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Student-Athletes vs. NCAA

PRESERVING AMATEURISM IN COLLEGE SPORTS AMIDST THE FIGHT FOR PLAYER COMPENSATION

“I do believe that the name, image, likeness for an individual is a fundamental right—that any individual controls his or her name, image and likeness—and I don’t believe that a student-athlete who accepts a grant-in-aid simply waives that right to his or her name, image, likeness.”¹

INTRODUCTION

Student-athletes have a few new opponents on their schedule. They are fighting their own regulatory board, the National Collegiate Athletic Association (NCAA), athletic conferences, broadcasters, and licensing entities. The NCAA’s mission is to be “an integral part of the educational program” and to maintain the amateur status of student-athletes.² Amateurism, which is codified in the NCAA’s bylaws, values the distinction between professional and student athletes and is the crux of the NCAA’s argument for maintaining regulations prohibiting the compensation of student-athletes.³ In line with these values, the NCAA regulates the amateur nature of college athletics to ensure that education is a principal priority.⁴ Recently, however, the controversy surrounding the amateur status of college athletes has resulted in challenges under antitrust law to the NCAA’s regulations prohibiting compensation of student-athletes. The

¹ Steve Berkowitz, *Oliver Luck Brings Own Perspective to NCAA on O’Bannon Name and Likeness Issue*, USA TODAY (Jan. 16, 2015, 6:05 PM), <http://www.usatoday.com/story/sports/college/2015/01/16/ncaa-convention-oliver-luck-obannon-name-and-likeness-court-case/21873331/> [<http://perma.cc/H8DL-Z95C>] (quoting Oliver Luck, NCAA Executive Vice President for Regulatory Affairs).

² NCAA, 2013-14 NCAA DIVISION I MANUAL 1 (2013), <http://fordhamsports.com/custompages/compliance/forms/CoachCompliance/2013-14%20NCAA%20Manual.pdf> [<http://perma.cc/HT58-V46E>].

³ *Id.* at 4.

⁴ *Amateurism*, NCAA, <http://www.ncaa.org/amateurism> [<http://perma.cc/9PFP-EA3T>] (last visited Mar. 4, 2016).

NCAA is now being confronted with something it has not faced in years: a viable challenge to its amateurism regulations.

While student-athletes are the backbone of the \$11 billion college sports industry, they never receive any of this revenue.⁵ In 2008, Ed O'Bannon, a former All-American basketball player for the UCLA Bruins, saw an avatar of himself in a video game.⁶ This virtual player not only physically resembled O'Bannon, it wore a UCLA jersey, which depicted his number, 31.⁷ Like all college athletes, O'Bannon waived the right to receive compensation for the use of his "name, image, or likeness" when he joined the NCAA, and therefore he was never compensated for their use in this video game.⁸ Soon after, in 2009, O'Bannon brought an antitrust class action lawsuit against the NCAA, challenging the Association's regulations that restrict compensation for the use of Division I athletes' names, images, and likenesses in media, other footage, and merchandise.⁹ Around the same time, Sam Keller, a former starting quarterback at Arizona State and Nebraska Universities, filed a similar lawsuit against the NCAA, Electronic Arts (EA), a video game developer, and the Collegiate Licensing Company (CLC), the entity that licenses the NCAA's trademarks.¹⁰

These cases were initially consolidated, but after EA and CLC settled claims for damages, the cases were deconsolidated,¹¹ and O'Bannon continued to seek an injunction to enjoin the NCAA from enforcing regulations that prevent Division I football and men's basketball student-athletes from receiving

⁵ Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 63 (2013); see also NCAA, REVENUES & EXPENSES: NCAA DIVISION I INTERCOLLEGIATE ATHLETICS PROGRAMS REPORT 2004-2011, at 31-32, 39 (2012). The NCAA prohibits student-athletes from receiving compensation outside of permitted scholarships. See 2013-14 NCAA DIVISION I MANUAL, *supra* note 2, at 191-214.

⁶ O'Bannon v. NCAA, Nos. 14-16601, 14-17068, 2015 WL 5712106, at *3 (9th Cir. Sept. 30, 2015).

⁷ *Id.*

⁸ *Id.*

⁹ Class Action Complaint at 2-5, O'Bannon v. NCAA, No. CV 09 3329 (N.D. Cal. July 21, 2009), ECF No. 1 [hereinafter O'Bannon Complaint].

¹⁰ See, e.g., *In re NCAA Student-Athlete Name and Likeness Licensing Litig.*, 724 F.3d 1268 (9th Cir. 2013).

¹¹ The NCAA awarded a \$20 million settlement "to certain Division I men's basketball and Division I Bowl Subdivision football student-athletes who attended" specific schools for their names, images, and likenesses used in college-themed basketball and football video games produced by EA. *NCAA Reaches Settlement in EA Video Game Lawsuit*, NCAA (June 9, 2014, 10:53 AM), <http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-reaches-settlement-ea-video-game-lawsuit> [<http://perma.cc/4AZ2-LTYD>].

compensation for use of their names, images, or likenesses.¹² The plaintiffs alleged that the NCAA exploited current and former athletes in order to obtain revenue from media rights for televised games, DVD sales, jersey sales, video games, corporate advertising, photographs, action figures, trading cards, posters, rebroadcasts of classic games, and more.¹³ The complaint further alleged that by requiring student-athletes to release their rights to compensation, the NCAA violated antitrust laws by using its bylaws to financially benefit from the names, images, and likenesses of eighteen-year-old student-athletes.¹⁴

On August 8, 2014, the U.S. District Court for the Northern District of California issued an injunction prohibiting the NCAA's strict ban on the compensation of collegiate student-athletes.¹⁵ Judge Wilken opined that while this case focused on athletic competition, "it is principally about the rules governing competition in a different arena—namely, the marketplace."¹⁶ In light of these concerns, the court held that NCAA regulations precluding student-athletes from receiving a share of revenue from their own names, images, and likenesses violated the antitrust laws, specifically section 1 of the Sherman Act.¹⁷ As a remedy for this violation, the district court held that the NCAA must allow its member institutions to offer scholarships to cover the full cost of attendance and up to \$5,000 per year in deferred compensation, which would be held in a trust for student-athletes until after they leave the institution.¹⁸

The NCAA appealed this decision to the U.S. Court of Appeals for the Ninth Circuit based on defenses of amateurism and First Amendment protection of live television broadcasts.¹⁹ The Ninth Circuit agreed with much of Judge Wilken's analysis and unanimously upheld the finding that the NCAA violated the Sherman Act by limiting compensation to student-athletes.²⁰ The three-judge panel also affirmed the district court's holding that the NCAA must allow schools to offer scholarships that

¹² O'Bannon Complaint, *supra* note 9, at 2-5, 8.

¹³ *Id.* at 37-58.

¹⁴ *Id.* at 5.

¹⁵ O'Bannon v. NCAA, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).

¹⁶ *Id.* at 962.

¹⁷ *Id.* at 1007-08; *see also* 15 U.S.C. § 1 (2012).

¹⁸ O'Bannon, 7 F. Supp. 3d at 1008.

¹⁹ Jon Solomon, *O'Bannon Plaintiffs Won't Appeal Judge's NCAA Ruling*, CBSSPORTS.COM (Sept. 8, 2014, 12:33 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24701112/obannon-plaintiffs-wont-appeal-judges-ncaa-ruling> [<http://perma.cc/AF9G-L2NB>].

²⁰ O'Bannon v. NCAA, Nos. 14-16601, 14-17068, 2015 WL 5712106, at *1 (9th Cir. Sept. 30, 2015); *see also* 15 U.S.C. § 1 (2012).

cover the full cost of attendance. But the Ninth Circuit disagreed with the district court's holding regarding the trust and found it was clearly erroneous to uphold the trust as a substantially less restrictive alternative to the NCAA's amateur-status regulation.²¹

As *O'Bannon* continues, so too does an era of litigation surrounding the NCAA.²² Plaintiffs continue to challenge the regulations promulgated by the NCAA and the athletic conferences, arguing that the Ninth Circuit erred in not permitting additional cash compensation.²³ In light of the *O'Bannon* litigation, this note argues that while the creation of a trust was not a viable remedy under antitrust law, the NCAA itself should permit this model of regulated, minimal compensation. Ultimately, maintaining amateurism in college athletics does not preclude minimal compensation of student-athletes. By adopting a trust model, the NCAA would avoid the need for reorganization among conferences, broadcasters, and third parties in order to manage the emerging rights of student-athletes. Furthermore, by analyzing the compensatory alternatives to the NCAA's current regulations, this note suggests that amateurism, while hanging by a thread, is still a necessary, significant, and most importantly, maintainable part of college athletics.

Part I of this note discusses the NCAA's past and present practices in balancing amateurism and the compensation of student-athletes, specifically with respect to the student-athletes' names, images, and likenesses. Part II briefly describes the *O'Bannon* litigation and the NCAA's amateurism defense. It also examines current NCAA regulations and their interaction with antitrust law. Part III analyzes the implications *O'Bannon* is likely to have on amateurism as the foundation of college sports and addresses how the Ninth Circuit's decision may affect the

²¹ *O'Bannon*, 2015 WL 5712106, at *1, *22. The NCAA changed its regulations to permit full cost-of-attendance scholarships after its annual convention in January 2015. Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships*, NCAA (Jan. 18, 2015, 6:58 AM), <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships> [<http://perma.cc/M7EB-5V7G>].

²² Two weeks following the Ninth Circuit decision, plaintiffs asked the court for an en banc rehearing of the case, in which an eleven-member panel of Ninth Circuit judges would review the majority decision of the three-member panel. See Plaintiffs-Appellees' Petition for Rehearing En Banc, *NCAA v. O'Bannon*, Nos. 14-16601, 14-17068 (9th Cir. Oct. 14, 2015), ECF No. 106-1. However, this request was subsequently denied by the court. See Order, *NCAA v. O'Bannon*, Nos. 14-16601, 14-17068 (9th Cir. Dec 16, 2015), ECF No. 116. Both parties have indicated an interest in petitioning the Supreme Court for certiorari, in which case they have until March 14, 2016, to file an appeal. See Jon Solomon, *Judges Deny O'Bannon Petition to Rehear Appeal vs. NCAA*, CBSSPORTS.COM (Dec. 16, 2015, 1:54 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/25416207/judges-deny-obannon-petition-to-rehear-appeal-vs-ncaa-> [<http://perma.cc/6CG8-YXV3>].

²³ See *infra* Part II.

NCAA's future as a regulatory body. Part IV argues that while implementing a trust at the order of the district court in *O'Bannon* was erroneous, the NCAA itself should adopt this type of compensatory structure. Ultimately, this trust model will allow for minimal compensation of student-athletes while still preserving amateurism as the cornerstone of college athletics and distinguishing them from professional sports. Significantly, both the court and consumers in the college sports market have made it clear that they prefer to keep a divide between collegiate and professional sports.²⁴ While the obvious way to uphold the unique and independent nature of college athletics is to keep the players on an unpaid, amateur level, this may no longer be a viable solution. In order to maintain student-athletes' amateur status while simultaneously complying with antitrust law, this note argues that the NCAA should develop a more hands-off regulatory approach that best serves student-athletes by allowing schools to enter into a revenue sharing system similar to the model used by the International Olympic Committee.

I. OVERVIEW OF NCAA BYLAWS AND COMPLIANCE REQUIREMENTS

A. *History of the NCAA's Regulation of Amateurism*

Intercollegiate athletics as we know it began on November 6, 1869, when Rutgers played Princeton in what was the first intercollegiate football game in American history.²⁵ As the popularity of college football spread rapidly, so did the issues surrounding the game. Due to the nature of the sport, players often suffered serious injuries and were even killed during games.²⁶ In 1905, President Theodore Roosevelt held a conference to address the issues in collegiate football.²⁷ That same year, 62 colleges gathered to form the Intercollegiate Athletic Association and develop a uniform set of regulations to address the safety concerns in college football.²⁸ Five years later, the group changed

²⁴ See, e.g., *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 975, 1008-09 (N.D. Cal. 2014).

²⁵ Allen Barra, *The First Down, Ever*, WALL ST. J. (Nov. 7, 2009, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703932904574511921170497590> [http://perma.cc/2RWR-9925].

²⁶ *O'Bannon*, 2015 WL 5712106, at *1.

²⁷ Dan Treadway, *Why Does the NCAA Exist?*, HUFFINGTON POST (Aug. 6, 2013, 1:39 PM), http://www.huffingtonpost.com/daniel-treadway/johnny-manzel-ncaa-eligibility_b_3020985.html [http://perma.cc/8FQQ-HFNB].

²⁸ *O'Bannon*, 2015 WL 5712106, at *1-2.

its name to the National Collegiate Athletic Association and required that all participants be amateurs.²⁹

In the 1930s and 1940s, as commercialization efforts attracted increased public attention to college sports, it was not uncommon for alumni to provide tuition for athletes attending their alma mater.³⁰ But because participation in the NCAA was voluntary at this time, the Association lacked the authority to enforce the amateurism requirement on its member institutions.³¹ Although many universities banned these “pay-for-play” practices on their own,³² a 1929 study found that 81 of 112 schools provided some type of improper compensation to student-athletes.³³ As public interest in intercollegiate athletics increased, the NCAA gained control over college athletics and developed regulations to balance the commercialization of the industry with the values of higher education.³⁴ In 1948, it implemented the “Sanity Code,” which prohibited schools from providing student-athletes with any financial aid based on athletic ability or aid not available to *all* students.³⁵

In 1956, the NCAA developed new regulations and amended its bylaws to allow schools to award athletic scholarships to student-athletes.³⁶ Because this new structure permitted universities to distribute financial aid without consideration of need or academic achievement, monetary inducements became a way for schools to target athletes.³⁷ Therefore, in order to balance the competing values of commercialization and amateurism, the NCAA gained better control over its member institutions by establishing enforcement authority over the amateurism provisions.³⁸ It did so through regulations that addressed student-athlete eligibility, limited financial inducements, penalized improper payments, and removed all pay-for-play

²⁹ *Id.* at *1.

³⁰ Jonathan Strom, *Putting Our Trust in the National Collegiate Athletic Association (NCAA): How Creating Trusts for Student-Athletes Can Save the NCAA from Itself*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 423, 426 (2014).

³¹ See Daniel E. Lazaroff, *The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?*, 86 OR. L. REV. 329, 332 (2007).

³² Strom, *supra* note 30, at 426.

³³ *O'Bannon*, 2015 WL 5712106, at *2.

³⁴ Rodney K. Smith, *A Brief History of the National Collegiate Athletic Association's Role in Regulating Intercollegiate Athletics*, 11 MARQ. SPORTS L. REV. 9, 13-15 (2000).

³⁵ Gary T. Brown, *NCAA Answers Call to Reform: The 'Sanity Code' Leads Association Down Path to Enforcement Program*, NCAA (Nov. 22, 1999), <http://fs.ncaa.org/Docs/NCAANewsArchive/1999/19991122/active/3624n24.html> [<http://perma.cc/KQA6-AUPP>].

³⁶ See Lazaroff, *supra* note 31, at 333-34.

³⁷ *Id.* at 334.

³⁸ Smith, *supra* note 34, at 13-15.

models from the system.³⁹ This current—and far more regulatory—structure of the NCAA is made evident by the 420 pages of the Division I Manual.⁴⁰

B. *Amateurism and Compensation in the Modern NCAA*

Today, the NCAA has approximately 1,200 member institutions and regulates 24 sports.⁴¹ The member institutions are organized into Divisions I, II, and III.⁴² Division I, which is at issue in the current litigation, consists of about 350 schools with the largest athletic programs that are each required to sponsor at least 14 varsity teams.⁴³ As the regulatory body for college athletics, the NCAA has a mission to “initiate, stimulate and improve intercollegiate athletics programs for student-athletes.”⁴⁴ The NCAA strives to distinguish collegiate athletics from sports of a professional nature by focusing on the amateur nature of the participants.

Amateurism, codified by section 12 of the NCAA’s bylaws, states that college athletics are “designed to be an integral part of the educational program,” and therefore it is necessary to “maintain[] a clear line of demarcation between college athletics and professional sports.”⁴⁵ In line with these values, the NCAA prohibits student-athletes from receiving compensation in order to protect them from “exploitation by professional and commercial enterprises.”⁴⁶ Section 12.1.2 indicates that a college-athlete will lose amateur status if he or she

- (a) [u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport;
- (b) [a]ccepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;
- (c) [s]igns a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration

³⁹ Strom, *supra* note 30, at 428; *see also* Lazaroff, *supra* note 31, at 334 (discussing revised regulations, which included “capping’ financial inducements, limiting transfers, and penalizing ‘under-the-table payments’”).

⁴⁰ *See generally* NCAA, 2015-16 NCAA DIVISION I MANUAL 1 (2015), <http://www.ncaapublications.com/productdownloads/D116.pdf> [<http://perma.cc/WCX6-EUR7>] (laying out all of the NCAA’s regulations of its member institutions, conferences, coaches, and student-athletes).

⁴¹ *Id.* at 406; *Membership*, NCAA, <http://www.ncaa.org/about/who-we-are/membership> [<http://perma.cc/JHP9-BYHG>] (last visited Mar. 4, 2016).

⁴² *O’Bannon v. NCAA*, Nos. 14-16601, 14-17068, 2015 WL 5712106, at *2 (9th Cir. Sept. 30, 2015).

⁴³ *Id.* Note that the *O’Bannon* litigation involves only NCAA regulations for Division I athletics. *Id.*

⁴⁴ 2013-14 NCAA DIVISION I MANUAL, *supra* note 2, at 1.

⁴⁵ *Id.* at 57.

⁴⁶ *Id.* at 4.

received . . . ; (d) [r]eceives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations; (e) [c]ompetes on any professional athletics team . . . even if no pay or remuneration for expenses was received . . . ; (f) [a]fter initial full-time collegiate enrollment, enters into a professional draft . . . [; or] (g) [e]nters into an agreement with an agent.⁴⁷

Amateurism is not only an issue at the forefront of the *O'Bannon* litigation—it is the NCAA's basis for maintaining their current regulations, which restrict the compensation of student-athletes.⁴⁸ There are very limited instances in which a student-athlete may receive compensation.⁴⁹ The NCAA codifies the distinction between college athletics and professional sports in Article 12 of its bylaws, which requires student-athletes to be amateurs in their respective sports in order to participate in NCAA-sponsored events.⁵⁰ Student-athletes are not eligible to participate in a sport if they have ever taken pay or the promise of pay for competing in that sport.⁵¹ More specifically, players are not eligible if they have ever accepted money, transportation, or other benefits from an agent, including having an agent market their athletic ability or reputation in that sport.⁵² Recent criticism of Article 12 attacks the founding principle of amateurism,⁵³ but the NCAA maintains its position, stating that the amateur nature of the NCAA is “crucial to preserving an academic environment in which acquiring a quality education is the first priority.”⁵⁴

While member universities may provide scholarships to student-athletes, the NCAA requires that these scholarships follow the same procedures as those awarded to non-student-athletes.⁵⁵ Whereas Article 15 previously indicated that student-athletes may receive a scholarship of no more than a “grant-in-

⁴⁷ *Id.* at 59.

⁴⁸ *See generally* O'Bannon Complaint, *supra* note 9 (stating that the NCAA's defense to the antitrust claims in *O'Bannon* rests on the values of amateurism in college athletics).

⁴⁹ *See* 2013-14 NCAA DIVISION I MANUAL, *supra* note 2, at 191-214.

⁵⁰ *Id.* at 57.

⁵¹ *Id.* at 59.

⁵² *Id.* at 66.

⁵³ *See, e.g.*, Steve Wieberg, *Despite Criticism, NCAA Takes Firm Stance on Professionalism*, USA TODAY (Jan. 4, 2011, 1:41 AM), http://usatoday30.usatoday.com/sports/college/2011-01-03-ncaa-professionalism_N.htm [<http://perma.cc/5BKV-ZSRX>].

⁵⁴ *Amateurism*, *supra* note 4.

⁵⁵ *See* 2013-14 NCAA DIVISION I MANUAL, *supra* note 2, at 57; *infra* Section III.A.

aid,”⁵⁶ the NCAA’s amended bylaws permit schools to give scholarships up to the full cost of attendance, “an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution.”⁵⁷ The bylaws also explain that an athlete may lose his or her eligibility to compete as a Division I athlete by receiving “financial aid other than that permitted by the Association” or through involvement with professional teams.⁵⁸

Because these regulations prevent student-athletes from receiving any form of compensation, net profits from the college sports industry go directly to the schools, athletic conferences, and the NCAA. Since the NCAA and its member institutions sell and license products using the names, images, and likeness of current and former student-athletes, the organizations receive 100% of the royalties.⁵⁹ This means that student-athletes are precluded from receiving compensation for any video games, rebroadcasts of classic games, DVDs of games, photographs, and replica jerseys that use their name, image, or likeness.⁶⁰ Furthermore, Collegiate Licensing Company, the NCAA’s primary licensing partner, owns nearly 85% of the college licensing market, which nets over \$4 billion in retail sales.⁶¹ One of the NCAA’s core reasons for promoting amateurism regulations is to prevent the exploitation of student-athletes “by professional and commercial enterprises.”⁶² Yet it appears that the NCAA may be exploiting the very people that it claims to be protecting.

In addition to its bylaws, the NCAA requires all Division I athletes to sign Form 08-3a, which requires student-athletes to waive their rights to the commercial use of their name, image, and likeness in perpetuity.⁶³ The form specifically states, “You

⁵⁶ “A full grant-in-aid is financial aid that consists of tuition and fees, room and board, and required course-related books.” 2013-14 NCAA DIVISION 1 MANUAL, *supra* note 2, at 193.

⁵⁷ *See id.* at 192. The NCAA changed its regulations to permit full cost-of-attendance scholarships after its annual convention in January 2015. Hosick, *supra* note 21; *see also infra* Section II.B (discussing the reasons for this change to the NCAA regulations).

⁵⁸ *Id.* at 191.

⁵⁹ O’Bannon Complaint, *supra* note 9, at 4.

⁶⁰ William D. Holthaus Jr., Ed O’Bannon v. NCAA: *Do Former NCAA Athletes Have a Case Against the NCAA for Its Use of Their Likenesses?*, 55 ST. LOUIS U. L.J. 369, 371-72 (2010).

⁶¹ *Id.* at 372-73.

⁶² 2013-14 NCAA DIVISION 1 MANUAL, *supra* note 2, at 4.

⁶³ NCAA, FORM 08-3A, ACADEMIC YEAR 2010-11: NCAA STUDENT-ATHLETE STATEMENT-DIVISION I, at 4 (2008), <http://www.liberty.edu/media/1912/compliance/newf>

authorize the NCAA [or a third party acting on behalf of the NCAA] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.”⁶⁴ This means that a student-athlete must permit the NCAA and the student’s respective university to use or sell the student-athlete’s name, image, or likeness to any third party while agreeing that the student will never receive any compensation for the use of their personal image, including after they graduate and are no longer subject to the NCAA’s regulations. While Article 12 only allows for the use of names, images, and likenesses of players affiliated with a university for limited promotional reasons, the plaintiffs in *O’Bannon* alleged that both the NCAA and its member institutions interpreted the language broadly in order to enter into self-profiting licensing agreements.⁶⁵

II. *O’BANNON V. NCAA: MAKING A CASE FOR THE STUDENT-ATHLETE*

Ed O’Bannon, along with 19 other former and current Division I football and men’s basketball players, brought claims against the NCAA and its partner, the Collegiate Licensing Company, a for-profit corporation⁶⁶ that oversees all of the licensing and rights distribution for the NCAA.⁶⁷ The complaint alleged that the NCAA’s regulations forcing student-athletes to release the rights to their names, images, and likenesses without compensation violate section 1 of the Sherman Antitrust Act, which prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce.”⁶⁸ With respect to the class seeking damages, the complaint further alleged that the NCAA unreasonably restrained trade and commercially exploited former student-athletes by continuing to sell products using their images well after they graduated.⁶⁹

ormsdec2010/currentflames/compliance/SA%20Statement%20Form.pdf [http://perma.cc/3ZFQ-T8G7].

⁶⁴ *Id.*

⁶⁵ O’Bannon Complaint, *supra* note 9, at 3-7.

⁶⁶ *Id.* at 3; *About CLC*, COLLEGIATE LICENSING CO., <http://www.clc.com/About-CLC.aspx> [http://perma.cc/2EXJ-9JBD] (last visited Mar. 4, 2016).

⁶⁷ *Id.*

⁶⁸ *See* *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 86, 98 (1984) (noting that in determining the reasonability of restraints on trade, courts will apply a “rule of reason” test).

⁶⁹ 15 U.S.C. § 1 (2012). The complaint sought unspecified damages from the NCAA and its partners for profits accrued from selling the following: media rights for televising games, DVD and On-Demand sales and rentals, video clip sales to corporate advertisers, photos, action figures, trading cards, posters, video games, rebroadcasts of classic games, jerseys, and other apparel. *See* O’Bannon Complaint, *supra* note 9, at 37-58.

O'Bannon specifically pointed to Form 08-3a⁷⁰ as the method for how the NCAA obtained ownership of these rights, and noted that the signatories were coerced and uninformed and in some cases, the forms were even signed by minors.⁷¹ Since failure to sign this form renders a student-athlete ineligible to participate in NCAA athletics, plaintiffs submitted that this put unfair pressure on young students to relinquish their licensing rights not only while they were in college, but for the rest of their lives.⁷² Plaintiffs asserted that the NCAA's prohibition of compensation for student-athletes for the use of their names, images, and likenesses was an unlawful restraint of trade under the Sherman Act.⁷³

In response, the NCAA argued that its restrictions on compensation are justifiable "because they are necessary to preserve its tradition of amateurism, maintain competitive balance . . . , promote . . . academics and athletics, and increase the total output of its product."⁷⁴ Thirty years ago, the Supreme Court upheld amateurism as a viable defense to antitrust challenges to the NCAA's regulations.⁷⁵ The Supreme Court's decision in favor of the NCAA specifically stated that amateurism was precisely what made college sports unique.⁷⁶ In its opinion, which resolved a dispute over the NCAA's licensing agreements with broadcast networks, the Court took note of the importance of upholding the NCAA's amateurism requirements.

The identification of [college football] with an academic tradition 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. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such

⁷⁰ See *supra* Section I.B (discussing Form 08-3a of the NCAA Manual).

⁷¹ O'Bannon Complaint, *supra* note 9, at 4-5.

⁷² *Id.* at 6 (alleging that Form 08-3a is designed to force student-athletes to release all licensing rights in order for the NCAA to avoid future compensation to former players).

⁷³ *Id.*

⁷⁴ O'Bannon v. NCAA, 7 F. Supp. 3d 955, 973 (N.D. Cal. 2014).

⁷⁵ NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984); Brian Welch, Comment, *Unconscionable Amateurism: How the NCAA Violates Antitrust by Forcing Athletes to Sign Away Their Image Rights*, 44 J. MARSHALL L. REV. 533, 541 (2011); see also Banks v. NCAA, 746 F. Supp. 850, 862-63 (N.D. Ind. 1990); Gaines v. NCAA, 746 F. Supp. 738, 744-45 (M.D. Tenn. 1990).

⁷⁶ NCAA, 468 U.S. at 101-11.

restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.⁷⁷

Here, the Supreme Court used a “rule of reason” test to weigh the NCAA’s restraint of trade against the need for amateurism regulations in light of an alleged antitrust violation.⁷⁸ This three-step test established the following requirements: (1) the plaintiff’s showing that the restraint produces substantial “adverse, anticompetitive effects within the relevant product and geographic markets”; (2) the defendant’s demonstration that the restraint promotes “a sufficiently pro-competitive objective”; and (3) the plaintiff’s proof that the restraint is not “reasonably necessary to achieve the stated objective.”⁷⁹ In this final step, the plaintiff may suggest less restrictive alternatives by showing that the same “objectives can be achieved in a substantially less restrictive manner.”⁸⁰

Under this third prong, suggesting that current regulations were not necessary to maintain amateurism, O’Bannon proposed three alternatives to the current regulations: (1) “allow schools to award stipends derived from . . . licensing revenue[] to student-athletes”; (2) “allow schools to deposit a share of licensing revenue into a trust fund for student-athletes . . . [to] be paid after the student-athlete[] graduate[s]” or leaves school permanently; and (3) “permit student-athletes to receive limited compensation for third-party endorsements” approved by their respective schools.⁸¹ O’Bannon refrained from attacking amateurism as a core value of the NCAA and instead offered reform that would contribute to a more equitable bargaining relationship between the NCAA and student-athletes.⁸²

A. O’Bannon *in the District Court*

Prior to *O’Bannon*, antitrust claims against the NCAA had not been successful, as courts followed the Supreme Court’s lead and deferred to the amateurism justification in favor of the NCAA’s trade restrictions.⁸³ Thirty years later, however, the U.S. District Court for the Northern District of California broke this

⁷⁷ *Id.* at 101-02.

⁷⁸ *Id.* at 120 (acknowledging that the NCAA should be given deference in maintaining the unique amateur nature of collegiate athletics).

⁷⁹ Scherling-Plough Corp. v. FTC, 402 F.3d 1056, 1065 (11th Cir. 2005).

⁸⁰ O’Bannon v. NCAA, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014) (quoting Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001)).

⁸¹ *Id.* at 982.

⁸² Welch, *supra* note 75, at 555-56.

⁸³ *Id.* at 538-40.

trend, holding in *O'Bannon* that the NCAA was in violation of the Sherman Act and entering an injunction requiring reform to the Association's regulations.⁸⁴

In applying the rule of reason test used by the Supreme Court in *Board of Regents*, the district court determined that the NCAA's restraint on compensation violated antitrust law because it did not reasonably support a procompetitive purpose.⁸⁵ It first found that in a "college education market," NCAA compensation regulations have a significant anticompetitive effect because they fix the price that schools pay to secure college athletes' services.⁸⁶ Next, the court individually addressed each of the NCAA's justifications for its restriction on compensation of student-athletes⁸⁷ and acknowledged that the NCAA's rules serve two procompetitive purposes—the promotion of amateurism and the integration of academics with athletics—because both increase consumer demand for college sports.⁸⁸ In the third step of the analysis, the court determined whether there were any "substantially less restrictive alternatives" to the NCAA's current rules.⁸⁹

Consistent with its findings that there existed less restrictive alternatives, the court issued an injunction against the NCAA requiring that it permit member schools to offer student-athletes scholarships equal to the full cost of attendance.⁹⁰ Additionally, the district court adopted one of O'Bannon's suggested alternatives, which would permit schools to hold payments in trust for student-athletes.⁹¹ The court held that member schools could set aside \$5,000 per academic year in deferred compensation that would be distributed after a student-athlete's graduation.⁹² This was the first time a federal court found that the NCAA's amateurism regulations violated antitrust laws, let alone issued an injunction requiring changes to the bylaws.⁹³

The district court suggested that holding a limited amount of money in a trust until after student-athletes have left school

⁸⁴ *O'Bannon*, 7 F. Supp. 3d at 1007-08.

⁸⁵ *Id.* at 985 (citing *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010)) (stating that "[t]he Supreme Court . . . specifically held that concerted actions undertaken by joint ventures should be analyzed under the rule of reason").

⁸⁶ *Id.* at 973.

⁸⁷ *Id.* at 1000-04.

⁸⁸ *Id.* at 999-1003.

⁸⁹ *Id.* at 1005.

⁹⁰ *Id.* at 1007-08.

⁹¹ *Id.* at 1008.

⁹² *Id.*

⁹³ *O'Bannon v. NCAA*, Nos. 14-16601, 14-17068, 2015 WL 5712106, at *1 (9th Cir. Sept. 30, 2015).

would compensate them for the use of their names, images, and likenesses while still “integrating academics and athletics.”⁹⁴ According to Judge Wilken, the NCAA did not provide enough evidence that paying players would affect the procompetitive balance of the market.⁹⁵ Most significantly, the district court noted that while amateurism could justify limited restrictions on student-athlete compensation, it could not justify the particular restrictions on receiving compensation for the use of those student-athletes’ names, images, and likenesses.⁹⁶ Furthermore, the district court found that O’Bannon presented “ample evidence . . . to show that the college sports industry has changed substantially in the thirty years since *Board of Regents* was decided.”⁹⁷ And therefore, the values served by upholding amateurism “do not justify the rigid prohibition on compensating . . . [for] the use of [players’] names, images and likenesses.”⁹⁸ Ultimately, the district court determined that the NCAA’s blanket restraints on compensation violated antitrust law and held that less restrictive alternatives were available. The court issued an injunction requiring the NCAA to alter its regulations in two ways: first, to permit its member institutions to issue scholarships up to full cost of attendance, and second, to allow its members to hold a maximum of \$5,000 annually in a trust for each student-athlete.

B. O’Bannon in the Ninth Circuit

The NCAA appealed to the Ninth Circuit Court of Appeals, noting that it would continue to fight to preserve the current NCAA model.⁹⁹ After an expedited review,¹⁰⁰ the court issued an opinion on September 30, 2015.¹⁰¹ In this long-

⁹⁴ *O’Bannon*, 7 F. Supp. 3d at 1008.

⁹⁵ *Id.* at 1003.

⁹⁶ *Id.* at 1001.

⁹⁷ *Id.* at 999-1000.

⁹⁸ *Id.* at 1001.

⁹⁹ See Steve Berkowitz, *Oliver Luck Brings Own Perspective to NCAA on O’Bannon Name and Likeness Issue*, USA TODAY SPORTS (Jan. 16, 2015, 6:05 PM), <http://www.usatoday.com/story/sports/college/2015/01/16/ncaa-convention-oliver-luck-obannon-name-and-likeness-court-case/21873331/> [<http://perma.cc/Z2ZR-3KZ8>].

¹⁰⁰ The district court’s injunction was scheduled to take effect on August 1, 2015. The parties filed a joint motion for an expedited motion schedule, in which the NCAA contended that the NCAA and its members would be “forced to make fundamental changes to the administration of collegiate athletics and to their relationships with student athletes.” Joint Motion to Revise Briefing Schedule at 1-2, *O’Bannon v. NCAA*, No.14-16601 (9th Cir. Sept. 19, 2014), ECF No. 7.

¹⁰¹ See *O’Bannon v. NCAA*, Nos. 14-16601, 14-17068, 2015 WL 5712106, at *1 (9th Cir. Sept. 30, 2015).

anticipated ruling, the three judge panel affirmed the district court's injunction and required the NCAA to allow its member schools to give student-athletes scholarships up to the full cost of attendance because, the court stated, the regulations had "significant anticompetitive effects."¹⁰² The Ninth Circuit also held, however, that the district court's remedy of allowing student-athletes to receive compensation in the form of a trust was erroneous, and the court struck it down as a less restrictive alternative.¹⁰³

The Ninth Circuit agreed with the district court in holding that NCAA rules are subject to antitrust scrutiny and must be tested within the "crucible of the Rule of Reason."¹⁰⁴ In applying the same three-part rule of reason analysis, the Ninth Circuit concluded, in line with the district court, that while under the first step of the analysis, the NCAA's compensation regulations have anticompetitive effects by precluding student-athletes from receiving compensation, they serve two procompetitive purposes under the second step: (1) preserving the NCAA by promoting amateurism and (2) "integrating academics with athletics."¹⁰⁵ The appellate decision found Judge Wilken's analysis of college athletics consistent with the Supreme Court's in *Board of Regents*, in that there is "an academic tradition [that] differentiates [it] from and makes it more popular than professional sports to which it might otherwise be comparable."¹⁰⁶

The Ninth Circuit emphasized, though, that not *every* NCAA regulation that restricts the market is "necessary to preserving the 'character' of college sports."¹⁰⁷ Thus, the panel moved to the third step of the analysis and looked to reasonable and "substantially less restrictive" alternatives to the NCAA's compensation regulations.¹⁰⁸ The Ninth Circuit upheld setting a grant-in-aid cap at the full cost of attendance, as it is a substantially less restrictive alternative to the trust model that still accomplishes the NCAA's two procompetitive purposes.¹⁰⁹ Ultimately, even before the panel issued its opinion upholding this part of the injunction, the NCAA amended its

¹⁰² *Id.* at *1, *21.

¹⁰³ *Id.* at *1.

¹⁰⁴ *Id.* at *26.

¹⁰⁵ *Id.* at *21.

¹⁰⁶ *Id.* at *22 (citing *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101-02 (1984)).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at *22-23.

regulations allowing its members to fund student-athletes' full cost of attendance.¹¹⁰

The district court upheld the trust as a less restrictive alternative, stating that a "modest payment" of \$5,000 a year would not undermine the NCAA's legitimate goal of protecting and preserving amateurism.¹¹¹ However, prior to the Ninth Circuit decision, some argued that the \$5,000 cap was an arbitrary award not in line with the court's opinion and would ultimately be overruled by the Ninth Circuit.¹¹² The Ninth Circuit indeed disagreed vehemently with the district court, concluding that there was not sufficient evidence to support the finding that giving student-athletes minimal compensation would be "as effective in preserving amateurism as not paying them" at all.¹¹³ In what may be the most influential part of the decision, the court suggested there might be a slippery slope in permitting compensation of student-athletes for purely athletic endeavors and feared this type of compensation would turn college athletics into the "minor league[s]."¹¹⁴

The difference between offering student-athletes education-related compensation and offering them cash sums untethered to educational expenses is not minor; it is a quantum leap. Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point At that point the NCAA will have surrendered its amateurism principles entirely and transitioned from its "particular brand of football" to minor league status.¹¹⁵

Both the district court and the Ninth Circuit concluded that the NCAA needed to reform its practices; however, neither court felt it necessary to do away with amateurism. Both decisions included strong dicta supporting the value of amateurism in college athletics. Judge Wilken herself conceded that there are limits to the district court's decision and that amateurism "might justify a restriction on large payments to student-athletes while in school."¹¹⁶ There are significant tensions still at play between the values of education and amateurism and the goals of compensating college athletes. However, by upholding both values

¹¹⁰ The NCAA changed its regulations to permit full cost-of-attendance scholarships after its annual convention in January 2015. Hosick, *supra* note 21.

¹¹¹ *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014).

¹¹² See, e.g., Michael McCann, *Next Steps in O'Bannon Case: Both NCAA and the Plaintiffs Could Appeal*, SPORTS ILLUSTRATED (Aug. 11, 2014), <http://www.si.com/college-football/2014/08/11/obannon-ncaa-case-appeal-next-steps> [<http://perma.cc/C85R-Z4R5>].

¹¹³ *O'Bannon*, 2015 WL 5712106, at *25.

¹¹⁴ *Id.* at *26 (citing *NCAA*, 468 U.S. at 101-02 (footnote omitted)).

¹¹⁵ *Id.*

¹¹⁶ *O'Bannon*, 7 F. Supp. 3d at 1001.

in its decisions, perhaps the court left room for the NCAA to adopt a model that incorporates both compensation and amateurism.

C. *The Future of Amateurism and O'Bannon*

Prior to the Ninth Circuit's decision, commentators suggested that *O'Bannon* would open the gate to a flood of future litigation surrounding student-athletes' compensation.¹¹⁷ The appellate decision does not preclude a similar outcome for other litigation, especially as *O'Bannon* remains ongoing. Two weeks after the Ninth Circuit handed down its opinion, plaintiffs filed a petition seeking an en banc rehearing in which an eleven-member panel of Ninth Circuit judges would review the case.¹¹⁸ In this petition, the plaintiffs maintained that the majority erroneously reversed the implementation of the \$5,000 trust and "treated amateurism as an all-or-nothing proposition—that paying college athletes even a dollar would necessarily dampen enthusiasm among fans."¹¹⁹ They further requested that the district court decision be upheld, particularly portions finding that "with ample support from the NCAA's own witnesses, consumer interest in college sports is driven almost entirely by school loyalty and geography—and not by the restraint [on compensation]."¹²⁰ The Ninth Circuit panel subsequently denied the plaintiffs' request for an en banc rehearing.¹²¹ In past comments, both parties have indicated an interest in petitioning the Supreme Court for certiorari, in which case they have until March 14, 2016, to file an appeal.¹²² Ultimately, however, the Ninth Circuit decision does not preclude the implementation of a trust, as it simply held that based on the record, the trust was beyond the scope of the judiciary as a viable remedy under antitrust law. In the event that the Supreme Court grants certiorari, in order to enjoin the NCAA to permit a trust, plaintiffs would need to develop a record with substantial evidence that a trust would be a viable remedy.¹²³ Alternatively, and more practically, the NCAA may of its own volition choose to implement this trust as a part of its own regulatory structure.

¹¹⁷ See, e.g., McCann, *supra* note 112.

¹¹⁸ Plaintiffs-Appellees' Petition for Rehearing En Banc, *supra* note 22.

¹¹⁹ *Id.* at 14.

¹²⁰ *Id.*

¹²¹ See Order, *NCAA v. O'Bannon*, Nos. 14-16601, 14-17068 (9th Cir. Dec 16, 2015), ECF No. 116.

¹²² See Solomon, *supra* note 22.

¹²³ See *O'Bannon v. NCAA*, Nos. 14-16601, 14-17068, 2015 WL 5712106, at *26-30 (9th Cir. Sept. 30, 2015) (Thomas, C.J., concurring and dissenting in part).

Since the Supreme Court has not heard a case on the issue of amateurism since *Board of Regents* some 30 years ago, the Supreme Court may not be an unrealistic next stop for *O'Bannon v. NCAA* given the recent flood of litigation. And while the Supreme Court only grants certiorari to less than one percent of the petitions it receives,¹²⁴ it may consider *O'Bannon* to be of high enough social importance to warrant review, given the growing concerns about compensation of student-athletes and public scrutiny of NCAA practices.

The injunction affirmed by the Ninth Circuit prohibits the NCAA from preventing its member schools from offering Division I football and men's basketball recruits scholarships for the full cost of attendance. Since the NCAA amended its regulations at the January convention, member schools started distributing the cost-of-attendance stipend to student-athletes.¹²⁵ A federally calculated number, the full cost of attendance takes into account the location of the school and the cost of living.¹²⁶ In addition to the grant-in-aid scholarships, it is meant to help students on financial aid cover expenses outside of tuition, such as "school supplies, two trips home per year, [and] food."¹²⁷ Since it is the first year the stipend is available for student-athletes, schools now bear the burden of determining how to implement and distribute it. Because the full cost-of attendance varies between schools, coaches and athletic departments have argued that schools with larger stipends will have a competitive edge when it comes to recruiting.¹²⁸

With recruitment letters going out to high school juniors for the 2017 recruit class as early as fall of 2015, athletic departments quickly faced the challenge of determining how to distribute this stipend.¹²⁹ Athletic departments, which often project their financial planning for the next three to five years, had to make immediate decisions involving new forms of student-

¹²⁴ *Supreme Court Procedures*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<http://perma.cc/6YHJ-P8ZE>] (last visited Mar. 4, 2016).

¹²⁵ Audrey Snyder, *Cost of Attendance Stipends Give Scholarship Student-Athletes a Little Financial Freedom*, PITT. POST GAZETTE (Sept. 1, 2015), <http://www.post-gazette.com/sports/college/2015/09/01/Cost-of-attendance-stipends-give-scholarship-student-athletes-a-little-financial-freedom/stories/201508310052> [<http://perma.cc/BRR2-HLVX>].

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Jon Solomon, *NCAA: 'Critical' for O'Bannon Appeal to be Decided by August 2015*, CBSSPORTS.COM (Sept. 19, 2014, 5:43 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24716564/ncaa-critical-for-obannon-appeal-to-be-decided-by-august-2015> [<http://perma.cc/FE46-59Y9>].

athlete compensation.¹³⁰ The University of Pittsburgh set aside \$1.1 million to cover the \$3,296 annual cost of attendance stipend for its student-athletes.¹³¹ At West Virginia University, the stipend is one of the lowest in the Big 12 Conference, at \$2,700 per student-athlete.¹³² This will cost the athletic department an additional \$600,000 annually.¹³³ Conversely, Pennsylvania State University has one of the highest stipends in the NCAA, at \$4,700, costing the school \$1.75 million this year.¹³⁴ This is a number that the football department now displays proudly to its recruits, perhaps using it to its competitive advantage.¹³⁵ This increase in compensation not only affected the football team; the Division I school made it a priority to distribute the stipend to all 31 of its athletic programs.¹³⁶ According to Sandy Barbour, Pennsylvania State's athletic director, the stipend is a priority so students have "access to resources and educational opportunities."¹³⁷ Ultimately, the court's reasoning holds true when applied by this athletic director. Here, as the court suggested it would, the stipend functions as a less restrictive alternative that preserves both the values of amateurism and the integration of academics with athletics.

Prior to the Ninth Circuit decision, many universities began the process of implementing a budget for the \$5,000 trust. The University of Texas developed a plan to allocate \$6 million of its annual budget to pay football and men's basketball players through a trust.¹³⁸ Ultimately these funds can be reallocated for stipends, but in light of a potential Supreme Court decision in *O'Bannon*, member schools should consider the possibility of eventually compensating student-athletes via a trust. While the district court's ruling did not require schools to compensate student-athletes,¹³⁹ in order to remain competitive in the recruitment market, the top athletic schools would understandably want to create trusts to compensate athletes for the use of their

¹³⁰ *Id.*

¹³¹ Snyder, *supra* note 125.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Wescott Eberts, *Texas Planning to Begin Paying Players \$10,000 to Comply with NCAA Ruling*, SB NATION (Oct. 22, 2014, 3:56 PM), <http://www.burntorangenation.com/2014/10/22/7041617/texas-longhorn-steve-patterson-paying-players-obannon-ruling> [<http://perma.cc/NE3X-XPJM>].

¹³⁹ See, e.g., *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 975, 1008-09 (N.D. Cal. 2014).

names, images, and likenesses in the event that compensation through a trust is reinstated as a legal option for Division I schools.

Because student-athletes do not currently receive any portion of the revenue that schools derive from the use of student-athletes' names, images, and likenesses, it would seem logical that most collegiate sports programs are extremely profitable. But according to the NCAA, in 2010, only 22 of 228 Division I athletic departments reported seeing profits.¹⁴⁰ Research presented by the *O'Bannon* plaintiffs, however, suggests that the NCAA and its member institutions have misconstrued these numbers and that ultimately, 90% of athletic departments return a profit.¹⁴¹ Either way, this further establishes that perhaps *O'Bannon* is not a one-size-fits-all remedy for NCAA reform. Arguably, every Division I school operates differently due to variations in size, athletic success, and most significantly, budget restrictions. Additionally, if a school does not sell the names, images, and likenesses of its student-athletes, the school will not be able to offer any compensation through a trust. This supports the NCAA's argument that it maintains a competitive balance between its member schools by promoting amateurism.¹⁴² Some argue, however, that Division I football and men's basketball already lack a competitive balance, which has not resulted in a lack of consumer interest or spending in the industry.¹⁴³ Ultimately, schools must be "prepared either way for whatever hand gets dealt."¹⁴⁴

¹⁴⁰ Libby Sander, *22 Elite College Sports Programs Turned a Profit in 2010, but Gaps Remain, NCAA Reports Says*, CHRON. HIGHER EDUC. (June 15, 2011), <http://chronicle.com/article/22-Elite-College-Sports/127921/> [<http://perma.cc/Z9UM-A6XH>]; see also Steve Berkowitz & Jodi Upton, *Athletic Departments See Surge Financially in Down Economy*, USA TODAY (June 16, 2011), http://usatoday30.usatoday.com/sports/college/2011-06-15-athletic-departments-increase-money_n.htm [<http://perma.cc/K6VQ-BCKG>]. The NCAA considers an athletic department to be financially self-sufficient when the school generates revenue from media contracts, ticket sales, and donations that together exceed the department's total expenses. In 2010, there were 22 self-sufficient schools, an increase from the 14 in 2009. Oregon, Alabama, Penn State, and Michigan earned the top five profits. Berkowitz & Upton, *supra*.

¹⁴¹ See Declaration of Daniel A. Rascher in Support of Motion By Antitrust Plaintiffs for Class Certification at 73, *In re NCAA Student Athlete Name & Likeness Licensing Litig.*, No. 4:09-cv-1967-CW (N.D. Cal. Apr. 24, 2013), ECF No. 748-4 [hereinafter Rascher Declaration]; see also Strom, *supra* note 30, at 446. In 2011, Dr. Rasher examined data from 66 member schools and found that more than 90% of the schools turned a profit. Another study suggested that 70% of universities in major conferences made a profit. Yet because many universities account for merchandise sales and other sports-related revenues in nonathletic departments, these significant revenues are not reflected in the NCAA's accounting. *Id.*

¹⁴² Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Licensing Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1040 (2014).

¹⁴³ *Id.* at 1042 ("For example, between 1950 and 2005, just five college football teams have accounted for a quarter of all top eight finishers . . . [and] just four men's

III. ONGOING LITIGATION AGAINST THE NCAA

In light of the injunction in *O'Bannon*, many other current and former Division I student-athletes are seizing the opportunity to challenge the NCAA's regulations restricting the compensation of student-athletes. Not only have cases that were filed prior to *O'Bannon* been allowed to proceed despite the injunction, but new lawsuits against the NCAA also continue to be filed.¹⁴⁵ These claims are indicative of the significant social importance attached to the compensation of student-athletes, which in turn may eventually result in review by the Supreme Court.

A. *The Grant-in-Aid Cap*

In March 2014, Shawne Alston, a former West Virginia University running back, filed a class action lawsuit on behalf of current and former football players in five of the top athletic conferences in the NCAA: the Big 12, Big Ten, Pac-12, ACC, and SEC.¹⁴⁶ Martin Jenkins, a former defensive back for Clemson University, and two current Wisconsin athletes filed a class action stating that financial aid awards and potential compensation should be determined by an open market and not regulated by the NCAA.¹⁴⁷ These cases were consolidated in *In re National College Athletic Association Grant-in-Aid Cap Antitrust Litigation*,¹⁴⁸ to be tried before Judge Claudia Wilken, who presided over *O'Bannon v. NCAA*.¹⁴⁹

Plaintiffs are seeking an injunction that would prohibit the NCAA and five of the top athletic conferences from adopting *any* limitations on the amount of compensation that may be paid to student-athletes while in school.¹⁵⁰ This class action complaint argues that the NCAA cannot limit financial aid to tuition, room

Division I college basketball teams represented nearly a quarter of all Final Four appearances . . .”).

¹⁴⁴ Solomon, *supra* note 125.

¹⁴⁵ See *Alston v. NCAA et al.*, No. 14-cv-01011 (N.D. Cal. Mar. 5, 2014); *Jenkins et al. v. NCAA*, No. 33-cv-0001, (D.N.J. Mar. 17, 2014); *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, No. 2541, 2014 U.S. Dist. LEXIS 115122 (N.D. Cal. July 11, 2014).

¹⁴⁶ See Complaint, *Alston v. NCAA et al.*, No. 14-cv-01011 (N.D. Cal. Mar. 5, 2014), ECF No. 1.

¹⁴⁷ See Complaint, *Jenkins et al. v. NCAA*, No. 33-cv-0001, (D.N.J. Mar. 17, 2014), ECF No. 7689.

¹⁴⁸ Consolidated Complaint at 1-2, *In re Nat'l Collegiate Athletic Ass'n Grant-in-Aid Cap Antitrust Litig.*, No. 2541, 2014 U.S. Dist. LEXIS 115122 (N.D. Cal. July 11, 2014), ECF No. 61.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 4.

and board, and books, while excluding incidentals.¹⁵¹ The plaintiffs argue that former athletes should be awarded damages for incidentals like travel and other costs associated with being student-athletes.¹⁵² The complaint further alleges that there is a disparity between the allowable grant-in-aid cap and the actual cost of attendance, resulting in student-athletes receiving a few thousand dollars less each year than they would in a competitive market.¹⁵³ The complaint states that denying players the benefits of economic assistance has imposed significant hardships on these athletes as their lives are much different from the average student.¹⁵⁴ Student-athletes (1) “have much less time and ability to earn money through part-time jobs than do other students”; (2) “are more likely to come from low-income households”; and (3) “are more likely to incur substantial travel costs to attend school.”¹⁵⁵

While the *O’Bannon* decision was tailored specifically to the compensation for players’ licensing rights, it paved the way for suits like *Grant-in-Aid* to continue attacking the NCAA’s restrictions on student compensation and promoting the need for more significant reform. Judge Wilken did not grant the NCAA’s motion to dismiss and noted the differences between *Grant-in-Aid* and *O’Bannon*.¹⁵⁶ Most significantly, this class of plaintiffs contains female student-athletes, which have yet to be included in prior class-action suits.¹⁵⁷

B. *Broadcast Rights*

Litigation surrounding the NCAA’s compensation restrictions has expanded to include a variety of defendants. Eleven current and former Football Bowl Subdivision and Division I men’s basketball players are challenging the licensing and use of student-athletes’ names, images, and likenesses in advertisements and broadcasts, as well as restrictions on student-athletes’ compensation for such use.¹⁵⁸ The plaintiffs seek to recover damages from three classes of defendants—the major

¹⁵¹ *Id.*

¹⁵² *Id.* at 6.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Jon Solomon, *Judge Allows Scholarship Cases to Continue vs. NCAA, Conferences*, CBSSPORTS.COM (Oct. 9, 2014, 6:36 PM), <http://www.cbssports.com/collegefootball/writer/jon-solomon/24746025/judge-allows-ncaa-scholarship-cases-to-continue> [<http://perma.cc/2MFL-NDTS>].

¹⁵⁷ *Id.*

¹⁵⁸ Complaint at 1-5, *Marshall et al. v. ESPN Inc. et al.*, 14-cv-01945 (M.D. Tenn. Oct. 3, 2014), ECF No. 1 [hereinafter *Marshall Complaint*].

television networks, licensing companies, and college athletic conferences—that were allegedly unjustly enriched by using the names, images, and likenesses of student-athletes in advertisements and broadcasts without their consent.¹⁵⁹

Along with other alleged violations of privacy rights, the Lanham Act, and tort law, the plaintiffs in *Marshall v. ESPN* made an antitrust claim parallel to that in *O'Bannon*. While *O'Bannon* claimed that the NCAA created an unreasonable restraint on trade, *Marshall* brought an antitrust claim against three different groups of broadcast defendants, alleging that broadcasts of collegiate games violated the use of players' names, images, and likenesses.¹⁶⁰ Since *Marshall* asserts a violation of section 1 of the Sherman Act,¹⁶¹ the court will apply a rule of reason analysis. As in *O'Bannon*, the burden of proof now rests with the defendants to provide a justification for their departure from a free market system.

C. *Student-Athletes as Employees and the Right to Unionize*

The College Athletes Players Association and Kain Colter, a former Northwestern University quarterback, brought a suit regarding the restrictions on the unionization of student-athletes at Northwestern University. Plaintiffs argued that football players on a scholarship should be granted the right to seek bargaining status and hold elections in favor of unionization.¹⁶² In March 2014, the Chicago National Labor Relations Board agreed that the players had the right to unionize. However, when the National Labor Relations Board (NLRB) granted Northwestern's request for review, it subsequently declined to assert jurisdiction.¹⁶³ By statute, the NLRB does not have jurisdiction over state-run schools, which account for 108 of the 125 Football Bowl Subdivision teams.¹⁶⁴ Since the NCAA and the conferences have substantial control over the majority of the teams, the NLRB held that asserting

¹⁵⁹ *Id.*

¹⁶⁰ See *supra* Section I.B; *Marshall* Complaint, *supra* note 158, at 1-5.

¹⁶¹ *Marshall* Complaint, *supra* note 158, at 1-5, 34.

¹⁶² Northwestern University's Brief to the Regional Director at 1-2, No. 13-RC-121359 (N.L.R.B. July 3, 2014).

¹⁶³ Press Release, Nat'l Labor Relations Bd. Office of Public Affairs, Board Unanimously Decides to Decline Jurisdiction in Northwestern Case (Aug. 17, 2015), <https://www.nlr.gov/news-outreach/news-story/board-unanimously-decides-decline-jurisdiction-northwestern-case> [<http://perma.cc/AQM8-VEBU>].

¹⁶⁴ Northwestern Univ. and Coll. Athletes Players Ass'n, 362 NLRB 167 (2015), 2015 WL 4882656.

jurisdiction over a single team “would not promote stability in labor relations” across the league.¹⁶⁵ Ultimately, this narrowly focused decision does not preclude reconsideration of the unionization issue in the future.

As they receive additional compensation, student-athletes develop a growing economic relationship with their university. The school compensates players in the form of a grant-in-aid and in turn is able to govern and control the players’ daily activities with regard to NCAA athletic competitions.¹⁶⁶ If universities begin to establish trusts to compensate players for the use of their names, images, and likenesses, student-athletes will have an even stronger argument for a bargaining collective.

IV. IMPLEMENTING CHANGES TO THE NCAA MODEL

While the NCAA implemented changes to its regulatory structure at its annual convention,¹⁶⁷ as litigation continues, there is a need for additional reform to whether and how student-athletes are compensated. In light of the Ninth Circuit’s conclusion that the NCAA regulations violate antitrust law, there is now an opportunity to develop a new, more effective model of compensation for student-athletes. While there are multiple proposed methods for more complete compensation, such as paying players directly for their performance and/or licensing rights, a model needs to be adopted that offers student-athletes the proper protection from exploitation while still maintaining amateurism in college athletics.

In amending its bylaws, the NCAA only scratched the surface of the issue of how to balance player compensation with the values of amateurism in college athletics. By allowing additional player compensation in the form of full cost-of-attendance stipends, the NCAA may have avoided a complete regulatory overhaul; however, there are several more functional alternatives to the current NCAA model. In order to comply with the antitrust laws and best serve student-athletes, the most effective solution is ultimately a combination of both a trust system and a revenue sharing model.¹⁶⁸

¹⁶⁵ *Id.*

¹⁶⁶ Northwestern University’s Brief, *supra* note 162, at 2-3, 74.

¹⁶⁷ Hosick, *supra* note 21.

¹⁶⁸ See *infra* Section IV.B.

A. *International Olympic Committee Trust Model*

The most practical model for reform further develops the trust fund proposed by the plaintiffs in *O'Bannon* and accepted by the Northern District of California. Although the Ninth Circuit held that the creation of a trust capped at \$5,000 was an erroneous remedy, the NCAA has the ability to implement a similar compensatory structure through its bylaws. Ultimately, the most functional trust for both the NCAA and its member schools is one that mirrors that of the International Olympic Committee (IOC), the governing organization for the Olympics and all of its member institutions. The IOC developed a trust system, very similar to that proposed in *O'Bannon*, which has a distribution scheme that would be valuable to college athletes.¹⁶⁹ Under *O'Bannon*, student-athletes are unable to access the funds in their trust until after they graduate or otherwise leave school.¹⁷⁰ But under the IOC, revenue from athletes' endorsements is held in a trust that is accessible to them both during and after competition.¹⁷¹ During competition, only necessary expenses, such as food and incidentals related to competition, may be paid from the trust; after a competition season, however, athletes may personally withdraw the remaining funds.¹⁷² Permitting students to access their trusts *only* for necessary expenses prior to graduation would allow them to finance expenses that may not be covered by tuition and the full cost-of-attendance stipend.

Currently, the NCAA prohibits compensating student-athletes with "funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics."¹⁷³ Creation of a trust would involve both the NCAA and its member institutions contributing a percentage of revenue from merchandise, video games, and television network contracts that use the names, images, and likeness of players to the trusts set up for student-athletes.¹⁷⁴ This is a practical compensatory structure that would allow the NCAA, universities, and conferences to regulate the trust while the student-athletes are in school. Furthermore, implementing a spend thrift provision that prohibits student-athletes from accessing the trust without the

¹⁶⁹ Leslie E. Wong, Comment, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right of Publicity*, 42 TEX. TECH. L. REV. 1069, 1104-05 (2010).

¹⁷⁰ *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 982 (N.D. Cal. 2014).

¹⁷¹ Wong, *supra* note 169, at 1105.

¹⁷² *Id.*

¹⁷³ 2013-14 NCAA DIVISION 1 MANUAL, *supra* note 2, at 58.

¹⁷⁴ Strom, *supra* note 30, at 438.

approval of a trustee—either the NCAA, a conference, or university—would provide a safeguard against unnecessary use of the funds prior to graduation.¹⁷⁵ As a trustee, the NCAA could maintain control over this additional compensation and ensure that it is used in a way that promotes amateurism and integrates academics with athletics. For example, the NCAA could create academic incentives by reducing access to trusts for poor academic standing.¹⁷⁶

Ultimately, a trust model, based on that of the IOC, is an ideal reform for collegiate athletics, as it will allow the NCAA to maintain enough control to ensure that the values of amateurism are maintained. Furthermore, the benefits of a trust system could eventually be applied to a greater population of student-athletes outside of men's Division I revenue sports, including for female athletes and those who play nonrevenue sports.¹⁷⁷

B. *Revenue Sharing and Complete Education Models*

As an alternative, schools may implement a revenue sharing system that allows student-athletes to collect a percentage of the revenue accumulated by their university from the use of their names, images, and likenesses, in addition to their athletic scholarship.¹⁷⁸ Advocates of this model further suggest that the NCAA could promote the values of education by awarding bonuses for outstanding academic performance.¹⁷⁹

Furthermore, if the NCAA revised its amateurism regulations that restrict compensation for student-athletes to allow them to receive a portion of the proceeds generated through personal endorsements or by their team, revenue sharing would allow student-athletes to further their own financial and professional gain.¹⁸⁰ While it is important to allow student-athletes to participate in an open and competitive market when it comes to licensing the rights to their names, images, and likenesses, it is imperative that doing so does not detract from the value of higher education. Arguably, giving student-athletes huge amounts of compensation from third parties would detract from the principle of integrating academics and athletics. Therefore, combining a revenue sharing system with the distribution method

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 442.

¹⁷⁷ Wong, *supra* note 169, at 1105.

¹⁷⁸ *Id.* at 1103.

¹⁷⁹ *Id.* at 1104.

¹⁸⁰ *Id.* at 1105.

of the IOC trust would allow the NCAA to comply with the Sherman Act while continuing to apply the ideals of amateurism. Ultimately, the NCAA could allow student-athletes to be compensated for the use of their names, images, and likenesses via the revenue sharing model and could ensure that student-athletes would not have access to the trust until after their collegiate tenure.

Although some commentators argue for a departure from the commercialization of the college sports industry to a focus solely on its educational atmosphere, that is highly improbable.¹⁸¹ College athletics have become a true industry. Fans identify with their school and athletic conferences. They purchase memorabilia and pay significant amounts of money to attend games. Consumers have grown to expect and appreciate the jerseys, DVDs, and video games that use the images and names of the players. The demand for this merchandise continues to grow, and removing the commercialized aspect of the industry would prove completely impractical.¹⁸²

While implementation of a trust would be the most beneficial model for compensating student-athletes, there are two specific issues that would need to be addressed to ensure its success. First, the trust would have to comply with Title IX requirements and apply equally to all athletes. Second, the NCAA would have to ensure that all of its member institutions have the financial stability to establish a trust.

Title IX, which was enacted in 1972, requires gender equality in educational programs.¹⁸³ It does not, however, expressly address the equality of payment of student-athletes, as this was not an issue at the time of its enactment.¹⁸⁴ To determine compliance with Title IX, 10 factors are examined to ensure that male and female student-athletes are afforded equal opportunities,¹⁸⁵ including, among others, “whether the selection of

¹⁸¹ *Id.* at 1102.

¹⁸² *Id.*

¹⁸³ 45 C.F.R. § 86.41(a) (2015).

¹⁸⁴ *History of Title IX*, TITLE IX.INFO, <http://www.titleix.info/history/history-overview.aspx> [<http://perma.cc/XUF5-6ZBG>] (last visited Mar. 4, 2016); Josephine Potuto et al., *What's in a Name? The Collegiate Mark, The Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879, 938-39 (2014).

¹⁸⁵ 45 C.F.R. § 86.41(c) (2015). The 10 factors considered are the following:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. Scheduling of games and practice time;

sports and levels of competition effectively accommodate the interests and abilities of members of both sexes” and the assignment and compensation of coaches and tutors.¹⁸⁶

Equal implementation of the proposed trust model would alleviate concerns that compensating student-athletes would be discriminatory towards women’s college athletics. While women’s Division I sports may not receive as much publicity or media attention as men’s sports, under this proposal, member institutions would still be required to implement trusts for all student-athletes. Each student-athlete would be required to receive the same percentage of merchandise sales related to their name, image, and likeness.¹⁸⁷

Between merchandise, ticket sales, and broadcast deals, extremely large sums of money are spent on the college sports industry each year; however, the top five conferences and schools receive the majority of this money.¹⁸⁸ In order for the trust model to be successful, it would need to be implemented across all Division I member institutions. Arguably, the biggest roadblock to a trust system would be the financial burden on member institutions, particularly public schools. But thanks to extensive research throughout the duration of the *O’Bannon* litigation, a report filed on behalf of the plaintiffs indicated that these numbers are a drastic misrepresentation due to convenient accounting by member institutions.¹⁸⁹ After adjusting for accounting inaccuracies, the report indicated that 70% of the athletic departments make an annual profit.¹⁹⁰ Unfortunately, that still leaves 30% of the NCAA’s member schools that may not have the ability to implement additional compensation for their student-athletes.

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4. Travel and per diem allowance;
 5. Opportunity to receive coaching and academic tutoring;
 6. Assignment and compensation of coaches and tutors;
 7. Provision of locker rooms, practice and competitive facilities;
 8. Provision of medical and training facilities and services;
 9. Provision of housing and dining facilities and services;
 10. Publicity.

¹⁸⁶ *Id.* § 86.41(c)(1).

¹⁸⁷ Strom, *supra* note 30, at 448.

¹⁸⁸ *Id.* at 446-54.

¹⁸⁹ See Rascher Declaration, *supra* note 141, at 73; Strom, *supra* note 30, at 446.

¹⁹⁰ Strom, *supra* note 30, at 447.

Ultimately, the purpose of a trust is to compensate student-athletes only from the profits made by their respective school and athletic conference. Therefore, when a school or athletic conference chooses to sell merchandise using the names, images, and likeness of its student-athletes, they would then accrue profits that could be distributed into the trusts of the respective student-athletes. From 2012 to 2013, the retail marketplace for licensed college merchandise was estimated at \$4.62 billion.¹⁹¹ The royalties from these sales were returned to the member institutions, indicating that the majority of college athletics departments do in fact make a significant return profit.¹⁹² There is no indication that implementation of a trust to share these royalties with student-athletes would financially destroy athletics departments.

CONCLUSION

Although *O'Bannon's* ultimate impact on the NCAA is still unknown, it did not hold the death sentence for amateurism that many anticipated it would. It is, however, indicative of the need for a drastic change to the NCAA and its relationship with athletic conferences, universities, and student-athletes. In the words of Mike Krzyzewski, coach for Duke University's men's basketball team, on the need for change in the NCAA, "Many times when you lose, it's the greatest opportunity to improve. You have this unique opportunity to make dramatic change that you probably couldn't make when things seem to be going right."¹⁹³

Even though the court in *O'Bannon* rejected amateurism as a justification for prohibiting *any* compensation for student-athletes, the decision was quite narrow in its application. Litigation surrounding compensation of student-athletes is indicative of the need for a change in the governance of the NCAA, rather than for a complete change of the entire college sports industry.

While player compensation has been at the forefront of issues surrounding college athletics, student-athletes deserve more than just compensation; they deserve the stability and protection from exploitation that the NCAA's regulations help to provide. The *O'Bannon* litigation and judicial intervention triggered the

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Coach K Backs NCAA Changes*, ESPN.COM (Oct. 3, 2013, 11:22 AM), http://espn.go.com/mens-college-basketball/story/_/id/9762424/duke-coach-mike-krzyzewski-says-ncaa-needs-new-definition-amateurism-report-says [<http://perma.cc/MTY8-3G5N>].

necessary action from the NCAA to take regulatory reform into its own hands. The NCAA was compelled to update its practices or else face paying damages to a large, injured class of former student-athletes. The NCAA will best serve student-athletes by continuing to reexamine its own regulatory structure and creating a revenue sharing system distributed via a trust model similar to that of the IOC. By implementing this reform and providing the full cost of attendance in conjunction with deferred compensation in a trust, the NCAA will promote adequate compensation of student-athletes while simultaneously maintaining the core values of amateurism. Perhaps, with some restructuring, it is possible to have the best of both worlds.

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