

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 09-1967 CW

IN RE NCAA STUDENT-ATHLETE
NAME & LIKENESS LICENSING
LITIGATION

ORDER DENYING
MOTIONS TO DISMISS
(Docket Nos. 856,
857, 858)

_____ /

Plaintiffs, a group of current and former college athletes, pursue this putative class action against Defendant National Collegiate Athletic Association (NCAA). They initially brought claims against Collegiate Licensing Company (CLC) and Electronic Arts Inc. (EA) as well, but recently agreed to settle those claims. Accordingly, this order only addresses Plaintiffs' claims against the NCAA.

The NCAA moves to dismiss the antitrust claims from Plaintiffs' Third Amended Consolidated Class Action Complaint (3CAC). After considering the parties' submissions and oral argument, the Court denies the NCAA's motion to dismiss.

BACKGROUND

Plaintiffs are twenty-five current and former student-athletes who played for NCAA men's football or basketball teams between 1953 and the present. Docket No. 832, 3CAC ¶¶ 25-233. All played at the Division I level, the highest level of collegiate athletic competition,¹ and many went on to play

¹ Prior to 1973, Division I was known as the "University Division." In college football, the division was later subdivided into two

United States District Court
For the Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 professionally, as well. Id. In the present case, four of the
2 Plaintiffs (Right-of-Publicity Plaintiffs) allege that the NCAA
3 misappropriated their names, images, and likenesses in violation
4 of their statutory and common law rights of publicity. The other
5 twenty-one Plaintiffs (Antitrust Plaintiffs) allege that the NCAA
6 violated federal antitrust law by conspiring with EA and CLC to
7 restrain competition in the market for the commercial use of their
8 names, images, and likenesses. This order addresses only the
9 latter set of claims, which arise under the Sherman Antitrust Act,
10 15 U.S.C. § 1 et seq.

11 Antitrust Plaintiffs² initiated the first of these
12 consolidated actions in 2009 and filed a Second Amended
13 Consolidated Class Action Complaint (2CAC) in May 2011. Docket
14 No. 327, 2CAC. Their 2CAC alleged that the NCAA, an
15 unincorporated association of universities and regional sports
16 conferences, which governs collegiate athletics, required student-
17 athletes to sign various release forms as a condition of their
18 eligibility to compete. According to Plaintiffs, those forms
19 "require[d] each of them to relinquish all rights in perpetuity to
20 the commercial use of their images, including after they graduate
21 and are no longer subject to NCAA regulations." Id. ¶ 21. The
22 2CAC alleged that the NCAA relied on these "purposefully
23 misleading" forms, along with its own bylaws, to sell or license
24 student-athletes' names, images, and likenesses to third parties

25
26 subdivisions now known as the "Division I Football Bowl Subdivision" and
27 the "Division I Football Championship Subdivision." For the sake of
28 simplicity, this order refers to all of these divisions as "Division I."

² All subsequent references to "Plaintiffs" in this order allude specifically to the twenty-one Antitrust Plaintiffs and not to the four Right-of-Publicity Plaintiffs, whose claims are not at issue here.

1 such as EA and CLC. Id. EA allegedly profited from the use of
2 these names, images, and likenesses by publishing NCAA-branded
3 videogames that feature player-avatars modeled after real student-
4 athletes. Id. ¶¶ 168, 173. CLC, meanwhile, allegedly represented
5 the NCAA in its licensing agreements with EA and other producers
6 of NCAA-branded merchandise. Id. ¶¶ 16, 341.

7 The 2CAC alleged that the NCAA enlisted these companies in "a
8 price-fixing conspiracy and a group boycott / refusal to deal that
9 [] unlawfully foreclosed [student-athletes] from receiving
10 compensation in connection with the commercial exploitation of
11 their images, likenesses and/or names following their cessation of
12 intercollegiate athletic competition." Id. ¶ 9. Their complaint
13 sought both injunctive and compensatory relief. In particular,
14 Plaintiffs requested a permanent injunction ending the alleged
15 group boycott and monetary damages compensating them for the
16 nonconsensual, commercial use of their names, images, and
17 likenesses.

18 In September 2012, Plaintiffs moved to certify a class to
19 pursue their antitrust claims. Docket No. 554 (subsequently re-
20 filed as Docket No. 651), Class Cert. Mot. Their motion, however,
21 relied on a theory of antitrust liability that had not been
22 clearly plead in their 2CAC. The new theory deviated in three
23 critical respects from the theory plead in their complaint.

24 First, Plaintiffs narrowed their proposed class definition
25 from a class of student-athletes whose names, images, or
26 likenesses were used for a wide range of commercial purposes --
27 including in videogames, apparel, highlight films, and other NCAA-
28 branded merchandise -- to a smaller class of student-athletes

1 whose names, images, and likenesses were featured specifically "in
2 game footage or in videogames." Id. at 1-2.

3 Second, Plaintiffs altered their damages theory by placing
4 greater emphasis on the revenue that the NCAA derives from the use
5 of student-athletes' names and images in live television
6 broadcasts. Before filing their class certification motion,
7 Plaintiffs had focused primarily on revenue derived from the
8 commercial use of their names, images, and likenesses in archival
9 game footage -- as well as videogames and other merchandise -- but
10 not live game broadcasts. In fact, during discovery proceedings
11 in February 2012, Plaintiffs expressly stated that they did not
12 "claim rights to be compensated for appearing in live broadcasts
13 or playing on the field." Docket No. 420, 2/8/2013 Hrg. Tr.
14 15:21-:22 (emphasis added).³ While their 2CAC referred briefly to
15 the revenue generated from the sale of live broadcasting rights,
16 2CAC ¶ 169, its discussion of broadcast-related revenue focused
17 primarily on the sale of archival footage to advertisers,
18 television networks, and fans, see id. ¶¶ 53, 119, 294, 306, 334-
19 64, 420-27 (alleging that former student-athletes' names and
20 images are featured without their consent in "'stock footage' sold
21 to corporate advertisers," "rebroadcasts of 'classic' games," and
22 "DVD game and highlight film[s]").

23 Third and finally, the motion for class certification
24 identified two new markets where Defendants had allegedly
25 restrained competition: (1) the "Division I college education
26

27 ³ See also 2/8/2013 Hrg. Tr. 14:21-:22 ("[Plaintiffs' Counsel]:
28 . . . I will agree that our claims do not emanate from the live
broadcasts.").

1 market" where colleges and universities compete to recruit the
2 best student-athletes; and (2) the "market for the acquisition of
3 group licensing rights for the use of student-athletes' names,
4 images and likenesses in the broadcasts or rebroadcasts of
5 Division I basketball and football games and in videogames
6 featuring Division I basketball and football." Class Cert. Mot.
7 at 18. Previously, Plaintiffs had only alleged harm to the
8 general "collegiate licensing market in the United States,
9 including licensing rights to current and former players' images
10 and likenesses," without reference to any specific "group
11 licensing" market. 2CAC ¶ 306. Furthermore, the 2CAC appeared to
12 conflate the demand for student-athletes' names, images, and
13 likenesses in the collegiate licensing market with the demand for
14 student-athletes among schools in the "Division I college
15 education market." Id. ¶ 312. Plaintiffs' class certification
16 motion made clear that these were two distinct markets.

17 Citing the various changes to Plaintiffs' theory of the case,
18 Defendants moved in October 2012 to strike the class certification
19 motion. Docket No. 639, Mot. Strike. The Court denied the motion
20 to strike but granted Defendants leave to file supplemental briefs
21 opposing class certification so that they could address the
22 changes to Plaintiffs' antitrust theory. Docket No. 673, Order
23 Denying Defs.' Mot. Strike, at 1-2. To further ensure that
24 Defendants had an adequate opportunity to respond to Plaintiffs'
25 new theory, the Court stated that it would also construe any
26 arguments raised in Defendants' motion to strike as part of their
27 opposition to Plaintiffs' class certification motion. Id. at 1.

28

1 The Court heard oral argument on class certification in June
2 2013. Although Defendants had already been granted several
3 opportunities to attack Plaintiffs' new antitrust allegations, see
4 Docket Nos. 639, 648, 677, 680, 794, 789, at the hearing they
5 nevertheless argued that they had not received adequate notice of
6 Plaintiffs' theory and that Plaintiffs should be required to file
7 a new complaint. The Court therefore directed Plaintiffs to amend
8 their complaint "the minimum amount necessary" to incorporate the
9 new allegations raised in their class certification motion.
10 Docket No. 830, Order Granting Pls. Leave to Amend. The Court
11 also permitted Plaintiffs to add a current student-athlete to the
12 complaint. Id.

13 On July 19, 2013, Plaintiffs filed their 3CAC. The 3CAC
14 maintains Plaintiffs' basic price-fixing and group boycott claims
15 while adding the new allegations raised in their class
16 certification motion.⁴ Although EA and NCAA had previously
17 responded to these new allegations in their joint motion to strike
18 and in various class certification briefs, see Docket Nos. 639,
19 648, 677, 680, 794, 789, they nonetheless sought leave to move
20 again for dismissal of the new complaint. Docket Nos. 834, 838.
21 The Court granted their request on September 10, 2013 and set an
22 expedited schedule for briefing the motions to dismiss. Docket
23 No. 855, Order Resolving Miscellaneous Mots., at 3-5. Although
24 CLC did not request leave to file a motion to dismiss, the Court
25 permitted it to file one anyway in the interest of fairness. Id.

26 _____
27 ⁴ The 3CAC also added six current NCAA football players to the
28 complaint as class representatives. 3CAC ¶¶ 3, 212-36. One of these
players, however, voluntarily dismissed his claims on July 30, 2013.
Docket No. 835.

1 The Court explained that while it was "reluctant to delay this
2 case further," it nevertheless found itself "compelled to allow an
3 additional round of motions . . . due to Defendants' insistence on
4 pursuing all available procedural steps, and the untimely changes
5 in Plaintiffs' theory of the case." Id. at 1. EA, CLC, and NCAA
6 each moved to dismiss shortly thereafter. Docket Nos. 856, 857,
7 858.

8 In September 2013, while those motions were still pending, EA
9 and CLC agreed to a settlement with Plaintiffs. They filed a
10 stipulation stating that they had resolved "all claims asserted by
11 all Plaintiffs in this matter against EA and CLC." Docket No.
12 861, Stipulation, at 1. Accordingly, their motions to dismiss are
13 denied without prejudice as moot. The stipulation noted, however,
14 that the "settlement does not affect Plaintiffs' claims against
15 Defendant National Collegiate Athletic Association." Id.

16 DISCUSSION

17 I. NCAA's Motion to Dismiss

18 A. Legal Standard

19 A complaint must contain a "short and plain statement of the
20 claim showing that the pleader is entitled to relief." Fed. R.
21 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
22 state a claim, dismissal is appropriate only when the complaint
23 does not give the defendant fair notice of a legally cognizable
24 claim and the grounds on which it rests. Bell Atl. Corp. v.
25 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
26 complaint is sufficient to state a claim, the court will take all
27 material allegations as true and construe them in the light most
28 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d

1 896, 898 (9th Cir. 1986). However, this principle is inapplicable
2 to legal conclusions; "threadbare recitals of the elements of a
3 cause of action, supported by mere conclusory statements," are not
4 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
5 (citing Twombly, 550 U.S. at 555).

6 B. Analysis

7 The NCAA argues that Plaintiffs' antitrust claims should be
8 dismissed for three reasons. First, it contends that Plaintiffs'
9 claims are "nothing more than a challenge to the NCAA's rules on
10 amateurism" and therefore must be dismissed under NCAA v. Board of
11 Regents, 468 U.S. 85, 102 (1984). NCAA Mot. Dismiss at 5.
12 Second, it argues that these claims must be dismissed because,
13 under both state and federal law, student-athletes "have no
14 protectable name, image or likeness right in sports broadcasts."
15 Id. at 3. Finally, it argues that the Copyright Act, 17 U.S.C.
16 §§ 101 et seq., preempts any rights of publicity that Plaintiffs
17 would otherwise enjoy. As explained more fully below, none of
18 these arguments provides grounds for dismissing Plaintiffs' claims
19 at this stage.

20 1. NCAA v. Board of Regents

21 To state a claim under § 1 of the Sherman Act, a plaintiff
22 must allege "(1) that there was a contract, combination, or
23 conspiracy; (2) that the agreement unreasonably restrained trade
24 under either a per se rule of illegality or a rule of reason
25 analysis; and (3) that the restraint affected interstate
26 commerce.'" Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th
27
28

1 Cir. 2001) (citations omitted).⁵ Here, Plaintiffs allege that the
2 NCAA's current rules and licensing agreements operate together to
3 restrain competition in two distinct but related national markets:
4 the "college education" market and the "group licensing" market
5 for student-athletes' names, likenesses, and images. 3CAC ¶ 391.

6 The NCAA denies that it unreasonably restrains competition in
7 these markets and argues that the Supreme Court has explicitly
8 endorsed its rules prohibiting student-athlete compensation. For
9 support, it cites Board of Regents, 468 U.S. at 91-94, which
10 involved an antitrust challenge to an NCAA rule capping the total
11 number of football games that Division I schools were allowed to
12 televise each season. The rule was part of a broader plan to
13 "limit[] the total amount of televised intercollegiate football"
14 in order to "reduce, insofar as possible, the adverse effects of
15 live television upon football game attendance." Id. The Supreme
16 Court held that this plan violated § 1 of the Sherman Act. Id. at
17 106 ("The anticompetitive consequences of this arrangement are
18 apparent."). It explained that "many telecasts that would occur
19 in a competitive market are foreclosed by the NCAA's plan" because
20 the plan prevented schools from selling the broadcast rights to
21 their own football games. Id. at 107-08. The NCAA failed to
22 offer a legitimate "procompetitive" justification for the plan so,
23 under the rule of reason, the Court held that the plan was an
24 unlawful restraint of trade. Id. at 113-20.

25
26
27 _____
28 ⁵ For reasons explained in prior orders, Plaintiffs' claims in this
case must be analyzed under the rule of reason. See Docket No. 151,
Order Granting in Part and Denying in Part NCAA's Mot. Dismiss, at 9-10.

1 In reaching this conclusion, however, the Court acknowledged
2 that the NCAA must be given some leeway to adopt anticompetitive
3 rules without running afoul of the Sherman Act. It reasoned that
4 intercollegiate athletics is "an industry in which horizontal
5 restraints on competition are essential if the product is to be
6 available at all." Id. at 101. The Court explained,

7 What the NCAA and its member institutions
8 market in this case is competition itself --
9 contests between competing institutions. Of
10 course, this would be completely ineffective
11 if there were no rules on which the
12 competitors agreed to create and define the
13 competition to be marketed. A myriad of rules
14 affecting such matters as the size of the
15 field, the number of players on a team, and
16 the extent to which physical violence is to be
17 encouraged or proscribed, all must be agreed
18 upon, and all restrain the manner in which
19 institutions compete.

20 Id. The Court further noted that the NCAA sought to market a
21 "particular brand" of athletic competition -- namely, college
22 sports -- which differs from comparable professional sports
23 leagues because it is tied to an "academic tradition." Id.
24 Proceeding from this premise, the Court then articulated the
25 statement on which the NCAA now relies: "In order to preserve the
26 character and quality of the [NCAA's] 'product,' athletes must not
27 be paid, must be required to attend class, and the like." Id. at
28 102 (emphasis added).

29 This statement does not preclude Plaintiffs' claims here. As
30 explained above, Board of Regents focused on a different set of
31 competitive restraints than the rules challenged in this case.
32 Indeed, the Supreme Court never even analyzed the NCAA's ban on
33 student-athlete compensation under the rule of reason nor did it
34 cite any fact findings indicating that this ban is the type of

1 restraint which is "essential if the [NCAA's] product is to be
 2 available at all." Id. at 101. More importantly, the Court never
 3 examined whether or not the ban on student-athlete compensation
 4 actually had a procompetitive effect on the college sports
 5 market,⁶ despite its own statement that naked restraints on price
 6 or output "place upon [the defendant] a heavy burden of
 7 establishing an affirmative defense which competitively justifies
 8 this apparent deviation from the operations of a free market."
 9 Id. at 113 (emphasis added).

10 This is precisely why many courts have construed the dicta
 11 from Board of Regents narrowly, recognizing that it authorizes
 12 only a limited range of restraints on competition -- specifically,
 13 restraints necessary to ensure that college sports remains a

14 _____
 15 ⁶ Even if the Court had examined the compensation ban under the
 16 rule of reason, Plaintiffs have plausibly alleged that the "business of
 17 college sports" has changed dramatically over the three decades since
 18 Board of Regents was decided. 3CAC ¶¶ 113, 427-30. "Antitrust law
 19 generally seeks to punish and prevent harm to consumers in particular
 20 markets, with a focus on relatively specific time periods." Data Gen.
 21 Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1184 (1st Cir. 1994)
 22 (emphasis added), abrogated on other grounds by Reed Elsevier, Inc. v.
 23 Muchnick, 559 U.S. 154 (2010). This is why, in antitrust cases, courts
 24 "ordinarily focus on harm to the competitive process in the relevant
 25 market and time period." Id. (emphasis added); see also United States
 26 v. Sargent Elec. Co., 785 F.2d 1123, 1127 (3d Cir. 1986) ("Because
 27 Sherman Act conspiracies involve a relevant market and that market may
 28 vary over time, the government's task in drafting indictments is
 somewhat more complex than in other conspiracy contexts."); United
States v. Int'l Bus. Machines Corp., 1997 WL 217588 (S.D.N.Y.)
 ("[W]hereas IBM formerly had a great degree of market power in an
 antitrust sense, that market power has been substantially diminished,
 and is continuing to diminish, to the point of its disappearance in the
 sense of a threat of antitrust violation."), aff'd, 163 F.3d 737 (2d
 Cir. 1998). Thus, Board of Regents offers limited guidance in
 determining the impact of the NCAA's ban on student-athlete pay on the
 demand for college sports today. See generally Banks v. NCAA, 977 F.2d
 1081, 1099 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting
 in part) ("The NCAA continues to purvey, even in this case, an outmoded
 image of intercollegiate sports that no longer jibes with reality. The
 times have changed.").

1 viable product.⁷ In recent years, courts have held that NCAA
2 rules restricting the size and availability of student-athletes'
3 scholarships and financial aid grants may be challenged under the
4 Sherman Act, even though they relate to forms of student-athlete
5 compensation. See, e.g., Rock v. NCAA, 2013 WL 4479815, at *14
6 (S.D. Ind.) (holding that a former college football player stated
7 a valid antitrust claim against the NCAA by alleging that its
8 rules "limit the number and distribution of Division I football
9 scholarships and that, as a result, the student-athletes in the
10 market received less for their labor than they would have received
11 without the restrictions"); White v. NCAA, Case No. 06-999, Docket
12 No. 72, slip op. at 3 (C.D. Cal. Sept. 20, 2006) (holding that
13 former college football and basketball players stated a valid
14 antitrust claim against the NCAA by alleging that its limits on
15 financial aid for student-athletes restrained competition in
16 markets where "colleges and universities compete to attract

17 _____
18 ⁷ See, e.g., Metro. Intercollegiate Basketball Ass'n v. NCAA, 339
19 F. Supp. 2d 545, 548 (S.D.N.Y. 2004) ("[T]he challenged rules and
20 expansions [governing Division I schools' participation in year-end
21 basketball tournaments] are not so obviously reasonable as to fall into
22 the group of restrictions sanctioned by Board of Regents."); Law v.
23 NCAA, 902 F. Supp. 1394, 1404 (D. Kan. 1995) ("Although this Court
24 concludes from the Supreme Court's analysis in Board of Regents that the
25 NCAA's 'vital role' in making college sports available to the public
26 entitles it to a rule of reason review of the NCAA legislation at issue
27 here, the Court does not believe that the Supreme Court intended to give
28 the NCAA carte blanche in imposing restraints of trade on its member
institutions or other parties because of its role in the marketplace."),
aff'd, 134 F.3d 1010 (10th Cir. 1998); see also Gary R. Roberts, "The
NCAA, Antitrust, and Consumer Welfare," 70 Tul. L. Rev. 2631, 2659
(1996) ("Despite the Board of Regents dictum suggesting the Court
already knows the answer, it is not at all clear that college sports'
great popularity is substantially greater because the athletes are paid
only with in-kind 'academic services.' . . . [Ultimately,] the question
of how much of the consumer utility generated by intercollegiate
athletics is dependent upon the limitations on athlete compensation is
one of fact that would have to be developed in a full record.").

1 student-athletes"); In re NCAA I-A Walk-On Football Players
2 Litig., 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005) (holding that
3 former college football players stated a valid antitrust claim by
4 alleging that NCAA restrictions on the number of full scholarships
5 that Division I schools may offer restrain competition in the
6 "market in which NCAA member schools compete for skilled amateur
7 football players").

8 In each of these cases, former student-athletes were able to
9 state a valid antitrust claim against the NCAA by alleging that
10 its rules hinder competition in the market for student-athletes.
11 Likewise, Plaintiffs in the present case allege that the NCAA's
12 rules prohibiting monetary compensation for student-athletes
13 ultimately restrain competition among Division I schools in the
14 market for football and basketball players -- the "college
15 education" market identified in their 3CAC. Plaintiffs' theory of
16 anticompetitive harm proceeds as follows. Division I football and
17 basketball programs routinely compete to recruit the best
18 athletes. In order to attract the top talent, these programs
19 offer recruits a variety of non-monetary privileges and incentives
20 such as scholarships, access to state-of-the-art training
21 facilities, and -- at the most elite programs -- the opportunity
22 to compete on a national stage. NCAA rules, however, forbid these
23 programs from offering monetary compensation to any recruit for
24 his athletic labor or for the commercial use of his name, image,
25 and likeness. 3CAC ¶ 397. Plaintiffs allege that this
26 prohibition restrains competition in the market for Division I
27 student-athletes and "result[s] in lower compensation [for the
28

1 student-athletes] than would otherwise prevail in a more
2 competitive market." Id. ¶ 398.

3 These allegations are sufficient to state a Sherman Act
4 claim. In Agnew v. NCAA, the Seventh Circuit recognized that a
5 pair of former college football players could have stated a valid
6 antitrust claim against the NCAA by alleging that its scholarship
7 rules stifled competition among NCAA schools in the "market to
8 attract student-athletes." 683 F.3d 328, 347 (7th Cir. 2012).
9 Although the court dismissed the plaintiffs' claims because they
10 failed to identify such a market, it also recognized that
11 "colleges do, in fact, compete for student-athletes" and "the only
12 reason that colleges do not engage in price competition for
13 student-athletes is that other NCAA bylaws prevent them from doing
14 so." Id. at 346-47. Because these colleges derive economic
15 benefits from recruiting the best student-athletes, the court
16 found that "the transactions between NCAA schools and student-
17 athletes are, to some degree, commercial in nature, and therefore
18 take place in a relevant market with respect to the Sherman Act."
19 Id. at 340-41 ("No knowledgeable observer could earnestly assert
20 that big-time college football programs competing for highly
21 sought-after high school football players do not anticipate
22 economic gain from a successful recruiting program."). The court
23 therefore concluded that the "proper identification of a labor
24 market for student-athletes . . . would meet plaintiffs' burden of
25 describing a cognizable market under the Sherman Act." Id. at
26 346; accord Rock, 2013 WL 4479815, at *14; White, Case No. 06-999,
27 Docket No. 72, slip op. at 3; In re NCAA I-A Walk-On Football
28 Players Litig., 398 F. Supp. 2d at 1150.

1 Critically, the Agnew court found that Board of Regents did
2 not pose a barrier to the plaintiffs' antitrust claims. In fact,
3 the court specifically recognized that Board of Regents -- which
4 involved an antitrust challenge brought by universities --
5 provides only limited guidance in cases involving claims by
6 student-athletes, noting,

7 The Sherman Act clearly applies to at least
8 some of the NCAA's behavior. The question for
9 us, however, is whether and when the Sherman
10 Act applies to the NCAA and its member schools
11 in relation to their interaction with student-
12 athletes. The Supreme Court has not weighed
13 in on this issue directly, but Board of
14 Regents, the seminal case on the interaction
15 between the NCAA and the Sherman Act, implies
16 that all regulations passed by the NCAA are
17 subject to the Sherman Act.

18 Agnew, 683 F.3d at 338-39 (citations omitted; emphasis in
19 original). Although the plaintiffs in Agnew focused on the NCAA's
20 scholarship rules, rather than its rules prohibiting student-
21 athletes from licensing their publicity rights, the court's
22 rationale for distinguishing Board of Regents is still persuasive
23 here: in short, Board of Regents did not address the impact of the
24 NCAA's horizontal restraints on student-athletes. Indeed, none of
25 the parties or amici curiae who participated in Board of Regents
26 represented the interests of student-athletes.

27 Thus, while Board of Regents gives the NCAA "ample latitude"
28 to adopt rules preserving "the revered tradition of amateurism in
college sports," 468 U.S. at 120, it does not stand for the
sweeping proposition that student-athletes must be barred, both
during their college years and forever thereafter, from receiving
any monetary compensation for the commercial use of their names,
images, and likenesses. Although it is possible that the NCAA's

1 ban on student-athlete pay serves some procompetitive purpose,
 2 such as increasing consumer demand for college sports, Plaintiffs'
 3 plausible allegations to the contrary must be accepted as true at
 4 the pleading stage. Brennan v. Concord EFS, Inc., 369 F. Supp. 2d
 5 1127, 1133 (N.D. Cal. 2005) ("Whatever the merits of these
 6 [procompetitive] arguments, they are intrinsically factual,
 7 contrary to plaintiffs' pleading and inappropriate for resolution
 8 at the motion to dismiss stage."); see also Paladin Associates,
 9 Inc. v. Montana Power Co., 328 F.3d 1145, 1156 (9th Cir. 2003)
 10 (stating that courts must "review all the facts, including the
 11 precise harms alleged to the competitive markets, and the
 12 legitimate justifications provided for the challenged practice" in
 13 order to "determine whether the anticompetitive aspects of the
 14 challenged practice outweigh its procompetitive effects" (emphasis
 15 added)).

16 2. Publicity Rights in Sports Broadcasts

17 The NCAA contends that the First Amendment and the California
 18 Civil Code bar student-athletes from asserting any rights of
 19 publicity in the use of their names, images, and likenesses during
 20 game broadcasts. Although Plaintiffs have not technically
 21 asserted any right-of-publicity claims here,⁸ their rights of
 22 publicity nevertheless remain relevant because their antitrust
 23 claims depend in part on the existence of a "group licensing"
 24 market where, absent NCAA rules, student-athletes would be able to
 25 sell their publicity rights in "broadcasts or rebroadcasts of

26 _____
 27 ⁸ As noted above, the twenty-one Plaintiffs who assert antitrust
 28 claims in this action are distinct from the four Plaintiffs who asserted
 right-of-publicity claims. See 3CAC ¶¶ 2-3. Only the antitrust claims
 are at issue here.

1 Division I basketball and football games.” 3CAC ¶ 391. If
2 broadcasters were simply allowed to use student-athletes’ names,
3 images, and likenesses without student-athletes’ consent -- as the
4 NCAA contends -- then there would be no demand among broadcasters
5 for those student-athletes’ publicity rights. Thus, the NCAA
6 argues, Plaintiffs’ lack of publicity rights in sports broadcasts
7 mandates the dismissal of any antitrust claims premised on the
8 unauthorized use of their names, images, and likenesses in those
9 broadcasts.⁹

10 Neither the First Amendment nor the California Civil Code
11 requires dismissal of Plaintiffs’ antitrust claims. Section
12 3344(d) of the California Civil Code provides that an individual
13 has no right of publicity in the “use of [his or her] name, voice,
14 signature, photograph, or likeness in connection with any news,
15 public affairs, or sports broadcast or account.” Cal. Civ. Code
16 § 3344(d). This provision only applies to right-of-publicity
17 claims brought under California law. As such, even if it
18 precludes Plaintiffs from selling or licensing their publicity
19 rights in California, it does not prevent them from doing so in
20 any other state that recognizes the right of publicity. Once
21 again, Plaintiffs allege harm to a national market for the

22
23 ⁹ The Court notes that, even if Plaintiffs lack publicity rights in
24 broadcast footage, the “group licensing” market they identify would
25 still encompass the market for group licenses to use their names,
26 images, and likenesses in videogames. The NCAA does not argue that the
27 First Amendment or California Civil Code precludes Plaintiffs from
28 selling the rights to use their names, images, and likenesses in
videogames. Such an argument would likely fail in light of the Ninth
Circuit’s recent decision in this case. In re NCAA Student-Athlete Name
& Likeness Licensing Litig., 724 F.3d 1268, 1284 (9th Cir. 2013) (“EA’s
use of the likenesses of college athletes like Samuel Keller in its
video games is not, as a matter of law, protected by the First
Amendment.”).

1 licensing rights to their names, images, and likenesses in game
2 broadcasts. To disprove the existence of this market at the
3 pleading stage, the NCAA would have to identify a law or set of
4 laws that precludes student-athletes from asserting publicity
5 rights to game broadcasts in every state. It has not done so
6 here.

7 Although the First Amendment -- unlike the California Civil
8 Code -- does impose certain limits on the right of publicity in
9 every state, the NCAA has not shown that those limits preclude
10 Plaintiffs from asserting publicity rights in the specific types
11 of broadcasts at issue here. Neither the Supreme Court nor the
12 federal courts of appeals have ever squarely addressed whether the
13 First Amendment bars athletes from asserting a right of publicity
14 in the use of their names, images, or likenesses during sports
15 broadcasts. The only case in which the Supreme Court has ever
16 sought to balance an individual's right of publicity against First
17 Amendment concerns is Zacchini v. Scripps-Howard Broadcasting Co.,
18 433 U.S. 562 (1977). There, the Court held that a television
19 station was not entitled to First Amendment protection for
20 broadcasting the entire fifteen-second "human cannonball" act of a
21 performer at an Ohio county fair. Id. at 563-64. The Court
22 reasoned that the station was not protected because it filmed and
23 broadcast the performer's entire act without the performer's
24 consent and, in so doing, undermined the performer's economic
25 livelihood by reducing demand for his live show. Id. at 575-76
26 ("The effect of a public broadcast of the performance is similar
27 to preventing petitioner from charging an admission fee.").
28

1 Zacchini does not provide a clear test for balancing the
2 right of publicity against free speech concerns. However, lower
3 court decisions provide some guidance in this area. In Pooley v.
4 Nat'l Hole-In-One Ass'n, for instance, a federal district court
5 held that the First Amendment did not bar a professional golfer's
6 right-of-publicity claim against a company that used footage of
7 him to promote its fundraising events. 89 F. Supp. 2d 1108, 1110
8 (D. Ariz. 2000). The court held that the company's use of the
9 footage -- which showed the golfer making a hole-in-one at a
10 professional tournament more than a decade earlier -- was not
11 protected because the company used it for "strictly commercial"
12 purposes. Id. at 1114. The court explained that "when the
13 purpose of using a person's identity is strictly to advertise a
14 product or a service, as it is here, the use is not protected by
15 the First Amendment." Id. at 1113 (emphasis in original).
16 Critically, the court distinguished between the original broadcast
17 of the golfer's hole-in-one -- which, it suggested, was entitled
18 to First Amendment protections -- and "its subsequent unauthorized
19 reproduction," which was "not automatically privileged simply
20 because the hole-in-one continued to be a 'newsworthy' event."
21 Id. at 1114.

22 A similar case, Dreyer v. NFL, 689 F. Supp. 2d 1113 (D. Minn.
23 2010), also held that use of footage of an athlete's past
24 accomplishments is not entitled to First Amendment protection when
25 it is done exclusively for commercial purposes. In Dreyer, a
26 group of former professional football players alleged that the NFL
27 had violated their rights of publicity "by using video footage
28 from games in which they played as part of the NFL Films'

1 promotional videos." Id. at 1115. After conducting a lengthy
2 analysis of the footage under the Eighth Circuit's "commercial
3 speech" test, the court denied the NFL's motion for judgment on
4 the pleadings. Id. at 1121 ("Plaintiffs sufficiently established
5 that the constitutional protection to be afforded the films may
6 not outweigh Plaintiffs' interests in their own identities."). As
7 in Pooley, the Dreyer court's decision rested on the plaintiffs'
8 allegations "that the films' entire purpose is to promote the
9 NFL." Id. at 1120 (emphasis added); see also Jordan v. Jewel Food
10 Stores, Inc., 851 F. Supp. 2d 1102, 1105 (N.D. Ill. 2012)
11 (applying "commercial speech" test to determine whether former
12 professional basketball player was entitled to summary judgment on
13 his right-of-publicity claims).

14 Under the framework adopted in these cases, the central
15 question in determining whether the First Amendment bars an
16 athlete's right-of-publicity claim is whether the defendant's use
17 of the athlete's name, image, or likeness is primarily
18 "commercial." See generally Laura Lee Stapleton & Matt McMurphy,
19 "The Professional Athlete's Right of Publicity," 10 Marq. Sports
20 L.J. 23, 44-45 (1999) ("Courts are forced to conduct a very
21 delicate balancing act in determining where 'newsworthy' ends and
22 'commercial' begins"). This typically involves a "highly fact
23 specific analysis." Id.; see also Dreyer, 689 F. Supp. 2d at 118
24 ("A court must examine the 'content, form, and context' of the
25 speech 'as revealed by the whole record' to determine whether the
26 speech is commercial speech." (citing Connick v. Myers, 461 U.S.
27 138, 147-48 (1983))). The Ninth Circuit has noted that "in many
28 areas 'the boundary between commercial and noncommercial speech

1 has yet to be clearly delineated.'" Charles v. City of Los
2 Angeles, 697 F.3d 1146, 1151 (9th Cir. 2012) (citations omitted).
3 Thus, even though the commercial speech determination is a
4 question of law, courts are sometimes reluctant to make this
5 determination at the pleading stage, before the record has been
6 more fully developed.

7 In the present case, Plaintiffs provide only general
8 descriptions of the "broadcasts [and] rebroadcasts of Division I
9 basketball and football games" in which they assert publicity
10 rights. 3CAC ¶ 391. Although their complaint refers to several
11 different types of game footage -- including live game broadcasts,
12 rebroadcasts of "classic games," highlight films, and "'stock
13 footage' sold to corporate advertisers," id. ¶¶ 372, 440-72 -- it
14 offers scant details about each of these specific categories.
15 Thus, it is difficult to determine with any certainty whether
16 these broadcasts are primarily commercial in nature.
17 Nevertheless, on the present motion, the allegations in the 3CAC
18 must be construed in the light most favorable to Plaintiffs. When
19 viewed in this light, it is plausible that at least some of the
20 broadcast footage described in the complaint -- particularly the
21 promotional highlight films and the "stock footage" sold to
22 advertisers -- was used primarily for commercial purposes. See
23 Dreyer, 689 F. Supp. 2d at 1120 ("Giving Plaintiffs the benefit of
24 every reasonable inference about the [NFL highlight] films, it is
25 a plausible inference that the films are advertisements within the
26 meaning of the [commercial speech] test.").

27 Thus, the First Amendment does not provide a basis for
28 dismissing Plaintiffs' broadcast-related claims at this stage.

1 Should the NCAA raise this issue again at summary judgment,
2 Plaintiffs will need to submit evidence that the relevant
3 broadcast footage on which their claims are based -- including
4 both the archival game footage and the live game broadcasts -- was
5 used primarily for commercial purposes. See generally Hunt v.
6 City of Los Angeles, 638 F.3d 703, 715 (9th Cir. 2011) ("Where the
7 facts present a close question, 'strong support' that the speech
8 should be characterized as commercial speech is found where the
9 speech is an advertisement, the speech refers to a particular
10 product, and the speaker has an economic motivation." (citations
11 omitted)).

12 3. Copyright Act Preemption

13 The NCAA's final argument in support of dismissal is that the
14 "Copyright Act preempt[s] the application of any applicable right
15 of publicity laws to the broadcast of college football and
16 basketball games." NCAA Mot. Dismiss 3. For support, the NCAA
17 relies principally on Jules Jordan Video, Inc. v. 144942 Canada
18 Inc., 617 F.3d 1146, 1155 (9th Cir. 2010), where the Ninth Circuit
19 held that an adult film actor's right-of-publicity claim against a
20 film production company was preempted by the Copyright Act.

21 Jules Jordan is inapposite here because the right-of-
22 publicity claim in that case was based not merely on the
23 misappropriation of the plaintiff's name, image, and likeness but
24 on the sale of counterfeit DVDs featuring films that the plaintiff
25 had produced. "The essence of [the plaintiff]'s claim [was] that
26 the [] defendants reproduced and distributed the DVDs without
27 authorization." Id. at 1153, 1155 (noting that the plaintiff's
28 right-of-publicity claim was "based entirely on the

1 misappropriation of the DVDs and [his] appearance therein"
2 (emphasis added)). Because the plaintiff owned a copyright in the
3 films, the court concluded that the plaintiff's "right of
4 publicity claim falls within the subject matter of copyright, and
5 [] the rights he asserts are equivalent to the rights within the
6 scope of § 106 of the Copyright Act." Id.

7 In contrast, the rights Plaintiffs seek to assert in the
8 present case are fundamentally different from those protected by
9 the Copyright Act. Plaintiffs here do not own copyrights in any
10 of the game footage described in their complaint and, thus, do not
11 seek to protect their copyrights in that footage. Rather, they
12 seek the right to license the commercial use of their names,
13 images, and likenesses in certain broadcast footage. See 1 Nimmer
14 on Copyright § 1.01[B][1][c], at 1-30 ("The 'work' that is the
15 subject of the right of publicity is the persona, i.e., the name
16 and likeness of a celebrity or other individual. A persona can
17 hardly be said to constitute a 'writing' of an 'author' within the
18 meaning of the Copyright Clause of the Constitution."). The
19 Dreyer court relied on this same distinction in rejecting the
20 NFL's argument that the Copyright Act preempted the right-of-
21 publicity claims of former players who were featured without their
22 consent in promotional highlight films. Dreyer, 689 F. Supp. 2d
23 at 1121.

24 Further, Plaintiffs' underlying claims here are not preempted
25 by the Copyright Act because they are based principally on an
26 injury to competition, not simply misappropriation. Whatever
27 preemptive effect the Copyright Act has on right-of-publicity
28 claims, federal courts have made clear, "Intellectual property

1 rights do not confer a privilege to violate the antitrust laws."
2 See, e.g., United States v. Microsoft Corp., 253 F.3d 34, 63 (D.C.
3 Cir. 2001) (emphasis added; citations and quotation marks omitted)
4 (rejecting defendant's argument that it could not incur antitrust
5 liability merely by exercising its copyrights); see also Ralph C.
6 Wilson Indus., Inc. v. Chronicle Broad. Co., 1982 WL 257, at *2
7 (N.D. Cal.) ("The fact that the Copyright Act permits the grant of
8 a geographically exclusive license does not immunize such licenses
9 from attack under the antitrust laws."). Therefore, the NCAA's
10 motion to dismiss Plaintiffs' Sherman Act claims on this basis is
11 denied.

12 CONCLUSION

13 For the reasons set forth above, the NCAA's motion to dismiss
14 (Docket No. 857) is DENIED. NCAA shall file its answer within
15 fourteen days of this order. EA and CLC's motions to dismiss
16 (Docket Nos. 856, 858) are denied, without prejudice, as moot.
17 They, along with Plaintiffs, shall file their motion for
18 preliminary settlement approval as soon as practicable.

19 IT IS SO ORDERED.

20
21 Dated: 10/25/2013

22 
23 CLAUDIA WILKEN
24 United States District Judge
25
26
27
28