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College Athlete Representations in Sports Video Games

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This study sought to gauge college sport video-game consumers' ability to identify National Collegiate Athletic Association (NCAA) college football players, whose likenesses are featured in such games. The study also measured whether consumers perceived the use of athletes' likenesses as sponsorship of these games, as well as whether certain demographic, usage, and other criteria may influence their positions on whether athletes should be compensated for such use, in excess of their current athletic scholarships. Findings point to the ability of consumers to identify athletes in the video games overall, and at a significantly higher percentage for nationally known football players whose likenesses are utilized in the games. Unsurprisingly, knowledge of college football as a sport, and of the video game series itself, significantly correlated with increased likelihood of identifying digital representations of real-life players. These and other findings, and their implications for NCAA policy and pending litigation related to student-athlete likenesses, are discussed.

Intercollegiate sport is a unique amalgam of passionate and loyal supporters, revenue-seeking athletic departments, creative marketers and sponsors, as well as the main actors of the college game experience, the amateur athletes. Since, according to Brand (2004, 2006, 2009) amateur defines the participants, not the intercollegiate athletic enterprise, National Collegiate Athletic Association (NCAA) member institutions have established several revenue-producing relations with corporate partners, commercial entities, and manufacturers of licensed merchandise. For

college sports video games, the NCAA's and its member institutions' commercial partner is Electronic Arts (EA), a \$4 billion company (Electronic Arts, 2011).

EA's *NCAA Football* sales have been increasing each year (Grant, 2011). Although not the most successful sports video game title overall, *NCAA Football* annually yields considerable gross revenue, estimated at \$200 million a year for EA and the licensing sources in the NCAA, the Collegiate Licensing Company (CLC), and NCAA member institutions (Software Sales, 2011). These video-game partners have become targets of federal class action suits¹ in which plaintiffs allege athletes' likenesses have been utilized to enhance the end users' (gamers) experience. Currently, there are no specific NCAA bylaws governing such usage (Cianfrone & Baker, 2010; Kaburakis, Pierce, Cianfrone, & Paule, 2012; Kaburakis, Pierce, Fleming, Clavio, Lawrence, & Dziuba, 2009). Furthermore, college athletes themselves are unclear regarding this use, whether it is covered by present releases they annually sign in order to be eligible for intercollegiate athletics participation (NCAA, 2012), and whether their participation in the video games could be construed as an endorsement of these games (Kaburakis et al., 2012).

While the NCAA has denied using player likenesses in college sports video games, including the NCAA Football series, the creators of the NCAA Football series have spoken openly to the media about in-game players representing their real-life counterparts, as noted by Temple (2012):

Due to NCAA restrictions on the amateur status of athletes, players' real names are not used. But standout players in the game certainly possess the physical and athletic attributes of their real-life counterparts. For example, Matt Barkley, otherwise known in the game as USC's "QB #7," has an overall rating of 98, as do Manti Te'o (Notre Dame's "MLB #5") and Montee Ball (Wisconsin's "RB #28"). Those numbers represent the highest overall individual ratings in the game, and all three are potential Heisman Trophy finalists next season.

Haumiller said that while makers of the video game cannot use actual names, they do attempt to replicate the style of play from each team. Wisconsin, for example, is known nationally as a power running team, which shows up in the game. (¶12-13).

Internal emails uncovered in the discovery process of the *O'Bannon* lawsuit have revealed NCAA executives were aware as early as 2003 of the usage of "attributes and jersey numbers of the players" (Solomon, 2012, ¶3) in the college football game.

Kaburakis et al. (2012) found 54% of surveyed college athletes felt they were endorsing these video games, and almost two-thirds believed they should receive additional compensation for the use of their images. In light of potential future legal adjudications, it is important to explore whether video game consumers are or may be confused in regard to the presence of athletes in these video games, and whether this presence may constitute endorsement of the games by the players. Examining video game users through surveys relating to their usage of games featuring digital representations of college athletes may indicate that the rights of these athletes have been violated. If there is evidence of recognition of student-athlete likenesses within the games found in surveys given to video game users, a connection can be made between the athlete's likenesses, their commercial values, the video game and its digital characters. Leaving aside a discussion of usage or non-usage, this study sought to gauge college sports video-game consumers' ability to identify student-athletes, whose likenesses are featured in such games. A secondary purpose was to measure whether consumers perceived the use of athletes'

likenesses constituted sponsorship of these games, as well as whether certain criteria may influence their positions on whether college athletes should be compensated for such use.

Theoretical Framework

The notion of NCAA amateurism has evolved considerably over the past century (e.g., Crowley, 2006; Falla, 1981; Kaburakis, 2007; Pierce, Kaburakis, & Fielding, 2010; Wheeler, 2004), especially considering commercialization and commodification of football and basketball. The recent *In Re Student Athlete Name and Likeness Licensing Litigation* (2010), consolidating class action suits in *Keller v. Electronic Arts, National Collegiate Athletic Association, and Collegiate Licensing Company* (2009) and *O'Bannon v. National Collegiate Athletic Association, and Collegiate Licensing Company* (2009), has attracted scholarly and media attention surrounding the use of athletes in commercial activities. In *Hart v. Electronic Arts* (2011), the court ruled athletes' video game likenesses' use is sufficiently "transformative" to enjoy First Amendment constitutional protection. Kaburakis et al. (2012) delivered the first empirical contribution on intellectual property aspects of the pending litigation and the use of athletes' likenesses in video games, through their survey of student-athletes' perceptions of commercial activity and video games. However, there is a dearth of empirical research on consumers' perceptions and understanding of such student-athletes images' use in college sports video games. This study contributes to the body of knowledge by collecting data from video game consumers, and scientifically analyzing that data.

The Role of Survey Evidence

There is growing utilization of survey evidence to clarify and quantify legal arguments, making quantitative analysis instrumental for intellectual property litigation that reaches trial (Berger & Halligan, 2012; Bush, 2008; International Trademark Association, 2008). Especially in regard to trademark infringement and false endorsement claims, survey evidence and research studies yield crucial data. In fact, the absence of such analytics has been held as a shortcoming in the context of some intellectual property litigation (*Amazon v. Cannondale*, 2000; *Cairns v. Franklin Mint*, 1998; *Charles Jacquin et Cie v. Destileria Serralles*, 1990; *Eagle Snacks v. Nabisco Brands*, 1985; *Essence Communications v. Singh Indus.*, 1988; International Trademark Association, 2008), and such survey evidence frequently proves to be pivotal for the outcome of each case (Berger & Halligan, 2012; Rodenberg & Kaburakis, 2011). Furthermore, the contribution of survey evidence was acknowledged as key toward condensing otherwise time-consuming litigation: "Scientifically designed samples and polls, meeting the tests of necessity and trustworthiness, are useful adjuncts to conventional methods of proof and may, under certain circumstances, contribute materially to shortening the trial of the protracted case" (Judicial Conference of the United States, 1960, p. 425).

The U.S. Supreme Court outlined the requirements for survey evidence and acceptable expert witnesses in *Daubert v. Merrell Dow Pharmaceuticals* (1993), and *Kumho Tire Company v. Carmichael* (1999). In order for a survey to be admitted as evidence, the Court examined four factors: testing, peer review, error rates, and acceptability in the relevant scientific community. An appropriate survey instrument requires that valid survey methodology be used, such as accurate reporting and precise recording/coding, correct analysis of the data recorded, and non-biased administration of the survey. The Manual for Complex Litigation by the Federal Judicial

Center (2004) outlined the important considerations in regard to good survey evidence, including representative samples, statistical validity, clear and objective questioning, appropriate interviewing procedure, accurate reporting and statistical analysis, as well as overall objectivity. Market surveys and objective, peer reviewed, academic research may result in clarifying data for adjudicating courts (Rodenberg & Kaburakis, 2011).

Right of Publicity and Commercial Value

Right of publicity law is rooted in late 19th Century privacy rights' scholarship (Cooley, 1878; Warren & Brandeis, 1890). Prosser (1960) included the appropriation of name or likeness in his invasion of privacy analysis, reflecting on *Haelan Labs v Topps Chewing Gum* (1953) and Nimmer (1954), as the first clear expressions of the right. The right of publicity is currently accepted as the inherent right to control the commercial use of one's identity (*Haelan Labs v Topps Chewing Gum*, 1953; McCarthy, 2011; *Zacchini v. Scripps-Howard Broadcasting Co.*, 1977). College athletes possess rights of publicity over the use of their images and likenesses (Cianfrone & Baker, 2010; Hanlon & Yasser, 2008; *Hart v. Electronic Arts*, 2011; Kaburakis et al., 2009; Matzkin, 2008; McCormick & McCormick, 2008; Mueller, 2004, Thompson, 1994).

Commercial publicity rights have been represented by a number of malleable concepts on which there is no uniformity of acceptance, no federally codified law, and jurisdictions across the U.S. have been split (Grady, McKelvey, & Clement, 2005; Kaburakis, et al., 2009). For example, the class action complaint in the pending NCAA athletes' suit encompasses both Indiana and California statutory right of publicity claims (In Re Student Athlete Name and Likeness Licensing Litigation, Second Consolidated Amended Class Action Complaint, 2011, pp. 143-145). In California, Civil Code § 3344 contains the following:

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... Punitive damages may also be awarded (Cal. Civ. Code § 3344a).

The American Law Institute's work on the Restatement (Third) of Unfair Competition encapsulates common threads among statutory right of publicity provisions and common law. U.S. Section 46 of the Restatement (Third) of Unfair Competition (1995) sets the burden of proof for establishing a violation of a right of publicity as: (i) use of the plaintiff's identity; (ii) identity has commercial value; (iii) appropriation of commercial value for purposes of trade; (iv) lack of consent; and (v) resulting commercial injury (Restatement [Third] of Unfair Competition, 1995, §46). Not establishing the second prong, commercial value, has been a pitfall for plaintiffs (*Condit v. Star Editorial*, 2003; *Cheatham v. Paisano Pub.*, 1995; *Jackson v. Playboy Enters.* 1983; *Pesina v. Midway*, 1996; *Vassiliades v. Garfinckel's, Brooks Bros.*, 1985). The second prong has been traditionally decided after consideration of marketing research surveys and analytical tools attempting to establish whether there is indeed commercial value (*Henley v. Dillard*, 1999, International Trademark Association, 2008; McCarthy, 2012; *Pesina v. Midway*, 1996). In *Pesina v Midway Manufacturing* (1996), the plaintiff contended his common law right of publicity and rights under the federal Lanham Act had been violated. However, only the

defendants used survey evidence, which established that only 6% of 306 (Mortal Kombat) video game users could recognize the plaintiff. The court concluded:

Only one respondent actually knew that Mr. Pesina modeled for Johnny Cage... Mr. Pesina could argue that he became so associated with Johnny Cage that the character invokes Mr. Pesina's identity. Thus, his right to publicity would be invaded by the defendants' use of Johnny Cage... To prevail on this theory, however, Mr. Pesina would have to show that his identity became "inextricably intertwined" in the public mind with Johnny Cage. This Mr. Pesina cannot do since the evidence shows that Mr. Pesina is not a widely known martial artist and the public does not even recognize him as a model for Johnny Cage (*Pesina v Midway Manufacturing*, 1996, p. 42).

Conversely, in *Henley v Dillard* (1999), Henley sued Dillard's over a line of shirts referred to as "Henley", and an advertisement of a man donning a shirt with text reading "This is Don" and "This is Don's Henley." In surveys provided by the Plaintiff, 15% of respondents identified Henley in the advertisement and thought he was a spokesman for the product (*Henley v Dillard*, 1999). The court considered this 15% finding to be persuasive and granted Henley summary judgment in his right of publicity misappropriation claim.

As acknowledged in the Restatement's comments section: "... [T]he identity of even an unknown person may possess commercial value... Thus, an evaluation of the relative fame of the plaintiff is more properly relevant to the determination of appropriate relief..." [Restatement (Third) of Unfair Competition, 1995, §46, comment d]. Hence, this article investigates the commercial value prong by evaluating whether consumers can sufficiently identify NCAA football player avatars in video games and, in turn, make the connection between the video avatar and the player. As a result, the first research question attempts to determine whether survey respondents are able to identify avatars as images and likenesses of real college football players, thus yielding a measurement of the college athletes' relative fame.

Furthermore, such research may lead to important findings for a court to consider in view of the consolidated class action suits and whilst determining class certification. Specifically, class considerations may encompass measuring consumers' recognition of national "marquee" student-athletes, their recognition of randomly selected players from the game's national pool of teams, and student-athletes who may lack national exposure but may be regionally recognized. In a closely-related class action suit, *White v NCAA* (2006), the elements of Federal Rule of Civil Procedure (Rule) 23 (a), numerosity, commonality, typicality, and adequacy were established for a class of student-athletes "... having received Grant-in-Aid (GIA) from major college football and basketball programs from a particular point in time through the present..." (*White v. NCAA*, 2006, p. 2). Distinctions in regard to student-athletes' institution's divisional affiliation, conference, Bowl-qualifying status, and others, necessitate a research sample of student-athletes and schools that encompass several levels of player success, player media notoriety, and school size/athletic team quality. Nevertheless, procedurally:

The commonality requirement is generally construed liberally; the existence of only a few common legal and factual issues may satisfy the requirement... the class members' claims derive from a common core of salient facts, and share many common legal issues..." (*White v. NCAA*, 2006, pp. 2-3).

As a result, the second research question attempts to determine whether survey respondents can identify marquee national players compared to local university players, while the third research question examines the effect of demographic and usage variables on the ability of survey respondents to identify national marquee players and local university players.

The Lanham Act

In addition to state-level common law or statutory right of publicity claims, plaintiffs in licensing-related cases often pursue a false endorsement claim under the Federal Trademark (Lanham) Act §43(a) (2011). Lanham Act plaintiffs must prove that: (i) the mark is legally protectable; (ii) the mark is owned; and (iii) the defendant's use of the mark to identify its good or service is likely to create confusion concerning the plaintiff's sponsorship. The "likelihood of confusion" standard in the Lanham Act is frequently litigated and decided pursuant to quantitative research (International Trademark Association, 2008). In relation to such a Lanham Act §43(a) claim, it is important for a court and jury to determine whether video-game consumers perceived student-athletes' participation in these video games as an endorsement.

Intellectual property surveys generally investigate three areas: distinctiveness (whether there was secondary meaning attributed to a mark), dilution (blurring or tarnishment of a mark), and the "likelihood of confusion," which is the most pertinent concept to this examination of video games' digital representations. The question arises: through exposure to the game, does the consumer develop a sense that the people whose likenesses are digitally incorporated into the game endorse it? As a result, the fourth research question seeks to determine if there is a perception among survey respondents that college football players are being compensated or should be compensated for appearing in college football video games. The final research question examines the effect of demographic and usage variables on such perceptions.

For the purposes of this study, it is useful to draw distinctions between survey evidence pointing to distinctiveness/secondary meaning of a mark and likelihood of confusion surveys. According to the Trademark Manual of Examining Procedure § 1212.03, proving that an image or likeness has acquired distinctiveness is found among other means by "... survey evidence showing that the relevant group of consumers views the mark as having a secondary meaning" (United States Patent and Trademark Office, 2011, § 1212.03). The Ninth Circuit Court of Appeals has remarked that an expert survey of purchasers can provide the most persuasive evidence of secondary meaning (*Vision Sports, Inc. v. Melville Corp.*, 1989). However, survey results must do more than indicate the popularity of a product. The survey must instead show that a significant part "... of the buying class uses the designation to identify a single source" (Bush, 2008, p. 2). While no specific benchmark exists "... for what percentage of purchasers must recognize a mark as a source identifier to show that the mark has acquired distinctiveness" (Bush, 2008, p. 2), courts have held that survey evidence in which 25% of respondents associated plaintiff's designation with a single source was insufficient proof of secondary meaning (*Zippo Mfg. v. Rogers Imports*, 1963). Another court found sufficient proof of secondary meaning in a case when 41% of respondents associated red and yellow capsules with a single brand and 38% identified that brand as TYLENOL (*McNeil-PPC v. Granutec*, 1995).

With respect to the "likelihood of confusion" problem, "... surveys can play a role in various ways in proving likelihood of confusion, including the analysis as to whether consumers are likely to be confused, the fame or strength of the mark, the distinctiveness of the mark, and so forth" (Bush, 2008, p. 3). The Second Circuit has observed that actual confusion need not be

shown to prevail under the Lanham Act, since actual confusion is very difficult to prove and the Act requires only a likelihood of confusion as to source (*Lois Sportswear, U.S.A. v. Levi Strauss*, 1986). Recently, the Third Circuit in *Facenda, Jr. v. NFL Films* (2008) confirmed that unlike Lanham Act claims under § 43(a)(1)(B), which require actual confusion and misleading statements, claims under § 43(a)(1)(A) do not (only requiring a “likelihood of confusion”). Generally, lower percentages are needed in a survey to show a likelihood of confusion as compared with a survey trying to show acquired distinctiveness. According to Bush (2008),

“In likelihood of confusion cases, the survey need not show that a majority are likely to be confused. Courts have held that an ‘appreciable’ number is what is required, although it is not exactly clear what the number has to be” (p. 3).

Despite the absence of clear numeric guidelines, sufficient case law exists pointing to general quantitative benchmarks for such likelihood of confusion surveys.

The Seventh Circuit has stated that a survey showing that over 50% of those participating are likely to be confused was strongly probative of actual confusion, and far in excess of the number needed to show a likelihood of confusion (*Union Carbide Corp. v. Ever-Ready, Inc.*, 1976). Overall, likelihood of confusion can be evidenced between 25% and 50% (Bush, 2008), but results as low as eleven percent have been relied upon to support a finding of likely confusion (*Jockey International v. Burkard*, 1975). The court in *Levi Strauss v. Abercrombie & Fitch* (2011) found that a survey indicating “... ten percent or more of the population is confused is problematic to a trademark owner” (§ 31). In a case that involved the McDonald’s brand and an economy hotel chain, 16% of respondents thought that defendant’s McSLEEP motel was owned or operated by plaintiff McDonald’s, and the court observed: “Projected across the 144 million people who are considered to be the potential audience for McSleep Inn, well over 20 million would be likely to be confused. This is not an insubstantial number.” (*Quality Inns Int’l v. McDonald’s Corp.*, 1988, p. 1649). In another case, a court found that a properly conducted survey showing that 15% of respondents associated defendant’s TEXON auto repair service mark with plaintiff’s EXXON gasoline mark, and that 23% associated TEXON with gasoline, constituted “strong evidence indicating a likelihood of confusion.” (*Exxon Corp. v. Texas Motor Exchange*, 1980, p. 500). In contrast, survey results falling under 10 percent is evidence that confusion is unlikely (McCarthy, 2011). In fact, the Seventh Circuit found that 7.6% is “... a factor weighing against infringement.” (*Henri’s Food Products v. Kraft*, 1983, p. 391).

In the case of *NCAA Football*, the crucial element in establishing a false endorsement claim under the Lanham Act would be: (iii) the defendant’s use of the mark... is likely to create confusion concerning the plaintiff’s sponsorship (§43(a)). Plaintiffs will be able to recover damages (absent successful defenses raised by defendants) if consumers are likely to be confused as to whether the use of student-athletes likenesses in the video game signifies that student-athletes endorsed the products (receiving compensation above their athletic scholarships). As discussed earlier, if 25 percent of (or in some cases even fewer) respondents are confused and believe that student-athletes are indeed endorsing the video games, such a finding may be considered as *prima facie* evidence of a successful Lanham Act §43(a) false endorsement claim.

Purpose of the Study

In light of the existing literature and the importance of intellectual property rights in the domain of entertainment and college sport, the research questions were divided into two sections with distinct questions. The questions asked in the first section, which examined college athletes' rights of publicity and commercial value, were:

RQ1: To what degree will respondents identify video-game avatars as representations of college football players?

RQ2: Is there a significant difference in the ability of survey respondents to identify marquee national players compared to local university players?

RQ3: What effect, if any, do respondents' demographic and usage variables have on their ability to identify avatars of national marquee and local university players?

The second section centered on the (Lanham Act) areas of false endorsement and the likelihood of confusion in reference to whether college athletes endorse video games. The questions generated for this section were:

RQ4: Is there a perception among respondents that college football players are compensated or should be compensated for their representative avatars to appear in college football video games?

RQ5: What effect, if any, do demographic and usage variables of survey respondents have on their perceptions of whether players are compensated for their representative avatars to appear in college football video games?

Methodology

The study utilized survey methodology to ascertain whether respondents interpreted the digital representations of football players in a video game as representations of real players. Student participants were selected as survey respondents because of their prominence in the demographic mix of video game users (Entertainment Software Association, 2011; Marketing Vox, 2008). EA has recognized the importance of the college-student market by installing marketing representatives on college campuses across the U.S. (CEGamers, 2011; Freiburg & Freiburg, 2005). The college football sports video game utilized was *NCAA Football 2010*.

Participants

The study's sample (N = 422) was obtained from students at four NCAA member universities. Sampled students majored in a wide variety of disciplines. The universities that the students attended were affiliated with both Automatic Qualification (AQ) conferences and non-Automatic Qualification (non-AQ) conferences to the Bowl Championship Series (BCS). The sample included: a mid-sized non-AQ institution in the Midwest ("Midwest non-AQ School A"); a large AQ institution in the Midwest ("Midwest AQ School"); a small, private AQ school in the southeastern U.S. ("Southeastern AQ School"); and a mid-sized non-AQ institution in the Midwest ("Midwest non-AQ School B"). The participants were part of large-scale lecture classes at each of the four universities, with the intent being to capture a broad demographic of both football fans and non-fans, as well as those both familiar and unfamiliar with video games. This was intended to avoid potential biases in these areas affecting the resulting data.

Procedures and Instrumentation

In order to create a standardized set of representations that could be demonstrated to a variety of participants, the following procedure was utilized. First, the default rosters were used. There was no alteration or modification of rosters or player avatars. The game's entire lineup of players was loaded, and the top eight players by overall ranking were selected. The overall ranking in the college football video game is determined by an EA Sports' proprietary algorithm, which takes into account the digital players' ratings in several categories involving physical skill set, football-specific abilities, and overall impact on a team's success (Temple, 2012). In addition to these top eight players, four players were chosen at random from the embedded national pool of players. This group of 12 players was shown to all of the participants in the study.

In order to assess player recognition and draw distinctions among participants of the different institutions in the study, nine players were selected from each sampled university's default roster. Variability in school size, competitive level of football team, home team success on the field, marketing/exposure of local team/student-athletes, and variance in levels of media exposure among the top-rated players may directly impact recognition in each school (Cianfrone, Zhang, Trail, & Lutz, 2008). Therefore, we utilized a cross-institutional comparison among the four available institutions. For this set of players, the top six by rating for each school were automatically included, as well as three randomly-selected players.

A total of 21 digital players were chosen, with the first 12 standard across all surveys, and the last nine differentiated by school. A digital screen capture was utilized to take two in-game images of each player resulting in two slides per athlete. Figures 1 and 2 illustrate the screens captures used in the data collection process. These standardized images were drawn from the player information screen within the game's roster page. Following capture, images were inserted into a PowerPoint presentation, which automatically advanced every 15 seconds. As a result, each avatar displayed for a total of 30 seconds, with two images split evenly across that time. Participants had a total of 10.5 minutes to identify the players' images. In all cases, the "national" players were displayed first, followed by the school-specific players. The national players were displayed in order from highest-rated to lowest-rated among the top eight, with the final four players displayed in a pre-set random order.

Figure 1 - Sample player representation within EA Sports NCAA Football 2010

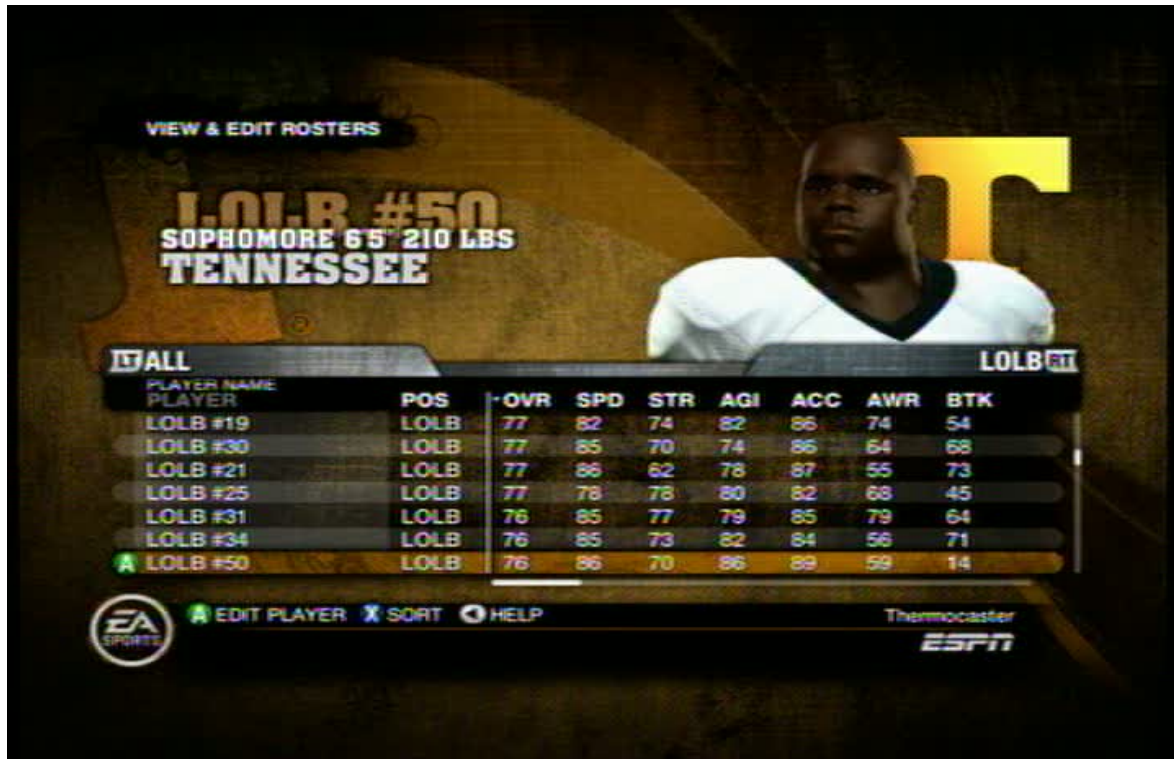


Figure 2 - Sample player roster information page



Participants were provided a two-part paper questionnaire. The participants completed both parts of the questionnaire as a group in a classroom setting. The first part of the questionnaire contained a grid, numbered 1 to 21. For each number, participants were asked to view the player on the screen and provide the player's position, name, and team, for the 30 seconds during the time period when each player's digital images were present on screen. Each player's position and team information was visible on the screen capture. However, the player's name was not included in the default roster, and therefore not visible on the screen capture. In its place, wording that described the player's position and number was present. The items on the questionnaire were based upon research concepts derived from prior research into sport video games (e.g., Cianfrone, Zhang, Trail, & Lutz, 2008; Clavio, Kraft, & Pedersen, 2009; Walsh, Kim, & Ross, 2008) and athlete likenesses (Kaburakis et al., 2012). A list of questions was prepared, then provided to a panel of scholars familiar with both video games and college athletics. Following these steps, the survey instrument was prepared in two parts.

Face validity, the extent to which an instrument appears to measure what it intends to measure (Gray, 2004), was established by adopting similar brand awareness measures utilized in marketing literature and studies, which have examined brand recall in sport video games (Cianfrone et al., 2008; Cuneen & Hannan, 1993; Miloch & Lambrecht, 2006; Pitts, 1998; Sandage 1983; Walsh et al., 2008). Face validity is established by providing simple measures, which clearly examine items such as the participant's perceived level of college football knowledge, knowledge of EA Sports' *NCAA Football*, etc. Single-item indicators for affective, cognitive, and conative responses have been widely accepted in both sport and non-sport contexts (Fink, Trail, & Anderson, 2002; Hennig-Thurau, Henning, & Henrik, 2007; Madrigal, 1995). Past scholarship points to single-item measures serving as appropriate, valid, and reliable indicators, increasing face validity and flexibility (Carlson, Donovan, & Cumiskey, 2009; Kwon & Trail, 2005; Nagy, 2002; Nunnally & Bernstein, 1994; Poon, Leung, & Lee, 2002). Content validity is also established by capturing potential facets of the brand awareness construct, in this instance the represented player's first and last names, as well as playing position and institution. Reliability analysis of the 63-item instrument (comprising player position, name, and team) was .964. When removing position and team name from the instrument (since that information was present on the screen, as mentioned above), the reliability of the remaining 21 items was .867.

The second part of the survey included ten additional questions related to demographics and usage derived from the aforementioned literature relating to brand awareness. Consistent with Cianfrone et al. (2008), Cuneen & Hannan (1993), Miloch & Lambrecht (2006), Pitts (1998), Sandage (1983), and Walsh et al. (2008), instrument questions were examined by a panel of researchers who made suggestions on improving validity (Fink et al., 2002; Hennig-Thurau et al. 2007; Madrigal, 1995). The reliability for this 10-item scale was .751. In terms of demographics, participants were asked to provide their class standing, race (US Census categories), gender, and home state. Regarding usage, participants were asked to rate, on a 5-point Likert-type scale, their overall knowledge of college football, their overall knowledge of their school's team, and their overall knowledge of EA Sports' *NCAA football* (1 = no familiarity or knowledge, 5 = highest level of familiarity or knowledge). As mentioned above, participants' perceived familiarity or knowledge via single item measures is generally accepted in mainstream marketing scholarship (Carlson, Donovan, & Cumiskey, 2009; Kwon & Trail, 2005; Nagy, 2002; Nunnally & Bernstein, 1994; Poon, Leung, & Lee, 2002). Participants were also asked to rate the importance of the presence of real football players on the rosters of college sports video games and the importance of having the ability to download or input real player names in a college

football video game on their purchase intentions (0 = never purchased a college football video game and have no intention of ever purchasing a college football game, 1 = not important at all, 5 = extremely important). The survey also asked participants whether they believed college football players should be compensated (above and beyond NCAA athletic grant-in-aid levels) for appearing in EA's college football video game series (1 = strongly disagree, 2 = disagree, 3 = neither agree nor disagree; 4 = agree, 5 = strongly agree). The single-item measures discussed were created to examine potential factors that may impact a participant's ability to identify players.

Data Analysis

A variety of methods were utilized to address the research questions. Frequencies, means, and percentages were utilized to examine the demographic profile of the study participants. Frequencies and percentages were utilized to determine if participants were able to correctly identify player avatars (RQ1) and to determine the perception of whether players are being compensated or should be compensated for the use of their names and likenesses in the games (RQ 4). Analysis of variance (ANOVA) was utilized to determine if there were significant differences in the mean recall rates of marquee players and local players (RQ2). Regression analysis was utilized to determine if any demographic or usage variables had an influence on one's ability to correctly recall players (RQ3) and if the variables had an impact on the belief that players were being compensated for appearing in the games (RQ5).

Results

The survey instrument yielded a total of 422 surveys. These were fairly evenly split across the four schools. Midwest non-AQ School A yielded a total of 98 surveys (23.2%), Midwest AQ School a total of 103 surveys (24.4%), Southeastern AQ School a total of 87 surveys (20.6%), and Midwest non-AQ School B a total of 134 surveys (31.8%).

Demographics and Usage

In terms of class standing, the largest single group self-identified themselves as juniors (114, 27%), followed by sophomores (108, 25.6%), freshmen (101, 23.9%), seniors/other undergraduates (69, 16.1%), and graduate students (28, 6.6%). A majority of the respondents were female (262, 62.1%). A large majority of the respondents were Caucasian (352, 83.4%), followed by those identifying themselves as Black or African American (32, 7.6%).

Participants were asked to self-rate their overall knowledge of college football, and the sample yielded a mean of 3.50 ($SD = 1.15$). Respondents' self-rated knowledge of their own university's team was almost a full point lower ($M = 2.76$, $SD = 1.29$), while their overall familiarity with the video game series rating fell between the two ($M = 3.21$, $SD = 1.77$). In addition, over 75% of respondents indicated they consumed 4 or more hours of televised NCAA football. In terms of reading or discussing college football, a majority of respondents (53.3%) indicated 1-3 hours, with 94.5% indicating that they spent at least some time every week engaging in this activity. While 68% indicated they attend at least three games per year, five percent indicated that they did not attend a college football game in an average year.

Respondents were also asked to rate the importance of the presence of real football players within game rosters for their intention to purchase the game. Approximately 56 percent of respondents indicated that the presence of real players was either “somewhat important” (26.7%) or “extremely important” (29.6%). Correlation analysis indicated a significant, moderate positive correlation between respondents’ self-identified college football knowledge and the importance of real football players within game rosters as a factor of game purchase intention, $r = .375$, $n = 419$, $p < .001$. A significant, moderate positive correlation also existed between familiarity with the video game series itself and the importance of the presence of real players within game rosters as a factor of game purchase intention, $r = .573$, $n = 419$, $p < .001$. Respondents were also asked to rate the importance of the ability to download or input real player names for their intention to purchase the game. Approximately 42% indicated that this ability was either “somewhat important” (22.7%) or “extremely important” (19.9%) to their purchase intention. A significant strong positive correlation was found between this variable and the importance of the presence of real players within game rosters as a factor of game purchase intention, $r = .765$, $n = 418$, $p < .001$.

Player Identification

The goal of research question one was to determine whether participants would be able to identify digital college football players as representations of real college football players. Respondents were asked if they could identify the 21 players on the slideshow. In regards to the first 12 players shown, which were displayed to all respondents, Table 1 illustrates the frequencies of correct and incorrect answers. In total, the survey yields 2,581 correct responses in a total of 8,862 items for an average recognition percentage of .291, which may be considered meaningful evidence as per aforementioned case law. Responses ranged from no correct identifications of Player 9, to 383 correct identifications of Player 4. The three highest levels of correct responses were all focused on popular quarterbacks of the 2009-10 season: Tim Tebow (90.8%) of the University of Florida; Sam Bradford (72.5%) of the University of Oklahoma; and Colt McCoy (79.4%) of the University of Texas. Based on the observed overall frequencies, the respondents were able to correctly identify national marquee players 50% of the time.

Table 1 - Responses to national player selection

Player	Correct	Incorrect	Pct. Correct
Marquee National Players			
Player 1 (Taylor Mays, SS, USC)	171	251	40.5%
Player 2 (Jermaine Greshman, TE, Oklahoma)	131	291	31.0%
Player 3 (Sam Bradford, QB, Oklahoma)	306	116	72.5%
Player 4 (Tim Tebow, QB, Florida)	383	39	90.8%
Player 5 (Colt McCoy, QB, Texas)	335	87	79.4%
Player 6 (Ciron Black, LT, LSU)	10	412	2.4%
Player 7 (Eric Berry, SS, Tennessee)	142	280	33.6%
Player 8 (Dez Bryant, WR, Oklahoma St.)	195	227	46.2%
Total	1673	1703	49.6%

Randomly Selected National Players

Player 9 (Fred Munzenmaier, FB, Georgia)	0	422	0%
Player 10 (Zack Anderson, RG, Akron)	1	421	.2%
Player 11 (Player does not exist, LOLB, Tennessee)	0	422	0%
Player 12 (Russell Okung, LT, Oklahoma St.)	9	413	2.1%
Total	10	1678	0.6%

A total of 48 digital players were chosen – twelve national players, plus nine “local” players from each of the four participant schools. Following these selections, the in-game player numbers, positions, and other factors (such as skin color, height, and weight) were compared with rosters from the season in question, in this case 2009. In 11 of the 12 instances among the national player chosen, there was a “real” player whose number and position matched their digital equivalent. The lone exception was player 11, a linebacker on the digital roster of the Tennessee Volunteers who did not appear to have a real-life counterpart. A similar pattern was found with the individual school rosters. Midwest non-AQ School A had real-life counterparts for seven of the nine digital players selected, Midwest AQ School had real-life counterparts for nine of the nine players selected, although one player was listed at the wrong position, and Schools Three and Four had real-life counterparts for eight of the nine players.

National versus Local Player Identification

Research question two was proposed in order to understand if there was a difference in the ability of participants to identify marquee national players when compared to local players. The highest-ranked players represented by digital figures 1 through 8 were identified at a higher rate (50%) than the local university players (24%). An ANOVA was conducted on the calculated coefficient of player identification and the results support the basic analysis of the percentage correct. Specifically, individuals were able to correctly recall the marquee national players ($M = .496$, $SD = .29$) at a significantly higher rate compared to their recognition of the local university players ($M = .237$, $SD = .25$, $F(9, 412) = 23.04$, $p < .001$).

Additionally, it was important to determine which factors may have an influence on identification. Research question three sought to determine if any demographic or usage variables have an effect on the ability of participants to correctly identify both marquee and local university players. Utilizing the coefficient determined by evaluating the response rates for the player groups, in regards to the identification of marquee players, college football knowledge ($\beta = .343$), knowledge of their university team ($\beta = .089$), how familiar one is with the game ($\beta = .232$), how many hours per week spent watching NCAA FBS football on TV ($\beta = .131$), how many hours spent per week reading about or discussing college football with others ($\beta = .087$), how many college football games attended in person per year ($\beta = -.112$), gender ($\beta = .067$), and importance of the presence of real football players on the roster when deciding to buy a college sports football video game ($\beta = .188$) were all significant predictors of one’s ability to correctly identify marquee players, $F(9, 404) = 76.62$, $p < .001$, adjusted $R^2 = .622$.

In regards to identifying local university players, knowledge of their university team ($\beta = .457$), how many hours per week spent reading about or discussing college football with others ($\beta = .130$), how many college football games attended in person per year ($\beta = .102$), gender ($\beta = .209$), and the importance of the presence of real football players on the roster when deciding to

buy a college sports football video game ($\beta = .179$) were significant predictors of one's ability to identify local university players, $F(9, 404) = 60.341, p < .001$, adjusted $R^2 = .564$.

Table 2 - Impact of Variables on Ability to Identify National Marquee Players

Variable	Standardized Coefficient β	T
College football knowledge	.342	7.55*
Knowledge of their university team	.089	2.14***
How familiar they are with the game	.232	5.35*
How many hours per week spent watching NCAA Football on TV	.131	3.04**
How many hours per week spent reading or discussing college football	.087	2.21***
How many college football games attended in person per year	-.112	-3.02**
Gender	.067	2.14***
Importance of presence of real players when purchasing game	.188	4.07*
Importance of ability to download players when purchasing game	-.010	-.244

* $p < .001$; ** $p < .01$; *** $p < .05$

Table 3 - Impact of Variables on Ability to Identify Local University Players

Variable	Standardized Coefficient β	T
College football knowledge	.042	.853
Knowledge of their university team	.457	10.23*
How familiar they are with the game	.038	.81
How many hours per week spent watching NCAA Football on TV	.024	.514
How many hours per week spent reading or discussing college football	.130	3.06**
How many college football games attended in person per year	.102	2.55***
Gender	.209	6.21*
Importance of presence of real players when purchasing game	.179	3.60*
Importance of ability to download players when purchasing game	-.011	-.239

* $p < .001$; ** $p < .01$; *** $p < .05$

With respect to the fourth research question, when asked whether college football players were being compensated for appearing the game, 75% of respondents said no, with ten percent responding yes and 15% indicating they were unsure. Respondents were also asked whether players should be compensated for appearing in the game. 17.3% strongly disagreed, 35.7% disagreed, 22.5% neither agreed nor disagreed, 19.7% agreed, and 4.8% strongly agreed.

With respect to the fifth research question, a binary logistic regression analysis was conducted to determine if any demographic and usage variables had an effect on whether individuals believed players were being compensated for appearing in video games. Game familiarity ($\beta = -.270$) was a significant predictor of individuals' perceptions that players were being compensated for appearing in the game ($\chi^2 = 30.645, p < .05, df = 16$) with a Nagelkerke R^2 of .134. This significant negative result indicates that the more familiar individuals are with the game, the less likely they believe athletes are being compensated.

Table 4 - Impact of Variables on Individual Perceptions that Players are being Compensated

Variable	β	Wald Statistic
College football knowledge	-.191	.926
Knowledge of their university team	.070	.223
How familiar they are with the game	-.270	4.25*
How many hours per week spent watching NCAA Football on TV	-.190	1.07
How many hours per week spent reading or discussing college football	-.061	.125
How many college football games attended in person per year	.065	.105
Gender	-.271	.775
Importance of presence of real players when purchasing game	-.136	.125
Importance of ability to download players when purchasing game	.288	.452

* $p < .05$

Discussion

The purpose of this study was to ascertain the degree to which consumers identified digital representations from EA Sport's *NCAA Football 10* as the likenesses of NCAA college football players (on the national level and individual school level). The results paint a picture of a college football video game experience which exists as a virtual mirror image of the "real" college football world, containing not only the officially-licensed and easily recognizable marks and logos of the NCAA and its members, but also the recognizable, but unlicensed, likenesses of college football players.

This study examined the degree to which college students perceived digital representations of players to be authentic (i.e. to be the player in question). The results of the

study indicated that study subjects associated actual NCAA football players with avatars in video games. Specifically, in the case of popular skill position players on the national stage, there is a great likelihood their likenesses will be identified by consumers. Moreover, a significant percentage of consumers were confused about whether players are being compensated for appearing in the game.

This study's finding that 24 percent of subjects correctly identified local college players, and 50 percent of nationally-known "marquee" players likenesses in the *NCAA Football* video game may prove to be dispositive for claims such as the ones raised in the pending case *In Re Student Athlete Name and Likeness Licensing Litigation* (2010). Such results may support plaintiffs' rights of publicity violation claims, as long as other factors (including lack of consent to particular use of these likenesses) also are established (Baker, Grady, & Rappole, 2012; Kaburakis, et al., 2009; Kaburakis, et al., 2012).

Furthermore, 15% of respondents were uncertain and 10% were under the impression athletes were in fact endorsing the products, a combined quarter of the total number of participants. Overall, the more familiar a consumer was with the game, the less likely he/she was to believe the players are endorsing the products. The fact that 25% of respondents felt (agreed or strongly agreed) that athletes should be compensated for the use of their likenesses in college sports video games, may be important in ensuing court deliberations. This finding is not quite at the level of the approximately two-thirds of surveyed student-athletes expressing a desire to receive additional compensation above their athletic scholarships (Kaburakis et al., 2012). Stated differently, the combination of factors affecting college students' perceptions on whether student-athletes should be receiving additional compensation for such use of their likenesses in video games, including the factors of familiarity with the video game, the identifiable nature of player likenesses within the game by the college students surveyed, and other environmental elements, led to three-quarters of the study's respondents holding the position that student-athletes should not receive additional compensation. This finding may be pivotal for amateurism policy reform action currently considered by the NCAA, and instrumental toward supporting defendants' arguments in the pending litigation. Additionally, even if the plaintiffs succeed on all their right of publicity and/or false endorsement claims, U.S. courts have been split in regard to whether such plaintiffs can recover damages and occasionally find First Amendment defenses (Fischer, 2012; Grady, McKelvey, & Clement, 2005; *Hart v. Electronic Arts*, 2011; Kaburakis, et al. 2009).

On the other hand, the NCAA has claimed on numerous occasions that complaints about athlete likeness usage in college sport video games were "...without merit, and that the video games did not violate NCAA rules," (Thomas, 2009, ¶9). The NCAA's own web page (NCAA, 2011) stipulates, "That the NCAA, a conference or an institution cannot grant the use of a student-athlete's name or likeness to endorse a product" (¶4). However, given the survey results relating to the presence of real players on the roster, it can be sufficiently argued that the demonstrated presence of digital likenesses of existent players in the college football video game is acting as a *de facto* endorsement of the product itself. A majority of the consumers in this sample were purchasing the game because of the presence of "real" players. The names of these players come pre-programmed into the game, as broadcasters record the names of real players in their voice work for the game (cited in Cianfrone & Baker, 2010). A similar phenomenon is found in the *College Hoops 2k* series games, announcers state the names of many players from the 2007-08 season, including players with unusual surnames such as 'Mbah a Moute'.

The importance of such sports video game players being viewed as “real” cannot be understated, for the business and marketing implications of not having real players may lead to series and franchise cancellation. Such was the case of the *ESPN NFL 2k* series which debuted during the 2001 football season. By 2005 the 2k series of NFL games had garnered significant critical praise, winning the Sports Simulation Game of the Year from the Academy of Interactive Arts and Sciences in 2005 (“Interactive Achievement Awards,” 2011). *ESPN NFL 2k* was poised to challenge the popular *EA Madden NFL* series for most successful professional football gaming franchise, causing one EA executive to say that *ESPN NFL 2k5*’s success “scared the hell out of us” (¶24, Bissell, 2012). However, in late 2004, EA, the NFL, and the NFLPA jointly signed an exclusivity contract which provided EA the only rights to NFL teams and players in the video game world (Rovell, 2004). The *ESPN NFL 2k* series game immediately disappeared from the marketplace due to a lack of consumer demand. While the company tried to reboot the franchise four years later with a list of former NFL greats on the roster, the series never regained its footing in the marketplace and ceased production once again.

In contrast to EA’s position that plaintiffs “... failed to point to specific attributes that belong to Plaintiff, which are misappropriated in the video game...” (*Hart v. Electronic Arts*, 2010, p. 8), the game does indeed contain these attributes and college athletes’ likenesses. This finding emanates from the empirical investigation of the *NCAA Football* series, and the fact that – in this particular game examination – only five out of the 48 digital players involved in the study did not have a “real” counterpart player, whose current institutional roster number and position matched their digital equivalent.

The results from the regression analyses performed in this study indicated that college football fans, who are active consumers of the game, spend time discussing the game with others, and attend football games or watch them on television, are the most likely to be able to recognize digital representations of players within the game. Utilization of the features within the *NCAA Football* series uncovered a group of tools which can be used to enhance the gaming experience. For example, the *EA Locker* system, which allows for users to download roster and settings files created by other users, as well as upload their own roster files. Examination of college football video game message boards around the launch date of each iteration of the series reveals a series of message threads devoted to creating “accurate” rosters through the process of renaming the existing players within the game to match their real-life analogues (Operation Sports, 2012). One other result of note is the significance of the positive relationship between attending games and the ability to identify local players, as this had a negative effect in the ability to identify the marquee players included in the presentation.

The results indicated that college student respondents in this study could identify popular skill position college football players. Survey findings may be convincing for courts adjudicating college athletes likenesses’ commercial value and consumers’ likelihood of confusion as per college athletes’ endorsement of these products. Such “sports law analytics” research is increasingly sought after by industry stakeholders, legal counsel and federal courts (Rodenberg & Kaburakis, 2011). As a result, scholars are encouraged to undertake such research, both for the academic research benefits and the potential contributions to practitioners and future litigants.

Limitations

The study has some limitations. First, the sample was comprised primarily of undergraduate college students. While this is a key demographic of college sports video games

(CEGamers, 2011; Entertainment Software Association, 2011; Freiburg & Freiburg, 2005; Marketing Vox, 2008), the findings cannot be generalized to the entire population of sports video gamers. Furthermore, the instrument used was a self-report survey, a method, which does contain some inherent limitations. It is assumed that survey respondents answered the instrument's questions truthfully and to the best of their ability.

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Notes

¹ E.g. *Keller v. Electronic Arts, National Collegiate Athletic Association, and Collegiate Licensing Company* (2009), *O'Bannon v. National Collegiate Athletic Association, and Collegiate Licensing Company* (2009), and *Hart v. Electronic Arts* (2011).