O'BANNON: EXPANDING NCAA STUDENT-ATHLETE RIGHTS OF PUBLICITY AND FORESHADOWING THE DOWNFALL OF AMATEURISM

Preston Barclay

***O'Bannon*: Expanding NCAA Student-Athlete Rights of Publicity and Foreshadowing the Downfall of Amateurism**

Preston Barclay

TABLE OF CONTENTS

O'Bannon: Expanding NCAA Student-Athlete Rights of Publicity and Foreshadowing the Downfall of Amateurism

Preston Barclay

ABSTRACT

Beginning in the 1950s, the National College Athletic Association ("NCAA") transformed from a non-profit organization designed to provide rules to protect players from the brutality of football into a multi-billion-dollar machine utilizing the labor of student-athletes to generate millions of dollars of revenue for its member schools while athletes fail to reap the rewards. As college football and men's basketball gained popularity and developed lucrative markets, the NCAA continued to legitimize pocketing the spoils while restricting player compensation through its self-designed concept of "amateurism." This Note examines the development of commercialism in intercollegiate athletics, the NCAA's rules perpetuating control of its financial windfall, and recent push back from former student-athletes through right of publicity and antitrust lawsuits in the Ninth Circuit. This Note analyzes the two related seminal cases, In re NCAA Student-Athlete Name & Likeness Licensing Litigation *and* O'Bannon v. NCAA*, forecasting future claims by student-athletes in light of these decisions to topple the NCAA and its member schools' stranglehold on the exploits of its students while advocating for changes to the NCAA system.*

INTRODUCTION

"Collegiate amateurism is not a moral issue; it is an economic camouflage for monopoly practice. . . , [one which] 'operat[es] an air-tight racket of supplying cheap athletic labor.'"[1]

The National Collegiate Athletic Association ("NCAA"), its member institutions, affiliated administrators, and athletic coaches profit off its "student-athletes" in a neo-plantation culture under the façade of "amateurism."[2] Despite its humble roots designed to protect student-athletes, consumer interests compelled the NCAA to internalize control over all facets of intercollegiate sports.[3] With the advent of television and other lucrative revenue streams, the NCAA legitimized hoarding profits by advocating that commercial influence on student-athletes would tarnish academic integrity.[4] Meanwhile, college administrator and coach salaries escalate.[5]

[1] WALTER BYERS AND CHARLES HAMMER, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES (University of Michigan Press 1997), at 376, 388 (quoting Walter Byers, NCAA Executive Director, 1951-1988).
[2] *See generally* Taylor Branch, *The Shame of College Sports*, Sept. 7, 2011, *The Atlantic,* http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/308643/.
[3] *See infra* Section I. A.
[4] *See infra* Section I. B.
[5] *See id.*

Student-athletes cannot earn a cut of the revenue they generate for their schools nor can they pursue third party licensing opportunities for their names and likenesses and other endorsements.[6] By agreeing to participate in intercollegiate sports, student-athletes sacrifice rights they could otherwise exploit absent the NCAA's draconian rules.[7]

Student-athletes are fighting back against the NCAA through successful litigation. The Ninth Circuit in *In re NCAA Student-Athlete Name & Likeness Licensing Litigation* ("*In re NCAA Student-Athlete*") and *O'Bannon v. NCAA* delivered two victories expanding the rights of student-athletes while combating amateurism. The former enabled student-athletes to claim a violation of their right of publicity in the licensing of their likenesses in college sports video games,[8] while the latter determined that the NCAA's compensation model resembled an illegal price-fixing scheme in violation of the Sherman Antitrust Act.[9] Despite these advances, however, the court failed to administer the necessary fatal blow to amateurism.[10] While *O'Bannon v. NCAA* expanded compensation for student-athletes, it clung to amateurism to justify withholding cash payments.

As the NCAA and its member institutions continue to feed off of the labor of student-athletes, student-athletes deserve the ability to profit off of the uses of their names and likenesses. While "pay for play" schemes may provide the most efficient compensation model in enabling for a free market for student-athlete services, a capitalistic solution in the recruitment of football and men's basketball players may threaten the existence of non-revenue generating

[6] *See infra* Section I. C.
[7] *See id.*
[8] *See infra* Section II. B.
[9] *See infra* Section III. B.
[10] *See infra* Section III. D.

sports programs.[11] Instead, the NCAA should adopt the "Olympic model" and allow student-athletes to pursue endorsement opportunities and profit off of their names and likenesses in video games, apparel, and merchandise.[12] Consumers crave these markets and student-athletes who fail to play professionally could profit while a market exists for their likenesses. Not only would student-athletes earn a return, but consumers would also benefit without harming the NCAA or its member institutions.

Section I of this Note examines the background of the NCAA, including the market forces behind the organization's founding, its internalization of enforcement authority, and the rapid commercialization of intercollegiate sports promulgating today's litigious climate. With the value of media rights deals skyrocketing, the NCAA, its member schools, administrators, and coaches continue to earn greater returns. Student-athletes, however, cannot profit off of their names and likenesses on and off the field or else risk losing their eligibility.

Section II introduces the intellectual property right of publicity and the Ninth Circuit's decision in *In re NCAA Student-Athlete*. In addition to the plaintiffs' successful claim of a violation of their right of publicity in the college football and men's basketball video games, this section proposes apparel and merchandise as other avenues for student-athlete right of publicity protection against the NCAA's unauthorized licensing activities to third parties.

Section III transitions to analyzing the Ninth Circuit's majority and concurring opinions in *O'Bannon v. NCAA* and its impact on the future of student-athlete rights and compensation. While *O'Bannon v. NCAA* failed to topple amateurism, it nevertheless allowed for increased compensation up to the full cost of attendance for student-athletes. Still, the Ninth Circuit

[11] *See infra* Section IV. A.
[12] *See infra* Section IV. B.

majority failed to provide proper relief by artificially creating a ceiling for student-athlete compensation.

Section IV concludes this Note by considering alternatives to the current NCAA model to provide just compensation for its participants. Among such alternatives includes free market "pay for play" schemes and the "Olympic model." The Olympic model ultimately presents the best solution to maintain adequate funding for non-revenue generating sports programs while authorizing student-athletes to pursue economic opportunities that they would otherwise maintain outside of the NCAA's governing sphere.

I. BACKGROUND: THE NCAA'S FAÇADE OF AMATEURISM AND RESTRICTIONS OF STUDENT-ATHLETES' RIGHT OF PUBLICITY AND COMPENSATION

"If the movement shall continue at the same rate, it will soon be fairly a question whether the letters B.A. stand for Bachelor of Arts or Bachelor of Athletics."[13]

The NCAA's history as an organization founded on principles of amateurism remains a fallacy. After the organization's birth in the early 1900s to develop rules to protect intercollegiate athletic participants from devastating injuries, it failed to provide substantial oversight to thwart escalating corruption in an increasingly lucrative market after World War II.

Beginning in the 1950s under Executive Director Walter Byers, however, the NCAA transformed from an organization unable to combat abuses into one that controlled the commercial exploits of its member schools and participating student-athletes. While unsuccessful in maintaining authority over television deals, the development of national tournaments provided the NCAA with accelerating revenue streams for the organization and its

[13] Rodney K. Smith, *Little Ado About Something: Playing Games with the Reform of Big-Time Athletics*, 20 CAP. U. L. Rev. 567, 570 (1991) [hereinafter Smith, *Little Ado*] (*quoting* Francis A. Walker, President of the Massachusetts Institute of Technology, 1893).

member schools. The beneficiaries of the influx of funds, however, remain the administrators and coaches whose salaries rival their professional counterparts, while student-athletes cannot secure monetary compensation for their labor that drives consumer interest.

A. BIRTH OF THE NCAA: 1850 - 1950

Since their inception in the mid-19th century, American intercollegiate athletics have been driven by the increasing commercialization of sports.[14] Financial and competitive greed often superseded safety[15] and academic concerns[16] by the turn of the century.

An overwhelming sum of significant player injuries, specifically eighteen deaths and over one hundred other major injuries in intercollegiate football in 1905, forced the White House to issue an ultimatum to university presidents to eliminate brutality or risk federal intervention.[17] Sixty-two major intercollegiate programs agreed to form the Intercollegiate Athletic Association (renamed the National Collegiate Athletic Association in 1910).[18] While successful in decreasing

---

[14] One of the first interschool athletic contests, a regatta between academic rivals Harvard and Yale, featured sponsorship by the then-powerful Elkins Railroad Line and Harvard's commissioning of a coxswain that did not attend the university to gain an advantage with prize money at stake. By the end of the 19th century, colleges assumed greater control and compensated star athletes with scholarships, free meals, profits from sale of programs, and vacations, among other economic benefits. *See generally* Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 Marq. Sports L. Rev. 9, 11 (2002) [hereinafter Smith, *Regulating*]; *see also* Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 988-89 (1987) [hereinafter Smith, *Death Penalty*]; Smith, *Little Ado, supra* note 13 at 569-70; *College Athletics - History of Athletics in U.S. Colleges and universities*, STATEUNIVERSITY.COM, http://education.stateuniversity.com/pages/1846/College-Athletics-history-athletics-in-u-s-colleges-universities/ [hereinafter STATEUNIVERSITY.COM].

[15] After the Harvard Athletic Committee voted to ban football for a year in 1883 due of its brutality, the school nevertheless proceeded with its scheduled game against Yale since both schools were relying on gate receipts to fund new football fields. *See* Smith, *Little Ado*, *supra* note 13; *see also* RONALD A. SMITH, SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS 89 (New York: Oxford University Press 1988) [hereinafter *Sports and Freedom*].

[16] In 1903, the University of Nebraska registrar denied admittance to a talented baseball player before the University Chancellor overruled and enrolled the athlete in the law school. *See* ROBERT N. MANLEY, CENTENNIAL HISTORY OF THE UNIVERSITY OF NEBRASKA 299 (Lincoln: University of Nebraska Press 1969), cited in *Sports and Freedom*, *supra* note 15 at 187.

[17] *See* Smith, *Liberating supra* note 14 at 12.

[18] *See* id.

violence, the new national entity failed to regulate an otherwise chaotic commercial climate as alumni, local boosters, and college officials recruited and compensated athletes uninhibited without sufficient oversight.[19] The advent of television and radio broadcasts as well as government involvement in providing greater access to higher education for returning World War II veterans further metastasized commercial interests in intercollegiate sports.[20] As a result, more schools launched athletic programs with unlimited scholarships.[21] Such excesses, however, left schools susceptible to illegal point-shaving schemes or gambling cartels by students, coaches, and alumni boosters.[22]

In 1948, the NCAA responded by enacting the "Sanity Code," which ultimately failed due to its severe sanction of expulsion that schools denounced as not representing "sanity" at all.[23] The Sanity Code nevertheless enabled for increased NCAA oversight through the subsequent installation of the Committee on Infractions in 1951, which fostered broader sanctioning authority beginning under the leadership of Walter Byers as Executive Director of the NCAA in 1951.[24]

[19] *See* STATEUNIVERSITY.COM, *supra* note 14.
[20] *See* Smith, *Liberating supra* note 14 at 14.
[21] *See* STATEUNIVERSITY.COM, *supra* note 14.
[22] *See id.*
[23] Gary T. Brown, *NCAA answers call to reform: The 'Sanity Code' leads Association down path to enforcement program*, NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, THE NCAA NEWS - NEWS AND FEATURES (Nov. 22, 1999), http://fs.ncaa.org/Docs/NCAANewsArchive/1999/19991122/active/3624n24.html.
[24] Smith, *Liberating supra* note 14 at 17.

B. EXPANDING AND CHALLENGING NCAA AUTHORITY IN *NCAA V. BOARD OF REGENTS* AND CURRENT STATE OF THE NCAA: 1950S – PRESENT

Under Executive Director Byers' reign, the NCAA not only accelerated infractions oversight, but also prevented member schools and students from pursuing independent media agreements by orchestrating lucrative national television contracts and internalizing the revenues.[25] In 1984, however, the NCAA lost its ability to control member schools' television exposure. In *NCAA v. Board of Regents,* the United States Supreme Court held that the NCAA's television plan that limited televised games, restricted the number of games that any one college could televise, and prohibited any member school from selling television rights outside of the plan constituted an unreasonable restraint of trade in violation of antitrust laws.[26]

The high profile *NCAA v. Board of Regents* decision produced a free market for universities to pursue significant commercial opportunities, but failed to thwart the NCAA from capitalizing on national championship tournaments and merchandising opportunities. Today, the NCAA continues to expand its national tournaments to provide additional lucrative revenue streams. In 2010, the NCAA inked a 14-year, $10.8 billion television deal with CBS Sports and Turner Broadcasting Systems to broadcast its annual 68-team national basketball championship

---

[25] *See generally* Branch, *supra* note 2.

[26] While the Court determined that the plan resembled a horizontal price fixing scheme, normally a *per se* illegal antitrust violation, the Court recognized that applying such a rule would be impossible in an industry that relies and markets horizontal restraints to govern competition; consumers remain attracted to competition itself, integral to the very essence of sport. As a result, the Court analyzed the NCAA's procompetitive arguments in restricting television output, namely protecting live game attendance, but found that such a plan restricted consumer choice between electing to attend games or view them on television. The Court also denied the NCAA's argument that the television plan maintained competitive balance by limiting revenues since the plan not only failed to restrict other football-related revenue streams, but also offered no evidence that it produced "any greater measure of equality than a restriction on alumni donations, tuition rates, or any other revenue-producing activity." Ultimately, by finding that more games would be televised in a free market, the Court rejected the NCAA's television plan as serving "any legitimate procompetitive purpose," which enabled universities to pursue their own television contracts.[26] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Ok.*, 468 U.S. 85, 85-87 (1984) [hereinafter *NCAA v. Board of Regents*].

tournament.[27] More recently in 2014, the NCAA expanded its college football championship tournament from two to four schools, securing a $7.3 billion deal with ESPN to air seven postseason games a year – four major bowl games, two semifinal bowl games, and the national championship game.[28] The Collegiate Licensing Company ("CLC"), the NCAA's merchandise licensing arm, generates another $4.6 billion in annual revenue for nearly 200 schools.[29]

While the NCAA benefits from its national agreements, the primary recipients of the explosion of wealth in intercollegiate sports remain the universities, administrators, and coaches. By earning berths into the NCAA's football playoff, the conferences of the four 2015-16 season semifinalists – the Southeastern Athletic Conference (University of Alabama), the Atlantic Coast Conference (Clemson University), the Big 12 Conference (University of Oklahoma), and the Big 10 Conference (Michigan State University) – each received $6 million.[30] Other conferences and football independent schools, such as the University of Notre Dame,[31] who failed to make the playoff, may also earn hundreds of thousands, if not millions, of dollars annually as a result of

---

[27] *See* Donald H. Yee, *College Sports Exploits Unpaid Black Athletes. But They Could Force a Change*, WASHINGTON POST (Jan. 8, 2016), https://www.washingtonpost.com/posteverything/wp/2016/01/08/college-sports-exploits-unpaid-black-athletes-but-they-could-force-a-change/; *see also* CBS Sports, Turner Broadcasting, NCAA Reach 14-Year Agreement, NCAA.com (Apr. 22, 2010), http://www.ncaa.com/news/basketball-men/2010-04-21/cbs-sports-turner-broadcasting-ncaa-reach-14-year-agreement. In April 2016, the NCAA, CBS, and TBS agreed to an eight-year, $8.8 billion extension through 2032. *See* Associated Press, *CBS, Turner Extend NCAA Tourney Deal for $8.8B*, ESPN.COM (Apr. 12, 2016), http://espn.go.com/mens-college-basketball/story/_/id/15190549/ncaa-tournament-deal-cbs-turner-extended-2032.

[28] *See* Yee, *supra* note 27*; see also* Marc Tracy and Tim Rohan, *What Made College Football More like the Pros? $7.3 Billion, for a Start*, NEW YORK TIMES, Dec. 30, 2014, http://www.nytimes.com/2014/12/31/sports/ncaafootball/what-made-college-ball-more-like-the-pros-73-billion-for-a-start.html?_r=0.

[29] *See* Yee, *supra* note 27; *see also* Max Rogers, *Texas and Kentucky Top College Rankings in the $4.6 Billion Licensing Industry*, Aug. 8, 2012, http://bleacherreport.com/articles/1290567-texas-and-kentucky-top-college-rankings-in-the-46-billion-licensing-industry.

[30] *See* Yee, *supra* note 27; *see also* College Football Playoff, Revenue Distribution, http://www.collegefootballplayoff.com/revenue-distribution.

[31] The University of Notre Dame, a member of the ACC for all sports except for football, remains independent due in large part to its lucrative television agreement with NBC paying the school $15 million per year through 2025. *See NBC extends ND football deal through 2025*, ESPN (Apr. 18, 2013), http://espn.go.com/college-football/story/_/id/9186897/nbc-extends-notre-dame-fighting-irish-football-deal-2025.

the new playoff arrangement.[32] Some conferences and schools, such as the Pacific 12 Conference, the Big 10 Conference, and the University of Texas, also recently developed their own sports television channels, with Texas guaranteed $15 million annually from ESPN for "The Longhorn Network."[33] Pacific-12 Conference Commissioner Larry Scott earned over $3.5 million in 2013,[34] while current NCAA President Mark Emmert pocketed over $1.8 million in the same year.[35] Nine athletic directors currently receive over $1 million per year, while more than 47 athletic directors earn at least $500,000.[36]

Salaries for collegiate coaches also continue to escalate. In 2015, forty-three NCAA football head coaches garnered wages greater than $2.5 million, while seventeen NCAA basketball head coaches eclipsed that figure.[37] Collegiate coaches may even earn salaries in excess of their professional counterparts; former NFL head coaches Nick Saban (University of Alabama) and Jim Harbaugh (University of Michigan) currently earn base salaries in excess of $7 million and $5 million, respectively, with bonuses for team performance successes, ultimately

[32] *See* College Football Playoff, *supra* note 30.
[33] Yee, *supra* note 27; *see also* Steven Godfrey, Longhorn network doomed? Texas' TV money stacking up fine against SEC's, SBNation.com (Jun. 5, 2015), http://www.sbnation.com/college-football/2015/6/5/8733131/texas-longhorn-network-money-revenue.
[34] Steve Berkowitz, *Pac-12 Leads Leagues in Revenues; Larry Scott Top-Paid College Commissioner*, May 21, 2015, http://www.usatoday.com/story/sports/college/2015/05/21/pac-12-revenues-larry-scott/27717251/.
[35] Steve Berkowitz, *NCAA's Mark Emmert Made More than $1.8 Million in 2013*, Jun. 30, 2015, http://www.usatoday.com/story/sports/college/2015/06/30/ncaa-mark-emmert-compensation-tax-return-990-form/29516401/.
[36] NCAA Salaries - NCAA Athletic Directors (USA TODAY), http://sports.usatoday.com/ncaa/salaries/all/director.
[37] NCAA Salaries – NCAAB Coaches (USA TODAY), http://sports.usatoday.com/ncaa/salaries/mens-basketball/coach.

scoring greater incomes at their schools than as head coaches in the NFL.[38] College coaches may also profit from school apparel deals and appearance agreements.[39]

NCAA student-athletes, particularly male basketball and football players who participate in the high revenue generating sports, however, represent "unpaid labor"[40] who, while earning scholarships, and other benefits,[41] do not receive an equitable return for their services.[42] Conversely, the recruitment for their services in some circumstances can exceed $100,000 in less than a two week period.[43] While professional and collegiate coaches may earn similar salaries,

[38] Harbaugh's incentives include (1) reaching the Big Ten championship game ($125,000), (2) winning the Big Ten championship ($250,000), (3) reaching a College Football Playoff bowl ($200,000), (4) playing in the four-team national championship playoff ($300,000), (5) for team academic performance (up to $150,000), and (6) winning a national title ($500,000). *See* Tracy, *supra* note 28; *see also* Chip Patterson, *Jim Harbaugh's contract at Michigan: Seven years, same pay as 49ers*, CBSSPORTS.COM (Dec. 30, 2014), http://www.cbssports.com/collegefootball/eye-on-college-football/24923614/jim-harbaughs-michigan-contract-7-years-same-pay-as-49ers.

[39] University of Georgia head football coach Kirby Smart is scheduled to earn $3.35 million per calendar year "attributable to the Association's shoe and clothing endorsement, and as compensation for radio and television shows, programs, interviews, and other appearances and endorsements." Carla Caldwell, *Kirby Smart is UGA's Head Football Coach (Here are the terms), Atlanta Business Chronicle*, Dec. 7, 2015, http://www.bizjournals.com/atlanta/morning_call/2015/12/kirby-smart-is-ugas-head-football-coach-here-are.html; *see also* Jon Solomon, *How Sonny Vaccaro accidentally created the Ed O'Bannon case*, CBSSports.com (Jun. 6, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24581965/how-sonny-vaccaro-accidentally-created-the-ed-obannon-case (discussing how Nike paid NCAA head coaches to utilize their gear while also sending them free equipment).

[40] "For talented football and basketball players, the NCAA's bargain is increasingly a bad deal: They are making enormous sums of money for everyone but themselves." Yee, *supra* note 27.

[41] The NCAA lists access to college education, academic success, scholarships, the NCAA's Student Assistance Fund (a $75 million fund enabling for trips home, clothing, school, tutoring, graduate test fees, health insurance, and more), academic and support services (i.e., tutoring), medical care, elite training opportunities, healthy living, exposure and experiences (such as global travel), and "preparation for life" as members of the workforce as benefits of the NCAA experience. *See The value of college sports*, NCAA.ORG (Mar. 15, 2015), http://www.ncaa.org/student-athletes/value-college-sports.

[42] "For all the outrage, the real scandal is not that students are getting illegally paid or recruited, it's that two of the noble principles on which the NCAA justifies its existence— "amateurism" and the "student-athlete"—are cynical hoaxes, legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes. The tragedy at the heart of college sports is not that some college athletes are getting paid, but that more of them are not. … college sports, as overseen by the NCAA, is a system imposed by well-meaning paternalists and rationalized with hoary sentiments about caring for the well-being of the colonized. But it is, nonetheless, unjust." Branch, *supra* note 2; *see also* Tony Manfred, *Here's how much big-time college athletes should be getting paid*, BUSINESS INSIDER (Mar. 20, 2013), http://www.businessinsider.com/heres-how-much-college-athletes-are-worth-2013-3 (valuing the average FBS football player at $137,357 per year and the average men's basketball player at $289,031 per year while acknowledging that the average player earns just $23,204 in scholarship money).

[43] Michigan coach Jim Harbaugh spent nearly $136,000 in a two-week period during his first month on the job, and $739,337 during his first fiscal year at the school. *See, e.g.,* Steve Berkowitz, *Jim Harbaugh's Jet Travel Valued at*

the average value of student-athlete scholarships fails to compare to professional minimum salaries,[44] let alone average salaries.[45] Even worse, student-athletes in the past have complained that their scholarships failed to provide them money for food, leaving them "starving" at night.[46] While student-athletes receive benefits for their participation in intercollegiate athletics, not only do coaches and administrators hoard the profits, but students cannot afford basic amenities.

C. NCAA BYLAW RESTRICTIONS ON STUDENT-ATHLETE RIGHTS OF PUBLICITY

The NCAA legitimizes restricting athlete compensation through the concept of "amateurism" as the "bedrock principle of college athletics."[47] While the NCAA does not supply a definition for amateurism, *Merriam-Webster* describes an "amateur" as "one who engages in a pursuit, study, science, or sport as a *pastime rather than as a profession*."[48] The NCAA claims that amateurism rules "ensure [that] the students' priority remains on obtaining a quality educational experience and that all of student-athletes are competing equitably."[49] In order to maintain such an environment, the NCAA refuses to allow its student-athletes to earn (1)

More than $10,000 a Day, USA TODAY, Feb. 12, 2016, http://www.usatoday.com/story/sports/ncaaf/2016/02/12/jim-harbaugh-michigan-jet-travel/80283324/.

[44] *Compare What are the minimum salaries in each type of professional sports league?*, QUORA, https://www.quora.com/What-are-the-minimum-salaries-in-each-type-of-professional-sports-league (detailing professional league minimum salaries); *with Average Athletic Scholarship per Varsity Athlete*, SCHOLARSHIPSTATS.COM, http://www.scholarshipstats.com/average-per-athlete.html (showing that the average athletic scholarship fails to exceed $15,000 for male Division I athletes); *see also* Larry Coon, *NBA Salary Cap FAQ*, LARRY COON'S NBA SALARY CAP FAQ 2011 COLLECTIVE BARGAINING AGREEMENT, http://www.cbafaq.com/salarycap.htm (referencing the National Basketball Association's collectively bargained minimum salary for NBA rookies as $525,093 for the 2015-16 season).

[45] *See* Cork Gaines, *The NBA is the highest-paying sports league in the world*, BUSINESS INSIDER (May 20, 2015), http://www.businessinsider.com/sports-leagues-top-salaries-2015-5.

[46] *See, e.g.,* Sara Ganim, *UConn Guard on Unions: I Go to Bed 'Starving',* CNN, Apr. 8, 2014, http://www.cnn.com/2014/04/07/us/ncaa-basketball-finals-shabazz-napier-hungry/ (quoting former University of Connecticut basketball player and current NBA player Shabazz Napier).

[47] Amateurism, NCAA.org (Apr. 24, 2014), http://www.ncaa.org/amateurism [hereinafter, *Amateurism*].

[48] *Definition of AMATEUR*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/amateur (emphasis added).

[49] *Amateurism*, *supra* note 47.

contracts with professional teams, (2) salary for participating in athletics, (3) prize money above actual and necessary expenses, (4) play with professionals, (5) tryouts, practice or competition with a professional team, (6) benefits from an agent or prospective agent, (7) agreement to be represented by an agent, or (8) delayed initial full-time collegiate enrollment to participate in organized sports competition.[50] A prospective student-athlete must pass the NCAA Eligibility Center's certification of their academic and amateur credentials in order to play.[51]

Student-athletes set to receive athletic financial aid must also sign a National Letter of Intent ("NLI"), which commits the individual to playing sports at the university and following the rules perpetuated in the NCAA Bylaws in exchange for aid for one academic year[52] renewable exclusively at the school's discretion.[53] The NLI, which some consider a non-negotiable boilerplate contract, enables educational institutions the ability to nullify the agreement if the student-athlete fails to meet the school or NCAA's eligibility standards.[54] Student-athletes cannot release themselves of their obligations if the coach who recruited the student loses his job or accepts an offer at another school.[55] Schools may also restrict student-athletes from transferring to other institutions of their choice.[56] Many student-athletes remain

[50] *Id.*
[51] *Id.*
[52] *See About the National Letter of Intent (NLI)*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/aboutTheNli/index.html; *see also* Jennifer Hinds, The One-Sided Games of the NCAA: How *In re NCAA Student-Athlete* Levels The Playing Field, 35 Loy. L.A. Ent. L. Rev. 95, 100 (2015).
[53] *See Athletic Scholarships*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/documentLibrary/athleticScholarship.html.
[54] *See Letter becomes Null and Void*, NATIONAL LETTER OF INTENT, http://www.nationalletter.org/nliProvisions/nullAndVoid.html.
[55] *See* Leo J. White, The National Letter of Intent Violates Doctrine of Unconscionability, CTS SPORTS LAW (Feb. 4, 2010), http://ctsportslaw.com/2010/02/04/the-national-letter-of-intentviolates-doctrine-of-unconscionability/.
[56] *See, e.g.,* Pat Forde, *Height of hypocrisy: Michigan limiting Spike Albrecht's transfer options*, YAHOO SPORTS (Mar. 30, 2016), http://sports.yahoo.com/news/michigan-limiting-spike-albrecht-s-transfer-options-224019956-ncaab.html.

minors when signing the NLI,[57] but often cannot obtain adequate representation; most parents or guardians may be unfamiliar with the contractual process, and student-athletes cannot hire an agent or else risk his or her eligibility.[58] Even if a student refrains from signing the NLI, he or she must still pass the NCAA Eligibility Center's certification process and sign the NCAA Student Athlete Statement (the "Statement") agreeing to abide by the NCAA Bylaws to participate in intercollegiate athletics.[59]

While enrolled, student-athletes must strictly adhere to the NCAA amateurism requirements codified in Section 12 of the NCAA Bylaws to maintain their eligibility to participate in intercollegiate competition.[60] If an athlete fails to meet such requirements, the NCAA can declare the student-athlete ineligible from participating in future athletic contests.[61] NCAA Bylaw 12.5.2 discusses non-permissible promotional activities that limit an athlete's commercial name and likeness expression and trademark usage while as a student-athlete.[62] Specifically, Bylaw 12.5.2.1 forces a student-athlete to refrain from profiting off of his or her name and likeness:

> After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual:
>
> a. Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind, or
> b. Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.[63]

---

[57] *See* Debra D. Burke et al., The NCAA Letter of Intent: A Voidable Agreement for Minors?, 81 MISS. L.J. 265, 266-68 (2011); *see also* Hinds, *supra* note 52 at 101.
[58] Hinds, *supra* note 52 at 101.
[59] *See Amateurism*, *supra* note 36; *see also* Form 15-3A: STUDENT ATHLETE STATEMENT – NCAA DIVISION I (2015) [hereinafter STUDENT ATHLETE STATEMENT] (otherwise known as Form 08-3a).
[60] *See Amateurism*, *supra* note 47; *see also* Hinds, *supra* note 52 at 101.
[61] *See Amateurism*, *supra* note 47.
[62] ACADEMIC & MEMBERSHIP AFFAIRS STAFF, NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA DIVISION I MANUAL § 12.5.2 (2015) [hereinafter NCAA MANUAL].
[63] *Id.* § 12.5.2.1.

Further, the NCAA controversially requires student-athletes to proactively police unauthorized commercial use of their name or likeness per Bylaw 12.5.2.2:[64]

> If a student-athlete's name or picture appears on commercial items (e.g., T-shirts, sweatshirts, serving trays, playing cards, posters, photographs) or is used to promote a commercial product sold by an individual or agency without the student-athlete's knowledge or permission, the student-athlete (or the institution acting on behalf of the student-athlete) is required to take steps to stop such an activity in order to retain his or her eligibility for intercollegiate athletics.[65]

The NCAA, however, exempts the use of a student-athlete's name or likeness in a magazine or newspaper provided that it is used in an "informational context and is not utilized to promote a commercial product."[66] Thus, in order to participate in intercollegiate athletics, student-athletes must contractually agree to abstain from licensing their name and likeness for commercial purposes or profit from registered trademarks while enrolled as a student-athlete.[67] Further, a student-athlete's eligibility may be threatened if a third party utilizes the student-athlete's name or likeness without his or her consent or knowledge if he or she fails to act in stopping such use.[68]

In addition to agreeing to maintain amateur status, prior editions of the Statement enabled the NCAA and other third parties to capitalize on student-athlete name and likenesses. The 2013

---

[64] Dan Wetzel, *Johnny Manziel's Suspension Exposes Ridiculousness of NCAA's Double Standards*, YAHOO! SPORTS (Aug. 28, 2013), http://sports.yahoo.com/news/ncaaf--johnny-manziel-s-suspension-exposes-ridiculousness-of-ncaa-s-double-standards-012517037.html.
[65] NCAA MANUAL § 12.5.2.2.
[66] NCAA Rules – Media and Private Internet Websites, NCAA, 2, http://grfx.cstv.com/photos/schools/samf/genrel/auto_pdf/Media_Internet_Sites.pdf.
[67] *See* Matt Fitzgerald, *NCAA Closes 'Johnny Football' Copyright Loophole in Amateurism Rules*, Bleacher Report (Feb. 27, 2013), http://bleacherreport.com/articles/1546254-ncaa-closes-johnny-football-copyright-loophole-in-amateurism-rules.
[68] In 2013, Texas A&M University quarterback Johnny Manziel was suspended for the first half of a game due to an "inadvertent violation" for signing autographs that "[he] should [have] know[n] … [were] likely to be sold for commercial purposes." George Schroeder, *'No Evidence' Manziel Took Money for Autographs, A&M Says*, USA TODAY, Aug. 28, 2013, http://www.usatoday.com/story/sports/ncaaf/sec/2013/08/28/johnny-manziel-suspended-for-first-half-of-texas-am-opener-vs-rice/2723767/.

Statement required student-athletes to "authorize the NCAA … to use [his or her] name or picture in accordance with NCAA Bylaw 12.5, including to promote NCAA championships or other NCAA events, activities or programs."[69] While Bylaw 12.5.1.1.1 still maintains this language,[70] the 2015 Statement no longer contains this provision[71] likely due to the *In re NCAA Student-Athlete* and *O'Bannon v. NCAA* litigation. Earlier editions of the Statement provided the NCAA exclusive control over the names and images of student-athletes, allowing them to license student-athlete likenesses to business partners without compensating the athletes.[72] While restricting student-athletes from profiting off of their own name and likenesses through the shroud of amateurism, the NCAA designed contractual arrangements to internalize the lucrative commercial benefits available through intercollegiate sports.

[69] FORM 13-3A: STUDENT ATHLETE STATEMENT – NCAA DIVISION I (2013).
[70] NCAA MANUAL § 12.5.1.1.1.
[71] STUDENT ATHLETE STATEMENT, *supra* note 59.
[72] Christie Cho, Protecting Johnny Football®: Trademark Registration for Collegiate Athletes, 13 Nw. J. Tech. & Intell. Prop. 65, 69-70 (2015).

II. *IN RE NCAA STUDENT-ATHLETE*: ESTABLISHING A RIGHT OF PUBLICITY FOR STUDENT-ATHLETES IN VIDEO GAMES AND CONSIDERING OTHER CLAIMS FOR PROTECTION

To combat the NCAA machine, current and former student-athletes have sought legal recourse to protect and expand their rights. Although unionization efforts by Northwestern student-athletes proved unsuccessful, a national organization of professors continues to fight on their behalf.[73] Future action by current student-athletes remains unlikely, however, given the risks of challenging the universities who control their playing time and, more importantly, their scholarships.

In their place, former student-athletes have initiated the assault against amateurism and the NCAA model in *In re NCAA Student-Athlete* and *O'Bannon v. NCAA* in the Ninth Circuit. The plaintiffs' success in combating the NCAA's licensing of student-athlete likenesses to video game companies in *In re NCAA Student-Athlete* not only enables for scrutiny of other NCAA name and likeness licensing practices, but also allowed plaintiffs to attack the entire NCAA model as an illegal price-fixing mechanism in *O'Bannon v. NCAA*. This Section II explores the right of publicity generally, the rationale behind the Ninth Circuit's prohibition against the NCAA's licensing of student-athlete name and likenesses for video games, and other potential avenues for student-athletes to challenge the NCAA's utilization of their names and likenesses.

A. DEVELOPMENT OF THE RIGHT OF PUBLICITY

The right of publicity, derived from the right of privacy, is a "state-law created intellectual property right whose infringement is a commercial tort of unfair competition."[74]

---

[73] *See generally* Dave Zirin, *Why not even the mighty John Oliver can shame the NCAA*, THE NATION (Mar. 16, 2015), http://www.thenation.com/article/why-not-even-mighty-john-oliver-can-shame-ncaa/.
[74] 1 J. Thomas McCarthy, The Rights of Publicity and Privacy 1-2 (1999); *see also* Restatement (Third) of Unfair Competition § 46 (1995) [hereinafter, *Restatement of Unfair Competition*].

Specifically, the right of publicity allows for an individual "to control the commercial use of his or her identity," such as his or her name, image, voice, likeness, or other identifying element of his or her persona.[75]

First introduced in *Haelan Labs, Inc. v. Topps Chewing Gums, Inc.,* the right of publicity expanded protection for individuals from not just the "personal right to be left alone, but also the business right to use one's identity in commerce."[76] After *Haelan*, the Supreme Court validated the right of publicity in *Zacchini v. Scripps-Howard Broadcasting Co.*, which recognized that the First Amendment did not immunize a television station from recording and showing the plaintiff's "human cannonball" routine in its entirety without the plaintiff's consent since it posed a "substantial threat" to the economic value of the performance.[77] Thus, the right of publicity created a new intangible property right to protect an individual's economic interests in his or her image or identity, akin to the economic considerations behind copyright, patent, and trademark protections.[78]

[75] *Cardtoons v. Major League Baseball Players Ass'n*, 95 F.3d 959, 967 (10th Cir. 1996); *see Haelan Labs., Inc. v. Topps Chewing Gums, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); *see also Talor Bearman*, Intercepting Licensing Rights: Why College Athletes Need a Federal Right of Publicity, 15 VAND. J. ENT. & TECH. L. 85, 105 (2013).
[76] "It is common knowledge that many prominent persons (especially actors and ballplayers), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertiser from using their pictures." *Haelan Labs., Inc.*, 202 F.2d at 868 (protecting an exclusive trading card agreement between professional baseball players and the plaintiff *Haelan Laboratories* for the players' names and pictures against the defendant *Topps Chewing Gum, Inc.*, who failed to have an arrangement with the players).
[77] *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 575 (1977).
[78] *See* Bearman, *supra* note 75 at 94; *see also Restatement of Unfair Competition*, *supra* note 74.

While copyright,[79] patent,[80] and trademark[81] receive protection under federal statutes, the right of publicity instead relies on state common law,[82] state statutes,[83] a combination of both, or remains "wholly unrecognized" in particular jurisdictions.[84] For states that have adopted the Restatement (Third) of Unfair Competition, an individual bears the burden of establishing the following elements to succeed in a claim for a violation of his or her right of publicity: (1) the defendant used the plaintiff's identity; (2) the identity has commercial value; (3) the commercial value is appropriated for the purpose of trade; (4) the plaintiff did not consent; and (5) the appropriation resulted in commercial injury.[85] Further, upon an infringed party's establishment of a prima facie case for the violation of their right of publicity in a particular jurisdiction, actions that would otherwise violate an individual's right of publicity may be protected under the First Amendment.[86] Given incongruences among state laws, nearly identical fact patterns brought in different jurisdictions may lead to materially different conclusions,[87] which caused some to advocate for a federal right of publicity in line with the other intellectual property rights.[88]

---

[79] 17 U.S.C. § 101 (2012).
[80] 35 U.S.C. § 1 (2012).
[81] 15 U.S.C. § 22 (2012).
[82] *See* Bearman, *supra* note 75 at 88; *see also Restatement of Unfair Competition*, *supra* note 74.
[83] *See id.*; *see, e.g.*, Cal. Civ. Code § 3344 (West 2012); Fla. Stat. Ann. § 540.08 (West 2012); 765 Ill. Comp. Stat. 1075/1 (West 2012); Ind. Code Ann. § 32-36-1-1 (West 2012); Ky. Rev. Stat. Ann. § 391.170 (West 2012); Mass. Gen. Laws Ann. ch. 214, § 3A (West 2012); Neb. Rev. Stat. Ann. § 20-202 (West 2012); Nev. Rev. Stat. Ann. § 597.790 (West 2012); N.Y. Civ. Rights Law §§ 50-51 (McKinney 2011); Ohio Rev. Code Ann. § 2741.01 (West 2012); Okla. Stat. Ann. tit. 12, §1448 (West 2012); 42 Pa. Cons. Stat. Ann. § 8316 (West 2012); R.I. Gen. Laws Ann. § 9-1-28.1 (West 2012); Tenn. Code Ann. § 47-25-1104 (West 2012); Tex. Prop. Code Ann. § 26.002 (West 2012); Utah Code Ann. § 45-3-2 (West 2012); Va. Code Ann. § 8.01-40 (West 2012); Wash. Rev. Code Ann. § 63.60.040 (West 2012); Wis. Stat. Ann. § 995.50 (West 2012).
[84] Bearman, *supra* note 75 at 96.
[85] *Restatement of Unfair Competition*, *supra* note 74.
[86] *See generally Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 562 (1977).
[87] *Compare Keller v. Elec. Arts, Inc.*, 2010 WL 530108 (N.D. Cal. 2010) (holding for the plaintiffs under California law); *with Hart v. Elec. Arts, Inc.*, 808 F. Supp. 2d 757 (D.N.J. 2011) (holding for the defendant under New Jersey law).
[88] *See* Bearman, *supra* note 75 at 96-101.

Nevertheless, student-athletes have succeeded in presenting viable claims for a violation of their right of publicity against the NCAA while dismissing the defendant's First Amendment defenses, opening the door for future litigation.

B. *IN RE NCAA STUDENT-ATHLETE*: FACTS & PROCEDURAL HISTORY

In May 2009, former University of Nebraska ("Nebraska") quarterback Sam Keller filed a class action lawsuit in the Northern District of California against video game manufacturer Electronic Arts ("EA"), the NCAA, and the CLC[89] for the misappropriation of student-athlete images in EA's *NCAA Football* video games and a violation of his right of publicity.[90] Shortly thereafter in July 2009, Ed O'Bannon, former NCAA All-American and 1995 NCAA Men's Basketball Tournament Most Outstanding Player as a member of the University of California, Los Angeles ("UCLA") National Championship team,[91] also brought a class action lawsuit in the Northern District of California against the NCAA and CLC. O'Bannon alleged that the Statement violated antitrust laws and restricted his right of publicity related to the licensing of his likeness to EA for its *NCAA Basketball* video game franchise.[92] In January 2010, the district court consolidated all related actions among the plaintiffs.[93]

The Keller and O'Bannon class's right of publicity claims derived from EA's replication of student-athlete likenesses in its *NCAA Football* and *NCAA Basketball* video games. In the 2009 iteration of *NCAA Basketball*, one of the avatars on its 1995 UCLA "Classic Team" shared

[89] To create the game, EA entered into licensing agreements with the NCAA and its member schools paying them for the permission to use their intellectual property in the video games. *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F.Supp.3d 955, 965 (N.D. Cal. Aug. 8, 2014).
[90] Complaint at 61, Keller v. Elec. Arts Inc., No. 4:09-cv-01967-CW (N.D. Cal. May 5, 2009).
[91] *See* Complaint, O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. 4:09-cv-03329 (N.D. Cal. July 21, 2009) [hereinafter, O'Bannon Complaint]
[92] O'Bannon Complaint, *supra* note 91.
[93] Order Granting Plaintiffs Samuel Michael Keller's and Edward C. O'Bannon, Jr.'s Joint Motion to Consolidate Actions, Keller v. Electronic Arts, Inc., 4:09-cv-01967-CW (N.D. Cal. Jan. 15, 2010).

O'Bannon's exact characteristics, including his bald head, jersey number 31, and left-handedness, but did not mention him by name.[94] Keller's virtual counterpart also maintained a bevy of his features in the *NCAA Football* franchise.[95] Similarly, players on other virtual college teams corresponded "exactly to their real-life counterparts," including the same position, jersey number, race, size, height, weight, and home state, while some even shared "uniquely identifiable idiosyncratic characteristics."[96] The only consistent departure from player likenesses involved omitting player names, instead referring to them as their position and jersey number, but nevertheless contained a "photographic-like realism" in the depiction of all other aspects of the visual presentation.[97] Further, EA allowed users of its video games the ability to upload rosters of names obtained from third parties.[98] O'Bannon nor Keller consented or received compensation for the use of their likenesses.[99] The Northern California District Court denied the defendants' motion to dismiss the plaintiffs' right of publicity claims, rejecting the defendants'

[94] *See* Solomon, *supra* note 38.
[95] Prior to playing on Nebraska's football team in 2007, Keller was the starting quarterback at Arizona State University ("ASU") in 2005 before transferring to Nebraska. In the 2005 edition of *NCAA Football*, ASU's virtual starting quarterback shared Keller's jersey number 9, with the same height, weight, skin tone, hair color, hair style, handedness, home state, play style ("pocket passer"), visor preference, facial features, and school year. In the 2008 version, Nebraska's virtual quarterback maintained the same characteristics, except for a different jersey number, which the Ninth Circuit presumed was the result of Keller changing his number upon arriving at Nebraska in real life. Like O'Bannon, Keller's name was omitted from the player jerseys. *In re NCAA Student–Athlete Name & Likeness Licensing Litig,,* 724 F.3d 1268, 1271-72 (9th Cir. 2013) [hereinafter, *In re NCAA Student-Athlete*].
[96] O'Bannon Complaint, *supra* note 91; *see also* Brent Schrotenboer, *Legal Risks Raise Questions for Colleges and EA Sports*, USA TODAY, Jul. 19, 2013, http://www.usatoday.com/story/sports/ncaaf/2013/07/18/ncaa-ea-sports-video-games/2561975/ (indicating that *NCAA Basketball* also included player tattoos); Patrick Vint, *126 top NCAA football 14 players nearly match their real-life counterparts*, SBNATION.COM (Jun. 20, 2013), http://www.sbnation.com/college-football/2013/6/20/4433024/ea-sports-ed-obannon-ncaa-football-14-players (describing similarities between the real life characteristics of 126 players and their video game counterparts in the *NCAA Football 14* game).
[97] O'Bannon Complaint, *supra* note 91.
[98] *In re NCAA Student–Athlete,* 724 F.3d at 1271.
[99] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).

affirmative First Amendment defenses."[100] While the plaintiffs ultimately resolved their claims with EA and CLC for $40 million, [101] the NCAA refused to settle. [102]

C. *IN RE NCAA STUDENT-ATHLETE*: NINTH CIRCUIT AFFIRMS VIOLATION OF STUDENT-ATHLETE RIGHT OF PUBLICITY CLAIMS IN VIDEO GAMES

In 2013, the Ninth Circuit affirmed the district court's ruling denying EA and the NCAA's First Amendment affirmative defenses allowing the O'Bannon and Keller class to proceed with right of publicity claims for the use of student-athlete likenesses in EA's video games.[103] The defendants had sought to proactively strike the plaintiffs' complaint at the outset and dismiss the suit as a strategic lawsuit against public participation ("SLAPP") under California's anti-SLAPP statute by establishing that the plaintiffs' suit arose under conduct protected by the First Amendment.[104] To succeed in an anti-SLAPP motion, the defendant must prove (1) that the plaintiff's suit arose from an act by the defendant in furtherance of the defendant's freedom of speech; and (2) that the plaintiff does not establish a reasonable probability that he or she will prevail on his or her claim.[105] In finding that the plaintiffs' claim would succeed on the merits, the district court denied the defendants' anti-SLAPP motion.

---

[100] *Keller*, 2010 WL 530108 at *1.
[101] Players to Receive $40 Million, ESPN (Sept. 28, 2013), http://espn.go.com/collegefootball/story/_/id/9731696/ea-sports-clc-settle-lawsuits-40-millionsource.
[102] Steve Berkowitz, NCAA Vows to Fight O'Bannon Suit to the Supreme Court, USA TODAY (Sept. 26, 2013), http://www.usatoday.com/story/sports/ncaab/2013/09/26/ncaa-ed-obannon-ea-sportslawsuit-supreme-court/2877579/.
[103] "[U]nder California's transformative use defense, 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." *In re NCAA Student-Athlete Name & Likeness Licensing Litig.,* 724 F.3d 1268, 1284 (9th Cir. 2013).
[104] *In re NCAA Student-Athlete,* 724 F.3d at 1272; *see generally* Cal. Civ. Proc. Code § 425.16 (West 2014).
[105] *In re NCAA Student-Athlete,* 724 F.3d at 1272-73.

On appeal, the plaintiffs did not contest that video games remain subject to the First Amendment,[106] while the defendants did not object that the plaintiffs submitted a valid right of publicity claim under California common and statutory law.[107] The appeal thus hinged on the Ninth Circuit's analysis of the defendants' four affirmative First Amendment defenses under (1) the "transformative use" test,[108] (2) the *Rogers* test,[109] (3) the "public interest" test,[110] and (4) the "public affairs" exemption[111] to demonstrate that the plaintiffs would not prevail in their right of publicity claim.[112]

---

[106] *Id.* at 1273*; see also Brown v. Entm't Merchs. Ass'n,* 131 S.Ct. 2729, 2733 (2011) ("video games qualify for First Amendment protection").

[107] The elements for a claim of a violation of the right of publicity under California common law are: (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury, while California statute also requires proving (5) "a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose." *In re NCAA Student-Athlete,* 724 F.3d at 1273; *see also Keller,* 2010 WL 530108 at *3; *see generally* Cal. Civ. Code § 3344(a).

[108] The transformative use defense is "a balancing test between the First Amendment and the right of publicity based on whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." *Comedy III Productions, Inc. v. Gary Saderup, Inc.,* 21 P.3d 797, 799, 809-10 (2001); *see also In re NCAA Student-Athlete,* 724 F.3d at 1273-74. *Comedy III* provides five factors to consider: (1) whether "the celebrity likeness is one of the 'raw materials' from which an original work is synthesized"; (2) whether the work is "primarily the defendant's own expression" and "something other than the likeness of the celebrity"; (3) whether the "literal and imitative or the creative elements predominate in the work"; (4) whether "the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted"; and, (5) whether "an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame." *See Comedy III Productions, Inc.,* 21 P.3d at 809-10.

[109] The *Rogers* test was adopted in the context of false endorsement claims under § 43(a) of the Lanham Act, which held that such a claim would not succeed "unless the [use of the trademark or other identifying material] has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the [use of trademark or other identifying material] explicitly misleads as to the source or the content of the work." *See Rogers v. Grimaldi*, 875 F.2d 994, 999 (2d. Cir. 1989); *see also In re NCAA Student-Athlete,* 724 F.3d at 1279-82.

[110] The common law public interest test allows a defendant to avoid liability in the "publication or reporting of newsworthy items." *See In re NCAA Student-Athlete*, 724 F.3d at 1282-83 (emphasizing the existence of factual data or statistics as indicators of "reporting").

[111] The statutory public affairs exemption relieves liability for the "use of a name, voice, signature, photograph, or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign." *See id.*; *see generally* Cal. Civ. Code § 3344(d).

[112] *In re NCAA Student-Athlete*, 724 F.3d at 1273.

The Ninth Circuit affirmed the ruling by the district court and denied the defendants' defenses,[113] indicating that student-athletes would "probably succeed on the merits in proving that EA's conduct fell outside of First Amendment protection because EA violated the student-athletes' right of publicity."[114] By denying the defendants' affirmative First Amendment defenses, the court effectively validated the plaintiffs' claim of a violation of their right of publicity in EA's video games.

As the dissent intimates, the majority equates the right of publicity of NCAA student-athletes to those of professional athletes,[115] suggesting that in addition to video games, student-athletes may be able to challenge other revenue streams, such as merchandise, where professional athletes license their names and likenesses to third parties.[116] If professional athletes can profit off of their identities through these channels, student-athletes should at the very least be able to protect themselves from the unauthorized sale of such items, if not profit off of such sales.

---

[113] *Id.* at 1273-78 (rejecting the transformative use defense since a defendant is only entitled to it if no trier of fact "could reasonably conclude that the [game] [i]s not transformative," concluding that the video game does not contain significant transformative elements); *id.* at 1279-82 (declining to adopt the *Rogers* test since it was designed to protect consumers from the risk of consumer confusion, but that the right of publicity does not implicate potential for consumer confusion and is designed to protect the celebrity); *id.* at 1282-84 (rejecting both the "public interest" test and "public affairs" exemption since "it is clear that both defenses protect only the act of publishing or reporting," concluding that *NCAA Football* is a game and not a reference source).
[114] Hinds, *supra* note 52 at 112.
[115] *See In re NCAA Student-Athlete*, 724 F.3d at 1288.
[116] *See* Darren Heitner, *Sports Licensing Soars to $698 Million in Royalty Revenue*, FORBES (Jun. 17, 2014), http://www.forbes.com/sites/darrenheitner/2014/06/17/sports-licensing-soars-to-698-million-in-royalty-revenue/#6cabb48241b7 (identifying merchandise retail as the primary licensing opportunity for professional leagues and collegiate organizations).

D. APPAREL AND MERCHANDISE AS ADDITIONAL AVENUES FOR STUDENT-ATHLETE RIGHT OF PUBLICITY PROTECTION

Following the framework of the Ninth Circuit's majority decision, student-athletes may be able to challenge other usages of their names and likenesses. In addition to previously licensing name and likenesses to EA for video games, the NCAA utilizes player images or likenesses in ticket brochures and other advertisements, apparel, and, of course, television broadcasting.

Regarding advertisements and media broadcasting where the NCAA and schools utilize student-athlete names, images, and likenesses rather blatantly,[117] the NCAA may nevertheless prevail through the articulated affirmative First Amendment defenses in *In re NCAA Student-Athlete*. While the NCAA would have a weak argument through (1) the "transformative use" test since advertisements and broadcasting of games offer little, if any, transformative elements,[118] and (2) the failed application of the *Rogers* test to the right of publicity, the NCAA would have a strong case for First Amendment protection through either (3) the common law "public interest" test, or (4) the statutory "public affairs" exemption.[119] Thus, while the NCAA and its member schools may use the exact image of student-athletes in game advertisements and broadcasts, they

[117] Utilizing California's threshold test for establishing a prima facie violation of a right of publicity through game advertisements and television broadcasting, the plaintiff would likely satisfy that (1) the defendant's use of the plaintiff's identity through the exact images of the athletes; (2) the appropriation of plaintiff's name or likeness to defendant's advantage since the NCAA and the individual schools profit off of game attendance and the selling of television rights to broadcasting companies; (3) lack of consent, which would follow similar arguments to those played forth in *In re NCAA Student-Athlete*; and (4) resulting injury since NCAA student-athlete professional counterparts are paid for their likeness in advertisements and the broadcasting of their games.

[118] It remains conceivable that certain advertisements may transform the student-athletes' likenesses by containing its own creative elements, but per *Comedy III,* there remains a high threshold for the addition of creative elements to make the advertisement "more than a mere celebrity likeness or imitation." *Comedy III,* 21 P.3d *supra* note 108.

[119] The California statute specifically articulates sports broadcasting in its list of protections against violations of the right of publicity. *See* Cal. Civ. Code § 3344(d). Further, the NCAA and its member schools could easily propose that utilizing player name and likenesses in game advertisements serves the public's interest in reporting the time and location of the event.

nevertheless maintain viable First Amendment defenses to enable them to continue use due to their public utility.

The NCAA, however, fails to maintain a strong argument for the continued sale of player apparel and merchandise depicting student-athlete names, images, or other identifiable aspects of their persona. The NCAA's First Amendment "public interest" and "public affairs" defenses lose momentum since apparel and merchandise, unlike game advertisements and broadcasts, fail to provide a reporting or publishing public benefit. Apparel and merchandise exist as consumer goods perpetuating fan hood as an extension of the actual on-field product similar to EA's sports video games.

While the NCAA and its member schools may nevertheless raise First Amendment arguments, their best defense against a purported violation of student-athletes' rights of publicity involves denying that apparel and merchandise utilize player names and likenesses at all. To do so, the NCAA should attempt to distinguish jersey sales from the depictions of student-athletes in video games. In EA's *NCAA Football* and *NCAA Basketball* series, a multitude of identifiable aspects of individual personas formed a complete virtual replica of the player. Jersey sales, absent player names, only connect the school and the number to the individual.

Nevertheless, such a feature may remain substantial enough to qualify as representative of a student-athlete's identity. Consumer ability to identify the student-athlete by his number remains a question of fact.[120] Relevant evidence may include the number and nature of identifying characteristics used by the defendant (here, limited), the actual identification made by consumers, and the defendant's intent to identify the plaintiff.[121] While the NCAA would likely

[120] *See Restatement of Unfair Competition*, *supra* note 74.
[121] *See id.*

attempt to develop a large consumer base that may struggle to identify the student-athlete, the student-athletes would seek smaller consumer baskets, such as the geographical area surrounding a particular school where consumers would surely recognize the player by his jersey number. Individuals in college towns that lack professional franchises would be even more likely able to identify college players.

Student-athletes would also seek to implicate the defendant's intent to identify the plaintiff by suggesting that the NCAA and the school purposely offered the particular number in its stores since a greater market would exist for that player's number than a generic one.[122] Further, student-athletes would seek to analogize jersey sales to the Ninth Circuit's decision in *Motschenbacher*, which held that the plaintiff could be identified by his distinctive race car, suggesting that objects attached to an individual's persona can represent the person's likeness.[123]

While the NCAA transitioned from selling particular player jerseys on its own online store[124] and member schools curtailed the practice as well,[125] many universities continue to sell jerseys with identifiable player numbers in their own stores.[126] Student-athletes may not have as strong a case in demonstrating third party usage of their likeness in jersey sales as in EA's video games, but they nevertheless maintain arguments to prohibit the practice. As collegiate administrators and coaches continue to receive compensation comparable to their professional

---

[122] *See, e.g.,* Gary Parrish, *ESPN's Jay Bilas spent Tuesday afternoon embarrassing the NCAA*, CBSSPORTS.COM (Aug. 6, 2013), http://www.cbssports.com/collegebasketball/eye-on-college-basketball/23040941/did-you-see-what-jay-bilas-did-to-the-shopncaasportscom-search-engine (demonstrating that the NCAA's online store enabled for the sale of specific jerseys attached to specific players despite their insistence against it).
[123] *See generally Motschenbacher v. R.J. Reynolds Tobacco Co.,* 498 F.2d 821 (9th Cir. 1974).
[124] *See* Mark Schlabach, *NCAA puts end to jersey sales*, ESPN.COM (Aug. 9, 2013), http://espn.go.com/college-sports/story/_/id/9551518/ncaa-shuts-site-jersey-sales-says-hypocritical.
[125] *See, e.g.,* Marc Tracy, *Days of Selling Popular College Players' Jerseys Seem Numbered*, NY TIMES (Aug. 5, 2015), http://www.nytimes.com/2015/08/06/sports/ncaafootball/days-of-selling-popular-college-players-jerseys-seem-numbered.html?_r=0.
[126] *See id.*

counterparts, student-athletes should also control the market for their names and likenesses like professional athletes.

III. *O'BANNON V. NCAA*: NCAA LICENSING OF STUDENT-ATHLETE LIKENESSES VIOLATES ANTITRUST LAWS

After successfully claiming a violation of their right of publicity in EA's video games, the *O'Bannon* class proceeded with antitrust claims against the NCAA before the district court in June 2014.[127] By challenging the NCAA's scholarship model as an illegal price fixing mechanism, the plaintiffs directly threatened the NCAA's existence. Although the Ninth Circuit rejected the district court's authorization of monetary stipends, the case nevertheless continues to peel back the façade of amateurism while enabling student-athletes to receive compensation up to the full cost of attendance. Section III explores the rationales of the district court, and the Ninth Circuit majority and concurring opinions, concluding that the court fails to provide adequate relief for student-athletes.

A. DISTRICT COURT ENABLES FOR STUDENT-ATHLETE NAME AND LIKENESS COMPENSATION

Following a fourteen-day bench trial, Judge Claudia Wilken determined that the NCAA's rules prohibiting student-athletes from receiving compensation for their name and likenesses amounted to an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.[128]

[127] *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1056 (9th Cir. 2015).
[128] *See id.*

After identifying potential adversely affected markets[129] by the NCAA rules, the court adopted the *rule of reason* following the precedent for sports cases held in *Board of Regents*[130] to consider both anticompetitive effects presented by the plaintiffs and procompetitive arguments offered by the NCAA.[131] Judge Wilken agreed with the plaintiffs, determining that the NCAA's restriction from allowing NCAA athletes to sell their name and likenesses to interested parties amounted to a price-fixing arrangement by the NCAA.[132] As buyers of student-athlete names and likenesses, the Statement and Bylaws enabled for the universities to behave like a cartel who collectively "agree[d] to value [name and likenesses] at zero."[133] Absent the NCAA's rules, schools would otherwise compete with each other by offering recruits compensation for their labor and likenesses.[134]

To counter the plaintiffs' anticompetitive arguments, the NCAA offered four procompetitive reasons for maintaining the rules: "(1) preserving amateurism in college sports; (2) promoting competitive balance in FBS football and Division I basketball; (3) integrating academics and athletics; and (4) increasing output in the college education market."[135] Judge

[129] The court identified two potential markets affected by the NCAA rules – (1) the college education market, and (2) the group licensing market. Judge Wilken rationalized that the former may be harmed since "there are no professional [or college] football or basketball leagues capable of supplying a substitute for the bundle of goods and services" that FBS football and Division I basketball schools provide. Further, the group licensing market may be harmed since TV networks seek to acquire athlete name and likenesses to broadcast their games, while the use of names and likenesses in sports video games increased their attractiveness to consumers. *O'Bannon v. Nat'l Collegiate Athletic Ass'n,* 7 F.Supp.3d 955, 965-71 (N.D. Cal. 2014).
[130] *See Board of Regents*, *supra* note 26 at 85.
[131] *See O'Bannon,* 7 F.Supp.3d at 984-85.
[132] *Id.* at 972.
[133] *Id.* at 973.
[134] Conversely, Judge Wilken determined that the NCAA rules do not promulgate anticompetitive effects in the group licensing market. Broadcasters and video game companies, Judge Wilken reasoned, seek to acquire the name and likenesses of all athletes and thus enabling for competition among student-athletes in this space would actually limit their appeal. Student-athletes have an "incentive to cooperate," which would be compromised by competition. . *Id.* at 993-98. However, enabling student-athletes to unionize would enable them to distribute their name and likenesses collectively to these broadcasting and video game companies.
[135] *Id.* at 999.

Wilken rejected the second and fourth justifications,[136] while accepting the first and third, at least in part.[137] Judge Wilken rejected the NCAA's "longstanding commitment to amateurism," declining to adopt dicta in *Board of Regents* that discussed the "revered tradition"[138] given that it "did not serve to resolve any disputed issues of law" in that case.[139]

The court also accepted the plaintiffs' evidentiary arguments of the fallibility of the NCAA's amateurism defense. Judge Wilken cited the ability for tennis players to accept up to $10,000 a year in prize money prior to enrolling as student-athletes as inconsistent with amateurism.[140] Further, the court rejected the contention that amateurism serves as the "driving force" of consumer demand of college sports.[141] Loyalty to one's alma mater or to a regionally local school, for example, trumped consumer interests in amateurism.[142] Analogies to the increase in popularity in (1) Major League Baseball following an increase in player salaries, and (2) the Olympics after the allowance for athletes to seek endorsements, despite initial consumer apprehension, also proved persuasive in limiting the NCAA's consumer driven amateurism argument.[143]

Judge Wilken nevertheless acknowledged that amateurism plays at least some role in consumer interest in NCAA sports.[144] Likewise, the court recognized the benefit of integrating

---

[136] Judge Wilken dismissed the claim that the NCAA rules promote competitive balance since schools may be able to spend indefinite amounts on their athletic programs for coaches or facilities. Likewise, the court found no support that the NCAA's compensation rules enable for more money to fund additional scholarships at low-revenue schools, while noting that the plaintiffs merely sought the ability for schools to pay athletes and not require them to do so. *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1060 (9th Cir. 2015).
[137] *Id.* at 1058.
[138] *Board of Regents*, *supra* note 26 at 120.
[139] *O'Bannon v. Nat'l Collegiate Athletic Ass'n,* 7 F.Supp.3d 955, 999 (N.D. Cal. 2014).
[140] *See id.* at 1000.
[141] *Id.* at 977.
[142] *Id.* at 978.
[143] *Id.* at 976-77.
[144] *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1058 (9th Cir. 2015).

academics and athletics, but determined that other rules, such as requiring student-athletes to attend class or live in dorms with non-student-athletes, achieve this goal.[145] Judge Wilken, however, expressed caution in creating a social "wedge" between paid student-athletes and the rest of the student body, but that it should not justify "sweeping prohibition" on paying student-athletes for their names and likenesses.[146]

In balancing the anticompetitive and procompetitive effects of the NCAA's rules, Judge Wilken determined that the NCAA could accomplish its objectives through less restrictive means. The court held that the NCAA could no longer prohibit its member schools from "(1) compensating FBS football and Division I men's basketball players for the use of their [names and likenesses] by awarding them grants-in-aid up to the full cost of attendance at their respective schools, or (2) paying up to $5,000 per year in deferred compensation to FBS football and Division I men's basketball players for the use of their [name and likenesses], through trust funds distributable after they leave school."[147]

Judge Wilken determined that a small payment in excess of the cost of attendance would not dissuade consumer interest in intercollegiate athletics, especially if not made on the basis of their athletic ability or performance (paid uniformly among FBS football and Division I men's basketball players) and only derived from revenue generated from the use of their names and likenesses.[148] Further, depositing such funds in trusts would minimize any detrimental impact on consumer demand, while also maintaining the social status quo between student-athletes and other students.[149] Judge Wilken's rejection of amateurism as a viable NCAA defense appeared to

[145] *See O'Bannon v. Nat'l Collegiate Athletic Ass'n,* 7 F.Supp.3d 955, 1003 (N.D. Cal. 2014).
[146] *Id.*
[147] *Id.* at 1004-05.
[148] *Id.* at 983.
[149] *Id.*

inflict a "decisive and crushing end to the era of amateurism in college athletics,"[150] but declaring victory proved too soon following the NCAA's appeal to the Ninth Circuit.

B. NINTH CIRCUIT MAJORITY: NCAA VIOLATES ANTITRUST LAWS BUT STUDENTS CANNOT COLLECT CASH COMPENSATION

On September 30, 2015, Judge Jay Bybee, writing for the three-judge panel of the Ninth Circuit, affirmed Judge Wilken's ruling that the NCAA's rules violated antitrust laws by fixing the price of student-athlete names and likenesses and allowed schools to cover student-athletes' full cost of attendance, but declined to enable schools to pay student-athletes up to $5,000 for their names, images, and likenesses.[151]

The Ninth Circuit found that Judge Wilken "probably underestimated the NCAA's commitment to amateurism," and placed a greater emphasis on the role of amateurism in the consumer appeal of intercollegiate athletics.[152] While agreeing with the district court that the NCAA only offered two legitimate procompetitive purposes – increased consumer appeal due to amateurism and a concern for the integration of academics and athletics – the Ninth Circuit emphasized that the plaintiffs bore the burden of proving that a less restrictive alternative is "virtually as effective" in serving the procompetitive purposes and that the NCAA must be afforded "ample latitude" to superintend college athletics.[153] The evidence at trial, including testimony from NCAA President Mark Emmert, suggested that student-athletes would "remain

---

[150] Stewart Mandel, *O'Bannon Ruling Deals Crushing End to Amateurism in NCAA Athletics*, FOX SPORTS (Aug. 9, 2014), http://www.foxsports.com/college-football/story/o-bannon-decisiondeals-decisive-end-to-amateurism-in-ncaa-athletics-080814.
[151] *See O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1074 (9th Cir. 2015).
[152] "[T]he college football market [serves] as 'particular brand of football' that draws from 'an academic tradition [that] differentiates [it] from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball.' … 'Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result, enables a product to be marketed which might otherwise be unavailable.'" *Id.* (quoting *Board of Regents*, 468 U.S. at 101-02).
[153] *Id.*

amateurs as long as any money paid to them goes to cover legitimate education expenses" in upholding an increase in the cap of aid for student-athletes at the full cost of attendance.[154]

The Ninth Circuit, however, felt as though any sum in excess of the cost of attendance, regardless of how large or small, directly conflicted with amateurism, thus concluding that the district court clearly erred in allowing cash compensation for student-athletes' names and likenesses.[155] Judge Bybee also dismissed the plaintiffs' analogies to maintained interest in baseball and the Olympics despite consumer opposition prior to rising baseball salaries during the 1970s and the International Olympic Committee allowing professional athletes to compete in the Olympics.[156] The Ninth Circuit was also troubled with the district court's utilization of television sports consultant Neal Pilson's testimony to conclude that $5,000 served as a viable alternative to maintaining amateurism yet allow student-athletes to receive some cash compensation for their names and likenesses.[157]

C. NINTH CIRCUIT PARTIAL CONCURRENCE AND PARTIAL DISSENT: STUDENTS SHOULD BE ABLE TO COLLECT CASH COMPENSATION UP TO $5,000 PER YEAR

While the Ninth Circuit majority's decision deferred to the NCAA and the prescribed procompetitive benefits, Judge Sidney Thomas emphasized the clear error standard of the Ninth Circuit, maintaining that sufficient evidence existed in the record to support Judge Wilken's decision.[158] In addition to discussing Neal Pilson's testimony that deferred compensation of $5,000 per year in trusts would not significantly impact the demand for college athletics, Judge

[154] *Id.* at 1075.
[155] *Id.* at 1077.
[156] "But professional baseball and the Olympics are not fit analogues to college sports. The Olympics have not been nearly as transformed by the introduction of professionalism as college sports would be." *O'Bannon*, 802 F.3d at 1077.
[157] *Id*. at 1078.
[158] *See id.* at 1078-80.

Thomas criticized the majority's dismissal of analogies to increased consumer interest in baseball and the Olympics since the majority merely offered speculation without evidentiary support to the district court's credit of the testimony.[159]

Judge Thomas also disagreed with the majority's antitrust analysis regarding the procompetitive interests at stake, emphasizing that amateurism only matters to the extent it affects consumer interest, which the district court held only played a minor role compared to school loyalty and geography.[160] Thus, alternatives must be considered with how they would ultimately affect consumer interest in intercollegiate athletics. Judge Thomas concluded by finding the NCAA's argument that enabling student-athletes to collect just one dollar above their cost of attendance would ruin a multi-billion-dollar industry a "difficult [one] to swallow."[161]

D. THE NINTH CIRCUIT MAJORITY AND CONCURRENCE MISS THE MARK: PLAINTIFFS DESERVE GREATER RELIEF

Both the Ninth Circuit majority and concurrence (and thus the district court) fail to provide proper relief for NCAA student-athletes for their names and likenesses. The majority's reliance on amateurism and the dissent's cap of $5,000 for student-athlete name and likenesses erect an arbitrary economic ceiling that not only provides for differences in the economic value of scholarships at different institutions, but may also inhibit the NCAA's academic ideals by withholding an incentive for talented student-athletes to complete their degrees before entering the professional ranks.

The majority's decision to overturn the district court's allowance of $5,000 in compensation placed in trusts for student-athletes reflects a misguided apprehension to eliminate

[159] *See id.* at 1080-81.
[160] *See id.* at 1081-83.
[161] *O'Bannon*, 802 F.3d at 1083.

amateurism.[162] Amateurism – the NCAA's self-proclaimed commitment to enabling for a quality education[163] – is a farce utilized by the NCAA to internalize the financial windfall of the lucrative intercollegiate athletic market.[164] Despite pushing back against amateurism as a universal defense against all claims against the NCAA by finding antitrust violations, the court nevertheless relied on dicta in *Board of Regents* and its progeny to insist on its significance when amateurism ultimately lacks legal definition or any statutory authority.[165] Given the NCAA's power and product "so deeply embedded in our national culture," the majority did not want to "deliver that one knockout blow" to the NCAA's bedrock principle.[166]

The majority's approach to lessen the district court's attack on amateurism represents a flawed calculus by failing to overcome the evidentiary record and clear error standard. While accepting the NCAA's study that suggested consumer apprehension to student-athletes receiving cash compensation, the report remained biased, failing to question consumers whether student-athletes should receive compensation for their already used names and likenesses and instead

[162] "[I]n finding that paying students cash compensation would promote amateurism as effectively as not paying them, the district court ignored that not paying student-athletes is precisely what makes them amateurs." *See id.* at 1076.
[163] *See generally* Branch, *supra* note 2; *see also* Sara Ganim, *Paying College Athletes Would Hurt Traditions, NCAA Chief Emmert Testifies*, CNN, Jun. 19, 2014, http://www.cnn.com/2014/06/19/us/ncaa-obannon-lawsuit-trial/ ("[T]he notion that athletes are students is the great hypocrisy of intercollegiate athletics").
[164] *See generally* Branch, *supra* note 2 (calling "amateurism" and the "student-athlete" as "cynical hoaxes, legalistic confections propagated by the universities so they can exploit the skills and fame of young athletes"); *see also* Aaron Leibowitz, *O'Bannon Ruling Allows 'Amateurism' Argument to Continue—for Now*, SPORTS ILLUSTRATED, Oct. 2, 2015, http://www.si.com/cauldron/2015/10/01/ed-obannon-ncaa-lawsuit-appeal-decision (describing amateurism as a "farce"); Tom Ley, *NCAA Investigating Academic Fraud at 20 Colleges*, DEADSPIN (Jan. 21, 2015), http://deadspin.com/ncaa-investigating-academic-fraud-at-20-colleges-1680928515 (discussing the prevalence of academic scandals in collegiate sports); Nick Caron, *NCAA Not Doing a Favor To Athletes by Banning Endorsements*, BLEACHER REPORT (Jul. 9, 2010), http://bleacherreport.com/articles/418140-ncaa-not-doing-a-favor-to-athletes-by-banning-endorsements (describing the national average graduate rate of Division I football players at close to just 55 percent in 2010, with traditional football power schools even lower).
[165] "[T]he NCAA has no recourse to any principle or law that can justify amateurism. There is no such thing. Scholars and sportswriters yearn for grand juries to ferret out every forbidden bauble that reaches a college athlete, but the NCAA's ersatz courts can only masquerade as public authority." Branch, *supra* note 2.
[166] Leibowitz, *supra* note 164.

referenced payment generally.[167] The plaintiffs should have presented their own consumer study to counter the NCAA's report to create a larger hurdle for the Ninth Circuit to find clear error in Judge Wilken's district court decision.[168]

Nevertheless, the plaintiffs did present viable evidence in the form of analogies to baseball in the 1970s and the Olympics that demonstrated continued consumer interest despite initial apprehension in the prospects of participants either earning more money or earning any money at all.[169] The majority, however, dismissed such analogies by claiming that the Olympics "have not been nearly as transformed by the introduction of professionalism as college sports would be" without offering any justification for such a hypothetical and conclusory analysis.[170] Judge Bybee also declined arguments from the plaintiffs that a tennis player could earn $10,000 a year before enrolling in school and maintain their eligibility.[171] The majority essentially elected to choose the evidence that best fit their motive.

While the majority's analysis contains flaws leading to an inappropriate ruling overcoming the clear error standard, the concurrence and district court fail to provide an adequate remedy once enabling students to receive cash compensation. The district court placed great deference in the cross-examination of the NCAA's witness, Neal Pilson, who when asked whether his opinion about amateurism depended on the amount of money paid to players, he

---

[167] *See id.*
[168] *See id.*
[169] *See id.* ("In 1960, a member of the International Olympic Committee told *Sports Illustrated* that, without amateurism, the Olympics would 'be destroyed within eight years.' In reality, the Olympic transition away from amateurism was as seamless as anyone could've reasonably hoped for"); *see also* Patrick Hruby, *The Olympics Show Why College Sports Should Give up on Amateurism*, Jul. 25, 2012, http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/.
[170] *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1077 (9th Cir. 2015).
[171] *See id.* at 1083.

admitted as such, saying off-hand that while $1 million would, $5,000 would not.[172] While the dissent urged the court not to find clear error in this figure, Pilson's testimonial lacked foresight and failed to reflect any empirical evidence.

The $5,000 limit proposed by Judge Wilken also inevitably transforms into the very device the court sought to eliminate – a veritable price-fixing mechanism to restrain the compensation available to student-athletes. As the court and surely the NCAA would contend, schools would not be forced to pay up to the limit; however, the NCAA and its member schools already do not require paying full scholarships to any student and a $5,000 cap simply pushes the maximum figure from the full cost of attendance to the full cost of attendance plus $5,000. By distinguishing between scholarships relating to education expenses versus cash payments for the use of their names and likenesses, the court attempts to erect an arbitrary barrier between the benefits a student-athlete may receive. The court fails to analyze the efficacy of the forms of compensation it allows student-athletes to receive to cover the full cost of attendance in comparison to sums held in trust in excess of those costs.

While the court and the NCAA refrain from enabling students at the same school to receive different sums in excess of the cost of attendance based on their merits, the court fails to provide an even value for all student-athletes across the country. Since schools charge different tuitions and various areas of the country maintain higher costs of living, the court allows certain student-athletes to obtain a greater financial benefit in presenting them with scholarships to cover

[172] *See id.* at 1078.

these costs.[173] Further, the intangible value of an education at one school versus another[174] as well as the varying levels of athletic training and coaching available at different schools provide additional economic benefits to student-athletes that remain unrestricted.

By refusing to enable student-athletes to receive compensation at the university level, many student-athletes elect to turn professional directly from high school or leave college early to the professional ranks to capitalize on their earning potential.[175] While NCAA compensation would likely never rival potential earnings from premier professional leagues, it may compare to lower level professional leagues or those abroad.[176] Regardless, failing to compensate student-athletes inevitably incentivizes them to consider professional careers to profit off of their abilities while they remain in their athletic primes before earning their degrees.

For the majority of athletes that do not develop professional playing careers despite leaving early for the professional ranks, the NCAA's reluctance to incentivize student-athletes to remain in school may actually be cataclysmic to their long term interests.[177] Allowing schools to

---

[173] *E.g.,* a student-athlete receiving a scholarship up to the full cost of attendance at an expensive university in an expensive locale to live, such as The George Washington University, receives a greater financial value than a student-athlete receiving the same full cost of attendance aid at a school that costs less money in a less expensive area to live (such as a student-athlete attending their state school in a rural area).

[174] *E.g.,* an Ivy League school versus a less regarded institution.

[175] Baseball and hockey players may be drafted by the MLB or NHL, respectively, out of high school, while the NBA's collective bargaining agreement requires players to be removed from high school for one year before they are eligible for selection in the NBA Draft, while the NFL forces players to be out of high school for three years. *See, e.g.,* MLB Advanced Media, First-Year player draft rules (Major League Baseball 2016), http://mlb.mlb.com/mlb/draftday/rules.jsp (discussing MLB Draft eligibility); *see also NHL Draft Rules*, DRAFTSITE (2016), http://www.draftsite.com/nhl/rules/ (NHL Draft eligibility); *NBA Draft Rules*, DRAFTSITE (2016), http://www.draftsite.com/nba/rules/ (NBA Draft eligibility); *NFL Draft Rules*, DRAFTSITE (2016), http://www.draftsite.com/nfl/rules/ (NFL Draft eligibility).

[176] While Major League Soccer's average salary reached $226,454 in 2015, the median salary was far less at $91,827. Further, the league minimum salary of $36,500 represents a figure that even modest compensation at the collegiate level may incentivize a player to complete his degree before becoming a professional. *See* Drew Olsen, *Visualizing MLS salaries compared to other U.S. Leagues*, AMERICAN SOCCER ANALYSIS (Jan. 28, 2015), http://www.americansocceranalysis.com/home/2015/1/26/visualizingmlssalaries.

[177] *See, e.g.,* Kevin Trahan, *Here's the list of 2016 NFL draft early entries, with Ohio State and Clemson sending the most*, SBNATION.COM (Jan. 22, 2016), http://www.sbnation.com/college-football/2016/1/22/10815474/2016-nfl-draft-early-entries-underclassmen-ohio-state-clemson ("Declaring for the NFL Draft is a big risk for underclassmen, because they are not allowed to return to college after they declare").

pay student-athletes may instead present the best way for the NCAA to perpetuate its purported academic ideals. Athletes that fail in professional careers would have degrees to fall back on if they stayed in school. Allowing schools to compensate student-athletes would ultimately incentivize more student-athletes to complete their undergraduate education before risking professional careers, which would not only benefit students, but would also align with the NCAA's asserted goals.

Considering these inequities, the Ninth Circuit's ruling maintaining amateurism and the district court's $5,000 cap for names and likenesses draw an arbitrary line in limiting student-athlete compensation that may actually detract from the NCAA's academic objectives. Nevertheless, the plaintiffs can claim victory in a push back against the NCAA's amateurism defense, which will likely lead to future litigation through either an appeal of this decision[178] or another antitrust suit on another matter,[179] to further challenge the NCAA's shield from distributing revenue to athletes and potentially enable for a free market for student-athlete recruitment.

[178] *See* Michael McCann, *What appeals court ruling means for O'Bannon's ongoing NCAA lawsuit*, SPORTS ILLUSTRATED (Sept. 30, 2015), http://www.si.com/college-basketball/2015/09/30/ed-obannon-ncaa-lawsuit-appeals-court-ruling (discussing the likelihood of the 9th Circuit reviewing the case *en banc* or the Supreme Court accepting a writ of certiorari).
[179] *See id.* (referencing a suit by current and former players against the NCAA arguing that the cap on athletic scholarships to tuition, room, board, books, and fees violates antitrust law).

IV. CONSIDERING ALTERNATIVES TO THE CURRENT NCAA MODEL

"For many NCAA athletes, their collegiate years are the peak of their athletic earnings potential through endorsements."[180]

Although *O'Bannon* failed to deliver the decisive blow to amateurism, it nevertheless enacted change to the NCAA model by enabling student-athletes to receive compensation up to the level of the cost of attendance. Such changes hardly resolve the inequity in the system, however, as administrators and coaches continue to receive the fruits of the student-athletes' labor.

Given the parallels to professional leagues, including exorbitant media rights deals, merchandising deals, and coach and administrative salaries, the players deserve compensation for their exploits. While student-athletes may receive scholarships, which undoubtedly have value, the post-*O'Bannon* regime continues to fix the maximum value student-athletes may acquire. Professional counterparts may also limit the maximum salaries of its athletes, but such maximum figures result from collective bargaining between the league and player associations resulting in revenue sharing percentages. Further, professional athletes may freely seek endorsement opportunities not subject to revenue sharing.

Professional league unionization approaches, and other monetary compensation schemes, however, may have unintended consequences. Regulated unionization efforts, and considerations for other models, including the "Olympic" model, may be reasonable alternatives to provide compensation for athletes while retaining some of the NCAA benefits advocated for in *O'Bannon*.

[180] Nick Bromberg, *Could allowing individual endorsements be the solution to college athlete compensation?*, YAHOO SPORTS (Mar. 27, 2014), http://sports.yahoo.com/blogs/ncaaf-dr-saturday/could-allowing-individual-endorsements-be-a-possible-solution-to-college-athlete-compensation-165031598.html.

A. PROBLEMS WITH COLLEGIATE COLLECTIVE BARGAINING AND "PAY FOR PLAY" SCHEMES

Uninhibited collective bargaining may not necessarily be a desirable outcome in the collegiate setting by further departing from the NCAA system's procompetitive benefits articulated in *O'Bannon*. Following the professional model, unionization would allow student-athletes to collectively bargain for revenue percentages with the NCAA and its member schools, but would require recognizing student-athletes as employees of universities. Treating students as employees[181] conflicts with the procompetitive arguments recognized by the Ninth Circuit. Employees most certainly could not be considered "amateurs," while also widening the social division with non-student-athletes at universities.

The potential to tarnish academic ideals may be further threatened if student-athletes chase success to generate additional revenue for their program to earn more cash in their pockets.[182] Student-athletes that may have considered subjective long term benefits, such as the institution's academic quality, may instead give greater deference to schools that offer them the greatest short term return, which remains particularly problematic since the vast majority of athletes do not turn professional. While student-athletes deserve the right to make their own informed choice, the system would ill prepare them for their professional careers after athletics. An explicit attachment between players and the financial successes of their programs would further dilute the alleged importance of academics in the NCAA model.

---

[181] Student-athletes, who may devote between 50-60 hours a week on their athletic exploits, essentially already behave as employees. *See generally* Roger I. Abrams, *The New NCAA*, HUFFINGTON POST, Apr. 14, 2014, http://www.huffingtonpost.com/roger-i-abrams/the-new-ncaa_b_5148946.html.

[182] Further, while declined to be considered by the Ninth Circuit given preexisting free markets in creating enticing athletic facilities and paying coaches, such a plan may nevertheless exacerbate competitive balance concerns. Whether or not players collectively bargain for revenue sharing between schools or conferences, successful conferences would continue to obtain the best players by being able to promise more lucrative compensation.

Any such unionization effort or other "pay for play" schemes may also pose an existential threat to lower revenue generating sports. For lower revenue sports where the value of scholarships provided to student-athletes may exceed the revenue it creates for the school, students may not receive scholarships for their athletic exploits if not otherwise subsidized by the higher revenue generating sports. A free market allowing athletic departments to act as for-profit businesses, like professional leagues, would inevitably lead to the dissolution of sports that do not positively impact the bottom line.

While student-athletes would be paid closer to their market value, an unregulated system would harm more individuals than it would help. Other students that possess exceptional skills in sports that do not maintain the same popularity would be denied opportunities they possess in the current model. Without the incentive of potentially earning scholarships, such sports would lose popularity in younger generations. A free market may also clash with Title IX provisions that ensure women's sports receive equitable funding.[183] From a societal standpoint, capitalistic treatment of intercollegiate athletics would have devastating effects.

Modified pay for play models through unionization may not provide a better alternative in avoiding inequities among student-athletes and may also diminish academic ideals. One such proposal would require high revenue sports to subsidize lower income sports before allocating excesses to student-athletes. Without regulation and minimum funding requirements for lower revenue sports, however, market forces would inevitably cause the dissolution of programs since schools would remain incentivized to eliminate sports that run at losses to enable for greater profit distribution to the higher revenue sports.

[183] *See generally* Mechelle Voepel, *Title IX a Pay-for-Play Roadblock*, ESPN (July 15, 2011), http://espn.go.com/college-sports/story/_/id/6769337/title-ix-seen-substantial-roadblock-pay-play-college-athletics.

Even if all student-athletes in the same sport earn the same return,[184] holding a stake in revenue resulting from their team's success would threaten academic goals of the NCAA model. Players would be incentivized to devote more time to athletics than their studies if they maintain a stake in team success.

Allowing students to delay matriculation, however, may enable students to pursue both athletic and academic goals by allowing them to pursue academic scholarship after the conclusion of their athletic careers.[185] Alternatively, students who participate in athletics while delaying academic enrollment hardly represent students, and players who turn professional may never step foot in a classroom, essentially allowing intercollegiate sports to serve as minor league systems for the professional ranks. For those students, schools would continue to profit off of their abilities without substantial cost. As established, paying these athletes poses downsides and would certainly create a greater social divide and disintegration of academic ideals considered vital by the *O'Bannon* majority.

While students deserve a substantial cut of the profits they generate, determining an appropriate method of implementation remains difficult to maintain academic ideals and continue to subsidize other student-athletes.

[184] Allowing individual student-athletes on the same team to earn different sums may be capitalistically just if a player has a stronger market for his services, but it may cause a player with a greater stake in his team's success to pressure others to devote more time toward the team's success and away from their studies. Creating the same rewards for all athletes on the same team would align their goals.
[185] *See generally* Roger I. Abrams, *The New NCAA*, HUFFINGTON POST, Apr. 14, 2014, http://www.huffingtonpost.com/roger-i-abrams/the-new-ncaa_b_5148946.html.

B. THE OLYMPIC MODEL APPEALS AS A COMPROMISE AND FAIR COMPENSATION MODEL FOR STUDENT-ATHLETES

Given the variety of difficult considerations in determining how to effectively and fairly allocate compensation through collective bargaining or unilateral pay for play schemes among NCAA institutions, the best option remains the "Olympic model." The Olympic model would allow student-athletes to profit off of their name and likenesses in endorsements, merchandise deals, and other opportunities. Although student-athletes would still remain unable to profit off of the lucrative broadcast and media deals, they could nevertheless pursue opportunities that they would be entitled to if not for the Statement.[186]

Between the *In re NCAA Student-Athlete* and *O'Bannon v. NCAA* decisions, the Ninth Circuit prohibits the NCAA and third parties from profiting off of their likenesses, but student-athletes still cannot pursue what has proven to be an enticing market for intercollegiate video games. The NCAA can no longer internalize profits and thus a market remains unsatisfied. Both student-athletes and consumers would benefit from their ability to license their likenesses for video games, apparel, and merchandise. Further, schools may stand to benefit from joint licensing opportunities.[187] Instead of removing potentially liable player jerseys from team stores, universities could instead enter into agreements with students to continue to sell the jerseys for a share of profits.[188]

---

[186] *See* Danny Roach, *A solution to the NCAA's compensation problem*, SPORTS MBA BLOG (Aug. 30, 2013), http://www.sportsmbablog.com/a-solution-to-the-ncaas-compensation-problem/.
("the images and likenesses of student-athletes must be returned to the proper place: the individual owner").
[187] *See* Christian Jensen, *Changing the NCAA: Let the Athletes Decide*, SPORTS MBA BLOG (Aug. 29, 2013), http://www.sportsmbablog.com/changing-the-ncaa-let-the-athletes-decide/.
[188] Such proposed endorsement and memorabilia agreements cannot be unregulated, however. Any revenue sharing agreement or player endorsement opportunity must maintain reasonable parameters to ensure that schools or boosters cannot pay students excessive sums compared to an endorsement's real value to entice athletes to enroll at the institution. For example, the NCAA could cap the amount a student-athlete may receive based on the kind of endorsement the player makes at a level in line with its "fair market value." The NCAA could determine the "fair

The NCAA would also benefit by diminishing investigative costs for minor infractions,[189] and would not incur additional costs[190] nor relinquish revenue streams following the Ninth Circuit decisions. Student-athletes who do not play professionally could profit off of their fame in a free market while they remain marketable.[191] Student-athletes in college towns lacking professional teams like Chapel Hill, North Carolina (University of North Carolina) and Ann Arbor, Michigan (University of Michigan) may have especially lucrative opportunities. Concerns that allowing student-athletes to profit off of their likenesses would diminish consumer interest in the sport appears unsubstantiated considering the increase in popularity in the Olympics following a similar approach.[192] Instead, consumer interest may actually intensify as student-athlete images permeate in endorsements, video games, and memorabilia. Enabling for the adoption of the Olympic model in intercollegiate sports allows student-athletes to pursue opportunities they would otherwise have if not contractually restricted, and would not harm academic institutions nor the NCAA.

Unlike "pay for play" schemes, the Olympic model fails to threaten the existence of lower revenue generating sports programs. While student-athletes may be incentivized to pursue sports with greater marketing opportunities, the Olympic model would merely expand access to opportunities and would not relinquish funds allocated to programs; schools would not incur

---

market value" of an autograph signing or television commercial, for example, through market studies and comparisons to professional endorsement deals.

[189] *See, e.g.,* Schroeder, *supra* note 68; *see also* Kristi Dosh, *Cost For Colleges To Conduct Internal Investigations Is Substantial*, CAMPUS INSIDERS (2016), http://campusinsiders.com/news/cost-for-colleges-conduct-internal-investigations-02-16-2016 (describing that even allegations of minor violations can cost schools tens of thousands of dollars).

[190] *See generally* Ben Cohen, *The Case for Paying College Athletes*, ASSOCIATED PRESS, Sept. 16, 2011, http://www.wsj.com/articles/SB10001424053111904060604576572752351110850.

[191] *See generally* Bromberg, *supra* note 180.

[192] *See* Dan Wetzel, *NCAA probe of Johnny Manziel raises questions about amateurism rules*, YAHOO SPORTS (Aug. 4, 2013), http://sports.yahoo.com/news/ncaaf--ncaa-probe-of-johnny-manziel-raises-questions-about-amateurism-rules-230350855.html.

additional costs or surrender revenues. Further, the Olympics have demonstrated that lucrative endorsement opportunities may exist for athletes in traditionally lower revenue sports.[193] While the NCAA allows Olympians to collect cash bonuses from winning medals, student-athletes cannot seize endorsement opportunities and return to intercollegiate play. [194] Student-athletes participating in lower revenue sports may face even greater pressure to turn professional than their higher revenue sport playing counterparts given their limited window to capitalize from their athletic achievements.[195] The Olympic model would not only preserve funding for lower revenue generating sports, but it would also strengthen programs by diminishing incentives for student-athletes to forego their collegiate athletic careers.

To ease the *O'Bannon* court's concerns of creating social wedges between athletes and other students or threatening academic ideals by allowing student-athletes access to cash compensation, the NCAA could provide reasonable restrictions on soliciting endorsement opportunities. The NCAA, for example, could require student-athletes to isolate marketing activities to outside of their playing seasons or the academic year. Funds could also be held in

[193] *See* Autumn Rose, *20 Athletes Who Got Rich After Winning the Olympics*, GOBANKINGRATES (Jul. 29, 2016), https://www.gobankingrates.com/personal-finance/athletes-rich-winning-olympics/.
[194] *See* Patrick Hruby, *The NCAA Lets College Olympians Collect Cash for Gold, Because Amateurism is a Self-Serving Lie*, VICE SPORTS (Aug. 18, 2016), https://sports.vice.com/en_us/article/the-ncaa-lets-college-olympians-collect-cash-for-gold-because-amateurism-is-a-self-serving-lie (detailing the hypocrisy of allowing student-athletes to accept cash prizes for winning Olympic medals while penalizing others for obtaining other forms of compensation).
[195] *See* Jodie Valade, *Missy Franklin has no regrets about decision to turn pro*, USA TODAY, Mar. 18, 2015, http://www.usatoday.com/story/sports/olympics/2015/03/18/missy-franklin-turning-pro-cal-ncaa-meet/24989047/ (discussing 2012 Olympic four-time gold medalist Missy Franklin's decision to refrain from turning professional before ultimately foregoing her final two years of eligibility at the University of California before the 2016 Olympics); *see also* James F. Peltz, *Most Olympic athletes won't be able to cash in on their glory*, LA TIMES (Aug. 18, 2016), http://www.latimes.com/business/la-fi-olympics-endorsements-20160819-snap-story.html.

trusts while student-athletes remain enrolled. Ultimately, however, student-athletes should be able to pursue marketing opportunities freely like other students.[196]

CONCLUSION

Despite the NCAA's insistence on academic ideals, commercial interests continue to drive intercollegiate athletics. Self-conceived notions of the importance of "amateurism" and the "student-athlete" enabled the NCAA to embed a paradigm in our national culture that students must remain free from receiving compensation. The NCAA and its member schools, on the other hand, receive the financial windfall from lucrative television rights deals and merchandise sales.

While the Ninth Circuit *O'Bannon* majority remained apprehensive in diminishing the NCAA's purported ideals, it nevertheless curtailed the NCAA's control over student-athlete name and likeness uses. Although NCAA student-athletes may not receive compensation above their full cost of attendance, student-athletes can utilize the decisions in *In re NCAA Student-Athlete Name* and *O'Bannon v. NCAA* to deny the NCAA from continuing to profit off of their names and likenesses in apparel and merchandise sales. Further, subsequent litigation continues to pose a threat to chip away at the NCAA's amateurism shield to inevitably provide cash compensation for student-athletes. Implementing such "pay for play" schemes, however, remains problematic. Adopting the Olympic model offers the best alternative for student-athletes to earn monetary compensation while also maintaining academic ideals and subsidizing all intercollegiate athletics.

[196] "While actress Natalie Portman attended Harvard, she appeared in the *Star Wars* prequels. Nobody forced her to work for free, or to settle for a small portion of her actual worth, because receiving market compensation would undercut her education. There is no National Collegiate Acting Association." Hruby, *supra* note 194.