

2022

Electronic Arts' College Videogames in the Name, Image, and Likeness Era

Ryan A. Buchanan
UNH Franklin Pierce School of Law, ryan.buchanan@law.unh.edu

Follow this and additional works at: <https://scholars.unh.edu/unhslr>



Part of the [Business Organizations Law Commons](#), [Civil Law Commons](#), [Civil Procedure Commons](#), [Conflict of Laws Commons](#), [Gaming Law Commons](#), [Immigration Law Commons](#), [Intellectual Property Law Commons](#), [International Law Commons](#), [Law and Economics Commons](#), [Law and Society Commons](#), [Legal Education Commons](#), and the [Litigation Commons](#)

Recommended Citation

Buchanan, Ryan A. (2022) "Electronic Arts' College Videogames in the Name, Image, and Likeness Era," *UNH Sports Law Review*. Vol. 1: Iss. 1, Article 7.
Available at: <https://scholars.unh.edu/unhslr/vol1/iss1/7>

This Article is brought to you for free and open access by the University of New Hampshire – Franklin Pierce School of Law at University of New Hampshire Scholars' Repository. It has been accepted for inclusion in UNH Sports Law Review by an authorized editor of University of New Hampshire Scholars' Repository. For more information, please contact Scholarly.Communication@unh.edu.

The University of New Hampshire Sports Law Review

Volume 1 | Number 1

Article 7

8-5-2022

Electronic Arts' College Videogames in the Name, Image, and Likeness Era

Ryan A. Buchanan



Ryan Buchanan

ELECTRONIC ARTS' COLLEGE VIDEOGAMES IN THE NAME, IMAGE, AND LIKENESS ERA

1 U.N.H. Sports L. Rev. 74 (2022)

ABSTRACT. EA Sports made an announcement early in 2021 that “College Football” would make its debut after almost a decade of no videogames dedicated to college sport. Previously, EA produced college videogames without compensating college athletes for their name, image, and likeness because it was forbidden by the NCAA. Today, athletes can legally receive compensation for their name, image, and likeness. It is likely that EA will compensate athletes in some form to use their likeness in future college videogames.

After reviewing the relevant law leading up to the name, image, and likeness era, the paper analyzes various ways EA can efficiently compensate college athletes for the use of their likeness in future videogames. It also discusses some of the ideas that were brainstormed in interviews with two NCAA Compliance officials, Melissa Peach and Max Lebowitz. They offered insight about how college athletes could legally be remunerated from a compliance standpoint now that the NCAA has left the decision up to each individual state regarding college athlete compensation.

BIO. Ryan Buchanan intends on completing each of the sports, entertainment, and intellectual property law certificates at UNH Franklin Pierce School of Law upon graduation as a member of the Class of 2023. He was selected to participate in the UNH Intellectual Property Clinic in the fall semester of 2022. As a sport management major at Ithaca College, and now as a law student, he has acquired valuable internship experience in college, professional, and even Olympic sport. He interned with the Korean Olympic Committee during the 2018 Winter Olympic Games, the 2019 Citi Open tennis tournament in Washington, D.C., Super Bowl LIV in Miami, and the University at Albany’s NCAA Compliance Department. In his free time, Ryan enjoys playing tennis in the warm months and cross-country skiing in the winter.

**ELECTRONIC ARTS' COLLEGE VIDEOGAMES
IN THE NAME, IMAGE, AND LIKENESS ERA**

INTRODUCTION.....76

I. WHAT HAPPENED TO THE EA SPORTS NCAA VIDEOGAMES?.....76

II. IMPLICATIONS IN LAW.....77

 A. *Personal Rights of Publicity*.....77

 B. *Employment Law*.....79

III. WHAT COULD BE IN THE CARDS FOR THE FUTURE?.....81

 A. *New Legal Landscape*.....81

 B. *New Modes and New Sports*.....82

 C. *New NIL Possibilities*.....83

CONCLUSION.....84

INTRODUCTION

I. WHAT HAPPENED TO THE EA SPORTS NCAA VIDEOGAMES?

Videogame companies were generating substantial revenues in the early part of the twenty-first century by releasing games dedicated to college sports.¹ One of the major contributors in this space was EA Sports (“Electronic Arts”), a leader in the college videogame market that produced titles like “*NCAA Football*” and “*NCAA Basketball*” on an annual basis.² These yearly releases included roster changes while featuring updates in graphics and playability to compete with rival game makers, such as Take Two.³ Eventually, game development included the need to provide hyper-realistic game simulation for users, including immersive sounds and detailed player and stadium depictions.⁴

This demand for accurate player depictions in videogames became problematic for videogame companies like EA due to implicated intellectual property concerns surrounding the use of a person’s name, image, or likeness (“NIL”).⁵ Following further concerns regarding contractual obligations to the NCAA,⁶ the line of highly successful college sports games were discontinued.⁷ However, in 2021, EA Sports tweeted “College Football is coming back,” signaling to fans that “*EA Sports College Football*” would make its long-awaited return.⁸ This article discusses the evolving legal issues that videogame producers must navigate when they attempt to produce

¹ James Brumley, *Back to School: Electronic Arts Revives College Football Video Game Franchise*, THE MOTLEY FOOL (Feb. 2, 2021), <https://www.fool.com/investing/2021/02/02/back-to-school-electronic-arts-revives-college-foo/#:~:text=While%20popular%2C%20college%20football%20video%20games%20aren%27t%20necessarily,driving%20about%20%2480%20million%20worth%20of%20annual%20revenue> [https://perma.cc/R9PK-HPRA].

² Andrew Gillis, *EA Sports Announces Return of College Football Video Game*, NBC SPORTS WASHINGTON (Feb. 2, 2021), <https://www.nbcsports.com/washington/ea-sports-announces-return-college-football-video-game> [https://perma.cc/P69M-3VH9]. “*NCAA Football*” and “*NCAA Basketball*” had their final release dates in July 2013 and November 2009 respectively.

³ See Bryan Wiedey, *College Sports Video Games Went Extinct, But Just Like the Dinosaurs They Could Make a Comeback*, HIT THE PASS (June 3, 2015), <http://hitthepass.com/college-sports-video-games-went-extinct-but-just-like-the-dinosaurs-they-could-make-a-comeback/> [https://perma.cc/M9KD-CBFD].

⁴ See *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268, 1271 (9th Cir. 2013) [hereinafter NIL Licensing Litigation].

⁵ See generally NIL Licensing Litigation, *supra* note 4, at 1271-72.

⁶ (“National Collegiate Athletic Association”).

⁷ See Gillis, *supra* note 2.

⁸ EA Sports, (@EASPORTS), Twitter (Feb. 2, 2021, 11:43 AM), <https://twitter.com/EASPORTS/status/1356644353901539342> [https://perma.cc/6MTS-398N]; see also Gillis, *supra* note 2.

the next generation of college sports videogames.

II. IMPLICATIONS IN LAW

A. *Personal Rights of Publicity*

About half of the country, twenty-four states in total, currently recognize a right of publicity.⁹ These rights typically include the personal right to one's own name, image, and likeness.¹⁰ A common theme among these rights is the recognition that there is a form of intellectual property in one's person which society deems has some social utility.¹¹ Often, an individual will expend considerable time, money, and energy to develop their prominence in a particular field, and it benefits society to protect those efforts.¹²

Videogame makers, and indeed EA themselves, have had to navigate NIL concerns with athletes even outside of the college world. When Michael Jordan was a professional in the NBA, he decided to negotiate his own videogame deals, opting out of the default NIL terms of the NBA Players Association ("NBAPA") licensing agreement.¹³ This posed a problem for EA, because without the grant of authority, they would not be able to depict Jordan, the best player in the NBA, in their games.¹⁴ In an attempt to side-step the license requirement, EA incorporated a cheat code in "NBA Live 96" to make Jordan an available player for the game.¹⁵ Users of the videogame could enter the aptly-chosen cheat code "JORDAN" to unlock the ability to play as Michael Jordan within the game.¹⁶ EA eventually transitioned away from the audacious cheat code and instead depicted a generic player named "Player 99"

⁹ See Johnathan Faber, *Statutes and Interactive Map*, RIGHT OF PUBLICITY (last visited July 21, 2022), <https://rightofpublicity.com/statutes#:~:text=Currently%2C%2024%20states%20have%20some%20form%20of%20right,recent%20to%20pass%20a%20Right%20of%20Publicity%20legislation> [https://perma.cc/6YNU-W78B].

¹⁰ West's Ann. Cal. Civ. Code § 3344 Use of another's name, voice, signature, photograph, or likeness for advertising or selling or soliciting purposes. "Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent ... shall be liable for any damages sustained by the person or persons injured as a result thereof."

¹¹ See *Comedy III Productions, Inc. v. Gary Saderup, Inc.* 21 P.3d 797, 804-805 (Cal. 4th 2001).

¹² See NIL Licensing Litigation, *supra* note 4, at 1280.

¹³ Jon Robinson, *Michael Jordan's Erratic Video Game History*, ESPN (Feb. 15, 2013), https://www.espn.com/blog/playbook/tech/post/_id/4185/michael-jordans-erratic-video-game-history [https://perma.cc/M5EX-E7NB].

¹⁴ See *id.*

¹⁵ *Id.*

¹⁶ *Id.*

to be the best avatar in the game.¹⁷ Without his name, number, or the technology to create a realistic digitized version of Jordan within the videogame, EA avoided any potential lawsuit related to using Jordan's NIL.¹⁸

EA appreciated that NIL rights were required to legally portray professional athletes in their games, and they were made aware, thanks to lawsuits brought by Sam Keller and Ed O'Bannon, of the unique considerations triggered when involving college athletes.¹⁹ The NCAA, which is the governing body of intercollegiate sports in the United States, boasting more than 1,000 member institutions today, prohibited its athletes from being compensated for their NIL rights for decades.²⁰ However, in 2013, the Ninth Circuit confirmed the validity of NIL rights for college athletes depicted in videogames.²¹ Sam Keller, a former Arizona State and University of Nebraska quarterback, was the lead plaintiff in a suit against EA for the wrongful misappropriation of college athlete's NIL rights resulting from depictions of athletes within EA's videogames.²² EA argued their use of player likenesses in their videogames was protected expression under the First Amendment.²³ Still, the Ninth Circuit found for Keller's class, acknowledging their right of publicity.²⁴

Keller was able to prove his case by showing that EA had depicted his likeness in the same location where he had made his name known to the public, which was

¹⁷ *Id.*

¹⁸ See Robinson, *supra* note 13.

¹⁹ See Gillis, *supra* note 2.²⁰ See O'Bannon v. National Collegiate Athletic Association, 802 F.3d 1049, 1052, 1054 (9th Cir. 2015). In the early twentieth century, athlete compensation was a problem for the NCAA, as there were no firmly enforced rules regarding compensation for college athletes. In 1929, a study discovered the prevalence of under the table payments to athletes, finding "81 out of 112 schools surveyed provided some sort of improper inducement to their athletes." Even worse, some players for schools were not enrolled in college. Others would play on multiple teams in a single season, traveling from one institution to another to play in a game or two before moving on to the next destination. Schools would then compete for athletic talent by enticing the best players with lucrative deals.

²⁰ See O'Bannon v. National Collegiate Athletic Association, 802 F.3d 1049, 1052, 1054 (9th Cir. 2015). In the early twentieth century, athlete compensation was a problem for the NCAA, as there were no firmly enforced rules regarding compensation for college athletes. In 1929, a study discovered the prevalence of under the table payments to athletes, finding "81 out of 112 schools surveyed provided some sort of improper inducement to their athletes." Even worse, some players for schools were not enrolled in college. Others would play on multiple teams in a single season, traveling from one institution to another to play in a game or two before moving on to the next destination. Schools would then compete for athletic talent by enticing the best players with lucrative deals.

²¹ See generally NIL Licensing Litigation, *supra* note 4, at 1279, 1284.

²² See *id.* at 1271.

²³ See *id.*

²⁴ See generally *id.* at 1279, 1284.

on a football field.²⁵ EA created player depictions to be used in their videogame by collecting player statistics related to height, weight, and any noted intricacies in play style.²⁶ Each season, EA sent detailed questionnaires to team equipment managers for the purpose of matching players with unique, highly identifiable playing behaviors for use in the videogame to make the game as lifelike as possible.²⁷ The real-life players' positions, numbers, and physical features all matched EA's videogame depictions.²⁸ The only major thing the depictions were missing were the names of the real-life players on their jerseys.²⁹ EA allowed users the ability to upload third-party content into the game, including team rosters.³⁰ Because everything corresponded between player portrayals in the videogame, and the college athletes in real life, the court reasoned EA's use of player likeness was not transformative enough to receive protection under the First Amendment.³¹

B. Employment Law

EA's legal issues emphasized a topic that is unique to college sports: amateurism. From its early days, the NCAA has insisted that collegiate sports require a system to distinguish themselves from professional sports.³² The NCAA has held the position that "student athletes," unlike their professional counterparts, should not receive compensation for their NIL rights for the purpose of preserving the sanctity of the game.³³ The term "student-athlete" was invented by the NCAA in the 1950s in an attempt to shield themselves from potential workmen's compensation claims from injured athletes.³⁴ Today, through the NCAA's insistent use over time, the term has become the default for describing college athletes despite its problematic history designed to deny rights and benefits.³⁵

²⁵ *Id.* at 1276.

²⁶ *Id.* at 1271.

²⁷ *Id.*

²⁸ NIL Licensing Litigation, *supra* note 4.

²⁹ *Id.*

³⁰ *Id.*

³¹ *See id.* at 1276.

³² Jon Solomon, *The History Behind the Debate Over Paying NCAA Athletes*, ASPEN INSTITUTE (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/> [<https://perma.cc/9RSS-ZX2C>].

³³ *See generally id.*

³⁴ *Id.*

³⁵ *See* Molly Harry, *A Reckoning for the Term "Student-Athlete"*, DIVERSE EDUCATION (Aug. 26, 2020), <https://www.diverseeducation.com/sports/article/15107633/a-reckoning-for-the-term-student-athlete> [<https://perma.cc/TZ86-TY7K>]. For further discussion on the disproportionate

The future of amateurism became uncertain after the Ninth Circuit decided that the NCAA's rules prohibiting college athletes from being paid for the use of their NIL rights violated antitrust laws.³⁶ In *O'Bannon v. NCAA*, a federal court found, for the first time, that aspects of the NCAA's amateurism rules implicated antitrust law, as these compensation rules unlawfully restrained trade.³⁷ The court determined that NCAA member schools operated like a cartel by essentially colluding together to fix the price of their negotiation terms.³⁸ This concerted action by the schools resulted in recruits paying for the bundle of services provided by colleges with their labor and associated NIL rights, while the member schools collectively valued their compensation at zero dollars.³⁹ The court recognized that the use of NILs in EA's videogames increased the attractiveness of the games to consumers in the relevant market of sport videogames.⁴⁰ Thus, there was a consumer demand for these NILs, indicating that athlete's NILs were worth more than the NCAA deemed.⁴¹ But for the NCAA restraints on trade, EA would bargain with college athletes for the rights to use their NILs.⁴²

Since *O'Bannon*, several states have enacted legislation to legalize the compensation of college athletes for their NIL rights.⁴³ The NCAA responded by amending its policy via an interim NIL policy, which finally allows college athletes to receive compensation for their NIL rights.⁴⁴ Since the temporary guidance was

effect the NCAA's actions have had on the black community, which makes up the greatest percentage of athlete representation in the two highest revenue-generating sports within the NCAA, football and basketball respectively, see Rohan Nadkarni, *Study: NCAA 'Robs Predominantly Black Athletes' of Opportunity to Build Generational Wealth*, SPORTS ILLUSTRATED (July 31, 2020), <https://www.si.com/college/2020/07/31/ncaa-athlete-compensation-cost-revenue-study> [<https://perma.cc/8WKP-CGHD>]. To avoid using the term "student-athlete," I will be using terms such as "college athletes," "athletes," or "college students" instead. I encourage you to do the same and to be mindful when conversing about collegiate athletics. This way, we can move forward as a society that promotes an inclusive environment for athletes, administrators, coaches, fans, and other stakeholders.³⁶ *O'Bannon*, *supra* note 20, at 1053.

³⁶ *O'Bannon*, *supra* note 20, at 1053.

³⁷ *Id.*

³⁸ *See id.* at 1058.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See id.* at 1057.

⁴² *Id.* at 1067.

⁴³ *Tracker: Name, Image and Likeness Legislation by State*, BUSINESS OF COLLEGE SPORTS (May 3, 2022), <https://businessofcollegesports.com/tracker-name-image-and-likeness-legislation-by-state/> [<https://perma.cc/U38P-UKD6>].

⁴⁴ *See* Brian Geisinger, *Interim NIL Policy Adopted By NCAA; College Athletes Able to Benefit Financially*, ACCSPORTS.COM (June 30, 2021), <https://accsports.com/acc-news/interim-nil-policy-adopted-by-ncaa/> [<https://perma.cc/BH85-6TJA>].

ELECTRONIC ARTS' COLLEGE VIDEOGAMES IN THE NAME, IMAGE, AND LIKENESS ERA

issued, both the NCAA and its member institutions have been operating in unchartered legal territory.⁴⁵ This is an evolving area of law that implicates each state's specific statutory schemes as well as that of the NCAA and its member organizations.⁴⁶ It is likely that it will take some time for states and universities alike to agree on common language regarding athlete's NILs. Therefore, EA likely has several avenues it could pursue in the meantime to compensate college athletes.

III. WHAT COULD BE IN THE CARDS FOR THE FUTURE?

With EA's announcement of their forthcoming game, it is clear their new release will have to navigate a different legal landscape than when "*NCAA Football 14*" hit the shelves. Considering college athletes are now able to license their own NIL rights, it is unlikely that EA would release their "*College Football*" videogame without paying athletes in some capacity.⁴⁷ The announcement for the videogame came after states began enacting NIL legislation, thus they were aware of the changing legal landscape surrounding NIL that would go into effect in the coming years.⁴⁸

A. *New Legal Landscape*

To properly procure the necessary NIL rights from college athletes, EA faces an uphill battle in navigating the unsettled legal issues for their upcoming new release. As collegiate athletes are not members of a collective bargaining unit, compensation could be negotiated individually, but this is a daunting task considering the size of football teams.⁴⁹ Any attempts at collective compensation would likely invoke employment regulations, and given the complexity of employment law with

⁴⁵ See Lila Bromberg, *In the NIL Arms Race, Some Schools Are Going the Extra Mile to Help Their Athletes*, SPORTS ILLUSTRATED (July 1, 2021), <https://www.si.com/college/2021/07/01/name-image-likeness-programs-schools-ncaa> [<https://perma.cc/LVW6-XDGV>].

⁴⁶ See Geisinger, *supra* note 44.

⁴⁷ Owen Good, *NCAA Ruling Means EA Sports Can Pay Real Players to be in College Football Game*, POLYGON (July 1, 2021), <https://www.polygon.com/22559909/ncaa-college-football-nil-rules-pay-players-ea-sports-video-game> [<https://perma.cc/5KM7-G8A2>].

⁴⁸ *Id.*

⁴⁹ For the last "*NCAA Football*" title, there were 126 schools featured. Most college football programs have over one hundred players. If EA Sports were to come to agreements with just the twenty-two starting players per team, they would need a total of 2,772 licenses. See Chris Fuhrmeister, *NCAA Football 14 Team Ratings Reportedly Revealed for all 126 Teams*, SB NATION (June 11, 2013), <https://www.sbnation.com/college-football/2013/6/11/4420446/ncaa-football-14-team-ratings-rankings> [<https://perma.cc/GW8E-J6Y7>]; Coach Martin, *How Many Players Are on a Football Team? (All Levels)*, FOOTBALL ADVANTAGE (last visited July 21, 2022), <https://footballadvantage.com/how-many-players-on-a-football-team/> [<https://perma.cc/AQ8E-AGWD>].

collegiate student status, compensating students like employees would require careful consideration as a type of hybrid regulation to avoid negative downstream consequences.

However, despite previous unsuccessful player attempts at unionizing at the college level, recent comments by new leadership at the National Labor Relations Board (“NLRB”) could indicate that future unionization may be in the cards.⁵⁰ When football players at Northwestern University attempted to unionize in 2014, they were denied on other procedural grounds, leaving the NLRB without ultimately ruling on the merits of their case.⁵¹

Other governmental intervention could further provide concrete rules for college athletes and those they seek to do business with. Legislation could provide such a regulatory path for EA to navigate. For example, a bill has been introduced by Senators Chris Murphy and Bernie Sanders that would allow college athletes to form unions within athletic conferences.⁵² Allowing unionization for college athletes opens the door for EA to pursue collectively bargained license agreements, similar to those they already pursue with professional athletes. Passing of legislation in this arena, however wide in scope, will have implications for EA in how they choose to engage with these college athletes for future releases.

B. New Modes and New Sports

Without a concrete path forward for college athlete collective bargaining, EA will have to find other ways to acquire the NIL rights of college athletes. EA could embrace this need for individual licenses for the near future, and instead choose to pare down the scale of available athletes. That is, EA could simply seek to depict fewer schools in order to reduce the number of individual licenses required for the game. This strategy could include only depicting teams that meet a certain threshold of rank or stadium attendance. However, this strategy is not likely viable, as it would preclude the ability of EA to market its highly successful Ultimate Team mode. ‘Ultimate Team’ allows users to assemble teams of individual players selected from

⁵⁰ Abigail Hess, *Some College Athletes are Employees, Federal Agency Says—Here’s What That Means*, CNBC (Sep. 29, 2021), <https://www.cnbc.com/2021/09/29/college-athletes-can-be-considered-employees-says-top-nlr-lawyer.html>. [<https://perma.cc/A6AB-R3YN>]. In a memo issued by the General Counsel of the NLRB, the current position of the government entity is that college athletes can receive the statutory benefits of an employee under the National Labor Relations Act.

⁵¹ *Board Unanimously Decides to Decline Jurisdiction in Northwestern Case*, NATIONAL LABOR RELATIONS BOARD (Aug. 17, 2015), <https://www.nlr.gov/news-outreach/news-story/board-unanimously-decides-to-decline-jurisdiction-in-northwestern-case> [<https://perma.cc/7JHP-ATCN>].

⁵² Hess, *supra* note 50.

ELECTRONIC ARTS' COLLEGE VIDEOGAMES IN THE NAME, IMAGE, AND LIKENESS ERA

across all active teams to compete against other users online in real time.⁵³ This mode of play has been wildly successful for EA,⁵⁴ and the benefit of offering this type of mode likely outweighs any benefits achieved by reducing the capital spent on paring down licenses.

On the other hand, EA could elect to pivot its franchise to cover college sports that field smaller teams. Sports like tennis or basketball would require fewer licenses for athletes in their respective games. Contrasted with college football, which typically has over one hundred players per team, focusing on sports with smaller rosters would reduce the legwork EA would have to undertake every season to update its rosters.⁵⁵ Further, this change would enable EA to provide a more diverse array of sports, including coed sports which would provide a more equitable gender representation, potentially increasing their market reach. Currently, no female athletes have been depicted in videogames at the college level. This strategy to focus on sports with smaller team sizes is unlikely to be anything more than a drive to capture additional gaming markets in the future, however, given the announcement that a football videogame is currently in the EA pipeline.

C. *New NIL Possibilities*

Returning the conversation to the “*EA Sports College Football*” videogame, it would be impractical for EA to negotiate individual licenses with every football player at every NCAA school portrayed in the upcoming release. Thus, EA would likely seek to obtain some form of combined assignment of rights. This type of licensing agreement would involve a single contract for each individual school depicted, where athletes at that school could elect to opt into the negotiated terms of their school’s contract. EA is currently collaborating with the Collegiate Licensing Company (“CLC”) to properly acquire the permissions necessary for the videogame producer to depict team names and uniforms in their new series.⁵⁶ The CLC is the entity that licenses the trademarks of the NCAA and its member schools.⁵⁷ Working with the CLC is an important step to ensuring that the videogame will be as accurate as possible in exhibiting the logos, stadia, and other distinguishing features of

⁵³ Shlomo Sprung, *EA Sports’ Ultimate Team Mode is Serious Business*, BOARDROOM (Jun. 3, 2021), <https://boardroom.tv/ea-sports-fifa-ultimate-team-madden-nhl/#:~:text=EA%20Sports%E2%80%99%20Ultimate%20Team%20game%20mode%2C%20in%20which,Sports%E2%80%99%20longtime%20slogan%20is%20%E2%80%9CIt%E2%80%99s%20in%20the%20Game.%E2%80%9D> [https://perma.cc/V6RS-X22Z].

⁵⁴ *Id.*

⁵⁵ Martin, *supra* note 49.

⁵⁶ Brumley, *supra* note 1.

⁵⁷ O’Bannon, *supra* note 20, at 1055.

participating member institutions.⁵⁸

Currently, the University of Washington already allows athletes to license their NILs through the University, where a percentage of proceeds from athlete jersey sales goes directly to the athlete if they opt into the licensing agreement with the University.⁵⁹ Max Lebowitz, who is the University of Washington Assistant Director for Compliance, believes this model could work for EA too.⁶⁰ To be included in the videogame, athletes would simply opt into their school's contract with EA and receive compensation.⁶¹ Of course, athletes can decline the school's contract, similar to what Jordan did in "NBA Live 96" and instead choose to negotiate their own deals. However, the University of Washington's agreement with the sports apparel company Fanatics makes it much easier for college athletes, without any legal training, to enter into a contract and agree to receive money.⁶² Given the program's success, Lebowitz believes such an opt-in model could be a viable solution for EA to obtain the rights they need for their next rollout.⁶³

Other non-traditional means of compensation could be utilized in conjunction with EA's new release. Melissa Peach, the Associate Athletic Director for Compliance at the University at Albany, pointed out that there could be various opportunities for athletes to take advantage of their NIL rights even after games have been released.⁶⁴ For example, athletes could engage with brick-and-mortar videogame stores, like GameStop or Best Buy, to schedule player appearances in accordance with a game's release.⁶⁵ During these appearances, athletes could sign memorabilia, posters, or videogame covers, as well as pose for pictures with fans.⁶⁶ There, the store would be able to compensate the athlete in any way that the parties agreed within the scope of their state's NIL policy.⁶⁷

CONCLUSION

EA needs to be smart with its decisions in releasing their forthcoming "College

⁵⁸ See Brumley, *supra* note 1.

⁵⁹ Zoom Interview with Max Lebowitz, Assistant Director for Compliance—Financial Aid, University of Washington (Apr. 4, 2022), [<https://perma.cc/NY8V-73VU>] [hereinafter Lebowitz].

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Lebowitz, *supra* note 59.

⁶³ *Id.*

⁶⁴ Zoom Interview with Melissa Peach, Associate Athletic Director for Compliance, University at Albany (Mar. 31, 2022), [<https://perma.cc/SF9T-H5YX>] [hereinafter Peach].

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

**ELECTRONIC ARTS' COLLEGE VIDEOGAMES
IN THE NAME, IMAGE, AND LIKENESS ERA**

Football” videogame series. EA should not force the game’s release if they cannot acquire the requisite athlete’s NILs, or else they risk disappointing consumers and producing an unsuccessful game. If the videogame developer takes the proper precautions to ensure that no athlete’s right of publicity is violated by the production of their game, they can avoid legal controversy. However, given the turbulence of the landscape of laws surrounding collegiate compensation, this is likely easier said than done. A successful release of “*College Football*” would give EA a licensing model that the company can use in developing future college videogames.