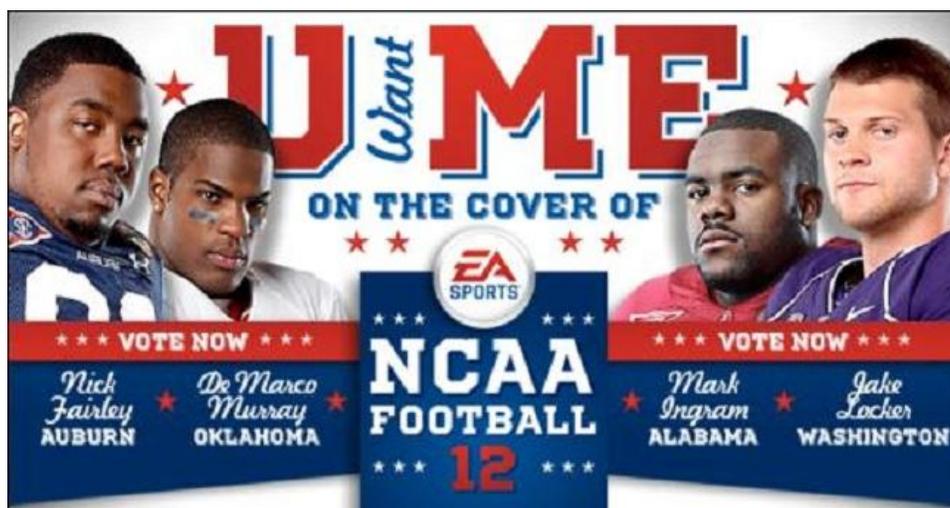


A Winthrop & Weinstine blog dedicated to bridging the gap between legal & marketing types.

## [NCAA-holes](#)

Posted on March 10, 2011 by [Brent Lorentz](#)



There has been a recent (over the last two years) rash of lawsuits by former NCAA athletes alleging a right to recover money arising from the exploitation of their likenesses in video games. Recently, the Ninth Circuit heard arguments in the case *Keller v. Electronic Arts, Inc.* (complaint [here](#)). For a summary of the case and arguments, see this [AP article](#).

Frankly, I don't see how NCAA athletes are in any different position than the professional athletes who receive compensation in the form of licenses through their respective players' unions. Given this ready corollary, any argument that is being lodged against the athletes in the college context would seem pretty weak.

One common and obnoxious counter is the concept of the "amateur" athlete; an argument which permeates every conversation about the NCAA's monopoly. However, regardless of the merits to this argument (and it is [oft-criticized](#)), the validity of the argument ceases when the athletes leave college.



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The other argument regarding the “[parade of horrors](#)” that will arise because "documentarians, biographers, filmmakers, novelists, photographers, and songwriters" will not be able to "create expressive works that realistically depict individuals and/or refer to them by their actual names," is borderline frivolous. First, there is a specific legal doctrine to address this situation: i.e. fair use. Second, it's not as if the college athletes are asserting a unique and novel right that has never been asserted before: it's the same publicity right being exploited through EA's licenses with the professional player's unions.

Finally, it's almost comical to consider who's siding on the “fair use” type argument in this case: It's the MPAA! Have there been more radical enemies to fair use than the [MPAA](#) and their members? I remember a story from law school where a documentary film-maker had to remove an entire scene from his film because there was a Simpson's episode playing in the background.

At the end of the day, if the AP article provides the best available arguments and allies, I see trouble for EA.

