

athletes' right of publicity. Therefore, effective communication was made through including initial contact, follow up, conducting the interview, and post-interview communication.

Ethical consideration. The researcher should practice proper ethics in conducting the study, analyzing the narratives and reporting the outcomes. Ethical considerations include obtaining consent from interviewees prior to the interview, keeping interviewee's personal information confidential, following Institutional Review Board requirements, acting professionally during the interview process (Christians, 2005). The researcher notified the interviewees of the purpose of the research project, study procedures, participant expectations and the role of the researcher. Besides, the researcher also informed interviewees the voluntary nature of the study, the right to withdraw from the study at any time, the policy of confidentiality and the opportunity to review the interview notes if requested (Creswell, 2009; Marshall & Rossman, 2011).

Trustworthiness

The assumptions of establishing trustworthiness for qualitative research include: credibility, transferability, dependability, and conformability (Lincoln & Guba, 1985). Creswell (2009) stated trustworthiness is essential to ensure qualitative research's reliability.

Credibility. Credibility refers to the confidence one can have in the truth of the findings and can be established through various methods such as member checking and negative case analysis (Bowen, 2005). In this study, the following was used to increase the credibility: interview questions were tested through a pilot study; interviewees were selected on purpose of who can provide the accurate data for the research; multiple data

collections were employed to collect more valid and reliable data; each interview was transcribed and reviewed, and the participants had the opportunity to examine the transcription for accuracy and to verify the credibility; and a reexamination process was used to verification the analysis.

Transferability. Transferability indicated the qualitative researcher should provide detailed description which future researchers could apply to future research. The procedure to enhance transferability was by doing a thorough job of describing the research context and the assumptions that were central to the research (Trochim, 2006). One of the goals of this study was to provide recommendations on how to manage student-athletes' right of publicity in the future. The process and results provided details for future researchers to conduct research on a similar topic within a similar context.

Dependability and confirmability. Patton (2003) stated dependability meant the findings of the research could be pertained to be stable over time. Bowen (2005) stated confirmability meant the data needed to be internally coherent with the findings, interpretations and recommendations. It was aimed to generate accurate recommendations from the data in the research that could stand the examination by others and future researchers. Here, all relevant records were maintained in a secure location.

Chapter IV: Findings

This study was aimed at interpreting student-athletes' publicity rights, investigating what publicity rights student-athletes still retain after they signed the agreement and authorized the NCAA to use their names and likenesses, discussing whether the NCAA violated student-athletes' publicity rights, and providing recommendations to future student-athletes' publicity rights management. The results of this study are presented in this chapter. The first section presents a summary of the law of right of publicity from common law and state statutes review. The second section presents results from interviews to Athletics Directors, college sports scholars and commentators, and attorneys and legal scholars. The third section provides answers to three research questions.

Findings of the Law of Right of Publicity

Summary of the law of right of publicity. The legal term "right of publicity" was first acknowledged in this name by Judge Jerome Frank from New York Second Circuit Courts of Appeals in 1953 (*Haelan*, 1953). Right of publicity is considered as a type of property right. The purpose of right of publicity is to prevent the use of a person's identities for commercial reasons without this person's permission (McCarthy, 2012). A person has the right to control commercial use of his/her own identities.

The primary resource of the right of publicity are state statutes or common law or both. According to the law of right of publicity, if a person's name, likeness or any other identifiable character was used for commercial reasons without consent, this person could ask for damages against the infringer. The finding of right of publicity statutes and common law provided the legal basis to discuss the use of student-athletes names and

likenesses by the NCAA and the third parties on behalf in NCAA championships, activities and events.

Thirty-one states recognize the right of publicity under state statutes, common law or both. Nineteen states that have right of publicity statutes are: California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. Ten states out of nineteen states use privacy statutes to cover the right of publicity protection: Indiana, Massachusetts, Nebraska, Nevada, New York, Oklahoma, Rhode Island, Tennessee, Virginia, and Washington. These states modeled the New York privacy statute. Twenty-one states recognize common law right of publicity: Alabama, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Utah, West Virginia, and Wisconsin. Eight states have both right of publicity statutes and common law: California, Florida, Illinois, Kentucky, Ohio, Pennsylvania, Texas, and Wisconsin. The rest nineteen out of fifty states in the country do not have state statues, common law or both, however, these states have not explicitly rejected the right of publicity interest (Anson, 2015). The law of right of publicity is summarized in Table 1.

Table 1

Right of Publicity State Statute and Common Law Summary

No	State	Protected Attribute	Common Law	Statute	Damages	Media Exemptions	Statute of Limitation
1	Alabama		Allison, 1998; Minnifield, 2004				
2	Arizona		Pooley, 2000; Moore, 2012				
3.	California	N, L, P, V	Moteschenbacher,1974; Clark, 1983	Cal. Civ. Code Section 3344	D, P, A Also provides for greater of $750 minimum or actual damages and profits	YES	2-year
4	Connecticut		Bi-Rite, 1985; Jim Hanson, 1994				3-year
5.	Florida	N, L, P	Zim, 1978; Genesis, 1983	Fla. Stat. Section 540.08	I, D, P Damages may include a reasonable royalty	YES	4-year
6	Georgia		Cabaniss, 1966; Martin Luther King Jr., 1982				2-year
7	Hawaii		Fergerstrom, 1968; Chapman, 2007				
8.	Illinois	N, L, P, V	Stone, 1981; Winterland, 1981	765 ILCS 1075	I, D, P	YES	1-year
9.	Indiana	N, L, P, V		Section 32-36-1 to 32-36-20 (privacy statute)	I, D, P, A Profits; minimum damages of $1,000 and for impoundment and destruction orders.	YES	

Table 1

No	State	Protected Attribute	Common Law	Statute	Damages	Media Exemptions	Statute of Limitation
10.	Kentucky	N, L	Cheatham, 1995	Kentucky Stat Section 391.170	--	No	
11.	Massachusetts	N, L		MASS GLC 214 (privacy statute)	I, D, 3X	No	
12	Michigan		Carson, 1983; Janda, 1991				1-year
13	Minnesota		Uhlaender, 1970; McFarland, 1991				
14	Missouri		Munden, 1911; Cepeda, 1969				
15.	Nebraska	N, L		Neb Code. 20-201 to 20-211 and 25-840.01 (privacy statute)	-- Merely says a person has a legal remedy	YES Incorporates all Constitutional defenses	1-year
16.	Nevada	N, L, P, V		Nev. Rev. Stat. §§ 597.770 to 597.810 (privacy statute)	I, D, P Also provides for minimum damages of $750	YES	
17	New Hampshire		Remsburg, 2003; Doe, 2008				
18	New Jersey		Palmer, 1967; Presley's Estate, 1981				6-year

Table 1

No	State	Protected Attribute	Common Law	Statute	Damages	Media Exemptions	Statute of Limitation
19.	New York	N, L, V		N.Y. CVR. LAW §50 & § 51 (privacy statute)	I, D, P	No	1-year
20.	Ohio	N, L, P, V	Zacchini, 1977;Seifer, 2002	Ohio Stat. Chapter 2741	I, D, P, 3X, A	YES	
21.	Oklahoma	N, L, P, V		21 Okl. St. Ann. Section 839.1 to 839.3 (privacy statute)	I, D, P, A	YES	2-year
22.	Pennsylvania	N, L, P, V	Hogan, 1957; Seale, 1996	Penn. Code. § 8316	I, D	YES	
23.	Rhode Island	N, L		Chapter 9-1-28 (privacy statute)	I, D, 3X	No	
24	South Carolina		Gignilliat, 2009; Insurance Products Marketing, Inc., 2012				
25.	Tennessee	N, L, P		Title 47 Chapter 25 Trade Practices (privacy statute)	I, D Includes defendant's profits and impounding and destruction orders	YES	

Table 1

No	State	Protected Attribute	Common Law	Statute	Damages	Media Exemptions	Statute of Limitation
26.	Texas	N, L, P, V	Kimbrough, 1975; National Bank of Commerce, 1980	Title 4. Chapter 26.	D, P, A Also provides for greater if $2,500 minimum or actual damages and so provides for profits	YES	2-year
27.	Utah	N, L		Utah Section 45-3	I, D, P, A Statutory liability only if there is a false implication of approval or endorsement	No	
28.	Virginia	N, L		Sec. 8.01-40 & 18.2-216.1. (privacy statute)	I, D, P	No	5-year
29.	Washington	N, L, P, V		Wash Sec. 63.60.010 - 080 (privacy statute)	I, D, P	YES	
30	West Virginia		Crump, 1984;Curran, 2008				1-year
31.	Wisconsin	N, L	Hirsch, 1979	Wisc. Code995.50 (privacy statute)	I, D, A	YES Incorporates all media defenses	

Among both statutes and common law right of publicity, names and likenesses are most commonly protected attributes. Pictures, or voices, or both are also protected in California, Florida, Illinois, Indiana, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas and Washington. As to damage award, the common damages include injunction, damages, punitive damages and reasonable attorney's fees. Pennsylvania and Tennessee do not grant punitive damages, and Ohio and Rode Island award triple damages. As to media exemption, New York, Rode Island, Utah and Virginia do not have media exemptions. Additionally, the common statute of limitations are one year or two years, however, Connecticut has three-year limitation, Florida has four-year limitation, Virginia has five-year limitation, and New Jersey has six-year limitation.

Implications of right of publicity. A person's identities could be used in the many scenarios, such as products, advertisements, media, and publications. The purpose of use and the context of use distinguish the infringed use and non-infringing use. The implications of the law of right of publicity are presented in the following.

***Use on products*.** One common use of a person's publicity rights are on products, including memorabilia, apparels, video games, and posters. The following presents the implications of right of publicity on products in details.

Memorabilia. Whether a use of person's identities is an infringement or not depends on the place and context of such use. When a person's name used in a phrase "Express Your Support of (the person's name)" without his/her permission, it is not an infringement use. Such use is protected under the First Amendment because this formed a free expression which is protected under the Frist Amendment free speech clause. The line between violation or not is whether it is a "commercial use" or "media" use. If the

purpose of the use is to sell products, the unpermitted use was illegal. For example, in *Lugosi*, the plaintiff's right of publicity was violated when her name and likeness were used to sell shirts, cards, games, kites and other products (*Lugosi v. Universal Pictures,* 1979). If the purpose of the use is for communication purpose, the use is protected as a medium of free expression. For example in *Valentino*, the name and likeness of Rudolph Valentino was used in a television fictionalized biography of Valentino's life was not an infringement use (*Guglielmi v. Spelling-Goldberg Productions*, 1979).

T-shirts and wearing apparel sale exceptions. The sale message is considered as a form of expressive free speech by the court in the *Ayres* case (*Ayres v. City of Chicago*, 1997). In this case, the T-shirts that were sold carry a widespread written social advocacy message and it became a medium of expression which was protected under the First Amendment (*Ayres*, 2007). The sale did not make the protection go away. Also in the *Frazier* case, the use of names on T-shirts bearing an anti-war political message received full free speech protection (*Frazier v. Boomsma*, 2007).

Video games. The courts have held that a video game was an "expressive work" entitled to full free speech protection (*Dillinger, LLC v. Elec. Arts, Inc.*, 2011; *Kirby*, 2006; *Romantics v. Activision Pub., Inc.*, 2008). Although the courts have ruled video games are expressive work, the rulings does not mean all the avatars in the video games are automatically immune from right of publicity liability. For example, in the *No Doubt* (2011) case, the court refused to dismiss a right of publicity accusation because the avatar was not "transformative" enough

to be something creative. Transformative use requires to transfer a description of a person's identities into a new creation/expression, then such new expression would be protected under the First Amendment.

Fantasy football and sports video games. The nature of fantasy sports games are fantasy participants create a team that competes against other fantasy teams based on the statistics generated by real world individual players or teams of a professional sport. Therefore, fantasy teams compete based on individual professional sports players' real-life performance in numerous statistical categories. The companies that operate the fantasy leagues must use the names and identities of real world professional athletes. This creates the potential for an infringement of the right of publicity of the professional athletes, since their identities must be used in fantasy games.

Baseball. A famous case regarding this matter is the *C.B.C. Distribution & Marketing* case. In the *C.B.C* (2007) case, the Eight Circuit held that the use of players' statistics was not an infringement because the athletic performance of individual professional players was a "substantial public interest" to the public. Besides, sports statistics about an individual baseball player's performance were available in traditional media such as newspapers and sports results websites, so such information should also be available in pay-to-play fantasy sports web-site without compensation to the players.

Football. In the *CBA Interactive* case, the court held that CBA Interactive, an operator of a fantasy sports website had no obligation to obtain license from the licensing agent for the NFL players (*CBA Interactive*, 2009) because the players' status was public information. However, in *Davis*, the federal court in California refused to dismiss a case brought by former pro-football players against the use of their identities in the very

popular Madden NFL football video game (*Davis v. Electronics Arts*, 2012). The court reasoned that the gamer decided which game to play, so when a gamer selected one of historic teams, the only historical aspect of the game that ensued were plaintiffs' likeness, which could violate the player's publicity rights.

Poster. In *Elvis Presley*, the New York court rejected the defense argument that the poster was a "memorial poster" commemorating a "newsworthy event," when the defendant enlarged a photograph of Elvis Parsley then made it into posters and sold them in commercial quantities (*Factors Etc., Inc. v. Pro Arts, Inc.*, 1978). Also, in *Titan Sports*, the Second Circuit Court of Appeals held that the wrestler's publicity rights were violated when posters of this famous wrestler were sold as commercial products in a magazine (*Titan Sports, Inc., v. Comics World Corp.*, 1989).

Calendars. A calendar is also a traditional medium for conveying commercial advertising although presenting editorial or communicative information. In *Beverley*, the New York Court of Appeals found the use of the plaintiff's likeness on a calendar was an advertisement to promote the business because the defendant's business information showed on each page of the calendar (*Beverley v. Choices Women's Med. Ctr.*, 1988). Besides, the calendars were widely distributed which proved the calendar was an advertising material, therefore, it violated the plaintiff's publicity rights.

Media profit. Usually, a court examined the content of the media use to determine it is an immune was use or not. In California, the inclusion of stories or photos of celebrities in a magazine in order to increase circulation was generally

immune under the First Amendment (*Dworkin v. Hustler Magazine Inc.*, 1989; *Hoffman v. Capital Cities/ABC, Inc.*, 2001)." Similarly, the New York Court of Appeals held that a magazine included a newsworthy story to attract readers and hence increased sales and profits was not advertising use (*Stephano v. News Group Publications, Inc.*, 1984). Therefore, a news or an entertainment program is sponsored and interspersed with commercials does not turn the whole program into an advertising use, if there is no connection between the performance and the commercial (*Delan by Delan v. CBS, Inc.*, 1983; *Geary v. Goldstein*, 1996).

Use in a predominantly commercial setting. If the main purpose of use of a person's identity without permission is for commercial purposes, then it is likely to infringe this person's publicity rights.

The Ninth Circuit in California overruled the defendant's argument that the use of Abdul-Jabbar's name and record in a General Motors' TV commercial was newsworthy (*Abdul-Jabbar*, 1996), because the use of Abdul-Jabbar's name was an advertisement for an automobile. Also in *Shamsky*, the New York court held that an imprinted photo of the team members of the famous 1969 New York Mets World Series champions' baseball team on jerseys was a violation because the photo was to sell jerseys (*Shamsky v. Garan*, 1995). In *Facenda*, a football narrator sued the NFL claiming his publicity right was violated the by the NFL for using his voice in a film without his consent (*Facenda v. N.F.L. Films*, 2007). The Third Circuit ruled in favor of the football narrator because the film was not a documentary on professional football, but was a commercial advertisement for the football video game.

Transfer, assign and license. In many courts' decisions across the United States, the right of publicity is held as a property right (*Cairns v. Franklin Mint Co.*, 1998; *Joplin Enterprises v. Allen*, 1992; *Waits*, 1992). Therefore, like other property rights, the right of publicity may be transferred, waived, assigned or licensed. For example, in the *Hanna* (1935) case, the Fifth Circuit held that professional baseball players could sign a consent or waiver which prevented them from objecting to the manufacturer's use of their names on baseball bats.

However, an assignment and a license are different. An assignment of title implies the sale of all legal and equitable title to the assignee, which means all the assignor's rights in the property sold and passed to the assignee with title (*Presley's Estate*, 1981). A license is permission to use within a defined time, context, market line or territory and the licensor keeps the title (*In re D.B. Kaplan Delicatessen*, 1985).

Assignment. In the *Haelen* (1953) case, Judge Frank specifically linked the right of publicity to the ability of a person to grant the exclusive privilege of publishing his picture. The right of publicity need not be assigned for any and all use. It could be assigned limited to certain defined uses, such as the use of identity in a specific photograph. For example, a model consent agreement may not only consent to use, but also specifically assign the model's right of publicity to use in specific photo or photos.

The assignor would retain some legal or equitable interest in the activities of the assignee when the assignor would receive payment in the form of continuing royalty from the assignee (McCarthy, 2013). Therefore, an assignor

has the right to monitor the assignee's activities on some degree and an assignor usually is not losing control over his own identity.

It is reasonable for some people, especially celebrities, to assign their publicity for commercial gain. Such as, Elvis Presley assigned his right of publicity to Boxcar Enterprises and Boxcar licensed other companies to use the Presley identity (*Factors Etc.*, 1978). The famous music group, the Beatles, formed a British company, Apple Corps Ltd., which had the right to exploit all of the performances by the Beatles as a group via assignment (*Apple Corps Ltd. v. Adirondack Group*, 1983).

License. A "license" is only a permission to use the property interests within a defined time, context, market line or territory (McCarthy, 2013). Besides, in the license, title remains within the licensor (*Presley's Estate*, 1981), which means licensor would possess any increased publicity value in the licensor's persona created by the licensed use.

There are two types of license, nonexclusive license and exclusive license. A nonexclusive license is merely permission to use the licensor's identity within the area and scope defined by the license (*Johnson v. Jones*, 1998). The licensor makes no promise, express or implied, not to license to other parties within that same area and scope. On the other hand, an exclusive license is a license with a defined scope which contains an explicit or implicit promise by the licensor that it will not license to others within the scope of license (*I.A.E., Inc. v. Shaver*, 1996). The licensee's rights of use are exclusive within the time, context of use, product line and territory defined in the license. The licensor's obligation is not to do anything, such as the granting of other licenses, which will impinge upon the exclusive licensee's use within the scope of its license.

Some states require a consent or license should be in writing, such as New York, Massachusetts, Ohio, Rhode Island, Utah, Virginia and Wisconsin (*Effects Associates, Inc. v. Cohen*, 1990). Some other states permit either oral or written consents/licenses, such as California, Oklahoma, Tennessee, Florida, and Nebraska (*Pinkham v. Sara Lee Corp.*, 1992). The Second Restatement of Torts (1979) explained that unless it might have become irrevocable by contract or otherwise, or except as its terms might include, expressly or by implication, consent was terminated when the user knew or had reason to know that the other was no longer willing to permit the particular use.

Some states clearly held that a licensee could not use the license outside the defined scope of the license. Otherwise it was not only constituted breach of the license contract, but also gave rise to an action by the licensor for invasion of privacy or infringement of the right of publicity (California, Connecticut, Florida, Georgia, Illinois, Massachusetts, New York, Ohio, and Pennsylvania). Therefore, a continued commercial use of identity beyond the expiration date of a license would be both a breach of contract and a violation of the New York publicity and privacy statute (*Welch v. Mr. Christmas Inc.*, 1982).

Scope of the consent. It is important to determine the scope of the consent or waiver of the privacy act. The scope of consent is a matter of degree or extent of the consent granted, which depends on the facts and circumstances of the case (*Lewis v. LeGrow*, 2003). For example, a person could give consent to use only his or her name, or likeness, or voice, or the combination of all above. A person

could give consent to use his or her identities for certain purposes or within certain geographic areas.

Scope of License. A license to use the identity of a person can be limited in scope in any way permitted by general law. The parties to a publicity license are free to agree to limit the scope of the license in any way they deem fit or include any legal conditions they choose (Lee, 2015). While the scope of informal and gratuitous licenses is narrowly construed, professionally negotiated licenses are interpreted according to their express language. Common limitations on the scope of licenses are duration, context of use, product line or territory, or some, none or all of these. The parties are free to agree upon any restrictions or conditions they desire in the license, like in the *Allen* (1985) case, the New York Law provides that any express limits on the written consent will be enforceable. Sometimes, a contract could be both a waiver and a grant of rights. In the *Marder* (2006) case, a person waived all claims against the studio and granted to this studio the right to use the story of his life and experiences in a factual or fictional manner in a motion picture. The Ninth Circuit held that it was proper for a movie studio to do so.

Unambiguous and ambiguous license or consent. The language of a license should be unambiguous. If a written license is unambiguous, the courts will refuse to admit parole evidence or evidence to vary the clear terms of a restriction (*Sharman v. C. Schmidt & Sons, Inc.*, 1963). In the *Sharman* case, the plaintiff, a professional basketball player, was modeling outside his basketball career. He permitted use of his photograph for some then-unknown possible advertising use in a license. In the release, it said the photograph to be "distorted in character or form and to be used for art, advertising, trade or any other lawful purpose whatsoever," with the added exception, "unless it can be

shown that said reproduction was maliciously caused, produced and published solely for the purpose of subjecting me to conspicuous ridicule, scandal, reproach, scorn and indignity (*Sharman*, 1963)." When his photograph was selected to be used in beer advertising, the plaintiff claimed the use injured his standing as a professional basketball player. However, the court noted that at no time during the photographic session did plaintiff say that he did not want his picture to be used in connection with an advertisement for beer. The court held that the release contract signed by plaintiff was clear and was a complete bar to his claims for libel, invasion of privacy and infringement of the right of publicity.

Similar, in the *Andretti* (1982) case, a race car driver Mario Andretti accepted a $6,000 Rolex watch, acknowledged in writing his membership in the "Rolex Club" and sent a signed photograph to the President of Rolex. It was held as a question of fact whether by these acts, Andretti had licensed Rolex to use his name and picture in advertisements for the watches. The New York Court of Appeals held that an equivocal writing signed by the subject of the photograph was intended as the expression of consent contemplated by the New York publicity and privacy statute to the use of the name (*Andretti*, 1982).

The use outside the scope of the license. The use outside the defined scope of the license not only is a breach of the license, but also an infringement of the right of publicity (*Benn v. Playskool, Inc.*, 1995; *Leavy v. Cooney*, 1963; *Zim v. Western Pub Co.*, 1978). In the *John Daly* (2009) case, the use of the professional golfer's name and picture on a webpage after his endorsement agreement ended was an infringement of his right of publicity. In the *Donoghue* (1995) case, the

use in advertising that was not authorized by the license between parties was both infringement of the plaintiff's trademark in his name and violation of Massachusetts Massachusetts privacy and publicity statute. In the *Facenda* (2007) case, the use of an audio recording of plaintiff's voice for advertising purposes was therefore not permitted by the license was an infringement of the plaintiff's right of publicity.

Even if the licensee stays within the restrictions in the license, the license is breached if the licensee makes a significant change in the substance of the particular use which is licensed. In the *National Bank of Commerce* (1980) case, the license to distribute plaintiff's book as a promotion for products was exceeded by interspersing the book with commercial advertising creating the false impression that the author endorsed those products. Similarly, a modification of plaintiff's photograph can be so substantial as to exceed the implied scope of plaintiff's consent to advertising use. In the *Russell* (1959) case, a model's photo for promotion of a reading for a bookstore was also used for a bed sheet advertisement which indicated that she was a willing call girl. The New York court in this case held that if the picture was altered sufficiently in situation, emphasis, background or context, it should be considered no longer the same portrait. As to the changed picture, the original written consent would not apply and the liability would accrue where the content of the picture as used, instead of the purpose or extent of its use.

Lack of authority to license or consent. A license or consent to use the right of publicity is of course invalid if the person granting the license or consent has no authority to do so. A license or consent is ineffectual if obtained from an agent who acts outside the scope of his or her authority from principle (*National Bank of Commerce,* 1980). In the *Anabas* (1985) case, when Anabas claimed Alper did not pay the agreed price for the

resale of Michael Jackson stickers, the court held that the contract was illegal and unenforceable because neither had a license from Michael Jackson and the items clearly an infringement of Jackson's right of publicity.

Remedies. The plaintiff usually sued the defendant to recovery his/her damages for the publicity rights infringement. The common remedies to the right of publicity damages are presented as the following.

Injunction. The court may order an injunction when monetary compensation are not adequate to compensate a person's publicity right damage. One advantage of an injunction is that it can be carefully tailored to preserve whatever rights defendant possesses to proper use of plaintiff's identity (*Allen*, 1985; *Onassis v. Christian Dior*, 1984). Additionally, an injunction can be tailored to enjoin defendant's use of plaintiff's identity which exceeded the scope of the consent or license given by plaintiff (*Leavy*, 1963). In this case, the court ordered an injunction against showing a film in theaters where plaintiff had consented only to show the film on television.

Market value of identity. In measuring damages in a case of infringement of the right of publicity, the first approximation is to recover for the marketplace value of the property right which defendant has infringed. For celebrities, the market value can be ascertained relatively easily by expert testimony: amounts received by comparable persons for comparable uses (*Grant v. Esquire, Inc.*, 1973). In the *Grant* (1973) case, the court held that there was a fairly active market for exploitation of the faces, names and reputations of celebrities, and such market must have its recognized rules and experts. For non-celebrities, there

exists a marketplace for the use of the identity of ordinary people in advertising. For example, non-celebrities are sometimes paid actor's equity rates plus residuals that vary depending upon where and how often a television advertisement appears (Treece, 1973). Even if there is infringement, if there is no expert or other testimony as to the reasonable value of the identity used, there is a failure of proof and there can be no recovery (*Capdeboscq v. Francis*, 2004). In the *Capdeboscq* (2004) case, the court held there was no recovery of economic value damages because plaintiff offered no expert testimony as to the reasonable use of plaintiff's photo in advertising a video. If plaintiff provides no evidence about the commercial value of his or her identity, the court can only award nominal damages (*Zim*, 1978). In the *Jesse Ventura* (1995) case, the Eighth Circuit held that the performer could in some circumstances recover a reasonable royalty under the rule of quantum meruit for the sale of video of the performances.

To some situations, the commercial value of a plaintiff's identity could be obtained from similar licensing programs (*Hogan v. A.S. Barnes & Co., Inc.*, 1957). In the *Hogan* case, the court awarded Hogan $5,000 damages for the unauthorized use of his name and picture in defendant's golfing book. Considering the plaintiff's reputation in professional golf, the damage was based on the amount that plaintiff had earned from endorsements, license and publications.

Commercial loss. An important feature distinguishing the right of publicity from all forms of privacy rights is that the right of publicity recognizes the proprietary and commercial value of a person's identity. There are some sports related examples of awards for unpermitted commercial use of identity. In *Hogan*, the award of the use of the name and picture of professional golfer Ben Hogan in a book purporting to disclose his

golfing "secrets" was $5,000 (*Hogan*, 1957). In *Weinstein*, former professional baseball player Cecil Fielder sued his interior decorator for using his name to promote the decorator's business without his permission and was awarded $300,000 (*Weinstein Design Group, Inc. v. Fielder*, 2004). In *Ventura*, Jesse Ventura, a wrestler was awarded almost $810,000 for doing commentary on 90 videotapes (*Ventura*, 1995). In *Doe*, a professional hockey player was awarded $15,000,000 for infringing using his the name in a comic book and lost endorsement deals (*Doe v. McFarlane, 2006*).

Punitive damages. In most states, punitive damages may be found in the publicity cases. In most jurisdictions, punitive damages are awarded to punish a willful legal wrong; to deter defendant from future misconduct; and as an approximate award to plaintiff (*Clark v. Celeb Pub., Inc.*, 1981; *Moore v. Big Picture Co.*, 1987; *Winterland Concessions Co. v. Fenton*, 1993; *Zieve v. Hairston*, 2004).

However, punitive damages cannot be awarded unless there are some actual damages awarded. In the 1992 *Waits* case, the U.S. Ninth Circuit awarded $2,000,000 in punitive damages because the advertiser was fully aware of its commercial imitation of performer's voice was illegal in California and that the performer would not grant permission (*Waits*, 1992). In the *National Bank of Commerce* case, the court awarded punitive money because defendant's conduct was intentionally and cleverly calculated (*National Bank of Commerce*, 1980). In the *Stone* case, the court awarded punitive damages because plaintiff repeatedly

refused defendant's permission to use the plaintiff's name, but defendant proceeded anyway (*Stone v. Creative Communications, Inc.*, 1981).

Defenses. On the other hand, the law gives defendant the opportunity to argue their use of a person's identity is not an infringement use. If the defendants could successfully argue a defense, they would not be held to the infringement. The common defenses to the right of publicity suits are presented in the following.

Transformative test. The transformative test is commonly used by the court to decide if the use of a person's likeness was an infringement or not (*Comedy III*, 2001; *Kirby*, 2006; *Winter*, 2003). If the accused use is "transformed" into a new expression, then the accused infringer may not violate the plaintiff's right of publicity (*Comedy III*, 2001). Therefore, in the *Winter* (2003) case, the California Supreme Court held that the accused comic book was an expressive work because the plaintiffs' images were merely the raw materials from which the comic books were created.

Video game. In the *Kirby* (2006) case, the California Court of Appeals held that an alleged imitation of a performer's appearance and style by a computer generated figure in a video game was not an infringement because the accused computer animation had a different physique, hairstyle and costume, its dance moves were different and the 25th century space-age setting was different from any used by plaintiff.

On the other hand, in the *No Doubt* (2011) case, the California Court of Appeal held the use of the plaintiff performers' identities in a video game without consent violated the performers' publicity rights because the avatars were designed to mimic the performers' real likenesses. Also in the *Davis* (2012) case, the California court held that the use of a former professional football player's identities in a video was an

infringement because the player was not transformed to any significant degree and the accused use was a relatively literal translation of plaintiff's conventional images into the medium of the video game.

Single publication rule. In many states, the "single publication rule" is adopted to limit the period of time to file an infringement complaint, which begins to run when an infringement statement is first published. For example, if a magazine is distributed, the single publication refers to when the magazine was initially made available. In New York, the courts apply the single publication rule to the statute of limitation of the right of publicity claim (*Nelson v. Working Class, Inc.*, 2000). The single publication rule has traditionally been applied to a hard copy expressive medium such as magazine, newspaper or book (McCarthy, 2013), however, the California Supreme Court held in the 2009 *Christoff* case that single publication rule could also apply to television and Internet (*Christoff v. Nestle USA, Inc.*, 2009). If there is continuous infringement of the right of publicity, each new and distinct act of infringement could give rise to a separate cause of action for purposes of the statute of limitations (*Lugosi*, 1979).

***Statute of limitation*.** Statute of limitation is one of the commonly used defenses which bars plaintiff to sue defendant after a certain period of time. The period of time varies depending on the jurisdiction. To the right of publicity cases, most states appear to have either a one- or two-year statute of limitation. Only a few states' statute of limitations are more than two years.

Antitrust. Under the Sherman Act Section 1, a contract by which a person assigns commercial rights in his or her name in a given market is not an

unreasonable restraint of trade. Antitrust risks may arise in connection with unreasonable restraints of trade created by licensing of the right of publicity. For example, **i**n the *Uhlaender* (1970) case, the court rejected the defendant's, a board game producer, argument that the MLBPA illegally conspired to exclude potential licensees or limited competition in the marketplace. In the *Fleer* (1981) case, the court held the licenses between Topps Gum Company and MLBPA did not violated antitrust law because it was procompetitive and it permitted the players to efficiently negotiate as a single entity with merchandisers.

Summary

The law of right of publicity protects a right of a person to request damages when this person's identities are used for commercial purposes by another without consent. The common attributes of a person which protected under the law are names, likenesses, pictures, voices and any identifiable characters of a person. The law of right of publicity is protected under state statute, common law or both. The right of publicity is recognized by the U.S. Supreme Court. The transformative test under the First Amendment is one of the most commonly used defenses in right of publicity cases. The court held that if the defendant could prove the use of the Plaintiff's identities were only as raw material and the defendant transferred such the raw material into a new expression, there was no right of publicity infringement.

Findings of the Interviews

This sections reports the interview finding from three category: current concerns in using student-athletes publicity rights, evaluation of existing student-athletes publicity

rights management methods, and recommendations and solutions to future student-athletes publicity rights management. The codebook of themes is reported in Table 2.

Table 2

Summary of Themes and Codes

Themes	Subthemes	Codes
Current Concerns of Using Student-athletes' Publicity Rights	Perspectives on compensating student-athlete	• Compensate in some sort of stipends; • At least cover their living expenses; • Start players' likeness are more valuable.
	Consideration on employment status of student-athletes	• The time and efforts should be highly valued; • The exchange should be quid pro quo.
	Reserved student-athletes' publicity rights	• licensor and licensee relationship; • Retain the rights outside the scope of licensed.
Evaluation of Existing Student-athletes' Publicity Rights Management Methods	Sufficiency of current athletics scholarship	• Living gap should be absolutely covered.
	Soundness of "trust-fund" solution	• Close the current living needs and gaps.
	Unfairness of the NCAA's form	• Not based on true mutual understanding; • No true negotiation; • Unfair to student-athletes; • Collectively control the market to restrain trade; • Drafted in favor of institutions.
	Feasibility of new conference proposal	• The current model is still the best and most benefit model; • All the adjustments will be made under current model.

Table 2 Continue

Themes	Subthemes	Codes
Recommendations and Solutions to Future Student-athletes' Publicity Rights Management	Increase the athletics scholarships to cover the full cost of attendance	• Student-athletes should be paid in some way; • Give athletes more money for the cost of attendance; • Minimum expenses should be covered; • Sufficient funded for their college life; • Increased cost of attendance will be enough; • At least should be compensated several thousand dollars more; • Current scholarship is not enough; • More stipends are needed to support their college life; • Taking care of student-athletes, like medical care; • Have a share from commercial use of their names and likenesses; • Pay some stipends via some sort of extra scholarship; • Receive some benefit beyond simple scholarship; • Restructures the bylaw to allow compensation.
	Have proper legal counsel representation	• Do not have enough legal knowledge to understand the contract; • Need legal help to negotiate a fair deal; • Have legal rights to exploit their images as they see fit; • Should be represented by legal counsel; • Need some representation to get the fair deal; • Help athletes understand the contract.

Current concerns in using student-athletes' publicity rights. The themes were created to understand the current concerns of using student-athletes publicity rights: perspective on student-athletes' compensation, consideration on employment status of student-athletes, and reserved rights of student-athletes' identities. Themes were generated from the interviewees' data under the guidance of grounded theory.

Perspectives on compensating student-athlete. The perspectives on compensating student-athlete theme concerned whether student-athletes should be compensated for using their identities by the NCAA. All interviewees were asked to provide their insight about this discussion. The interviewee's responses to this theme is reported in Table 3. Five interviewees (83%) in the SC group and eight interviewees (73%) in the AS group stated student-athletes should be paid for using their names and likenesses. Seven interviewees (100%) in the AD group, one interviewee (17%) in the SC group, and one interviewee (9%) in the AS group stated that student-athletes should not be paid. Two interviewees (18%) in the AS group stated it depended on the type of use activity and the timing of the activity occurred. In total, 13 interviewees (54%) of the total interviewees agreed student-athletes should be compensated, nine interviewees (38%) indicated student-athletes should not be compensated, and two interviewees (8%) stated it depended on the type of activity they were involved and the timing of the activity occurred. The majority opinion generated from all the interviewees is that student-athletes should be compensated by the NCAA and its member institutions for using their names and likeness.

Table 3

Perspectives on compensating student-athlete

Group	Should Not Compensate	Should Compensate	Depends on
AD (7)	7 (100%)		
SC (6)	1 (17%)	5 (83%)	
AS (11)	1 (9%)	8 (73%)	2 (18%)
Total (24)	9 (38%)	13 (54%)	2 (8%)

Although interviewees provided split opinions regarding the compensation to student-athletes, some common codes were generated from their responses: student-athletes should be compensated in some sort of stipends, which at least should cover their living expenses; and star players' likeness is more valuable than non-star players. Majority interviewees supported that "student-athletes should be compensated in some manner, so the minimum expenses would match (AS6)." "Student-athletes should be sufficiently funded for their college life (AS8)." Although Athletics Directors group interviewees were unwillingly to support the idea of compensating student-athletes, one Athletics Director admitted that that a few very popular and famous student-athletes' likenesses were worth value (AD4).

Consideration on employment status of student-athletes. The consideration on employment status of student-athletes theme concerned whether student-athletes should be considered a school's employee. If student-athletes were considered the universities' employees, they should be entitled to be compensated for their work. There were 23 interviewees who were asked to

provide opinions to this discussion, including seven interviewees in the AD group and six interviewees in the SC group and 10 interviewees in the AS group. The interviewees' responses to this theme is reported in Table 4. Seven interviewees (100%) in the AD group, one interviewee (17%) in the SC group and five interviewees (50%) in the AS group interviewees agreed student-athletes should not be considered as a university's employees. Five interviewees (83%) in the SC group, three interviewees (30%) in the AS group stated that student-athletes should be considered as employees. Two interviewees (20%) in the AS group answered it depended on the sports (revenue generation sports or not) and the university type (public school or private school). In the total responses, 13 interviewees (57%) of the total interviewees stated the student-athletes were not employees, eight interviewees (35%) of the total interviewees agreed that student-athletes should be considered as employees and two interviewees (8%) of the total interviewees stated it depended on certain conditions.

Table 4

Consideration on employment status of student-athletes

Group	Should Not be considered as employee	Should be considered as employee	Depends on
AD (7)	7 (100%)		
SC (6)	1 (17%)	5 (83%)	
AS (10)	5 (50%)	3 (30%)	2 (20%)
Total (23)	13 (57%)	8 (35%)	2 (8%)

The codes generated from the interview opinions are: the times and efforts of student-athletes spent the training and competition should be highly valued; and the

exchange between the institutions and student-athletes should be quid pro quo. The majority answers support exchange at equal values, therefore, they indicated the effort student-athletes gave was unequal to what they received from the NCAA. “Student-athletes do not have summer break and they build their class schedule around their team’s schedule. Additionally, they put football first and everything goes after football (SC1).” Therefore, the majority of interviewees’ responses suggested that student-athletes’ time and efforts should be proper compensated, although they should not be considered as employee status.

Reserved student-athletes’ publicity rights. The reserved student-athletes’ publicity rights theme concerned the restrictiveness and limitations faced in student-athletes’ publicity rights management. The opinion was only collected from 11 interviewees in the AS group because it was a legal opinion. The interviewee’s responses to this theme is reported in Table 5. Seven interviewees (63%) in the AS group agreed student-athletes retained their rights. Three interviewees (27%) in the AS group stated that student-athletes did not retain their rights after they signed the agreement. Four interviewees (36%) in the AS group indicated it depended on case by case scenario.

Table 5
Reserved student-athletes’ publicity rights

Group	Retain rights	Does not retain rights	Depends on
AS (11)	7 (63%)	3 (27%)	4 (36%)
Total (11)	7 (63%)	3 (27%)	4 (36%)

The common codes generated under this theme are: Student-athletes are as licensor of their identities, and NCAA are licensee; student-athletes retained their

rights outside the parts they signed to the NCAA. Based on this licensor and licensee relationship, “student-athletes always retained their rights, but they did give permission to maintain their eligibility (AS1).” Also, AS10 indicated, “Athletes are to give NCAA permission to use their identities for very specific purposes – promote NCAA events.”

Evaluation of existing management methods. The following themes were created to evaluate the soundness of the existing student-athletes right of publicity management methods. The themes here include: sufficiency of current athletics scholarship, soundness of “trust-fund” solution, fairness of the NCAA Form 08-3a, and feasibility of new conference proposal. The purpose of these themes were created to prepare for generating new and more viable solutions to manage student-athletes publicity rights.

Sufficiency of current athletics scholarship. Athletics scholarships are generally considered a type of compensation to student-athletes, because the universities are usually responsible for the full-scholarship athletes’ tuition, books, lodging and fees. In the interview, the scholarship refers to the full-scholarship. A student-athlete receives the full-scholarship means he/she gets a free education. The sufficiency of current athletics scholarship theme was created to investigate the sufficiency of this compensation method. Sixteen interviewees provided insight to this theme, including seven interviewees in the AD group and six interviewees in the SC group and three interviewees in the AS group. The interviewee’s responses to this theme are reported in Table 6. One interviewee (15%) in the AD group, five interviewees (83%) in the SC group and three interviewees (100%) of AS group stated that current athletics scholarship was not enough and the institutions needed to increase to the full cost of attendance. Six

interviewees (85%) in the AD group and one interviewee (17%) in the SC group agreed that athletic scholarship was enough to compensate student-athletes. In total responses, nine interviewees (56%) of the 16 interviewees stated that scholarship was not enough to compensate student-athletes, and seven interviewees (44%) of the 16 interviewees stated that scholarship was enough to compensate student-athletes. The majority views concerned the current full scholarship was not enough to cover a student-athlete's actual college living expense, therefore, they proposed that at least the actual living gap should be covered in some type of stipends.

Table 6

Sufficiency of current athletics scholarship

Group	Enough	Not enough
AD (7)	6 (85%)	1 (15%)
SC (6)	1 (17%)	5 (83%)
AS (3)		3 (30%)
Total (16)	7 (44%)	9 (56%)

The common code generated under this themes is: There is still a gap between scholarship and living expenses, and the gap should be absolutely covered. The majority opinion concerned expense gap between the athletics scholarships and actual living expenses. Therefore, interviewees suggested to close this living as a way to compensate student-athletes, for example, "typical scholarship was not enough and more stipends were needed to support their college life (AS6)."

Soundness of "trust-fund" solution. The soundness of "trust-fund" solution theme was created to evaluate the soundness of trust-fund solution. Although some commentators proposed to build a trust fund to resolve the issue (Belo, 1996; Brighton, 2010; Carrabis, 2010; Cronk, 2012; Mueller, 2004; Zylstra, 2009), this proposal has not been implemented. Fifteen interviewees provided insight regarding this theme, including seven interviewees in in the AD group and six interviewees in the SC group and two interviewees in the AS group. The interviewee's responses to this theme are reported in Table 7. Six interviewees (85%) in the AD group, four interviewees (66%) in the SC group and one interviewee (50%) in the AS group who were asked this question indicated that a trust fund was not a viable solution. One interviewee (15%) in the AD group, two interviewees (33%) in the SC group and one interviewee (50%) in the AS group who were asked this question agreed the trust fund may help solve the problem. In total responses, 11 interviewees (73%) of 15 interviewees did not support the trust fund was a viable solution, and four interviewees (27%) supported the trust fund solution.

Table 7

Soundness of "trust-fund" solution

Group	Not viable	Viable
AD (7)	6 (85%)	1 (15%)
SC (6)	4 (66%)	2 (33%)
AS (2)	1 (50%)	1 (50%)
Total (15)	11 (73%)	4 (27%)

The common code generated under this theme is: the future money cannot close the current living needs and gaps. The interviewees expressed their concerns about the ineffectiveness of the trust fund, "Trust fund is a future money which cannot benefit

student-athletes while they are still in campus (AS5)." Besides, "trust fund could not benefit for the current needs (SC6)."

Unfairness of the NCAA's form. The unfairness of the NCAA's form theme was created to evaluate the existing management of student-athletes publicity rights. If the contract terms are substantially unfair to one party, the contract might not be enforceable. The NCAA has much more power than student-athletes, and the NCAA is the party which drafted the contract. Therefore, if the agreement is substantially unfair to student-athletes, it potentially makes the agreement unenforceable. Since this is a legal question, the opinion was only collected from 10 interviewees in the AS group. The interviewee's responses to this theme is reported in Table 8. Eight interviewees (80%) in the AS group stated the language of the agreement was unfair and ambiguous. Two interviewees (20%) in the AS group indicated the agreement was a fair agreement. Since there is no common law decision on the fairness and validity of this agreement; therefore, the fairness of the agreement has not been settled under the law.

Table 8

Unfairness of the NCAA's form

Group	Fair	Not fair
AS (10)	2 (20%)	8 (80%)
Total (10)	2 (20%)	8 (80%)

The common codes generated under this theme are: the terms were not based on true mutual understanding; there is no true negotiation; the language was

unfair to student-athletes; the agreement is to collectively control the market to restrain trade; the contract certainly drafted in favor of institutions. These concerns showed in the interviewee's answers, such as "there were no true mutual understanding and true negotiation between the institutions and student-athletes (AS5)." Also, AS3 indicated that the NCAA set the competitors and gained collectively control the market via the agreement.

Feasibility of new conference proposal. The feasibility of a new conference proposal theme was created to evaluate whether new conference would give the institutions more flexibility and autonomy to compensate student-athletes. The idea of having "Big Five" conferences (Big Ten, Big 12, Atlantic Coast Conference, Pac-12 and Southeastern Conference) found a new conference has been discussed in the media. The reason behind this proposal was that if a new conference might be created outside the structure of the NCAA, the new conference could create their own rules which could be more freely to compensate student-athletes. Ten interviewees provided the insight regarding this theme, including seven interviewees in the AD group interviewees and three SC group interviewees. The interviewee's responses to this theme is reported in Table 9. Seven interviewees (100%) in the AD group and one interviewee (33%) in the SC group stated the new conference would not be founded. Two interviewees (66%) in the SC group said the new conference should be founded. To the total responses, eight interviewees (80%) stated the new conference was only an illusion, two interviewees (20%) stated the new conference may be founded.

Table 9

New conference proposal will not happen

Group	Will not be founded	May be founded
AD (7)	7 (100%)	
SC (3)	1 (33%)	2 (66%)
Total (10)	80 (80%)	1 (10%)

The common codes generated under this theme are: the current model is still the best and most benefit model; all the adjustments will be made under current model. NCAA member institutions do not want to separate from the NCAA, because "the NCAA is still the best and most established model to administrate the intercollegiate sports (AD2)." Besides, AD3 was concerned about financial burden after such separation, "from financial standpoint, Big Five institutions may not easily walk away from the all the benefits they can receive from the NCAA."

New practical recommendations. The following themes were created to generate new recommendations and solutions on future student-athletes publicity rights management. The influence of the student-athletes' lawsuits has already pushed the NCAA and its member institutions to make changes. The themes were generated from interviewees' responses are (a) increasing of the full of attendance and (b) providing proper legal counsel representation. The NCAA and its member institutions need to increase the scholarship to cover the full cost of attendance, which could be considered as a "compensation" for using student-athletes'

publicity rights. Student-athletes are less sophisticated in negotiation, therefore, student-athletes should have proper counsel representation in their publicity rights negotiation.

Increasing the full cost of attendance. The majority of the interviewees across the three interview groups indicated that the NCAA should provide more compensation to student-athletes for using their publicity rights. The theme is indicated 43 times by all interviewees. The term of "increase of full cost of attendance" was specifically mentioned 17 times. The full cost of attendance is part of a full athletics scholarship in addition to tuition, fees, books and room and board, the scholarship will also include expenses such as academic-related supplies, transportation and other similar items (NCAA, 2015c). The codes generated from the interviewees' responses include but are not limited to: stipends, reimbursement, living expense gaps, extra scholarship, and more funding.

Proper legal counsel representation. That student-athletes should have proper legal counsel representation is the most commonly recommended legal suggestions by the AS group interviewees, which was mentioned eight times by attorney group interviewees in their answers to the interview questions. The codes generated from the interviewees' responses include: student-athletes generally do not have enough legal knowledge to fully understand the contract terms; they need legal help to negotiate a fair deal; and student-athletes have legal rights to exploit their images as they see fit.

Answers to Research Questions

The three research questions of this study are: a. Do both former and current NCAA student-athletes retain their publicity rights after they contractually authorized the use of their names and likenesses to the NCAA by signing the Form 08-3a? b. Did the

NCAA violate the student-athletes' right of publicity by licensing their names and likenesses to the third parties for commercial purposes? c. What are possible recommendations/solutions based upon this study for the NCAA to manage athletes' right of publicity in the future and what rationale is provided for these recommendations?

Under state statutes, or common law, or both, a student-athlete has the publicity rights over his or her identities. Student-athletes could assign or license their publicity rights to another. Student-athletes licensed their names and pictures to the NCAA via the eligibility Form 08-3a. Student-athletes still retain their publicity rights outside the agreed scope. The scope and the context of use of student-athletes' publicity rights decide whether or not the NCAA or other parties infringed the student-athletes' publicity rights. The NCAA and member institutions should compensate student-athletes in some sort of stipends for using their publicity rights by increase of the athletics scholarship to cover the full cost of attendance. Student-athletes' right should have proper counsel representation. The following section provides the answers to three research questions based upon the study findings.

Student-athletes retain their publicity rights except the rights they authorized. Based upon common and statutory law, the right of publicity is an inherent right of every human being to control the commercial use of his or her identity and persona and to recover in court damages and the commercial value of an unpermitted taking. A student-athlete as a person has the right of publicity. A

person's publicity rights includes but not limited to name, voice, signature, photograph, likeness or anything could identify a person.

The right of publicity, as a property right, could be transferred, assigned or licensed, but it cannot be taken away without due process of law (*First Victoria National Bank v. U.S.*, 1980). Since publicity right is a property right, it is practicable to have a monetary value (*Yuba River Power Co. v. Nevada Irr. Dist*, 1929). Therefore, student-athletes could transfer, assign, or license their publicity rights to others with or without certain conditions to exchange monetary compensation.

First, the marketplace value of student-athletes' identities could be measured by expert testimony and comparable use (*Grant*, 1973). Besides, the commercial value of a person's identity could be obtained from similar licensing programs (*Hogan*, 1957) and reasonable royalty awarded (*Ventura*, 1995). If the plaintiff cannot provide evidence to decide the value of his or her identity, the court can only award nominal damages (*Zim*, 1978). Therefore, student-athletes' publicity right value could be measured by expert testimony, comparable use, similar licensing program, reasonable royalty award, or nominal damages ordered by the court.

Second, the contract Form 08-3a between the institutions (which also represent NCAA) and students-athletes should be considered as a valid and enforceable contract. The contract issues between the NCAA (and its member institutions) and student-athletes have a long case law history. The courts have consistently determined that the athletic scholarship is a valid contract (*Hysaw v. Washburn Univ.*, 1987; *Jackson v. Drake Univ.*, 1991; *Ross v. Creighton Univ.*, 1992; *Taylor v. Wake Forest Univ.*, 1972). Although there is no common law decision on whether or not the Form 08-3a is a valid contract, it should

be considered as a valid contract because this Form is one of the many contracts between NCAA and member institutions and student-athletes.

Some scholars and commentators argued the NCAA contracts may be contract of adhesion and unconscionable (Hanlon & Yasser, 2008; Wong, 2010), because Form 08-3a might create an inequitable situation where the NCAA may impose terms on student-athletes who had a weak bargaining power (Carrabis, 2010). If the contract is decided by the court as adhesion or unconscionabale, it may not be an enforceable contract. Hanlon &Yasser (2008) argued that Form 08-3a was oppressive and there was no meaningful choice for the student-athlete because student-athletes must sign Form 08-3a annually if they wanted to compete in NCAA games. On the other hand, Johnson (2012) argued that student-athletes had access to compliance staff and the NCAA to help clarify any confusion, and student-athletes voluntarily agreed and signed the form when they always had an option to not to play NCAA games.

However, the situation may potentially change because the California Appellate Court held that NCAA's compensation rules were subject to antitrust scrutiny and plaintiffs suffered antitrust injury as result of compensation rules (*O'Bannon*, 2015). It means that the NCAA violated anti-trust law and all the NCAA forms might potentially be ruled unenforceable and had no legal effect. However, it cannot be said now this is the final decision on this issue, because the plaintiff appealed the appellate court decision to the U.S Supreme Court in March, 2016. The U.S. Supreme Court has not decided this case (at the time of the

submission of this dissertation). The Court's decision would provide a more clear explanation and judgement about the enforceability of the NCAA forms.

Third, the scope of use of the student-athletes publicity rights was broad and unclear. The purpose to examine the scope and the context of the agreement is to define the scope of the use that student-athletes authorized to the NCAA and the scope of publicity rights that student-athletes still retain. The exact term in this agreement, Form 08-3a, is: "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 (Form 08-3a, 2008)." The resource of this power was granted in the NCAA Davion I Bylaw Section 12.5 (2008). The agreement is required to be signed by the student-athletes before the first competition of each season (NCAA, 2008b). Therefore, based on this particular form, student-athletes authorized the NCAA to use their names and pictures to promote NCAA championships, activities and events by signing this eligibility form. However, the defined scope of the term is very broad and ambiguous considering Section 204 of the Restatement (Second) of Contracts, which requires more specific definitions. The Restatement (Second) of the Law of Contracts is a legal treatise from the second series of the Restatements of the Law, and seeks to inform judges and lawyers about general principles of contract common law. Here, the use is to "generally promote NCAA championships or other NCAA events, activities or programs." This is relatively ambiguous language and there is no specific definitions on the events, activities or programs. Besides, "generally" as a contract term is overly broad. Therefore, this term gave the NCAA a broad scope of use as long as the use was related to the NCAA

championships, events, activities and programs. Additionally, the Form 08-3a terms also stated the third party on behalf the NCAA had the right to use the authorized publicity rights. Therefore, if a third party could acquire permission from the NCAA or the third party fits the situations of permissible uses which defined in this agreement, the third party may use student-athletes' names and likenesses.

The agreement indicated student-athletes authorized the NCAA a non-exclusive license to use their names and pictures. Student-athletes did not pass the title of their publicity rights to the NCAA and its member institutions, so Form 08-3a did not establish an assignment. A license is permission to use property rights within a defined time, context, market line or territory and the licensor keeps the title (*In re D.B. Kaplan Delicatessen*, 1985). Student-athletes authorized the NCAA and its member institutions to use their names and pictures to promote NCAA championships, events and activities in Form 08-3a, which also indicated a limited scope of use. Therefore, such use should be considered as a license. In this situation, the license should be a nonexclusive license because the term language did not express the use was exclusive and the term did not contain language that the NCAA asked the student-athletes to make a promise not to license other parties within the same area and scope. Therefore, student-athletes here licensed a non-exclusive license to the NCAA and the third party on behalf the NCAA. NCAA student-athletes still retain their publicity rights outside the authorized use.

In sum, student-athletes have publicity rights. Student-athletes may transfer, assign and license their publicity rights to other parities. By signing eligibility Form 08-3a, student-athletes licensed the NCAA and the parties on behalf the NCAA to use student-athletes names and pictures for general promotion of the NCAA championships, events, activities and programs. Student-athletes retain their publicity rights outside the agreed scope.

Infringement or non-infringement uses of student-athletes' publicity rights depends on the scope and context of the use. As discussed before, the student-athletes licensed their names and pictures to the NCAA when signing Form 08-3a. Therefore, the student-athlete is a licensor and the NCAA is the licensee. Although the term of the agreement is broad and ambiguous, it still defined the scope of the use and the context. The scope of authorized publicity rights were student-athletes' names and likenesses. The scope of the context of use was general promotion of the NCAA's championships, activities, events and programs. This means the NCAA could use student-athletes' names and pictures freely as long as the use fits in the scope of context in the agreement.

On the other hand, the infringement happens when the use by a licensee was outside the defined scope in the license agreement (*Benn*, 1995; *Leavy*, 1963; *Zim*, 1978). The infringed uses outside the scope of license include the use after the contract has expired (*John Daly*, 2009); the use was not authorized by the license between parties (*Donoghue*, 1995); the use of identities of licensor was not included in the license (*Facenda*, 2008); and the use was outside the defined context in the license (*National Bank of Commerce*, 1980; *Russell*, 1956). Here, the NCAA cannot use student-athletes identities or characters other than the names and pictures, such as voice and signature,

because student-athletes did not authorize these identities in Form 08-3a. Besides, the NCAA cannot use student-athletes' names and pictures other than promoting NCAA's championships events, activities or programs for the same reason discussed above. Since there was no clearly defined scope of duration in the agreement, a question raised as to when the term expired. However, since the eligibility form was annually signed form, it could indicate that the duration of the use should not be more than a year. According to the agreement, if the NCAA gave consent to a third party to use student-athletes names and pictures and such use was to generally promote the NCAA, then the third party user did not infringe the student-athletes' publicity rights, and vice versa.

In sum, the infringement and non-infringement uses of student-athletes' publicity rights depends on the scope and context of the use by the NCAA. As long as the NCAA's use falls in the board scope of general promotion of the NCAA championships, events, activities and programs, the NCAA will not infringe student-athletes' publicity rights. Any use outside the scope will be subject to infringement scrutiny.

Recommendations to the future student-athletes' publicity rights management. The recommendations presented in this study were generated from interviews to Athletics Directors, college sports scholars and commentators, and attorneys and legal scholars. The use of student-athletes' publicity rights for the NCAA's promotion will continue, because the NCAA and its member institutions need to market and promote the intercollegiate sports and student-athletes are central to the college sports. Therefore, the reasonable and realistic solution is not

to stop using student-athletes' identities but to find a way to properly use the student-athletes' publicity rights without violating the law of right of publicity and the NCAA bylaw. The law of right of publicity requires permission for use and fair compensation. The law of contract implies the parties who entered into the agreement did so based on good faith and fair dealing. Based on above considerations, two major recommendations for the future student-athletes' right of publicity management were generated from the interviews: the NCAA and member institutions should compensate student-athletes by increasing their athletics scholarship to cover their full cost of attendance; and student-athletes should receive proper legal counsel representation before signing the publicity right agreement.

Increase full cost of attendance as a proper compensation to student-athletes. The compensation issue of collegiate sports has been debated for a very long time but it has not been settled. The conflict is that NCAA's rules prohibit payment of compensation to student-athletes beyond grants-in-aid, but at the same time student-athletes, an integral and essential component of NCAA's product and business, should be compensated for their publicity value based on the law. In order to resolve this conflict, interviewees recommended to increase the athletics scholarship to cover the full cost of attendance as a type of compensation.

Majority views. The solution proposed by majority interviewees is that the NCAA and its member institutions should increase the athletics scholarship to cover the full cost of attendance. How this majority opinion was reached from the interview data is discussed in the following.

The first group of interviewees are NCAA Division I Athletics Directors (AD group). Seven NCAA Division I member institutions' Athletics Directors were interviewed in this study, they identified themselves as the powerful people who create the rules and policies, and actually administrate college sports. As one interviewee in the AD group said in the interview, "First of all, we are the NCAA. The NCAA is not those people who work at Indianapolis, it is us – institutions (AD4)."

The key here is the compensation controversy. This is very important to these NCAA Division I institutions, because the NCAA and its member institutions need to well manage the revenues and expenses in order to support the development of college sports. On the one hand, NCAA Division I football and basketball programs could generate more revenues for the institutions than other sports programs. On the other hand, these programs spend huge amount of money on operation. Therefore, it is not hard to imagine that NCAA Division I institutions' athletics departments seek to keep student-athletes' amateur status in order to avoid paying student-athletes. When the AD group interviewees provided their opinions about compensation to student-athletes, they offered a unanimous answer, that student-athletes should not be compensated for their publicity rights. For example, AD6 stated that "student-athletes have already been compensated well." AD5 also indicated that "student-athletes participate college sports voluntarily and they are getting the best accommodation, otherwise it won't be available to get those kind of opportunities." Although one Athletics Director offered a slightly different opinion that "Only a few very popular and famous

player's their likenesses worth value (AD4)," this Athletics Director did not clearly stated the student-athletes therefore should be compensated. Although AD group's opinions on the sufficiency of current athletics scholarship seems conflict with their recommendation to increase scholarship to cover the full cost of attendance, it is still a viable recommendation. This is because the extra award would have virtually no impact on amateurism interest in NCAA sports and did not significantly increase financial burden to the institutions.

The second group of interviewees was college sports scholars and commentators (SC group). Six interviewees were interviewed, including three scholars and three commentators. The SC group interviewees were more willing to share their opinions and insights, because they did not have direct conflict of interest in college sports and they were not employed by college athletics departments The SC group's opinions were stronger than AD group's opinions. For example, when talking about the compensation issue, one interviewee said, "Quite honestly, student-athletes should be compensated because it is the American way (SC1)." When evaluating the sufficiency of the athletics scholarship, one interview argued that "It was just the silly idea that schools are charging athletics departments for these kid's tuitions. Athletics are a part of school's marketing promotion, therefore, those costs are entirely for doing business (SC3)."

The SC group interviewees were more inclined to support the idea of compensating student-athletes. Their suggestions were more creative as compared to the other two interviewee groups. For example, when talking about the solutions to the student-' publicity issues, one interviewee said that "I will go one step further to offer a special contract to those guys who are most popular, because the NCAA earned a lot of

money from them and they deserve a cut of that (SC6)." Another interviewee said, "I think the NCAA should be realistic to admit the student-athletes are their partners in this business and respect their value (SC1)."

In sum, the SC group interviewees repeatedly mentioned about compensating student-athletes across their interviews. It is reasonable to conclude the SC group interviewees upheld the idea of increasing compensation to student-athletes as the solution to resolve the student-athlete right of publicity dispute.

The third group of interviewees are attorneys and legal scholars (AS group). Eleven attorneys and legal scholars were interviewed in this study. Attorneys preferred to give hedging opinions and they were more inclined to use phrases like "depends on" and "fact by fact, case by case scenario." For example, when discussing the compensation issue, one interviewee stated that "whether the student-athletes should be paid for their publicity rights depends on the type of commercial activities and when the activities happened (AS11)." Another interviewees also said, "It depends on what sports the athletes play and the role of student-athletes in that specific commercial setting (AS10)."

The AS group's opinions and recommendations are legal orientated. For example, one interviewee stated that "The solution is to follow the law. I believe the law is equal to every citizen. The solution is very simple, recognizing student-athletes' publicity rights and compensating them based on the law (AS3)." Another interviewee said, "I do think players have the legal rights to exploit their publicity rights as they see fit. The NCAA should not try to prohibit players from exercising their publicity rights (AS10)."

Minority views. Although the majority of interviewees supported the idea of compensating student-athletes for the use of their publicity rights, minority interviewees insisted that student-athletes should not be compensated. They criticized the current system. They showed their concerns about the commercialization of the college sports. They were worried that college sports went too far away from the educational purposes. For example, one AS group interviewee stated that "The current system is unjust and unfair. I think the college sports should move back to the educational mission athletics, rather than be more commercialization (AS4)." A SC group interviewee said, "I would not agree with paying student-athletes for their likenesses, because the gap and imbalance in athletics programs and major sports increase even more, and it will eventually jeopardize the whole system (SC4)."

In sum, although the minority interviewees held against the idea of compensating student-athletes, the majority interviewees would like to seek a way to compensate student-athletes for the use of their names and likenesses. Therefore, the interview data suggested that increasing the athletics scholarship to cover the full cost of attendance is the most proper way to compensate student-athletes without violating the law of right of publicity and the NCAA's amateurism rule.

Legal implication to this recommendation. The law of right of publicity says a person should be compensated for using their publicity rights for commercial purposes. Here, the purpose of using student-athletes' names and likenesses in various NCAA marketing promotion activities is to attract and maximize consumers expenditure on college sports. Therefore, the use of student-athletes' publicity rights is for commercial purpose and student-athletes should be compensated for their publicity value based on the

law of right of publicity. The question is what the proper compensation resource is. Student-athletes are restrained from accepting compensation by the NCAA regulations. According to the NCAA bylaw article 15, the student-athletes cannot received monetary award other than athletics scholarships (educational grants-in-aid) (NCAA, 2015b). Since this bylaw has not been successfully challenged in courts, the only possible monetary award resources could be used to compensate student-athletes is athletics scholarship (*Banks v. NCAA*, 1992; *Bloom v. NCAA*, 2004; *McCormack v. NCAA*, 1988; *Smith v. NCAA*, 1998). Increasing the athletics scholarships to fully cover the college life expenditures will not jeopardize student-athletes' amateur status and will not increase undue financial burden to the institution, therefore, it is a viable solution.

Proper legal counsel representation. Student-athletes need to sign various NCAA contracts in their college athletics career, such as NLI, grant-in-aid, eligibility form and so on. AS group interviewees were concerned that student-athletes were less sophisticated in legal knowledge to understand these agreements and they were in a weak bargain position to negotiate a fair deal. Therefore, the majority of the attorney interviewees recommended that student-athletes should be properly represented by attorneys. For example, "I think college students do not understand the rights raised in the forms. They give their rights to the university. We need to find a way to help athletes understand what they are waiving by signing the contract (AS8)," and "I don't think they really have true mutual understanding to the contract, because athletes may not understand what they are signing, and there is no true negotiation at all (AS1)."

Some interviewees from other interviewee groups shared the same concerns and proposed the similar recommendations. For example, a SC group interviewee said that "I that "I think it has to have some sort of third party come in and represent student-athletes, so the fair deal can be done. It is a business (SC6)."

In addition, an AS group interviewees suggested that the institutions should take the active role to provide internal legal help to student-athletes and assist them to understand what they have waived, "I would like to see the universities present some people who are legally trained, could represent the interest of student-athletes and tell them that 'University are appreciate that your work and contribution. You need to know after you signed this agreement you gave university the legal rights to those pictures have been taken of your to market your sports (AS8).'"

In sum, proper counsel representation proposed by attorney interviewees would be a solution to help student-athletes understand the contract and protect their publicity rights.

Summary

Student-athletes may transfer, assign or license their publicity rights to another. Student-athletes licensed their names and pictures to the NCAA via the eligibility Form 08-3a, which gave the NCAA and the third party on behalf the NCAA the right to use student-athletes' names and likenesses for generally college sports championship, events, and programs promotions. Student-athletes still retain their publicity rights outside the agreed scope.

From a management perceptive, if the NCAA and its member institutions intend to use student-athletes publicity rights for promoting activities and events. The finding

from this study indicate that student-athletes should be compensated with some sort of stipends without violating the collegiate sports amateur regulations. The recommendations here is increasing the scholarship to cover the full cost of attendance. Additionally, considering the student-athletes are less sophisticated in legal knowledge, they should have proper legal representation.

Chapter V: Discussions

The purpose of this research is to interpret student-athletes' publicity rights under NCAA intercollegiate sports context and provide recommendations to future student-athletes' publicity rights management. The outcomes of this study are a definition of student-athletes' right of publicity and a model which offers the guidance for future student-athletes right of publicity management.

Definition of Student-Athletes' Publicity Rights in College Sports Context

The use of student-athletes' publicity rights is a unique situation. On one side, the law of right of publicity indicates a person should be properly compensated for the use of his/her publicity rights for commercial purposes. On the other hand, NCAA's amateurism rule prohibits to compensate the student-athletes for commercial activities. Although the court recognize amateurism rule was integral to NCAA's business (*O'Bannon*, 2015), the activities of using student-athletes' right of publicity in marketing promotions are commercial in nature.

Considering all above factors, the definition of student-athletes right of publicity could be: If a student-athlete' identity, including but not limited to name, image, likeness, voice and any identifiable identity, is used by the NCAA for any college athletics related commercial activity, the NCAA and its member institution should get permission from this student-athlete and compensate him/her for his/her publicity value without violating the amateurism rule.

Discussion to Three Research Questions

The first research question concerns whether both former and current NCAA student-athletes still retain their publicity rights after they contractually authorized the

NCAA to use their names and likeness to by signing the Form 08-3a. This is a complicated question. The answer to this question needs to combine both the law of publicity and the contract law. In *O'Bannon*, the appellate court ruled the NCAA's compensation rule subject to anti-trust strict scrutiny, which made this question even more complicated, because it potentially made the NCAA agreement become void and have no legal effect. Therefore, based on current ruling, the student-athletes may retain all their publicity rights if the agreements they signed have no legal effect. However, it is still a pending decision because the student-athletes plaintiff appealed the case to the U.S. Supreme Court. If the Supreme Court will not overturn the appellate court ruling, then the anti-trust violation decision stands. If this is the final decision, as discussed above, it is more likely than not that the NCAA forms will become void and student-athletes keep all their publicity rights. Otherwise, student-athletes retain their publicity rights except the names and likenesses rights they have contracted away.

The second research question concerns whether the NCAA violated the student-athletes' right of publicity by licensing their names and likeness to the third parties for commercial purposes. According to the agreement between the NCAA and student-athletes, student-athletes gave the NCAA the right to use their names and pictures to generally promote NCAA championships, events, activities and programs. The language of this agreement is very broad; therefore, student-athletes gave the NCAA a very broad authority to use their names and likeness. Besides, the NCAA is free to contract with a third party, and the third party could use the student-athletes' names and likeness for the NCAA permitted activities.

This means, it will be hard to find that the NCAA violated student-athletes' publicity rights, since the NCAA obtained a broad right of use via the eligibility form. The NCAA still may violate student-athletes' publicity right when the NCAA's use outside the scope of the agreement.

The third question concerns the possible practical recommendations/solutions for the management of the NCAA student-athletes publicity rights. Although the interviewees' opinions were split on some interview questions, they still provided common recommendations to resolve the student-athletes' publicity rights issue. The recommendations in this study follow the majority opinions of the interview participants.

Increasing athletics scholarship to cover full cost of attendance would be a substantially less restrictive alternative to the current no compensation rule. All of the fact indicated that the increased full cost of attendance would have virtually no impact on amateurism, because all the money given to students would be going to cover their "legitimate costs" to attend school. Increasing the full cost of attendance could be the biggest comprise that the NCAA may agree to because, by the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.

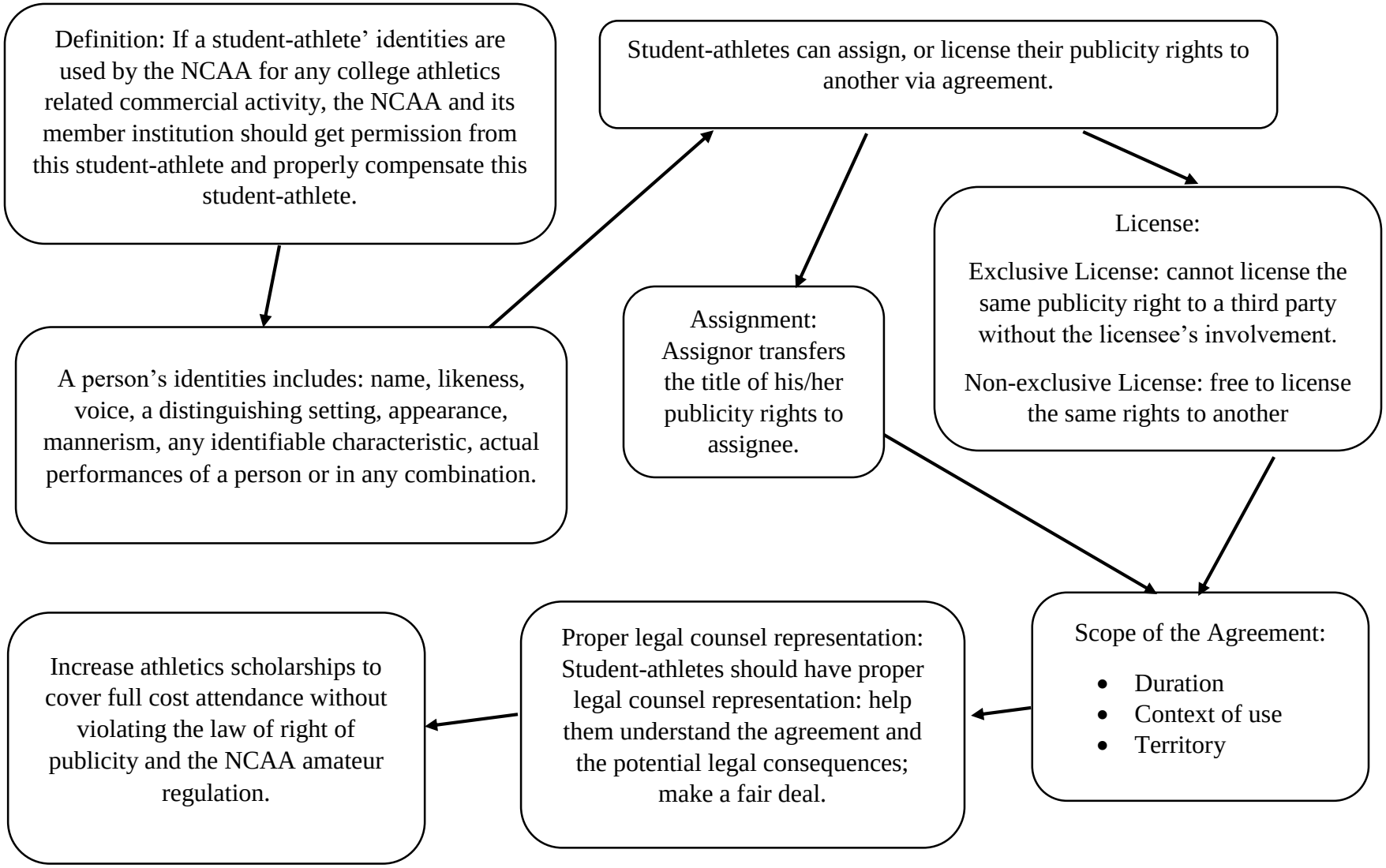
The outcome of these three research questions is a student-athletes' right of publicity management model, which provides a clear and systemic solution process to the future student-athletes right of publicity management. The model starts from the definition of student-athletes' right of publicity, and follows by the rights student-athletes retain and the potential influence factors of student-athletes' publicity right use. The

model ends with the solutions and recommendations to the student-athletes publicity right use. The details are discussed in the following section.

The Student-Athletes Right of Publicity Management Model

The proposed Student-Athletes Right of Publicity Management Model could be used to guide student-athletes' right of publicity management. The model is presented in Figure 1. This model was created based on both legal and interview data obtained for this dissertation. The legal data, including the concept of right of publicity and its legal implications, provided a theoretical and legal basis for the model. The elements of right of publicity have direct influence on the use of student-athletes' publicity rights. According to the law of right of publicity, sports managers need to be clear about what identities they are allowed to use and what identities student-athletes could offer. This is presented at the starting part of the model.

Figure 1: Student-Athletes Right of Publicity Management Model



Next, since the law requires to compensate or obtain consent from student-athletes, there are several legal ways for sports managers to receive the right to use student-athletes' publicity rights. Student-athletes could transfer, assign, or license their rights to another, which indicates sports managers could obtain the right to use student-athletes' identities via assignment or license. However, limitations are usually involved with such agreement. These limitations can regulate the length of the right to use, the context of permitted use, and the geographic area of the right to use. The agreements and limitation are the second and the third part of this model.

Finally, the final part of the model is how to manage student-athletes' publicity rights. The purpose of the law of right of publicity is to allow a person to profit from his/her identities values, which means student-athletes should be compensate for their publicity rights. However, the NCAA's bylaw restrains student-athletes' ability to receive monetary compensation. This regulation is uphold by courts, and, therefore, sports managers need to have proper ways to compensate student-athletes for their publicity value without violating the NCAA bylaw.

The interview data provided viable suggestions for balancing the conflict between the law of right of publicity and the NCAA bylaw. The interview participants including Athletics Directors, college sports scholars and commentators, and attorneys and legal scholars discussed the reasons why student-athletes should be and could be compensated for their publicity rights, evaluated the enforceability of several existing solutions, and proposed more

viable and effective recommendations other than the existing ones. Therefore, the recommendations generated from interview data were presented at the final part of the of the model. The step by step explanation of this model is presented in the following.

The first step is to find out what publicity rights student-athletes could offer to the NCAA and member institutions. The law of right of publicity protects a person's right on his/her "persona." "Persona" is used to refer to name, nickname and voice, picture or performing style and other indicia which can be used to identify a person. Therefore, student-athletes should be freely to offer any his/her identifiable characters.

The next step is to find out how student-athletes could authorize the NCAA and member institutions to use their publicity rights. Student-athletes have the rights to transfer, assign, and license their publicity right for financial gain. Student-athletes could assign or license their publicity rights. If they assign their rights, they actually transfer their publicity rights' title to the assignee. This means student-athletes would not retain the title of their publicity rights. If they license their publicity rights to another, they could enter into an exclusive license or a non-exclusive license. If they enter into an exclusive license, they cannot license the same publicity right to another party. For example, if a student-athlete grant an exclusive license to the NCAA to use his/her name, no other party can obtain the same license to his/her name without the NCAA's involvement. If student-athletes enter into a non-exclusive licensing, they are free to license their names to multiple parties, as long as these parties do not breach their entered agreements.

Another consideration here is the scope of the assignment or licensing, which include duration, context of use, and territory defined in the agreement. This means

student-athletes should have the right to negotiate how long the other party can use their publicity rights, where the publicity rights would be use and under what context these rights could be used.

The latest version of student-athletes eligibility form, Form 15-3a, has dropped the publicity right term in the agreement (NCAA, 2015d). This means student-athletes do not contractually authorize the NCAA to use any their publicity rights via this eligibility form. However, the latest version of the NCAA Division I Manual does permit the use of students' publicity rights in certain promotional activities (NCAA, 2015b). The current bylaw change urges student-athletes to have proper counsel representation, because lack of any written agreement on the publicity rights certainly makes the whole issue more complicated and unclear. Although the eligibility form is not served as a licensing agreement any more, it is very likely the NCAA would have a new form to get student-athletes' authorization on the use of their publicity rights. Considering the fact that the student-athletes are lack of ample legal knowledge to understand the legal terms, it is important that student-athletes have legal counsels to help them understand the legal consequences they potential will face. As AS8 and AS1 said, "We need to find a way to help athletes understand what they are waiving by signing the contract," and "student-athletes should be represented by legal counsel or someone who are sophisticated in contract negotiation." Therefore, the legal counsels could also help student-athletes make a fair deal for the use of their publicity rights.

All these changes and concerns lead to the last step—how to compensate student-athletes for using their publicity right without violating the NCAA bylaw. One thing is relatively clear that the NCAA will not change its non-profit and amateur intercollegiate status at least for now. Based on previous discussion, the suggested solutions here is increasing athletics scholarships to cover the full cost of attendance.

The compensation of increasing athletics scholarships to cover the full cost of attendance has practical significance, especially considering the criticisms faced by the NCAA in recent years. Institutions are criticized that they are not doing enough to help the students, especially those from low-income backgrounds, and those help their institutions bring in millions of dollars in ticket sales, merchandise sales and television contracts. The decision to offer full cost-of-attendance is an attempt by the NCAA and its member institutions to address these rising criticisms. Although some commentators suspect the effectiveness of the policy, this could be a reasonable and practical solution to resolve the current situation. The full cost of attendance is not "outside" payment which will not violate the NCAA bylaw. Although the sufficiency of the compensation is unclear, a certain type of compensation is better than nothing. Since the full cost of attendance can benefit student-athletes in their college life without jeopardize their eligibility to play college sports, it is a reasonable and realistic solution.

Confirm the Autonomous Self-definition Theory

Autonomous self-definition means an individual has an important interest in controlling uses of her identity, and unauthorized use of a person's identity interferes with her autonomy because the third party takes at least partial control over the meaning associated with this person (McKenna, 2005). Student-athletes would like to have control

over their publicity rights, so they can legally profit from their publicity value. Student-athletes filed the lawsuit against the video game producer because they found themselves have lost the control over their identities and they want to regain the control and profit from their publicity rights. The power of control and the ability to profit are very important to many student-athletes, because most of student-athletes will not continue to compete at professional level and they may only have a few limited opportunities to generate some revenue from their publicity rights associated with their sports. Based on the finding of this research, although student-athletes are restrained by the amateur rule of the NCAA, they still retain their publicity rights. The use of student-athletes' identities by the video games producer without their consents interfered with these student-athletes' autonomy over their publicity rights. Therefore, the student-athletes asked for monetary damages to compensation for their publicity value confirmed the autonomous self-definition theory that student-athletes want to control and profit from their publicity rights.

Contributions to Existing Research

Contributions to student-athletes' right of publicity research. Student-athletes' right of publicity is a relative new and unclear area. No current research has provided definition of student-athletes' right of publicity. The study defined what is student-athletes' publicity rights in the context of intercollegiate sports, which is a good addition to current student-athletes' right of publicity research. Besides, the current publicity rights studies only use law review as the research method (Belo, 1996; Brighton, 2010; Carrabis, 2010; Cronk, 2012; Mueller, 2004; Wong, 2010; Zylstra, 2009). This study combine both law review and qualitative

interviews as research methods which expanded the use of research methods in the right of publicity research.

Contributions to student-athletes video games marketing research. Current research on student-athletes video games marketing include examining the video games influence as a marketing tool for the sport (Kim, Walsh, & Ross, 2008), the motives that drive a gamer to play student-athletes video games (Kim, Ko, & Ross, 2007), the student-athletes video game advertising (Cianfrone & Zhang, 2009) and consumers perceived the use of athletes' likenesses as sponsorship (Clavio, Kaburakis, Pierce, Walsh, & Lawrence, 2013). Here, the application of right of publicity in video game area and the discussion about the scope of the licensing in this study provided detail legal suggestions to student-athletes video games marketing licensing and agreement drafting.

Contribution to application of critical theory in sports research. This study used critical theory to guide the investigation. Current and existing sports related studies used critical theory in studying sports media, consumer responses to representations of women's sports, sports tourism, physical education, and race and sports (Bailey, 1993; Carrington, 2013; Kane, LaVoi & Fink, 2013; Kane & Maxwell, 2011). The background issue of this study is the NCAA made all the rules about how to use student-athletes identities, which created asymmetrical power and relation between the NCAA and student-athletes. This study expands critical theory's implication to research the asymmetrical power and economic considerations in using student-athletes' publicity rights for the NCAA related promotion purposes. The solutions provided in the research help resolve the asymmetrical power and economic imbalance between the NCAA and the student-athletes.

Contributions to grounded theory. This study used grounded theory to generate themes and concepts. Grounded theory is an inductive approach to generate new theory emerging from the data (Charmaz, 2006). This study used the grounded theory to evaluate the existing student-athletes' publicity rights solutions and generate new management recommendations. The contribution of this research to the grounded theory is that the use of grounded theory was combined with legal deductive theory approach. This combination of such use expanded the application of grounded theory to the legal research area where is traditionally dominated by deductive approach.

Contributions to Practice

The practical purpose of this research is to offer practical recommendations to future student-athletes publicity rights management. Student-athletes could be considered as a special group of students. They cannot freely use their publicity rights to generate profit when they still maintain their athletics eligibilities. Student-athletes' names and likenesses have been used on jerseys, video games, broadcasting and other marketing promotions. This interpretation of the student-athletes' publicity rights will help better understand the complicated situation of student-athletes' right of publicity use. The recommendations and the model generated in this research offered a practical guidance about what student-athletes' identities could be used, how to use assignment or license to obtain, limit and protect student-athletes' publicity rights and how to compensate student-athletes without violating the NCAA's bylaw.

Limitations and Future Research

Limitation and future research overlap in this study. Frist, future research could continue and expand the student-athletes' right of publicity research from student-athletes' perspective and contract law perspective. Student-athletes are not interviewed in the current research, which is also a limitation of this study, due to the fact that the *O'Bannon* case is still an on-going investigation. After the case is finally closed, it will be interesting to research student-athletes' own opinions on the use of their names, likenesses in video games or merchandizes. The NCAA obtained the authorization from student-athletes via contractual agreements. As the drafter of all the NCAA contracts, the NCAA commonly uses the agreements as main tools to get what they want from the student-athletes. It will be interesting to investigate the enforceability of the NCAA agreements and examine how they use the contract languages to achieve their purposes.

Second, the further investigation could be conducted via different research methods, for example, confirming the qualitative findings by using a large sample survey. The qualitative research method used in the current research is qualitative interview, which was to collect information by asking open-ended questions. The future research could develop a survey by asking close-ended survey questions to a large number of participants to confirm the validity of current research outcomes. Such future research will supplement the findings from the current research.

Third, due to the complexity of college sports, the student-athletes' right of publicity issue is not an isolated issue but a complicated issue which also involves several other legal concerns, such as anti-trust issue and Title IX. This study only focused the law of right of publicity, which is another limitation of this study. NCAA's structure, business model, and regulations may relate to the restraint of trade and monopoly in the market

place, which is an anti-trust topic. In the past years, many cases challenged or tried to challenge the NCAA based on anti-trust law, such as *NCAA v. Board of Regents of the University of Oklahoma* (1984), *Law v. NCAA* (1998), and *O'Bannon v. NCAA* (2015). It will be interesting to review all the cases that concern NCAA's anti-trust violation, and investigate how the courts decided on this matter as well as why some cases successfully challenged and some cases failed. Besides, Title IX's application and influence on compensating student-athletes is also a very interesting topic. Title IX prohibits gender discrimination in educational institutions which receive federal funding. *O'Bannon* case plaintiffs are male student-athletes who played or are playing college football and men's basketball. To other male athletes who play other college sports and all the female athletes, their images may be unlikely to be used in video games or on the merchandises. However, these non-football/men's basketball student-athletes should be treated equally as football and men's basketball athletes on compensation, since their names and likenesses are also use to promote their own sports. Consequently, it is important to investigate how the NCAA handle commercial activities related gender equity issue in their administration.

Lastly, a further investigation could also extend to the marketing perspective, such as investigating the commercial activities of the NCAA. It will be interesting to collect all kinds of NCAA commercial activities, categorize them based on different marketing purposes or components, and research the effectiveness of these commercial activities.

Chapter VI: Conclusion

This study investigated the NCAA student-athletes' right of publicity issue and provided recommendations to student-athletes' right of publicity management via state statute and common law review and interviews to athletics directors, college sport scholars, commentators, attorneys and legal scholars. A student-athlete has a right of publicity and his/her publicity rights can be transferred, assigned and licensed to others. Student-athletes licensed the NCAA and the third parties on behalf the NCAA to use student-athletes names and likenesses to promote the NCAA championships, events, activities and programs via the NCAA's eligibility form. Student-athletes do not retain their publicity rights in the agreed scope. Student-athletes retain their publicity rights outside the agreed scope. If the NCAA and the third parties on behalf the NCAA are intended to use student-athletes' publicities for promotion activities and events, student-athletes should be compensated but without jeopardizing their amateur status. The viable solution is to increase full cost of attendance to cover full cost of attendance. Besides, student-athletes' right of publicity should also be protected through proper legal counsel representation.

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APPENDICES

APPENDIX A

E-mail Request for Participants

Dear _____

My name is Yishun (Sandy) Wang, a doctoral candidate from the University of Minnesota. I am working on my dissertation research which is aimed at better understanding NCAA student-athletes' right of publicity issues. The situation that former and current NCAA student-athletes' identities are used in college sports video games has generated wide discussion, including the *O'Bannon* lawsuit. Results of this study could provide management recommendations about how to use student-athletes' publicity rights based upon law review and elite interviews.

I am reaching out to you, because you are identified as an administrator or a commentator or an attorney and are familiar with the student-athletes' publicity issues. Your professional opinion will be valuable to my research. In this study your professional identification **will be kept confidential** and no personal identification statements will be used. The interview will be conducted via phone which will take approximately 30 minutes. I will send you the final section of my study that relates to your interview to ensure that the information for the final report accurately portrays your professional opinion.

I appreciate your help and your time. Your professional opinion will add great value to my study and I am looking forward to hearing from you. Please contact me at: wang2149@umn.edu if you are interested in participating in this confidential research.

Sincerely,

Yishun (Sandy) Wang
PhD Candidate
University of Minnesota

APPENDIX B

IRB Approval

1501E60241 - PI Wang - IRB - Exempt Study Notification graduate--phd x

irb@umn.edu 2015/2/13

发送至 我

TO : alli0069@umn.edu, wang2149@umn.edu,

The IRB: Human Subjects Committee determined that the referenced study is exempt from review under federal guidelines 45 CFR Part 46.101(b) category #2 SURVEYS/INTERVIEWS; STANDARDIZED EDUCATIONAL TESTS; OBSERVATION OF PUBLIC BEHAVIOR.

Study Number: 1501E60241

Principal Investigator: Sandy Wang

Title(s):
Student-Athletes' Right of Publicity Legal Issue and Implications

APPENDIX C

Interview Guide

Introduction

Self-Introduction and thank you for participation.

Brief introduction to purpose of the research and interview

Inform interviewees their identities will be kept confidential.

Inform interviewees that I will tape recording the interview to try to ensure accurate record keeping of your views and I will also make a few notes for the same purpose.

Do you agree to allow the researcher to tape record this interview?

If no: Turn off the tape recorder and continue with the interview protocol.

If yes: Thank you, and proceed with the interview.

Interview Information

Date of interview: _____ Time: from _____ to _____

Interview Questions:

Interview Questions – Athletics Directors Group and Scholars and Commentators Group

1. If NCAA's regulations were not a consideration, do you think student-athletes should be paid for using their names and likenesses?

2. What potential influence do you think the O'Bannon case will bring to the NCAA and college sports?

3. Do you think the NCAA will potentially make some adjustments regarding the payment of student-athletes, and if so, what changes do you think the NCAA will make? Is a "trust fund" solution a viable solution or not? And why?

4. Do you think the athletic scholarships and other student-athletes' benefits are enough for student-athletes? Why and why not?

5. If you were in charge of the whole student-athletes' publicity issue, how will you resolve the issue? And why?

Interview Questions – attorneys & scholars

6. If NCAA's regulations were not a consideration, do you think student-athletes should be paid for using their names and likenesses?

7. What potential influence do you think the O'Bannon case will bring to the NCAA and college sports? Do you think the NCAA will potentially make some adjustments regarding the payment of student-athletes, and if so, what changes do you think the NCAA will make?

8. Part IV of the NCAA Form 08-3a states: “You authorize the NCAA [or a third part 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 (Form 08-3a, 2008).”
9. Do you think both former and current NCAA student-athletes retain their right of publicity after signing NCAA Form 08-3a?
10. In order for student-athletes to retain eligibility for practice and competition, they must sign all the NCAA required forms/agreements. Do you think these terms are fair to the student-athletes? Why or why not?
11. If you were in charge of the whole student-athletes’ publicity issue, how will you resolve the issue? And why?

Follow-up Questions

12. Follow up 2-1: Do you think student-athlete should be considered as the University's employee or not? How do you think the argument because collegiate athletics is not core business of higher education, student-athletes should not be considered as the universities' employees?
13. Follow up 2-2: do you think these power 5 conferences will separate from the NCAA and have their own some kind of governing body?
14. Follow up 3-1: Do you think paying athletes will dramatically change the NCAA's business model or not?

Closing the Interview

Thank you for your participation. I will be transcribing this interview and can provide you a summary of the interview, for clarification and/or further input. If interested in having a copy of the summary, do you prefer that I provide your copy via e-mail?

If you have any further thoughts before you receive your summary, please feel free to e-mail me at wang2149@umn.edu or via phone at 612-323-8236.

Researcher's Interview Notes

A. Comments about the conduct, tone, progression of the interview:

   a) Was the participant comfortable and forthcoming, reserved, hostile?

   b) Were there interruptions or other events that changed the pace or effectiveness of the interview?

   c) What are the feelings and perceptions about the person interviewed and the interview conduct, tone, progression, etc.?

   d) What else occurs/emerges as a result of this interview?

B. Comments about interview protocol?

   a) Problems encountered, anything I would possibly change before I use this protocol again?