WHY COLLEGIATE ATHLETES COULD HAVE THE NCAA, ET AL. SINGING A DIFFERENT TUNE♦

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INTRODUCTION

The exponential growth of intercollegiate athletics over the past quarter century has led to the financial viability of NCAA Division I football and men's basketball as bona fide businesses generating revenues comparable to professional sports. The financial success of the National Collegiate Athletic Association (NCAA) and its members has concurrently called its practices into question, particularly those rules that restrict compensation to college athletes.[1] While the NCAA purports to preserve "amateurism" by limiting an athlete's income to no greater than "cost-of-attendance," the NCAA and its member institutions reportedly earn upwards of $11 billion per year.[2] The seeming inequity has sparked a movement by former college athletes to pursue multiple legal actions against the NCAA, its members and licensees under theories of, *inter alia*, antitrust, right of publicity,

[1] *See e.g*., The NCAA 2013–14 DIVISION I MANUAL, § 15.01.6, *available at* http://www.ncaapublications.com/productdownloads/D114.pdf [hereinafter NCAA MANUAL].

[2] *Id*. § 2.9 (stating that "[s]tudent-athletes shall be amateurs in an intercollegiate sport"), § 15.01.6 (stipulating maximum grant-in-aid permitted to student athletes) and §15.02.2 (defining "cost of attendance").

The revenue estimates vary from about $6 billion to $11 billion annually and can be difficult to track as certain agreements may not be public, and the calculation must account for revenues generated across the NCAA, the Collegiate Licensing Company, and individual member institutions. *See* Marc Edelman, *The Case for Paying College Athletes*, U.S. NEWS & WORLD REPORT (Jan. 6, 2014), www.usnews.com/opinion/articles/2014/01/06/ncaa-college-athletes-should-be-paid; Joe Nocera, *Here's How to Pay Up Now*, N.Y. TIMES SUNDAY MAGAZINE at MM30 (Dec. 30, 2011), *available at* http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all&_r=0. *See also* 2004–12 REVENUES & EXPENSES: NCAA DIVISION-1 INTERCOLLEGIATE ATHLETICS PROGRAM REPORT, http://www.ncaapublications.com/productdownloads/2012RevExp.pdf (last visited Mar. 26, 2015) [hereinafter NCAA REVENUES REPORT]; Ben Steverman, *The Real Cost of March Madness*, BLOOMBERG (Mar. 21, 2012), http://www.bloomberg.com/consumer-spending/2012-03-21/the-real-cost-of-march-madness.html (showing that the 2013 March Madness tournament collected $1.15 billion in advertising revenue for the NCAA).

conspiracy, labor and employment, and unjust enrichment in order to level the playing field.[3]

In the preeminent case, *O'Bannon v. NCAA*, the District Court of the Northern District of California issued an unprecedented judgment against the NCAA holding that the NCAA rules prohibiting College Athletes[4] from receiving compensation for use of their names, images and likenesses (generally, "NIL") violates Section 1 of the Sherman Antitrust Act ("Sherman Act").[5] The court further acknowledged the right of *current* College Athletes to pursue group licensing opportunities.[6] Although the decision was a "win" for College Athletes, the *O'Bannon* Court also imposed strict parameters around the exercise and scope of such rights, affording the NCAA substantial discretion to prescribe rules limiting the terms and amounts of such compensation. For example, the court stipulated that the NCAA may enact rules to that require its members to equally compensate athletes participating on the same team and in the same class, regardless of their role or contributions to the athletic program.[7] Perhaps most notably, the court implied that a cap on NIL compensation would be permissible, so long as such cap was not less than $5,000 per athlete, per year of his participation.[8] Such a remedy begs the question of whether a rule that would cap NIL compensation, particularly at the lowest threshold of $5,000, could withstand antitrust scrutiny any more successfully than the rule struck down by the court, which capped such compensation at zero.

This article will discuss the implications of the *O'Bannon* decision and analyze the viability of an antitrust claim against the NCAA if it were to implement the hypothetical rule proposed by the *O'Bannon* court. Furthermore, in taking the court's lead in recognizing the right of College Athletes to pursue group licensing opportunities, this article will further address the formation, structure and viability of a royalty-based system designed to compensate College Athletes for use of their NI, as well as the related management of such rights by a group

[3] *See, e.g.*, Tom Farrey, *Players, Game Makers Settle for $40M*, ESPN (May 31, 2014), http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm; Sara Ganim, *Northwestern Football Players Take Union Hopes to Labor Board Hearing*, CNN (Feb. 18, 2014), http://www.cnn.com/2014/02/18/us/northwestern-unionization-attempt/.

[4] For the purposes of this article, the term "College Athlete" shall refer to both current and former collegiate athletes who have competed in NCAA Division I men's basketball or football (including the Football Bowl Subdivision ("FBS")), as reflected in the *O'Bannon* class of Plaintiffs, unless otherwise specified as "current" or "former."

[5] O'Bannon v. NCAA, 7 F.Supp.3d 955 (N.D. Cal. 2014). The court also held that any restrictions imposed by the NCAA that restrict the amount of scholarship, at any amount less than cost-of-attendance, violated federal antitrust. *Id.* at 1007.

[6] *Id.* at 1008 (emphasis added).

[7] *Id.*

[8] *Id.*

licensing organization, similar to a labor union representing the group licensing rights of professional athletes or a performing rights organization managing the public performance rights of music rights holders. As further discussed, establishing such an organization would both provide a means within which to efficiently compensate College Athletes and enable the NCAA and its members to preserve the spirit of intercollegiate athletics in a manner palatable to federal antitrust law.[9]

I. JUSTIFICATIONS FOR PROHIBITING AN ARTIFICIAL CAP ON NIL COMPENSATION TO COLLEGIATE ATHLETES

A. *Economic Justifications – The Business of College Athletics*

Notwithstanding its classification as a "nonprofit" organization, the NCAA is a business enterprise that has experienced exponential growth over the past quarter century, as has its "for profit" licensing affiliate, the Collegiate Licensing Company ("CLC"). The CLC's clients represent approximately 80% of the $4.6 billion collegiate licensing market.[10] As articulated by a former NCAA President, "'[a]mateur' defines the participants, not the enterprise," and the business of intercollegiate athletics and revenues generated by the NCAA and its member institutions substantiate this position.[11] Between fiscal years ending 1998 and 2008, the NCAA's distribution to Division I members grew from roughly $146,350,000 to $358,506,000, representing a distribution growth of 245% over the decade.[12] Five years later, in 2013, the NCAA issued a reported record distribution of $527.4 million to its Division I members, an average increase of $33.8 million per year over the period.[13]

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[9] *Id*.

[10] *About CLC*, COLLEGIATE LICENSING COMPANY, http://www.clc.com/About-CLC.aspx (last visited June 20, 2015) (the CLC represents nearly 200 of the top universities, as well as the NCAA, major athletic conferences, individual football bowl games, and the Heisman Trophy brand; collectively these entities account for 80% of the collegiate retail licensing market).

[11] Robyn Norwood, *NCAA Chief Thinks Revenue*, L.A. TIMES (Jan. 9, 2006), http://articles.latimes.com/2006/jan/09/sports/sp-ncaa9.

[12] Archive of NCAA News, *Budget Supports New NCAA Structure* (Sept. 1, 1997), http://fs.ncaa.org/Docs/NCAANewsArchive/1997/19970901/active/3431n01.html (last visited Mar. 9, 2015); NCAA Revised Budget for Fiscal Year Ended August 31, 2008 (on file with author). The cited figures solely represent the revenues distributed to Division I schools and do not include, *inter alia*, amounts retained by the NCAA for its operations, amounts generated by the CLC, amounts distributed to Division II and III members, or revenues generated by individual member institutions independent of the NCAA. The numerical estimations do not account for inflation or other variables and are not intended to provide a comprehensive analysis but are offered in order to illustrate the growth of intercollegiate athletics as a business over the past decade.

[13] Steve Berkowitz, *NCAA Has Net Assets of $627 Million, Say Records*, USA TODAY (Mar. 20, 2014), *http://www.usatoday.com/story/sports/college/2014/03/20/ncaa-expenses-revenue-money-mark-emmert/6651133/* (last visited Mar. 9, 2015). Advertising sales for the NCAA's Division I men's basketball tournament saw a similar increase over the decade as advertising sales more

Rising television and marketing rights fees have primarily contributed to the economic growth of the NCAA and its member institutions over the past 25 years, as together such fees accounted for 81% of the NCAA's total revenue in 2012.[14] Increased viewership has produced more robust media deals, as television networks have been able to obtain higher fees from their advertisers.[15] Multiple factors have contributed to the increase in overall viewership, including the expansion of basic and paid cable networks, which provide additional platforms to exhibit games and related content.[16] Recognizing the revenue opportunities derived from television media rights deals, some major conferences and universities have created their own cable networks, including the Pac-12, the Southeastern Conference ("SEC"), and the University of Texas at Austin.[17] Moreover, increased mobility and multiple platforms beyond traditional television, allow real-time viewership in virtually any location. In 2013, a reported 181 million viewers tuned in to watch March Madness via traditional television and online or mobile platforms.[18]

Multiple networks, diverging platforms, and the live nature of sporting events, have led to unprecedented media rights and advertising fees paid by content providers and sponsors. In 2010, the television broadcast network, CBS, along with Turner Sports, renegotiated CBS' eleven-year, $6 billion marketing and media rights package with the NCAA for March Madness media rights, extending the deal through 2024 at a price tag of $10.8 billion.[19] As a result, the NCAA will gain roughly $226 million *per year* over the extended term.[20] In addition to

than doubled from $239.1 million in 1998 to $545 million in 2008. *See* Toni Fitzgerald, *Swish! Big Bucks for March Madness*, MEDIA LIFE MAGAZINE (Mar. 11, 2008), http://www.medialifemagazine.com/swish-big-bucks-for-march-madness/.

[14] *See* Steve Berkowitz, *NCAA Had Record $71 Million Surplus in Fiscal 2012*, USA TODAY (May 2, 2013), http://www.usatoday.com/story/sports/college/2013/05/02/ncaa-financial-statement-surplus/2128431/.

[15] *See* Tim Arango, *Broadcast TV Faces Struggle to Remain Viable*, N.Y. TIMES (Feb. 28, 2009), http://www.nytimes.com/2009/02/28/business/media/28network.html?pagewanted=all.

[16] By way of example, since 1993, ESPN, a leading sports entertainment brand, has added multiple sister networks, including ESPN2, ESPNews, ESPNU, and ESPNClassic. *ESPN, Inc. Fact Sheet*, ESPNMEDIAZONE.COM, http://espnmediazone.com/us/espn-inc-fact-sheet/ (last visited Mar. 26, 2015).

[17] Notably, the Longhorn Network (University of Texas at Austin) and the SEC Network are owned and operated in conjunction with ESPN. *See id*.

[18] Alicia Jessop, *Viewership and Social Media Help March Madness Beat the Super Bowl in Ad Revenue Generation*, FORBES (Apr. 8, 2013), http://www.forbes.com/sites/aliciajessop/2013/04/08/viewership-and-social-media-help-march-madness-beat-the-super-bowl-in-ad-revenue-generation/.

[19] Steve McClellan, *CBS Scores with NCAA Deal*, BROADCASTING & CABLE (Mar. 3, 2003), http://www.broadcastingcable.com/news/news-articles/cbs-scores-ncaa-deal/77733; Thomas O'Toole, *NCAA Reaches 14-Year Deal with CBS/Turner That Expands to 68 Teams for Now*, USA TODAY (Apr. 22, 2010), http://content.usatoday.com/communities/campusrivalry/post/2010/04/ncaa-reaches-14-year-deal-with-cbsturner/1#.UWSWdqVgJbw.

[20] *Id*. Under the 2003 deal, CBS paid approximately $545 million, per year while under the

its deal with CBS and Turner Sports, in 2014, the NCAA entered the first year of a twelve-year agreement with the cable network ESPN worth $7.3 billion.[21] These aforementioned television and media rights deals are propelled by interest from corporate brands in the form of advertising and revenue opportunities across traditional and digital platforms. In 2012, for the first time in history, March Madness topped advertising sales of all sports at over $1 billion, surpassing the National Football League ("NFL") Playoffs and Super Bowl.[22] In ranking the value of the singular championship game among all sports, the NCAA Division I Men's Basketball Championship Game and the Football Bowl Subdivision ("FBS") title game rank second and third, respectively, in cost per thirty second (:30) advertising spot.[23] Moreover, the NCAA's sponsorship agreements with its highest-level corporate partners (e.g., AT&T, Capital One and Coca-Cola) each generate between $35 million and $50 million per year.[24]

In addition to NCAA distributions and media rights agreements, universities earn income from other sources including, but not limited to: merchandising, cash and in-kind agreements with athletic apparel and footwear companies, stadium and team sponsorships, ticketing and concessions, and alumni donations.[25] With respect to licensing, the CLC represents the NCAA and 200 of the nation's major universities, bowl games, and athletic conferences.[26] Per the CLC, the company has paid over $1 billion in royalties since its inception in 1981, and its clients account for nearly 80% of the annual $4.6 billion collegiate merchandising market.[27] By way of example, the CLC represents the University of Texas at Austin ("UT at Austin") football program, which generated $133 million in revenues for 2012–13.[28] UT at Austin is not an anomaly, as the twenty most valuable college football programs

current deal, CBS, et al. pay approximately $771 million per year.

[21] James Andrew Miller, Steve Eder & Richard Sandomir, *College Football's Most Dominant Player? It's ESPN*, N.Y. TIMES (Aug. 24, 2013), http://www.nytimes.com/2013/08/25/sports/ncaafootball/college-footballs-most-dominant-player-its-espn.html?_r=0.

[22] Anthony Crupi, *Show Me the Moneyball: March Madness Generates $1 Billion in Ad Sales*, ADWEEK (Mar. 6, 2013, 1:12 PM), http://www.adweek.com/news/television/show-me-moneyball-march-madness-generates-1-billion-ad-sales-147732.

[23] *Id*. For the 2011–12 season, the average cost per thirty second (:30) advertising spot for the top five sports team championships were as follows: 1. Super Bowl (NFL) at $3.5 million, 2. NCAA Championship Game (men's basketball) at $1.34 million, 3. FBS title game (NCAA football) at $1.14 million, 4. NBA Finals at $460,000, and 5. World Series (MLB) at $450,000. *Id.*

[24] Michael Smith, *NCAA Adding Burger King as Sponsor*, SPORTSBUSINESSDAILY (Oct. 7, 2013), http://www.sportsbusinessdaily.com/Journal/Issues/2013/10/07/Colleges/Burger-King-NCAA.aspx.

[25] Chris Smith, *College Football's Most Valuable Teams: Texas Longhorns on Top, Notre Dame Falls*, FORBES (Dec. 19, 2012), http://www.forbes.com/sites/chrissmith/2012/12/19/college-footballs-most-valuable-teams-texas-longhorns-still-on-top/#.

[26] *About CLC*, *supra* note 10.

[27] *Id.*

[28] Smith, *supra* note 25.

average revenues of $65 million per year.[29] The appeal of larger revenues has led to the so-called "conference realignment" movement, which involves expanding athletic conferences via universities transferring from one conference to another. While its effects are still to be determined, the realignment decisions of athletic conferences and universities seem unequivocally motivated by the goal of increasing their revenues; a stark departure from the initial function of athletic conferences as a means to organize competition on a regional basis.[30]

The NCAA, its member institutions, and licensees are not the only parties to profit from the business of intercollegiate athletics. As the market for college coaches becomes more competitive, so do the compensation packages. For example, following a heralded run to the "Sweet 16" as coach of the fifteenth-seeded team from Florida Gulf Coast University ("FGCU"), Andy Enfield leveraged his salary from $157,000 per year at FGCU to over $1 million per year at the more renown, University of Southern California.[31] Across Division I men's basketball, the top 10 head coaches earn a collective $26.9 million per year, exclusive of bonuses, incentives and endorsement deals.[32] In thirty-nine states, a college football or basketball coach is the highest paid government employee.[33] In addition, athletic commissioners of the so-called "Power Conferences" (i.e., the ACC, Big Ten, Big Twelve, Pac-12, and SEC) are handsomely compensated as well, each earning approximately $1 million to $1.9 million in 2010–11.[34] Lastly, the venues and cities in which the NCAA sporting events are held also cash out. As an example, the 2013 Final Four held in Atlanta generated approximately $70 million for the city.[35]

Despite the unprecedented revenues generated by intercollegiate athletics, NCAA member institutions claim that expenses are rising faster than revenues.[36] In his article, *Accounting Holds Sports*

[29] *Id.*

[30] *See, e.g.*, Mark Schlabach, *Expansion 101: What's at Stake?*, ESPN (June 9, 2010), http://sports.espn.go.com/ncf/columns/story?columnist=schlabach_mark&id=5268212.

[31] *USC Hires FGCU's Andy Enfield*, ESPN (Apr. 2, 2013), http://espn.go.com/los-angeles/mens-college-basketball/story/_/id/9123661/usc-trojans-hire-fgcu-andy-enfield-men-hoops-coach; Reuben Fischer-Baum, *Infographic: Is Your State's Highest-Paid Employee a Coach? (Probably)*, DEADSPIN (May 9, 2013), http://deadspin.com/infographic-is-your-states-highest-paid-employee-a-co-489635228.

[32] *Highest Paid College Basketball Coaches*, FORBES, http://www.forbes.com/pictures/eddf45gedg/highest-paid-college-basketball-coaches/ (last visited Feb. 24, 2014).

[33] *Id.*

[34] Steve Berkowitz, *Pac-12, ACC Commishes Got Big Pay in '10*, USA TODAY (May 23, 2012), http://usatoday30.usatoday.com/sports/college/story/2012-05-22/Commissioners-Scott-Swofford-received-huge-bumps-in-pay/55139964/1.

[35] Alicia Jessop, *Atlanta's Winning Final Four Bid Creates a $70 Million Economic Impact for the City*, FORBES (Apr. 6, 2013), http://www.forbes.com/sites/aliciajessop/2013/04/06/atlantas-winning-final-four-bid-creates-a-70-million-economic-impact-for-the-city/.

[36] *Knight Commission Plans Focus on 'Spending Problem,'* NCAA (Oct. 28, 2008), http://fs.ncaa.org/Docs/NCAANewsArchive/2008/association-

Accountable, Michael Granof, a professor at the University of Texas at Austin, Red McCombs School of Business, asserts that universities have failed by allowing athletic department accounting to drive both managerial and budgetary decisions, or in other words, by allowing athletic departments to control both their revenues and expenses.[37] As reflected in Professor Granof's analysis, athletic programs are accounted for as self-sustaining businesses with the revenues generated from Division I football and men's basketball essentially financing the expenditures of entire athletic departments.[38] For instance, although CBS and Turner entered their multi-billion dollar deal with NCAA to acquire March Madness, expenses associated with Division I championships and programs for all sports accounted for less than 9% of the NCAA's total operating budget in 2010.[39] As previously highlighted, many Division-1 football and men's basketball programs independently produce multi-million dollar profits; suggesting that the accounting practices of athletic departments and resulting fiscal failures have caused the escalation of costs, rather than a program's actual operational expenses.

B. *Legal Justifications – An Application of Federal Antitrust*

The *O'Bannon* decision focused on antitrust and did not examine the underlying alleged misappropriation of the publicity rights of College Athletes, and will likewise be the predominant focus of this discussion. In order to succeed on an antitrust claim under Section 1 of the Sherman Antitrust Act, a plaintiff must establish that: (1) there was a contract, combination, or conspiracy; (2) the agreement unreasonably restrained trade under a rule of reason or *per se* analysis; and (3) the restraint affected interstate commerce.[40] This analysis will focus on the proposed remedy prescribed by the district court under the "rule of reason" analysis.[41] In applying the rule of reason standard, the court must determine whether the restraint's harm to competition outweighs

wide/knight%2bcommission%2bplans%2bfocus%2bon%2bspending%2bproblem%2b-%2b10-28-08%2b-%2bncaa%2bnews.html.

37 Michael H. Granof, *Accounting Holds Sports Accountable*, NCAA (Nov. 22, 2004), http://fs.ncaa.org/Docs/NCAANewsArchive/2004/Editorial/accounting%2Bholds%2Bsports%2Baccountable%2B-%2B11-22-04%2Bncaa%2Bnews.html.

38 *Id.*

39 NCAA Revised Budget for Fiscal Year Ended August 31, 2010 (on file with the author).

40 Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001).

41 O'Bannon v. NCAA, 7 F.Supp.3d 955 (N.D. Cal. 2014). The *O'Bannon* Court determined that the rule of reason, as opposed to the *per se* rule of illegality was the appropriate standard, acknowledging that the Supreme Court has "expressed reluctance to adopt *per se* rules with regard to 'restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.'" *O'Bannon*, 7 F.Supp.3d at 984–85 (quoting State Oil Co. v. Khan, 522 U.S. 3, 10 (1997) (citing FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458-459 (1986))).

its procompetitive effects.[42] The plaintiff first bears the burden of establishing the anticompetitive effects of the challenged restraint.[43] Thereafter, the burden shifts to defendant to show a procompetitive justification for the restraint.[44] Finally, if the defendant is successful, the burden returns to the plaintiff to show that "any legitimate objectives can be achieved in a substantially less restrictive manner."[45]

In *O'Bannon v. NCAA*, plaintiffs specifically challenged the NCAA Division I bylaws, which prohibit college athletes from receiving compensation for use of their personal attributes, by alleging unreasonable restraint on trade in the following submarkets: (1) live telecasts and re-broadcast of games; (2) video games; and (3) archival footage.[46] The District Court for the Northern District of California held that the NCAA's alleged procompetitive purposes did not justify the challenged restraint and could be accomplished by less restrictive means.[47] However, the court also stipulated that the NCAA could implement a rule requiring that all college athletes participating on the same team, in the same class, must be equally compensated for his NIL rights and further intimated that the NCAA could cap such compensation, so long as such cap is not less than $5,000 per athlete, per year he participates in intercollegiate athletics.[48] Arguably, the court's conclusion, particularly concerning the institution of a vertical and horizontal remuneration cap (also known as "price-fixing"), raises the question of whether such a restraint is in fact permissible under the same antitrust laws relied upon by the court in its holding. The following will discuss the court's application of the "rule of reason" to the NCAA bylaws and practices in question, as well as examine how the limitations on NIL compensation as proscribed by the *O'Bannon* court may also violate the Sherman Act under an application of the same "rule of reason" analysis.

1. Anticompetitive Effects of the Alleged Restraint Argued in *O'Bannon* as Applied to the Hypothetical New Rule

Following the guidance of the *O'Bannon* court, the challenged restraint here would be a hypothetical rule implemented by the NCAA that would: (a) prohibit a university from paying (or offering to pay) a recruit greater compensation for use of his NIL than that university paid

[42] *See* California ex rel. Harris v. Safeway, Inc., 651 F.3d 1118, 1133 (9th Cir. 2011) (acknowledging the rule of reason as the applicable standard in evaluating claims arising under § 1 of the Sherman Act).
[43] Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996).
[44] *Id.*
[45] *Id.*
[46] *O'Bannon*, 7 F.Supp.3d at 993.
[47] *Id.* at 1006–07.
[48] *Id.* at 1008.

(or offered to pay) to any other recruit on the same team, in the same class; and (b) cap such compensation at $5,000 per college athlete, per year of his participation in intercollegiate athletics.[49] The first step of the test requires a showing by the plaintiff that the rule produces anticompetitive effects in the relevant market. In *O'Bannon*, the court recognized two relevant markets, the college education market and the group licensing market.[50]

In the college education market, the court noted that universities compete to offer recruits the opportunity to earn a college education and that college athletes receive financial aid in exchange for both their athletic services and for conceding rights to use of their NIL during the term of their participation.[51] The NCAA argued that universities cannot afford to engage in price-fixing because all universities compete with one another, and against both foreign and domestic professional sports leagues for an athlete's services.[52] In rejecting this argument, the court first considered a university's alleged competition with foreign leagues and determined that such leagues should be excluded from the "field of competition" under a rule of reason analysis because such leagues do not offer a collegiate educational experience as part of their compensation package.[53] The product offered by the Division I universities is therefore unique and not reasonably interchangeable with that offered by the foreign leagues. The court similarly excluded professional leagues, like the NBA and NFL, since in addition to not offering a college education, neither the NBA nor the NFL permit entry immediately following high school.[54] The court further excluded from the relevant market all NCAA members outside of Division I and FBS, since such universities typically offer limited benefits with fewer athletic scholarships (if any), smaller audiences, more basic facilities, and fewer opportunities for television and media exposure, if any.[55] The court, therefore, concluded that the relevant market should be limited to

[49] *See O'Bannon*, 7 F.Supp.3d at 1008. For purposes of this analysis, name, image and likeness shall be expanded to include other potentially protectable aspects of an individual's identity, including, but not limited to voice, signature, and jersey number, and may generally be referred to as "personal attributes" or third party use of any of the foregoing, "publicity rights." While the court set the $5,000 per College Athlete per year threshold as a floor, for the purposes of this discussion, the author assumes a hypothetical scenario where the NCAA implements the minimum amount the court suggests would be permissible. Given the history of the NCAA and general business principles of protecting profit margins, there is no reason to believe that if so implemented, the NCAA would require payments to College Athletes of an amount exceeding $5,000.

[50] *Id.* at 986.

[51] *Id.* at 987–88.

[52] *Id.* at 988.

[53] *Id.* at 966–67.

[54] *Id.* at 967.

[55] *Id.*

universities competing in Division I men's basketball and the FBS.[56]

In the group licensing market, the *O'Bannon* Court determined that the market of buyers who acquire the intellectual property and related rights necessary to telecast games, broadcast archival footage, and distribute video games, would also be in the market to obtain group licensing rights from the college athletes, if permitted by the NCAA rules.[57]

The District Court found that the cap on the amount a university may offer in the form of scholarships and the absolute prohibition on the ability of current college athletes to receive remuneration for use of their NILs causes injury to buyers and sellers in the college education market with respect to athletic services and publicity rights of perspective college athletes.[58] In essence, the restriction injures buyers who may lose prospective College Athletes they would otherwise be able to recruit if they were able to offer a more competitive compensation package than their competitors.[59] The restriction also injures sellers by suppressing the amount a prospective College Athlete may earn from his services and related rights in an open market.

Similarly, the cap and equal share arrangement proposed by the court would also injure buyers and sellers in the same market. Like the NCAA rule that prohibited a current college athlete from receiving compensation for licensing his personal attributes, a court may similarly find that a proposed rule which restricts and caps the NIL compensation to be anticompetitive under the Sherman Act as a monopsony (i.e., price-fixing among buyers, here, the universities).[60] Under this theory, potential plaintiffs could challenge the new rule as an illegal restraint, since in the absence of the new rule, a college athlete would be able to freely negotiate with universities in the education submarket for his publicity rights, whether directly or via a third party.[61] In this respect, college athletes would compete against one another over the value of their publicity rights.[62] In such a market, universities could offer, and College Athletes could select a certain university over others based on the bundle of rights that includes licensing compensation. For example,

[56] *Id.* at 968.
[57] *Id.* at 971.
[58] *Id.* at 1007.
[59] *Id*.
[60] *See generally* Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984) (citing Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982) in recognizing that horizontal agreements to fix maximum prices may be scrutinized under antitrust to the equivalent extent as agreements to fix minimum or uniform prices).
[61] *O'Bannon*, 7 F.Supp.3d at 991–92 (finding that in the absence of a monopsonistic restraint "schools would compete against one another by offering to pay more for . . . services.").
[62] *See, e.g.*, *In re* NCAA I-A Walk-On Football Players Litig., 398 F.Supp.2d 1144, 1151 (W.D. Wash. 2005) (acknowledging that the NCAA's scholarship rules may restrain trade in a so-called "input" market where universities compete for amateur football players).

elite recruits could individually or collectively leverage their market power to negotiate with universities (or athletic conferences) to determine who would offer the best compensation package. Furthermore, athletes playing certain positions, like quarterback, or who achieve status as a first team starter, could negotiate better compensation packages due to their anticipated visibility, performance, and value to the program, as contrasted with the position of back-up players. In *Law v. NCAA*, wherein a plaintiff challenged restrictions on salaries earned by assistant college basketball coaches, the Tenth Circuit found that producing lower prices for consumers does not *per se* justify depriving sellers the right to be compensated for the "normal fruits of their enterprises."[63] The restraint may also injure universities as buyers sine in the absence of the restraint, , universities could offer targeted recruits more than $5,000 per year and pool their offerings to a particular college athlete at a higher compensation level than offered to other recruits, or to offer other monetary incentives in subsequent years based upon performance. As a result, similar to the NCAA rule capping scholarships at cost-of-attendance, a proposed rule that requires equal NIL compensation to all college athletes on the same team, within the same class, and caps such compensation at $5,000 per athlete, per year of participation, would conceivably harm competition among both buyers and sellers in the college education market.

In the group licensing market, by contrast, the *O'Bannon* Court concluded that while the NCAA rule prohibiting NIL compensation may harm the plaintiffs' own business, it does not injure competition in the marketplace—a required element in establishing a cause of action under the Sherman Act.[64] Consequently, the court failed to find a cognizable harm to competition in the group licensing market, primarily because the value to a licensee would be the acquisition of rights to feature all athletes participating in the particular competition or event, as opposed to individual teams or athletes.[65] As a result, the court reasoned that teams or groups of college athletes would not be incentivized to compete against each other in a group licensing context.[66] Although this argument may be tenable with respect to tournaments or post-season competitions, the court's reasoning is partial. First, in television, college athletes on opposing teams may compete against each other in licensing their personal attributes. By way of example, college athletes playing on ranked teams, teams with larger fan-bases, or teams featuring elite athletes, may be more desirable to potential licensees. Although, the *O'Bannon* Court indicated that the

63 Law v. NCAA, 134 F.3d 1010, 1022 (10th Cir. 1998).
64 *O'Bannon*, 7 F.Supp.3d at 995.
65 *Id.*
66 *Id.*

NCAA rules prohibiting college athletes from licensing their personal attributes does not inhibit competition among universities and athletic conferences as sellers in either the television or video game submarkets, the deduction assumes that introducing the element of player licensing would have no effect on the agreements entered into between the universities or athletic conferences and third party licensees.[67] Introducing uncapped player licensing may not only incentivize competition among sellers in the marketplace but also among buyers who may be willing to recognize higher license fees to College Athletes in the overall package in order to secure such rights over their competitors.

2. The NCAA's Procompetitive Justifications Argued in *O'Bannon* as Applied to the Hypothetical New Rule

In its defense, the NCAA argued the following procompetitive justifications: (1) the preservation of amateurism; (2) promoting competitive balance amongst its members; (3) the integration of academics and athletics; and (4) the ability to generate greater output in the relevant markets.[68] The *O'Bannon* Court rejected each of the NCAA's procompetitive arguments regarding the NCAA rule that prohibited current college athletes from receiving any form of compensation in licensing of their NIL.[69] A court could reasonably conclude that the newly proposed restraint restricting the amount of NIL compensation payable to a current College Athlete likewise does not have any persuasive procompetitive purpose.

a. The Preservation of Amateurism

The NCAA has long relied on the preservation of amateurism in its defense against antitrust, breach of contract, workers compensation and other claims challenging its rules and bylaws.[70] In departing from the reasoning in prior cases, the *O'Bannon* Court clarified that the Supreme Court's decision in *NCAA v. Board of Regents* does not stand for the

[67] *Id.* at 998 (concluding that the NCAA does not restrain the submarket for licensing archival footage since the rights are managed by a third party agent. The agreement requires the agent to acquire the pertinent rights from former college athletes and prohibits the agent from licensing any footage featuring current college athletes).

[68] *Id.*

[69] *Id.* at 999.

[70] Prior to the *O'Bannon* Decision, the courts consistently recognized the NCAA's right to preserve amateurism, as first articulated by the District Court in Justice v. NCAA, 577 F. Supp. 356, 370 (D. Ariz. 1983). *See also In re* NCAA 1-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144 (W.D. Wash. 2005) (alleging antitrust with respect to rules specifically pertaining to so-called "walk-on" football athletes); Bloom v. NCAA, 93 P.3d 621 (Colo. App. 2004) (alleging breach of contract and arbitrary and capricious action by the NCAA); and Rensing v. Ind. State Univ., 444 N.E.2d 1170, 1175 (Ind. 1983) (holding that collegiate athletes are not employees for workers compensation purposes).

broad proposition that college athletes cannot or should not be paid for the commercial exploitation of their personal attributes and, furthermore, does not reflect changes in the market and business of intercollegiate athletics over the past thirty years.[71] The court additionally noted that the NCAA has been inconsistent in its definition and application of "amateurism."[72] Since its inception, the NCAA has redefined the term "amateur" as needed, and the courts have permitted the NCAA to do so.[73] In addition to the definition itself being fluid, the NCAA applies the term differently across various sports. The *O'Bannon* court cited an example of a tennis player who would be considered an "amateur" for the purposes of preserving his/her NCAA eligibility, even if he/she accepts prize money for participating in athletics prior to entering college, while a track and field athlete would forfeit his/her athletic eligibility doing the same.[74] Despite these inconsistencies, the *O'Bannon* Court stated that such an argument could be persuasive if the absence of a particular restraint results in a negative impact on demand for intercollegiate athletic competition.[75] Accordingly, the NCAA presented consumer opinion surveys, which suggested that demand for intercollegiate athletics might decrease if college athletes are compensated beyond cost-of-attendance.[76] The court ultimately found the evidence unpersuasive on the grounds that the survey questions lacked specificity and were generally insufficient in light of other evidence presented by Plaintiffs, which indicated that geography and alumni loyalty were more significant factors in consumer demand.[77] Although the court found the surveys to be inconsequential, as a prelude to the proposed remedy, the court suggested that the surveys do support the conclusion that unrestricted compensation to college athletes may negatively affect demand.[78] However, this suggestion does not appear conclusive in the court's own reasoning, as the plaintiffs presented evidence, relied upon by the court, showing the opposite effect.[79] For instance, despite public opinion polls to the contrary, demand for the Olympics increased after allowing professionals to participate, as did demand for professional sports, including Major League Baseball, when

[71] *O'Bannon*, 7 F.Supp.3d at 995, 999 (citing NCAA v. Bd. of Regents, 468 U.S. 85 (1984) in finding that the portion of the Supreme Court's decision that states "in order to preserve the quality of the NCAA's product, student-athletes 'must not be paid,'" was essentially *dicta* and was not based upon any factual findings at trial).
[72] *Id.* at 1000.
[73] *See, e.g.*, *Bloom*, 93 P.3d at 626.
[74] *O'Bannon*, 7 F.Supp.3d at 1000.
[75] *Id.* 1001 (acknowledging that if the restraint maximized consumer demand, it would have legitimate procompetitive purposes).
[76] *Id.* at 975.
[77] *Id.* at 976–78.
[78] *Id. at* 1000–01.
[79] *Id.*

salaries increased.[80] Furthermore, an analysis of Major League Baseball teams shows a positive correlation between the amount of money a team spends on its player payroll and the overall attendance at its games.[81] In other words, contrary to the results of public opinion surveys, the more a team pays its players, the greater the consumer demand, whereas the higher payrolls do not necessarily correlate to the success of the team.[82] Even assuming, in favor of the NCAA, that compensation results in lower demand, the amount paid to college athletes should be dictated by the market, not artificially prescribed by the NCAA as a price-fixing scheme. Moreover, whether college athletes in the same class share the licensing royalties equally or in some other designated proportion, would have no bearing on an athlete's status as an amateur.

b. Maintaining Competitive Balance

The NCAA has also previously advanced the competitive balance argument in defending antitrust claims.[83] Courts in prior antitrust decisions have acknowledged a legitimate procompetitive purpose where the competitive balance increases demand for the product of athletic competition.[84] Expert testimony in *O'Bannon* noted that the consensus among sports economists is that the absolute prohibition of compensation imposed by the NCAA does *not* affect competitive balance.[85] Without a cap, each university would only pay its college athletes an amount the market (and its respective athletic budget) could bear, providing an inherent cap without the necessity of artificial price-fixing by the NCAA. In response, the NCAA could counter that universities with larger athletic budgets could simply offer their recruits greater compensation in comparison to other universities, creating a competitive imbalance. However, the NCAA was unsuccessful in persuading the court that demand for intercollegiate athletics would decrease without competitive balance.[86] The *O'Bannon* Court noted in

[80] *Id.*

[81] For 2013, of the top fifteen MLB teams with the highest player payrolls, fourteen teams (except for the Chicago White Sox) also landed in the top fifteen for highest season attendance. *See MLB Attendance Report – 2013*, ESPN, http://espn.go.com/mlb/attendance/_/year/2013 (last visited Sept. 15, 2014); *2013 Baseball Payrolls, List*, CBSSPORTS (Apr. 1, 2013), http://www.cbssports.com/mlb/story/21989238/baseball-payrolls-list.

[82] *Id.* In direct contrast to the abovementioned spending-attendance correlation, only half of the teams participating in the 2013 postseason were listed as one of the top fifteen teams with the highest player payrolls. *See 2013 MLB Postseason Schedule*, MLB.COM, http://mlb.mlb.com/mlb/schedule/ps.jsp?y=13 (last visited Sept. 15, 2014) (for a list of teams participating in the 2013 MLB Postseason).

[83] *See, e.g.*, NCAA v. Bd. of Regents, 468 U.S. 85 (1984).

[84] *See* Am. Needle, Inc. v. NFL, 560 U.S. 183, 204 (2010) ("We have recognized, for example, 'that the interest in maintaining a competitive balance' among 'athletic teams is legitimate and important.'" (quoting *Board of Regents*, 468 U.S. at 117)).

[85] *O'Bannon*, 7 F.Supp.3d 1001.

[86] *Id.* at 1002.

dicta that the current NCAA revenue distribution model primarily rewards the universities most successful in athletic competition with a greater share of the revenues.[87] As a result, these universities can offer recruits more substantial in-kind benefits, like facilities, accommodations, resources and access, and thereby continue to acquire top athletic talent and excel competitively.[88] In addition, for the NCAA to argue that disparate payments to universities do not affect competitive balance, but disparate payments to individual college athletes in the same class, or attending the same university, would definitively affect competitive balance is unsubstantiated and questionable in light of inherent caps that would be set by the market. Moreover, the licensees, rather than the universities, may bear some, if not all, of the cost of the licensing fees, thus having a minimal financial impact on the university. Even without a cap, the market would dictate the level of compensation, and therefore, the proposed restraint would do little to produce a greater level of competitive balance amongst the universities then currently exists, and even if eliminating a cap produced a level of imbalance, such imbalance would be unlikely to adversely affect demand for intercollegiate athletics any more significantly than the current revenue distribution model.

c. Integration of Athletics and Academics

The NCAA offered a third procompetitve justification regarding the integration of athletics and academics. The NCAA argued that its prohibition on NIL compensation is procompetitive by ensuring that its athletes receive the personal and academic value of the collegiate experience, including integration of athletes with the student body. In support, NCAA President, Dr. Emmert, testified that wealthy students present similar concerns, although no such rules are similarly instituted to control the amount of money these students can earn, possess and/or spend.[89] The court determined that the absolute prohibition on NIL compensation is not necessary to achieve these results, as the *O'Bannon* Plaintiffs were not challenging, *inter alia*, rules that integrated athletes in student housing or that limited practice hours.[90] The NCAA's point was not supported by empirical evidence that wealthier or well-known students are not in fact integrated into a university at the same level as other students. The argument is further undermined by the fact that certain College Athletes may already be among the class of wealthy students attending the university, and even if they are not, can reach "celebrity" status through television and media exposure thereby

[87] *Id.* at 979.
[88] *Id.*
[89] *Id.* at 980.
[90] *Id*.

becoming distinguishable from the general student population and recognizable like movie stars and other entertainers.

In fact, a college athlete's athletic obligations, and not his level of compensation, have a greater impact on his integration into academics. In an article by Robert McCormick and Amy McCormick, the authors reported the findings of interviews they conducted with current and former college athletes, which revealed that during the football season (which consists of fourteen to nineteen weeks, commencing approximately two (2) weeks prior to the start of the fall semester and continuing through the end of the semester—or several weeks longer if the athlete participates in a post-season bowl or playoff game), a Division I football player committed 53 hours per week to football-related activities required by his team.[91] A poll conducted by the NCAA similarly shows that FBS athletes commit approximately 43 hours per week to their sport, with Division I men's basketball and baseball athletes committing comparable amounts of time during their respective seasons.[92] This time commitment does not include travel to and from games played away from campus or the college athlete's academic obligations.[93] The surveys, when viewed in conjunction with the academic year, affirms that college athletes commit more time to their sport than to their academics.[94] Due to practice schedules and athletic obligations, college athletes are often prohibited from enrolling in afternoon classes, severely limiting the athlete's ability to shape his or her academic curriculum and meet the minimum academic requirements of most majors.[95] A *USA Today* report determined that athletes at most Division I universities disproportionately cluster in particular majors as compared to the overall student body, the results heavily favoring social science majors, which typically demand less rigid requirements.[96] In another *USA Today* article, a former Kansas State University football player expressed regret in selecting a social science major, which he called a "waste" and claimed that a bad grade in a freshman biology course led his academic advisor to urge him to major in the social sciences, an "easier path."[97] C. Keith Harrison, an associate professor at

[91] Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as an Employee*, 81 WASH. L. REV. 71, 98–100 (2006).
[92] Steve Wieberg, *NCAA Survey Delves into Practice Time, Coaches' Trust*, USA TODAY (Jan. 15, 2011), http://usatoday30.usatoday.com/sports/college/2011-01-14-ncaa-survey_N.htm.
[93] McCormick & McCormick, *supra* note 91, at 98.
[94] *Id.*
[95] *Id.* One interviewee estimated that despite his best efforts to schedule classes around his sport-related obligations, he typically missed 15–20% of his classes.
[96] Jodi Upton & Kristen Novak, *College Athletes Cluster Majors at Most Schools*, USA TODAY (Nov. 19, 2008), http://usatoday30.usatoday.com/sports/college/2008-11-18-majors-graphic_N.htm.
[97] Jill Lieber Steeg, et al., *College Athletes Studies Guided Toward 'Major in Eligibility'*, USA TODAY (Nov. 19, 2008), http://usatoday30.usatoday.com/sports/college/2008-11-18-majors-

the University of Central Florida, described the phenomenon of diluting academic schedules with less intensive or "easier" classes for college athletes, masked by higher graduation rates, as "majoring in eligibility."[98] Limiting NIL compensation alone would have a negligible, if any, impact, as a College Athlete's athletic obligations are more detrimental to his integration with academics. Therefore, uncapping NIL compensation would not affect the NCAA's ability to integrate college athletes academically, any more significantly than currently affected by the student-athlete's participation in intercollegiate athletics. As in the *O'Bannon* reasoning, in challenging the hypothetical new rule, the NCAA would be able to achieve its goals by instituting a minimum grade point average ("G.P.A."), minimum units of coursework, integrated student housing, limited practice hours, and other such rules to promote the integration of College Athletes into the university's academic programs and student life.

d. Increased Product Output

Finally, the NCAA argued that the restraint promotes greater product output in the relevant markets by attracting universities committed to the principle of amateurism and enabling the participation of universities who, absent the restraint, could not afford to do so.[99] The *O'Bannon* Court observed that the Power Conferences had recently sought more autonomy from the NCAA in order to implement their own rules, including those related to scholarships and other compensation afforded to college athletes, exposing a lack of commitment to the NCAA's current definition of amateurism.[100] If the NCAA modified its current definition of amateurism to permit NIL compensation with a hypothetical cap of $5,000, it may likewise be difficult to establish that its cap on compensation attracts potential membership, since the appeal largely stems from the national exposure afforded NCAA members and the ability of its members to monetize that exposure, as highlighted by

cover_N.htm. According to the study, 34% of Kansas State football players majored in social sciences as compared with 4% of the population of juniors and seniors at Kansas State.

98 *Id*. *See also* David Pargman, *End the Charade: Let Athletes Major in Sports*, THE CHRONICLE OF HIGHER EDUCATION (Nov. 26, 2012), http://chronicle.com/article/End-the-Charade-Let-Athletes/135894/.

99 O'Bannon v. NCAA, 7 F.Supp.3d 955, 981 (N.D. Cal. 2014).

100 *Id*. Perhaps not so coincidentally, in early August 2014, the Division I Board of Directors voted 16-2 to adopt a proposal that would grant the five so-called power conferences the authority to independently institute certain rules regarding collegiate athletes, such as a stipend to provide for disparities between the grant-in-aid scholarships and actual cost-of-attendance related to the respective university. *See* John Solomon, *NCAA Adopts New Division I Model Giving Power 5 Autonomy*, CBS SPORTS (Aug. 7, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24651709/ncaa-adopts-new-division-i-model-giving-power-5-autonomy (stating that NCAA members may veto the proposal, but if approved, the Power Conferences will submit their proposed rule changes for official adoption at the 2015–16 NCAA Convention).

the court.[101] Furthermore, the court noted that the current NCAA revenue model does not provide any revenue sharing structure by which higher revenue generating programs subsidize lower revenue generating programs.[102] Hence, the manner in which a university distributes the licensing compensation to its athletes, whether equally or proportionate to certain factors, would have no bearing on the participation of lower revenue generating athletic programs in the NCAA, since even under the new rule proposed by the *O'Bannon* Court, the universities would make independent decisions regarding NIL compensation to its college athletes. Even if the NCAA could show evidence that its cap on NIL compensation would result in a greater number of scholarships available to other students, the justification is unsound because it considers outside markets. The relevant market solely concerns Division I men's basketball and the FBS, and regardless of NIL compensation, other NCAA rules specifically limit the number of scholarships a university may carry in its football and men's basketball programs.[103] It would be difficult for the NCAA to provide any evidence establishing that fewer scholarships in these particular sports would become available without the restraint or that more scholarships would otherwise be practicable given the limited number of positions available to play each respective sport. Like the plaintiffs in *O'Bannon*, plaintiffs challenging the new restraint would not *require* universities to compensate college athletes above the $5,000 minimum or in a non-equal proportion, only that each university be *permitted* to do so.[104]

3. How the Procompetitive Justifications can be Accomplished by Less Restrictive Means

As acknowledged by the district court, *O'Bannon* plaintiffs merely sought to enjoin the NCAA from barring their ability to earn compensation from the use of their personal attributes, not mandate any particular level of compensation.[105] Therefore, the new hypothetical rule suggested by the court contradicts the foregoing position. The *O'Bannon* Court does not provide any legitimate legal rationale for imposing a $5,000 minimum or reasoning for how paying variable amounts to college athletes within the same class would inhibit any of the NCAA's alleged procompetitive purposes, including consumer demand for intercollegiate athletics. As proscribed by the court, a university may offer compensation to its own athletes in amounts disparate to that paid by other universities to its College Athletes or

[101] *O'Bannon*, 7 F.Supp.3d at 981.
[102] *Id*. at 1004.
[103] NCAA MANUAL *supra* note 2, at §§ 15.5.5.1 & 15.5.6.
[104] *O'Bannon*, 7 F.Supp.3d at 1004.
[105] *Id.*

even offer disparate amounts to each class of college athletes on the same team. Consequently, neither the NCAA nor the court provides any procompetitive justification for why licensing compensation payable to college athletes requires price-fixing and cannot be a function of the open market.[106] In fact, the court's own analysis and the foregoing discussion support the conclusion that such newly proposed limitations would not withstand an antitrust challenge.[107] Without valid procompetitive justifications, a pricing scheme that fixes the value of licensing rights for college athletes at $5,000 per year is as much of a pricing scheme as one that fixes the value at zero. While certain rules may be appropriate in managing a royalty-based system on behalf of college athletes, like holding the funds in trust until his eligibility expires or terminates, such rules would be far less restrictive than the newly proposed rule.

As the court suggested throughout the *O'Bannon* decision, college athletes may elect to manage the licensing of their personal attributes either directly or via a third party agent.[108] In professional team sports, labor unions representing professional athletes control the group licensing rights of their members.[109] In the absence of a labor union, current and former college athletes could join an organization to negotiate, manage, administer and enforce their group licensing rights specifically with respect to the NCAA and their college teams. As later discussed, the formation of such an organization would not only permit an adequate level of compensation to College Athletes for use of their personal attributes, but provide a mechanism by which all student-athletes may be compensated for use of their NIL, regardless of sport or gender.

II. A LESS RESTRICTIVE MEANS – A LICENSING ORGANIZATION FOR COLLEGIATE ATHLETES

A case filed in the District Court of New Jersey raises antitrust challenges to business practices and agreements entered into by the NCAA and the Power Conferences.[110] The complaint requests that the

[106] *Id.* at 1008 (stating in *dicta*, without analysis, that the proposed $5,000 NIL compensation comparably reflects the amount of money a student-athlete may receive in the form of a Pell Grant, as well as the amount a tennis player may earn from his or her sport prior to enrollment).

[107] *Id.* at 1007–08 (prohibiting universities from unlawfully conspiring with one another in setting NIL compensation, yet also acknowledging the right of the NCAA to set a cap on such compensation).

[108] *Id.* at 994.

[109] *See, e.g.*, *The Players Choice Group Licensing Program*, MLBPLAYERS.COM, http://mlbplayers.mlb.com/pa/info/licensing.jsp (last visited Mar. 29, 2015).

[110] Complaint at 1, Jenkins v. NCAA, No. 3:14CV01678, 2014 WL 1008526 (D.N.J. Mar. 17, 2014) (class action lawsuit alleging antitrust allegations against the NCAA and its major Division I athletic conferences in connection with restrictions on compensation to the class of athletes engaged in the Division I FBS and men's basketball).

court enjoin the NCAA from enforcing all rules that "prohibit, cap or otherwise limit remuneration and benefits" to college athletes.[111] To that end, a less restrictive means of promoting competitive balance that is consistent with both the NCAA's alleged procompetitive arguments and the *O'Bannon* Court's rationale for its proposed new rule, would be to remove any cap on licensing compensation payable to current college athletes and establish a group licensing organization to represent the publicity and related rights of current and former college athletes.[112]

In establishing a basis for the NIL rights of College Athletes, the courts have landed on opposing sides of the related causes of action, particularly with respect to the right of publicity. In *O'Bannon*, although not specifically analyzed by the Court, Judge Wilken rejected the NCAA's argument that college athletes have no rights under intellectual and personal property theories, and further determined that college athletes had an interest in television revenues, despite the NCAA's First Amendment argument and recognition that certain states prohibit college athletes from receiving any such compensation by statute.[113] In comparison, the District Court for the Middle District of Tennessee recently dismissed causes of action alleged by a group of former College Athletes, which included, violations of federal law under the Sherman Act and Lanham Act, as well as the right of publicity, civil conspiracy, and unjust enrichment under Tennessee state and common law.[114] Plaintiffs did not name the NCAA as a defendant, but named television broadcast and cable networks, athletic conferences and licensing agents.[115] Similarly, in *Dryer, et al. v. NFL Films, Inc.*, the District Court of Minnesota dismissed the claims of three retired NFL players who opted out of a class action settlement upheld by the District Court of Minnesota found their individual claims under the Lanham Act and the right of publicity of multiple states in connection with NFL documentary-style programs featuring game footage and interviews.[116]

Despite the foregoing decisions, the law is not settled. For example, *Marshall* focused on broadcast of games, and the Court held that Tennessee's statutory right of publicity explicitly excepts sports broadcasts and limits violations to use of an individual's name,

[111] *Id.* This case has since been transferred to N.D. Cal., and was then consolidated with another case. It is now called *In re* NCAA Athletic Grant-in-Aid Antitrust Litigation, 24 F.Supp.3d 1366 (J.P.M.L. 2014).

[112] The Court acknowledged that the NCAA rules do not apply to former college athletes, who are permitted to receive compensation for their publicity rights. O'Bannon v. NCAA, 7 F.Supp.3d 955, 983 (N.D. Cal. 2014).

[113] *O'Bannon*, 7 F.Supp.3d at 1004.

[114] Marshall, et al. v. ESPN, Inc., et al., No. 3:14-01945, *7 (M.D. Tenn. June 4, 2015).

[115] *Id*. at *2.

[116] Dryer, et al. v. Nat'l Football League, Inc., Civil No. 09-2182-PAM/FLN (D.Minn. Oct, 10, 2014).

photograph or likeness "for the purposes of *advertising*," which element Plaintiffs did not allege.[117] Moreover, in highlighting a contrary holding *In re* NCAA Name & Likeness Litigation, the District Court asserted that if the Northern District of California case had any relevance to its analysis of *Marshall*, its relevance would be the contention that there *might* be a right of publicity under Minnesota law for sports broadcasts.[118] Distinguishable from *Marshall*, the *Dryer* Court focused on documentary-style programs featuring game footage and interviews rather than sports broadcasts, but like the *Marshall* Court, recognized that its decision would be limited to the three named Plaintiffs, and that the analysis required to determine whether any of the "thousands of original Plaintiffs" could establish a genuine issue of fact would be very different.[119] With no federal right of publicity, and given the diverging body of state law in this area, potential licensees may reasonably elect to enter agreements to acquire such rights from College Athletes in an attempt to preempt litigation and reconcile inconsistencies among state laws.[120] As the *O'Bannon* Court reasoned, even if such rights are in fact ambiguous, businesses commonly acquire "uncertain" rights in order to mitigate potential legal issues.[121]

While *O'Bannon, Marshall and Dryer* focused exclusively on television, video games and archival footage, the foregoing categories are not an exhaustive list of the revenue streams from which college athletes may receive compensation for their publicity and related NIL rights, which may include without limitation, merchandising, digital media, advertising, and memorabilia. The discussion below will address multiple revenue streams in which parties currently and may potentially feature the personal attributes of college athletes.

A. *Management of Intellectual and Personal Property Rights in Sports and Entertainment*

The sports and entertainment industries operate under both labor and employment and intellectual property frameworks. First, the major professional team sports as well as the television and motion picture industries are organized under labor law, where, *inter alia*, professional athletes, actors, writers, and directors unionize pursuant to the National

117 *Marshall*, No. 3:14-01945, *11 (M.D. Tenn. June 4, 2015) (emphasis added).
118 *Id*.
119 *Dryer*, Civil No. 09-2182-PAM/FLN, *5 (D.Minn. Oct, 10, 2014).
120 Among the states that recognize the right, states are inconsistent not only in the scope of protections but also in the legal rationale, whether such rights should arise under privacy rights, personal property and/or intellectual property. *Compare* N.Y. CIV. RIGHTS LAW § 50 (Consol. 2000) (recognizing a statutory right of privacy solely in an individual's name, portrait or picture), *with* CAL. CIV. CODE § 3344 (West 2007) (recognizing a statutory right of publicity in an individual's name, voice, signature, photograph, and likeness).
121 *Id.*

Labor Relations Act ("NLRA") in order to promote their respective common interests.[122]

Secondly, in the music industry, in addition to direct agreements, the performing rights organizations manage the non-dramatic, public performance rights of publishers, musicians, composers, producers and writers, under a royalty-based licensing system governed by federal copyright law, in lieu of managing such rights via a labor union.[123] The performing rights organizations (i.e., the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and the Society of European Stage Authors and Composers ("SESAC")) negotiate, manage and distribute royalties to their members (e.g., authors, composers, and publishers), which arise from the public performance of non-dramatic musical compositions, as public performance is one of the bundle of rights afforded copyright holders.[124] U.S. Supreme Court affirmed the scope of the right in *Herbert v. Stanley Co*. [125] In 1913, Victor Herbert sued a restaurant that played a song he had composed without having obtained his consent.[126] After further exploration, Herbert discovered that there were unauthorized public performances occurring in multiple venues.[127] After granting *certiorari*, the Supreme Court held in favor of Herbert finding that a copyright holder has the right to compensation for the public performance of his or her work, regardless of whether any admission fee was charged.[128] In order to coordinate their collective interests, the venue owners organized in their defense of the legal actions.[129] In response to the venue owners, a group of composers and publishers joined in solidarity to form ASCAP.[130] Following *Herbert*, the federal courts extended the performance right to radio broadcasts, nightclubs, movie theatres and other venues.[131] Today, the public performance right also reaches television and digital media platforms.[132] In addition,

122 National Labor Relations Act, 29 U.S.C. §§ 151–69 (2014).

123 17 U.S.C. § 101 (2010) (defining a "performing rights society" as "an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.").

124 17 U.S.C. §§ 106(a)(4) & (6) (2010) (recognizing the right of a copyright holder to publicly perform musical works, as well as the right to publicly perform a sound recording by digital audio transmission). *See, e.g.*, *About ASCAP*, ASCAP, http://www.ascap.com/about/ (last visited Feb. 23, 2014).

125 Herbert v. Stanley Co., 242 U.S. 591, at 595 (1917).

126 Richard Ergo, Comment, *ASCAP and the Antitrust Laws: the Story of Reasonable Compromise*, 1 DUKE L.J. 258, 260 (1959).

127 *Id.*

128 *Herbert*, 242 U.S. at 595.

129 *See* Ergo *supra* note 126, at 259.

130 *Id.* at 259–60.

131 *Id.* at 260.

132 17 U.S.C. §§ 106(a)(4) and (6) (2010).

SESAC and BMI have since joined ASCAP in the management of public performance rights (each commonly referred to as a, "Performing Rights Organization" or "PRO"). Together, the aforementioned performing rights organizations represent over 1,000,000 composers, songwriters, lyricists and music publishers generating royalties of over $1 billion each year.[133]

For various reasons beyond the scope of this article, even if College Athletes may be deemed employees under the applicable laws, a royalty-based system may be preferable to a wage-based system with respect to compensating college athletes. In lieu of unionizing collegiate athletes, whereby the applicable collective bargaining agreements would set forth related compensation and the labor union would manage group licensing, the formation of a licensing organization akin to the function of both the players associations and performing rights organizations in managing the collective rights of their respective members, would provide a viable, less restrictive, means by which to compensate college athletes for exploitation of their publicity rights.

While group licensing in professional sports can serve as a guide for creating a licensing organization for college athletes, the differences between professional sports and intercollegiate athletics warrant a novel approach to its management. A potential model for compensating college athletes on a royalty basis would involve a hybrid of group licensing agreements, as commonly relied upon by professional sports leagues and licensing arrangements, as prescribed by Congress, the United States courts and performing rights associations in the context of musical works. For the purposes of this article, such a licensing organization shall be hereinafter referred to as the Collegiate Athletes Licensing Association ("CALA").[134] Using the music industry and professional sports as a template, this article shall further discuss the potential revenue sources, formulas and operations of such a licensing organization for collegiate athletes. For the sake of clarity, CALA could

[133] *See, e.g.*, *About ASCAP supra* note 124. ASCAP represents a purported 500,000 rights holders. BMI represents a purported 600,000 rights holders. *What We Do*, BMI, http://www.bmi.com/about (last visited Sept. 16, 2014). *See also* Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, 24 COLUM.-VLA J.L. & ARTS 349, 350 (2001) (regarding the amount of license fees paid to ASCAP and BMI).

[134] The *O'Bannon* Court also suggested that the universities may represent current college athletes in licensing agreements. O'Bannon v. NCAA, 7 F.Supp.3d 955, 994 (N.D. Cal. 2014). However, having the university represent its athletes would produce a conflict of interest, as the university and college athletes may have adverse interests with respect to the amount of compensation allocated towards publicity rights, particularly given the historically adversarial position of the NCAA and general opposition of athletic directors with respect to any form of "pay-for-play." *See, e.g.*, Adam Jacobi, *College Athletic Directors Slam 'Pay-for-Play' in Mass Statement*, SB NATION (Sept. 25, 2013, 8:32 PM), http://www.sbnation.com/college-football/2013/9/25/4769638/college-sports-pay-for-play-athletic-directors.

represent the interests of all current and former college athletes in the management of their publicity rights, including the negotiation, collection, distribution and enforcement of licenses.[135]

B. *Players Associations and Performing Rights Organizations – Methods of Licensing*

While individual negotiation and contracting for the rights of college athletes would remain an alternative, individual or "direct" licensing involves high transactional costs in the expense and time required to identify, locate and negotiate agreements with each athlete. The number of college athletes and the nature of licensing would be managed more efficiently by an organization, like CALA, that would administer, collect, and enforce the licensing agreements of college athletes'. CALA would thereby negotiate or establish rates for the licensing of publicity rights, based on the scope of rights requested by the licensee. In addition to individual or direct licensing, there are three licensing arrangements common among professional team sports and the music industry include the blanket license, the compulsory (or mechanical license) and the group license, each as summarized below.

1. The Compulsory License

A compulsory license permits licensees to reproduce and/or distribute non-dramatic musical compositions for private use.[136] In other words, the compulsory license grants manufacturers and/or distributors the right to make copies of music for sale to the public in the form of CD's, digital downloads, etc. Although a PRO manages the distribution of compulsory license fees to its members, it does not set the licensing fees, as public performance rights are not triggered in the physical manufacture and sale.[137] The terms and conditions of the compulsory license are governed by the United State Copyright Office and Section 115 of the Copyright Act.[138] Accordingly, while the

135 The NFLPA represents current NFL players in connection with their collegiate licensing. *See NFL Players Inc. Goes Back to College with New Co-Branded Partnerships*, NFL PLAYERS, INC. (Dec. 5, 2014), https://www.nflpa.com/players/news/nfl-players-inc-goes-back-to-college-with-new-co-branded-partnerships. Therefore, CALA would represent all current and former collegiate athletes not otherwise represented, including, but not limited to, active and retired NBA players as well as former college athletes who did not play in the NBA or NFL.

136 *See generally* Copyright Act, 17 U.S.C.A. § 115 (2010) (regarding scope and requirements of obtaining a compulsory license).

137 *See, e.g.*, BMI, ROYALTY POLICY MANUAL, *available at* http://www.bmi.com/creators/royalty_print/detail (last updated Jan 16, 2015).

138 17 U.S.C. §115 (2010). In an effort to keep pace with the changing digital landscape and the transition from hard copy to digital distribution of music, the United States Congress enacted the Digital Performance Right in Sound Recordings Act of 1995 Pub.L. 104-39, 109 Stat. 336 (1995) (codified at 17 U.S.C. §§ 101, 106, 111, 114–15, 119, 801–03) (hereinafter "DPRA"), which extended the public performance right to sound recordings by means of digital audio transmission. The DPRA prescribes specific means of licensing based on the anticipated risk of

licensor has the option to negotiate directly with the rights holder(s), unlike other licensing arrangements, the consent of a rights holder is not required, so the potential licensee can circumvent the rights holder(s) if negotiations stall or would otherwise become too costly.[139] A compulsory license could therefore be useful with respect to the resale of certain collegiate products and merchandise, like jerseys and video games. As with music singles and albums sold via third party retailers, jerseys are mass-produced and sold through numerous vendors, including brick-and-mortar retailers, pop-up shops and online, so the application of a compulsory license may be more practicable for both CALA and the licensees.

2. The Group License

Group licensing is common among professional team sports and may be entered on an exclusive or non-exclusive basis. Each union, (also known as players associations), manages the group licensing of its respective members.[140] Although the minimum number of players varies by collective bargaining agreement, typically where three or more current athletes are featured, a potential licensor would be required to enter a group licensing agreement rather than contract with the athletes individually.[141] In the absence of a union, CALA would similarly manage the group licensing rights of its current and former members.

In connection with performance rights organizations, the group license is non-exclusive and traditionally comes in the form of a "blanket license," which grants its licensees access to the organization's entire repertory or a "program license," which grants a license based on time period and/or broadcast region.[142] In the context of College Athletes, the group license would provide flexibility by permitting either a "blanket" license, which would grant the NIL rights of all College Athletes across a conference, sport and/or the NCAA or a "semi-blanket" license, which would grant NIL rights of College Athletes from a limited number of teams or multiple College Athletes across a number of teams, where the blanket license is too broad or expensive. Such agreements could therefore be entered on a team-by-team basis or for a select group of college athletes, as applicable. A

financial loss in accordance with the given use.

139 *Id.* § 115(c)(3)(B).

140 With respect to the NBA, the NBA controls the group licensing rights of its players pursuant to a licensing "buyout" agreement between the NBA and NBPA, the terms of which are confidential.

141 *See* NFL PLAYERS INC. *supra* note 135. For reference, in the NFL licensing the rights of six (6) or more players requires a group license, and in the MLB, licensing three (3) or more players requires a group license. *See MLBPA Info*, MLBPLAYERS.COM, http://mlb.mlb.com/pa/info/licensing.jsp (last visited Mar. 17, 2015).

142 *See e.g.*, BMI ROYALTY POLICY MANUAL, *supra* note 137 (follow "U.S. Television Royalties" hyperlink).

university, athletic conference, or the CLC could even enter group licensing agreements directly with current collegiate athletes via CALA. The parties could agree that certain categories of merchandising would be exclusive to the university (e.g., jerseys), athletic conference (e.g., trading cards), and CLC (e.g., video games), which would simultaneously allow the NCAA and its member institutions to advance their mutually beneficial economic interests.

3. Distribution of License Fees

PROs generally "follow the money," meaning that rather than aggregating license fees from all revenues sources into a single bucket for distribution, the PRO establishes separate pots according to the medium or type of use (e.g., television, radio, mobile and online and restaurant/retail store).[143] Unlike PROs, players associations commonly distribute the licensing royalties equally among the union membership, whereas Each PRO has its own method of weighting the licensed music performances to determine how to proportionately distributed such royalties to its members.[144] Similarly, whether CALA should distribute its royalties equally or according to a weighted formula would depend on the nature of the use.

III. THE FORMATION OF CALA – REVENUE SOURCES, LICENSING METHODOLOGY & ADMINISTRATION

In forming CALA, identifying revenue sources and instituting workable distribution formulas would be as critical as identifying the methods of licensing. Again, both professional team sports and the music industry can serve as a guide to CALA in developing formulas that would allow for comparable and efficient compensation of CALA's members.

Like the sports and music industries, the acquisition of rights in the context of intercollegiate athletics is often a multi-tiered process. For example, in music, depending on the rights desired, licensees may be required to obtain rights from the publishers, musicians, writers and performers, and in professional team sports, licensees may be required to obtain rights from the league, teams, and athletes. Similarly, third parties seeking to obtain licenses in connection with intercollegiate athletics may be required to obtain rights from the NCAA, the athletic conference, the university and/or the College Athlete. Although the

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143 *See e.g.,* ASCAP'S SURVEYS AND DISTRIBUTION SYSTEM: RULES & POLICIES, § 1.5, *available at* http://www.ascap.com/~/media/files/pdf/members/payment/drd.pdf (last visited June 24, 2015).

144 *Id.* By way of example, the MLBPA distributes group licensing revenues on a pro rata basis in accordance with the number of "dues-paying" days accrued by active players during the applicable season.

O'Bannon court asserted that all current college athletes in the same class should receive equal compensation arising from use of their publicity rights, as previously discussed, the procompetitive justifications provided by the NCAA do not support the court's conclusion. As acknowledged by the court, the NCAA rewards more successful teams with a greater proportion of revenues, and there is no evidence to corroborate that rewarding successful College Athletes could not have a procompetitve purpose. The *O'Bannon* court similarly noted that holding such compensation in trust and restricting access until a college athlete's eligibility expires or terminates would not affect demand, so whether such revenues are distributed equally or pursuant to other factors, the determination should be a matter of practicality and function, not directive, especially if the College Athletes cannot access such monies until their eligibility expires or is earlier terminated. However, in order to develop an efficient administrative structure and disbursement methodology, it is important to understand the potential sources from which the revenues would be derived.

A. *Player Licensing for Multi-Media Content*

In today's multi-media world, content is distributed across traditional and digital media platforms, including, but not limited to, television, online and mobile, for exploitation via live broadcast, streaming, rebroadcast and other forms. The *O'Bannon* Court specifically recognized that college athletes have a right to compensation for use of their personal attributes in live game telecasts, re-broadcast games, and archival footage.[145]

1. Sources of Revenue

Potential revenue streams utilizing the personal attributes of college athletes include exhibiting games and archival footage across television, digital stream, digital download, and disc units (e.g., DVD, Blu-ray). Multiple broadcast and cable networks telecast collegiate games. In addition, certain Power Conferences, like the Big Ten and Pac-12 have their own cable networks dedicated to their athletic programs. As previously noted, the NCAA agreements with CBS, Turner and ESPN are valued collectively at approximately $1.38 billion per year, which excludes revenues generated by conference and university-branded networks as well as agreements entered directly between athletic conferences and television networks.[146] Beyond the primary media deals, there is an additional market for the rebroadcast of games. For instance, the cable network, ESPN Classic, is dedicated to

[145] O'Bannon v. NCAA, 7 F.Supp.3d 955, 1009 (N.D. Cal. 2014).
[146] O'Toole, *supra* note 19 and Miller, et al., *supra* note 21.

airing the "greatest games, stories, heroes and memories in the history of sports."[147] Similarly, the NCAA both licenses and offers for sale recorded collegiate games from previous years via disc and video on demand, like the nearly 5,000 games that comprise the NCAA Championship Collection.[148] In addition to the broadcast and retransmission of sporting events in their entirety, college athletes may also generate revenue from the use of game footage or other audio/visual clips in secondary productions, such as commemorative discs, documentaries, clip shows, motion pictures, and other third-party productions.

2. Methods of Licensing & Distribution of Revenues for Games, Compilations, and Footage Across Television and Digital Media

The primary licensees in media include broadcast and cable television networks, such as CBS, Turner, ESPN, in addition to digital platforms, such as BleacherReport.com, ESPN.com, FoxSports.com, and third-party content producers. Each PRO has its preferred method of licensing. Some commonalities and distinctions are further discussed below in examining how comparable licensing arrangements could be adopted by CALA. The blanket, per program (or semi-blanket), and compulsory licenses may be workable in licensing for multi-media content.

a. Television Exhibitions & Digital Media Streaming – the Blanket License

A blanket license may be practical for a television network that has an agreement with one or more athletic conferences. Under the blanket license, the network would be able to feature current college athletes in games during a given term, thereby providing the network with flexibility in determining which games will be televised throughout the season with the security of a fixed cost for player licensing. In music, broadcast networks typically pay a flat fee, whereas cable networks pay a set percentage of advertising or subscription revenues, as applicable.[149] By analogy, ESPN could enter into a blanket license agreement with CALA in connection with its telecast of ACC men's

147 *ESPN Classic*, ESPN.COM, http://espn.go.com/tvlistings/networks/classic.html (last visited Mar. 19, 2015).

148 Third Consol. Amended Class Action Complaint at 128, *In re* NCAA Student Athlete Name & Likeness Licensing Litig. (N.D. Cal. 2007) (No. 4:09CV01967) at ¶ 108, 2013 WL 3772677.

149 Einhorn, *supra* note 133, at 353. ASCAP has separate agreements with a handful of networks, including ABC, CBS, NBC, PBS and Univision, and BMI has separate agreements with ABC, CBS, NBC, and Univision, and the precise licensing terms are not public. ASCAP, *Television Network License*, http://www.ascap.com/licensing/types/television.aspx (last visited July 5, 2015); BMI, *U.S. Television Royalties*, http://www.bmi.com/creators/royalty/us_television_royalties (last visited July 5, 2015).

basketball each season and negotiate a license fee based upon a percentage of ESPN's advertising revenues. If a license was needed solely on a game-by-game basis, CALA could also offer either: (1) a program license as an alternative to the blanket license for, by way of example, regional licensing where a certain team may be featured on a local affiliate or regional cable network; or (2) a segment license, which may differentiate rates based upon weekend or weekday telecasts, daytime or primetime timeslots, or live, rebroadcast or archived games.[150] CALA may also adjust the license by conference based on factors such as national rankings, number of games telecast, and strength of schedule. As with music, the broadcaster would have the flexibility to rebroadcast the games during the term. Although a blanket license is rendered on a non-exclusive basis by the PROs, the blanket license would not prohibit the conferences from entering exclusive licenses, since the blanket license would extend solely to the personal attributes of college athletes, and not the game itself, or to any rights of the NCAA and its members. A blanket license would also ensure that each licensee pays a set amount for comparable rights, so as not to discriminate against other licensees.[151] In other words, the cable network, ESPN, would pay the same percentage under a blanket license as the cable network, TBS, for the same scope of rights. In digital media, the methods also vary by PRO, but ASCAP, for example, bases its license fees on the average number of visitors and revenues generated by the online or mobile platform per month and distinguishes platforms that allow users to directly select individual songs from those that do not. CALA could likewise derive license fees from the monthly traffic of a particular site or negotiate a percentage of advertising sales revenues or subscription fees, as applicable, in connection with games streamed online or via mobile media platforms.

In distributing royalties to its members, each PRO utilizes its own formula for valuing the music performances in order to proportionately allocate payments to its members. While each PRO may not consider all of the following factors, in valuing television performances, such factors may include, without limitation: (1) duration of the performance, (2) viewership rating of the program, (3) amount of the license fee, (4) type of use (e.g., theme song, commercial jingle, background vocal), and (5) time period of the program.[152] The PRO then implements a

[150] For the purposes of this article, the author distinguishes rebroadcast games (i.e., games rebroadcast prior to the start of the immediately subsequent football or basketball season, as applicable) from archived games (i.e., games rebroadcast in the immediately subsequent season or any time thereafter).

[151] As further discussed below, pricing discrimination has been at the center of reoccurring antitrust disputes between the PROs and its licensees. *See, e.g.*, Broad. Music, Inc., v. CBS, Inc., 441 U.S. 1 (1979).

[152] ASCAP, *Television Network License*, *supra* note 149; BMI, *U.S. Television Royalties*, *supra*

formula to rank each song or rights holder to determine the amount of royalties due in proportion to the license fee.[153]

CALA could institute a similar formula to rank each collegiate athlete appearance in order to determine the amount of royalties due to its members. For example, CALA may generate its own formula by adapting factors comparable to those utilized by the PROs: (1) duration of appearance; (2) viewership rating of the programs; (3) frequency of appearance; and (4) type of use (e.g., live game, rebroadcast game, footage). In addition, CALA could add national ranking of the athlete or team. CALA would then use the aforementioned factors to rank each team, and within each team, rank each college athlete in order to determine the proportion of royalties due each. CALA could institute the same formula in evaluating digital media royalty distributions based on the streaming of games and archival footage.

b. Disc Units, Digital Downloads & Video On Demand – the Compulsory License

While the compulsory or mechanical licensing rates are set by statute or special rate courts in the music industry, CALA could establish a compulsory license with respect to the sale of hard units, downloads or on demand purchases featuring entire games. The rates could also be negotiated directly with the NCAA, athletic conferences or universities, as applicable, who would then sublicense the rights to their licensees. As previously mentioned, the advantage of the compulsory license would be a predetermined per sale or per rental rate, which would not necessarily require the approval of college athletes on either an individual or group basis. The fees would be determined by the number of games featured in each unit sold or rented, whether as a hard copy, digital download or on demand purchase. CALA would establish a ranking system that tracks the number of games in which each team was featured per unit sold or rented. In this scenario, the proportion accorded to each team would be equally distributed amongst the college athletes appearing on the roster for the applicable season.

c. Archival Footage for Use in Secondary Productions – the Group License

Since archival footage would most likely be used in connection with a limited number of teams or for a specific period, a semi-blanket license could apply. For example, a licensee may seek archival materials from a particular university or related to the current Heisman

note 149.

[153] *Id.*

Trophy candidates. To meet these specific needs, a group license may be negotiated based on the type, duration and scope of rights sought by the potential licensee. With respect to distributing the respective licensing fees, licensees could also submit a feature sheet, similar to surveys used by the PROs, describing the nature of the use in order for CALA to proportionately distribute the royalties to its members.[154]

B. *Player Licensing for Marketing and Advertising*

Although tabled in 2011, the NCAA had considered implementing a new rule that would allow a student-athlete's personal attributes to be featured in commercial advertisements or promotions in the form of licensed materials, such as game footage or photographs.[155] In *O'Bannon*, the court did not analyze the use of personal attributes in marketing, advertising, and promotion other than to conclude that permitting current college athletes to receive compensation for the endorsement of third party products and services would not constitute a less restrictive alternative to absolute prohibition.[156] Despite the foregoing, in the absence of direct endorsements by current college athletes, advertising, marketing, and promotions may still represent revenue opportunities for current as well as former college athletes as either a direct endorsement or group license. In a real-life example involving former college men's basketball players, the car manufacturer Pontiac aired a series of commercials in 2003 featuring clips of legendary "buzzer beater" shots made throughout the history of March Madness.[157] The commercials highlighted sixteen game winning shots made by former college athletes, including Michael Jordan, Christian Laettner; and Tyus Edney, as well as those of lesser known names such as Jared Smart, Jerome Whitehead, and Lorenzo Charles.[158] The commercials ran in conjunction with a promotion where fans could vote online for the most memorable play.[159] Under a licensing scheme assuming similar circumstances, Pontiac would have negotiated a group license with CALA to feature the former collegiate athletes in such a commercial.

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154 *See e.g.*, ASCAP'S SURVEYS AND DISTRIBUTION SYSTEM: RULES & POLICIES, § 1.1, *available at* http://www.ascap.com/~/media/files/pdf/members/payment/drd.pdf, (last visited June 24, 2015).

155 *See* Press Release, NCAA, Presidential Group to Examine Use of Student-Athlete Likeness (Dec. 4, 2007), http://fs.ncaa.org/Docs/PressArchive/2007/Announcements/index.html.

156 O'Bannon v. NCAA, F.Supp.3d 955, 984 (N.D. Cal. 2014).

157 Mike Wise, *Final Four 2003; Time Honored Tradition*, N.Y. TIMES (April 5, 2003), http://www.nytimes.com/2003/04/05/sports/final-four-2003-time-honored-tradition.html.

158 *Id.*

159 *Id.*

1. Sources of Revenues

Potential revenue streams utilizing the personal attributes of college athletes include, but are not necessarily limited to, television commercials, online advertisements, promotions and sweepstakes and print advertisements. The NCAA alone generates $35 million to $50 million per year from its top-tier sponsors, which does not include corporate naming rights and sponsorships of individual teams and venues.[160]

2. Methods of Licensing & Distribution of Revenues for Advertising, Marketing and Promotions

In advertising, marketing and promotion, the preferred methods of licensing would be direct or group licensing. Where a corporate brand desires to feature only one or two former college athletes, the corporate brand may obtain a license directly, since direct licensing and endorsements would fall outside of CALA's purview.[161] However, if a corporate brand has an exclusive sponsorship arrangement with a university or conference, the corporate brand may seek a group license to cover all current college athletes at the university (or in the conference) for use in advertising and promotional activities throughout the season. At the professional level, for example, the NFLPA grants group-licensing rights to all official NFL sponsors.[162] In addition to current college athletes, a corporate brand may desire to capitalize on the notoriety of former college athletes, as with the Pontiac advertisement. CALA could implement the census and sampling methods in determining the frequency that a particular advertisement or commercial played or was featured in order to appropriately distribute the related royalties.

a. Distribution of Revenues Across Television – The Census Method

Applying the census method, licensees would be responsible for reporting to CALA the teams featured in each of its television advertisements, during the applicable timeslots the advertisements were featured, as well as the frequency with which each commercial ran over

[160] *About CLC*, *supra* note 10.

[161] The *O'Bannon* Court did not enjoin any NCAA rules that prohibit current college athletes from directly endorsing any third party products or services, so until such rules are eliminated or enjoined, a current college athlete cannot engage in any direct endorsements. *O'Bannon*, F.Supp.3d at 984. With respect to former college athletes, issuing a group license would grant use of personal attributes but would not compensate the collegiate athlete for supplemental services. Subsequently, a corporate brand may elect to directly compensate a former college athlete for making in-person appearances and participating in the production of commercials, print advertisements, online promotions and related materials.

[162] *Give your products more personality by leveraging NFL players*, NFLPLAYERS.COM, https://www.nflpa.com/players/services/licensing (last visited Mar. 29, 2015).

the course of the license term, and this information would be part of the feature sheet submitted by each network. As with television broadcast rights, CALA would rank each conference within the NCAA, each team according to its conference and each College Athlete according to his teammates in order to determine the proportion of revenues due each athlete.

b. Distribution of Revenues Across Digital Media – The Sampling Method

Since television and digital media rights may be bundled by the NCAA, in determining distribution for each category, CALA may first need to allocate the exploitation by medium in order for CALA to properly assess the payments due its members. Unless specifically allocated, CALA can base the proportion of revenues attributable to each medium upon the proportion of budget allocated by the corporate sponsor to each medium. By way of example, if the corporate sponsors allocate 80% of their applicable marketing budget to television and 20% to digital media on average, then the revenues will be proportionately divided before applying the respective formula by which to distribute the royalties. Moreover, television advertising real estate is limited and therefore may not adequately reflect the use of the college athletes' publicity rights across digital media. The sampling method represents a possible method by which to calculate the proportion of revenues due each collegiate athlete derived from advertising, marketing and promotions across digital media. With respect to radio plays, a PRO samples a limited number of radio stations to see how often a song is played during a particular period in order to estimate how many times the given song would have been played over a longer period.[163] By way of example, CALA could sample a website like ESPN.com, Yahoo!, or Google throughout the season in order to determine how many sponsors or advertisers featured licensing rights of collegiate athletes in digital advertisements, promotions, etc., based on factors such as the duration of the campaigns and the number of players featured. CALA could thereafter apply its team and college athletes ranking system to determine the appropriate distribution of licensing royalties.

C. *Merchandising & Memorabilia*

The *O'Bannon* Court did not address the use of publicity rights in merchandising or memorabilia, other than video games. However, the *O'Bannon* decision has opened the door for increased licensing opportunities that include use of NIL, in addition to other personal attributes. As a result of bifurcating the rights of publicity and antitrust

163 *See* ASCAP'S SURVEY AND DISTRIBUTION SYSTEM, *supra* note 154.

claims, *O'Bannon* plaintiffs successfully were able to settle claims against Electronic Arts ("EA") and the NCAA in the amount of $60 million. The claim against EA arose from the right of publicity issues from misappropriation of their likenesses in the *NCAA Football* and *NCAA Basketball* video game franchises.[164] In professional sports, retired NFL players have been able to successfully recover damages under various theories for use of their personal attributes in merchandising and memorabilia, including, video games and trading cards.[165] In the context of active and retired athletes, as well as other celebrities, several courts have also found violations of the right of publicity with respect to, *inter alia*, greeting cards, t-shirts, video games, and board games, which also represent potential revenue generating opportunities for college athletes.[166]

1. Sources of Revenue

There are numerous potential revenue streams in merchandise featuring the publicity rights of college athletes, including, but not limited to, jerseys, posters, trading cards, board games, souvenirs, screensavers/wallpapers, decals and video games. Merchandise licensing generates approximately $4.6 billion per year for the NCAA and its member institutions.[167] Presently, merchandising revenues are retained by the university and are not shared across the NCAA. To date, a key distinction between professional and collegiate player licensing is that collegiate merchandise does not bear the names of college athletes.[168] As with the EA video games, the jerseys offered for sale

[164] Tom Farrey, *Players, Game Makers Settle for $40M*, ESPN (May 31, 2014, 1:22 PM), http://espn.go.com/espn/otl/story/_/id/11010455/college-athletes-reach-40-million-settlement-ea-sports-ncaa-licensing-arm.

[165] RetiredPlayers.org, *Jury Awards Retired Players $28.1 Million in Parrish, et al. v. NFLPA* (Nov. 10, 2008), http://retiredplayers.org/2008/11/10/jury-awards-retired-players-281-million/ (last visited February 24, 2014).

[166] *See* Hilton v. Hallmark Cards, 599 F.3d 894 (9th Cir. 2010) (unauthorized use of socialite's image on greeting cards); Comedy III Prods., Inc. v. Gary Saderup, Inc., 21 P.3d 797 (Cal. 2001) (unauthorized use of the likenesses of the Three Stooges in the form of a lithograph reprinted on t-shirts); No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397 (Cal. Ct. App. 2011) (unauthorized use of the likenesses of members of the band in a video game); Palmer v. Schonhorn Enter., Inc., 232 A.2d 458, 462 (N.J. Super. Ct. Ch. Div. 1967) (unauthorized use of golfer's name and likeness in a board game). *See also* Shamsky v. Garan, 632 N.Y.S.2d 930 (N.Y. Sup. Ct. 1995) (concerning the right of publicity and group licensing) (*Shamsky* stands for the proposition that even where a College Athlete has not gained individual notoriety beyond his association with a particular team or university, a right of publicity action may still exist.).

[167] Max Rogers, *Texas and Kentucky Top College Rankings in the $4.6 Billion Licensing Industry*, BLEACHER REPORT (Aug. 8, 2012), http://bleacherreport.com/articles/1290567-texas-and-kentucky-top-college-rankings-in-the-46-billion-licensing-industry.

[168] A handful of licensees have pursued and entered agreements directly with individual athletes in connection with their collegiate licensing rights. *See, e.g.*, STEINERSPORTS, *Carmelo Anthony: Steiner Sports Exclusive Athlete*, http://www.steinersports.com/basketball/shop-by-player/carmelo-anthony/index.html (last visited July 5, 2015) (selling memorabilia featuring NBA player, Carmelo Anthony, related to his collegiate career at Syracuse University). By

feature only the jersey numbers and not names. During his tenure as NCAA President, Myles Brand iterated that the NCAA "draw[s] the line at . . . names on jerseys."[169] The NCAA claims that jersey numbers are "technically interchangeable" and are property of the university.[170] Despite this philosophy, others suggest that a College Athlete's jersey number is a part of his identity.[171]

The courts construe "name, symbol, or device" broadly under trademark law, as do certain states with respect to personal attributes under the right of publicity.[172] For example, the Illinois Right of Publicity Act defines identity as "*any* attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer."[173] Therefore, even in the absence of his name, a college athlete could assert that a license should be required for merchandising that features his college number or other personal attributes. An athlete is often associated with his number across a variety of platforms, including statistics, player rosters, and in games.[174] Moreover, only one college athlete per university can wear a particular number in his respective sport, and most players wear the same number throughout the duration of their amateur and professional careers.[175] Universities commonly honor an outstanding athlete by "retiring" the jersey number he or she played in, thereby preventing any future athletes of the same sport from wearing the number at the university, which establishes the NCAA members' own recognition that an athlete and his jersey number are synonymous or "interchangeable" with the athlete, but not necessarily interchangeable with other athletes, as argued by the NCAA.[176]

contrast, the Texas Longhorns do not sell jerseys featuring the names of any of its current or former athletes. Texas Longhorn Official Shop, *Texas Longhorns Jerseys*, http://shop.texassports.com/Texas_Longhorns_Jerseys (last visited July 5, 2015).

169 Darren Rovell, *Use of athletes' names, likeness would be prohibited*, ESPN (Mar. 16, 2005), http://sports.espn.go.com/espn/print?id=2014075&type=story.html. *See also* Laken Litman & Steve Berkowitz, *NCAA apparel sales site used athletes' names in search*, USA TODAY (Aug. 7, 2013), http://www.usatoday.com/story/sports/ncaaf/2013/08/06/ncaa-shop-search-football-jerseys-johnny-manziel/2625119/ (proposing that jersey numbers identify particular athletes even in the absence of his name on the retail version of the jersey).

170 Rovell, *supra* note 169; *see also* Litman & Berkowitz *supra* note 169.

171 *See, e.g.*, Sean Hanlon & Ray Yasser, *'J.J. Morrison' and his Right of Publicity Lawsuit Against the NCAA*, 15 VILL. SPORTS & ENT. L.J. 241, 267–75 (2008).

172 *See, e.g*., Facenda v. NFL Films, Inc, 542 F.3d 1007, 1014 (3d Cir.2008). *See also*, Motschenbacher v. R.J. Reynolds Tobacco, Co., 498 F.2d 821 (9th Cir. 1974) (holding that summary judgment on right of publicity claims under California law was inappropriate in a case involving the use of a race car in Defendant's advertisement, even though Defendant had not used Plaintiff's name, image or likeness, and only his race car number appeared).

173 765 ILL. COMP. STAT. 1075/5 (West 1999) (emphasis added).

174 Hanlon & Yasser, *supra* note 171, at 267.

175 *See* Lee Jenkins, *What is a Number Worth? Some Athletes Pay the Price*, N.Y. TIMES (May 13, 2005), http://www.nytimes.com/2005/05/13/sports/what-is-a-number-worth-some-athletes-pay-the-price.html?_r=0.

176 *See e.g*., Bryan Fischer, *Jim Brown Didn't Endorse Syracuse Unretiring No. 44* (June 4, 2015), http://www.nfl.com/news/story/0ap3000000495704/article/jim-brown-didnt-endorse-

Notably, some college teams, like Notre Dame Football, do not display names on game day jerseys, and thus, can sell jerseys identical to the game day jerseys worn by its football players. The NCAA's position is further weakened by the fact that jerseys bearing the numbers worn by high profile college athletes are manufactured and sold at disproportionately higher volumes in comparison to other numbers, supporting consumer association.[177] NBA All-Star Carmelo Anthony, a member of the 2003 NCAA National Championship men's basketball team while attending Syracuse University, believes that players should earn a percentage of "their" jersey sales.[178] Anthony recognizes that even without a name, the public can and does associate a particular jersey and number with an individual athlete. Since a number and an athlete's name are synonymous, a consumer can, under such circumstances, purchase a college athlete's authentic replica jersey, whether or not it bears his name, and reasonably believe they are buying that particular player's jersey. Even if an athlete's position may be weakened if his jersey number is not retired and may be worn by other athletes in other years the foregoing more strongly supports an equitable distribution method, as opposed to a legitimate rationale to deny college athletes their share of revenues attributable to their likenesses,. Granted, not all university merchandise bears the personal attributes of its College athletes. However, like video games, college athletes may reasonably assert their right to royalties derived from merchandise bearing one or more of their personal attributes, even in the absence of a name.

The sale of memorabilia is a bona fide business. In an online search of the term "college sports memorabilia," the search returns millions of hits at any given time with websites selling autographed jerseys, basketballs, photos, figurines and other collector's items. Although the settlement terms would be confidential, College Athletes may similarly seek inclusion of memorabilia in the calculation of revenues, as retained by retired NFL players.[179]

2. Methods of Licensing for Merchandising and Memorabilia

Although the rationale for mandating an equal share of revenues among college athletes within the same class is tenuous, the nature of merchandising may support equal distribution of revenues across members of the same team, depending on the product. While publicity

syracuse-unretiring-no-44 (acknowledging that the no. 44 may be worn by a player moving forward due to the "unretirement" of Brown's jersey).

177 Hanlon & Yasser, *supra* note 171, at 267.

178 Rovell, *supra* note 170.

179 *NFL Retiree Publicity Rights Settlement Gets Approved*, ASSOCIATED PRESS (Apr. 8, 2013), http://www.nfl.com/news/story/0ap1000000158326/article/nfl-retiree-publicity-rights-settlement-gets-approved.

rights licensees would have the option of negotiating a blanket or group license in connection with merchandise and memorabilia, a compulsory license would also provide a viable method with respect to certain categories of merchandise. The compulsory license may be advantageous in instances where the related retail price has been established, the product is manufactured in high-volumes, the product is sold by multiple retailers or the license requires use of personal attributes of all athletes on a team-by-team basis across the NCAA, in which case the licensee would pay a set, flat rate for each unit manufactured and/or sold. By way of example, like the sale of music albums, jerseys may be sold by numerous retailers with relatively predictable pricing based on prior sales. Given the number of potential manufacturers and retailers, CALA could agree to establish a compulsory license based on units manufactured or sold, in lieu of negotiating separate group licenses for each team. Video games present another category of merchandise suitable for compulsory licensing given the inclusion of College athletes across the NCAA, where such royalties would be equally shared by the CALA members. As with the distribution of music, the licensee would be required to serve notice on the rights holder(s), thereby providing CALA with notice to directly monitor the vendor or manufacturer.[180] In the alternative, group licensing would be more appropriate for local (regional) or championship licensees, since such licensees obtain rights to a limited number of universities, and therefore, may only need rights to a limited group of College athletes.

3. Distribution of Revenues for Merchandising & Memorabilia

Given the nature of merchandising, licensees would be expected to report the number of units sold, providing precise volume numbers attributable to each team or athlete in order to appropriately distribute the royalties. However, the CLC has approximately 3,000 licensees, and sales of merchandising and memorabilia can be difficult to track given the number of small, independent businesses selling items whether online or via so-called "pop-up" shops and storefronts.[181] As a result, it may not be feasible, or timely, to sufficiently track merchandise or memorabilia attributable to specific college athletes. Where precise volume numbers are unobtainable, CALA may equally distribute the royalties among the members of a team, if the item features a single team, or equitably allocate the royalties among college athletes in accordance with the ranking formula applied to the teams and college athletes over the reported year, if the item features multiple teams or

[180] *See* 17 U.S.C. § 115(b)(1).

[181] *Business Considerations*, COLLEGIATE LICENSING COMPANY, http://www.clc.com/Licensing-Info/Business-Considerations.aspx (last visited Mar. 18, 2015).

individual athletes from multiple teams. With respect to former college athletes, CALA may elect to rank each individual athlete in order to determine the proportionate amount of royalties due, since merchandising and memorabilia sales are more likely to be driven by the popularity of the particular athlete, over that of the team.

a. Structure & Administration

While the professional sport labor unions are non-profit organizations, player licensing is generally managed by a for-profit corporation owned by the labor union, analogous to the relationship between the NCAA and the CLC.[182] By contrast, both ASCAP and BMI are organized as non-profit organizations, whereas SESAC is the only privately-owned, for profit, PRO.[183] Although SESAC has faced private lawsuits, the organization has not been pursued by the Justice Department or otherwise been subject to judicial oversight like ASCAP and BMI. Forming CALA as a privately-held, for-profit business entity would not guarantee that its activities would fall outside of the purview of the Justice Department, but it may be the preferred method of organization given the precedent. With respect to administration, CALA would be responsible for negotiating agreements, establishing rates, as well as collecting and distributing royalties. For its services, CALA would receive a percentage of the revenues towards administrative and operational fees. As is custom in the payment of royalties, CALA would issue periodic statements on a quarterly, semi-annual or annual basis. Considering the number of current and former college athletes, annual statements would probably be the most efficient. In order to avoid a burdensome influx of statements each year, CALA could categorize payment groups based upon sport. For example, since the FBS postseason concludes by early January, statement periods for individuals in sports like football or other fall sports would close in February, whereas statements for individuals in basketball or other spring sports would close in August, with each statement covering royalties generated in the preceding twelve-month period. In addition, like the PROs and Players Associations, CALA would have the right to audit licensees to ensure proper payment calculations and the ability to legally enforce against third party misappropriation or infringement of publicity rights.

182 *See e.g.*, NFLPlayers.com, *Licensing*, https://www.nflpa.com/players/services/licensing (last visited July 5, 2015).
183 Einhorn, *supra* note 133, at 354–55.

IV. CALA AND THE LEGAL AFTERMATH OF A ROYALTY-BASED SYSTEM

A. *Potential Antitrust Challenges*

A potential hurdle facing college athletes in the formation of CALA would be exposure to federal antitrust challenges.[184] Whereas current and former college athletes have disputed the business practices of the NCAA and its members in setting and limiting the value of publicity rights, a licensing organization representing college athletes may face similar questions in setting prices to be paid by licensees, i.e., "price-fixing," as a monopoly. The courts have acknowledged that ASCAP is a monopoly under the Sherman Act by definition, and there would likely be similar legal challenges and scrutiny against CALA.[185] As articulated by the district court in *Alden-Rochelle, Inc. v. Am. Soc. of Composers, Authors & Publishers*, the

> [C]ombination of the members of Ascap (sic) in transferring all of their non-dramatic performing rights . . . is a combination in restraint of interstate trade and commerce, which is prohibited by Sec. 1 of the anti-trust laws . . . . [Which] ha[s] given Ascap (sic) the power to fix the prices at which the performing rights are sold to exhibitors.[186]

Unlike professional team sports where the NLRA insulates core activities of labor unions from federal antitrust challenges in connection with their collectively bargained agreements with employers, the college athletes would not be organized under a recognized labor union, and therefore, the corresponding activities and agreements of CALA would not be similarly protected.[187] In analyzing the history of antitrust challenges, three potential practices of CALA previously discussed may similarly come under federal antitrust scrutiny: (1) institution of a blanket license; (2) institution of a compulsory license; and (3) entering

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184 *See* MLBP, Inc. v. Salvino, Inc., 420 F.Supp.2d 212 (S.D.N.Y. 2005) *aff'd,* 542 F.3d 290 (2d Cir. 2008). (Granting Plaintiff's motion for summary judgment where Defendant had originally challenged the designation of Plaintiff as the exclusive agent of the MLB's intellectual property rights under various state and federal antitrust theories, including Section 1 of the Sherman Act.).

185 Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888, 893 (S.D.N.Y. 1948).

186 *Id.* at 894–95.

187 *See* National Labor Relations Act of 1947, 29 U.S.C. § 157 (Lexis 2008). *See e.g.*, Meat Cutters v. Jewel Tea, 381 U.S. 676, 695 (1965) (an agreement among butches not to sell meat at night was held to be a mandatory subject and protected by the labor exemption). While precedent supports the notion that wage restraints may be subject to antitrust scrutiny even under the NLRA, in the context of sport, courts have held that draft rules and the salary cap are exempt. *See e.g.*, Brown v. Pro Football, Inc., 518 U.S. 231, 250 (1996) (although the Supreme Court found that wage restraints may be subject to scrutiny, the Court ultimately held that setting the wages of developmental squad players was exempt); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954, 963 (2d Cir. 1987) (plaintiff argued that cap on his rookie salary was an antitrust violation by restricting his earning potential).

exclusive agreements.[188] The following shall discuss each practice as it pertains to CALA and how such practices may be examined under federal antitrust laws.

B. *The ASCAP Consent Decrees and Potential Application to CALA's Practices*

The first series of legal challenges against ASCAP began in the late 1930s when ASCAP instituted a flat 7.5% fee on profits earned by network radio stations to offset reduced licensing fees to smaller, independent stations; the dispute led to both criminal charges and civil suits being levied against ASCAP.[189] To avoid litigating the underlying issues, ASCAP pled *nolo contendere* to the criminal charges, which ultimately resulted in a judgment against ASCAP (also referred to hereafter as the ASCAP Consent Decree of 1941) (the "ASCAP Consent Decree"), as subsequently amended, which requires government oversight of the PROs and established a process for determining rates and adjudicating rate disputes.[190] The ASCAP Consent Decree would not absolutely end litigation against ASCAP, as a group of movie theatre owners brought a subsequent action in *Alden-Rochelle, Inc. v. ASCAP*.[191] In *Alden-Rochelle*, the district court held that although ASCAP had violated antitrust laws with respect to licensing fees charged to the movie theater owners, plaintiffs had failed to prove they sustained injuries and damages.[192] The Court further acknowledged that ASCAP's structure and operations essentially function as a monopoly within the meaning of Section 2 of the Sherman Act and many of its activities implicate antitrust violations.[193] As a result, the Consent Decree was amended in 1950 to expand beyond the radio industry.[194] The ASCAP Consent Decree, as amended, was intended to curb the more monopolistic practices of ASCAP by eliminating exclusive licenses and arbitrary and discriminatory pricing,

188 *See, e.g.*, United States v. ASCAP, No. 41-1395, 2001 WL 1589999 at *5 (S.D.N.Y. June 11, 2001).

189 Ergo, *supra* note 126 at 262–63.

190 United States v. ASCAP, No. CIV.A. 42-245, 1950 WL 42273 (S.D.N.Y. Mar. 14, 1950) (*amended* July 17, 1950). The ASCAP Consent Decree did the following, *inter alia*: (1) prevented ASCAP from discriminating against similarly situated licensees, (2) prevented ASCAP from refusing to issue per piece licensees to any use other than broadcasters, (3) required the ASCAP Board of Directors to be elected by a membership vote, (4) required minimum membership requirements, (5) required distribution of revenue based on a graduated scale with respect to the frequency of play and the overall success of the musician; and (6) granted the United States Department of Justice auditing rights to the books and records of ASCAP. *See id.* BMI also entered its own consent decree in 1941. United States v. BMI, 64-Civ-3787 (S.D.N.Y. 1966) (*amended* Dec. 9, 1966).

191 Ergo, *supra* note 126 at 264.

192 Alden-Rochelle, Inc. v. ASCAP, 80 F.Supp. 888, 890 (S.D.N.Y. 1948).

193 *Id.* at 893.

194 *ASCAP*, 1950 WL 42273 at *2–3.

in addition to implementing judicial oversight and establishing licensing rates.[195] Successive litigation over ASCAP and its pricing practices led to the Second Amended Final Judgment ("Second AFJ") in 2001.[196] The Southern District of New York imposed, *inter alia*, the following obligations on ASCAP, which may be analogously applied to CALA: (1) providing reasonable alternatives or a "genuine choice, (2) requiring non-exclusivity, and (3) prohibiting discriminatory pricing and price gouging.[197]

1. Reasonable Alternatives, or a "Genuine Choice"

A key element of the Second AFJ obligated ASCAP to provide reasonable alternatives to the blanket license, also known as a "genuine choice."[198] Although the PROs and their licensees continue to dispute reasonable alternatives, or more specifically, what constitutes reasonable fees and genuine alternatives to the blanket license, the courts will generally assume a licensing alternative to be genuine unless the price for the alternative license is greater than the value of the rights obtained.[199] In evaluating the compliance of a specific licensing arrangement under the rule of reason, the appropriate standard is whether the effect is designed to "increase economic efficiency and render markets more, rather than less, competitive."[200] By definition, the blanket license has been found to meet this threshold since it is non-exclusive and "allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations."[201] Conversely, a semi-blanket license would not meet the standard where the license fee is disproportionate to the comparable blanket license. In *Buffalo Broadcasting Co. v. ASCAP*, a group of affiliate television stations challenged the program licenses instituted by ASCAP and BMI.[202] The lower court determined that the program license was not a genuine alternative to the blanket license because it was uneconomically priced, exceeding the prorated blanket license by 700%.[203] Although the Second Circuit reversed the decision on the grounds that the segment license was based upon different revenue sources than the original blanket license, CALA could use the blanket license as a

195 Ergo, *supra* note 126 at 273.
196 United States v. ASCAP, No. CIV.A. 42-245, 1950 WL 42273 (S.D.N.Y. Mar. 14, 1950).
197 *Id*.
198 *Id*.
199 *Id*. *See also* Buffalo Broad. Co. v. ASCAP, 744 F.2d 917, 926 (2d Cir. 1984) (articulating the "genuine choice" reasonableness standard).
200 Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 20 (1979) (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).
201 *Id*. at 22.
202 CBS, Inc. v. ASCAP, 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).
203 Buffalo Broad Co. v. ASCAP, 546 F. Supp. 274 (S.D.N.Y. 1982), *rev'd,* 744 F.2d 917 (2d Cir. 1984).

standard by which to determine segmented license fees and royalties, particularly where derived from the same revenue sources.[204] Depending on the nature of the use and scope of rights desired, CALA would also offer a "genuine choice" via a blanket license, e.g., all college athletes, the semi-blanket license, e.g., program or segment licenses, group licensing, e.g., issued by team, year or group of athletes, or compulsory licensing.

2. No Exclusivity

The Second AFJ expressly prohibited ASCAP from entering any exclusive agreements on behalf of its members. Consequently, it is unclear whether CALA entering exclusive agreements, even for limited purposes, would withstand judicial scrutiny. In practice, CALA would only issue player licenses in conjunction with the NCAA, the athletic conferences and its university members. Thus, CALA could enter agreements on a non-exclusive basis with the understanding that the group licensing rights would have no practical use without the corresponding rights of the NCAA, et al. While exclusive agreements may be entered by the CLC, the rights granted by CALA could be non-exclusive. However, any exclusive arrangements may expose the NCAA and CALA to federal antitrust liability as a conspiracy. In *American Needle v. National Football League*, plaintiff, apparel manufacturer, challenged an exclusive licensing arrangement between the NFL and its teams and the athletic apparel company, Reebok.[205] The United States Supreme Court, granting *certiorari*, rejected the NFL's argument that its teams acted as a single entity in the exclusive arrangement with Reebok, thereby holding that exclusive arrangements in the context of intellectual property licensing may be subject to antitrust scrutiny.[206] On remand to address the facts at issue, the District Court for the Northern District of Illinois denied the NFL's motion for summary judgment, finding that facts alleged by the plaintiff showing increases in price and decreases in product output may reflect anticompetitive practices in violation of the Sherman Act.[207] Any such allegations against CALA, and the NCAA, et al., would therefore be fact specific and determined on a case-by-case basis, depending on

[204] *Buffalo Broad Co.*, 744 F.2d at 933.

[205] Am. Needle, Inc. v. NFL, 538 F.3d 736 (7th Cir. 2008), *cert. granted*, 560 U.S. 183 (2010).

[206] Am. Needle, Inc. v. NFL, 560 U.S. 183, 217 (noting that the appropriate inquiry under the single-entity theory is whether the agreement serves to join "separate economic actors pursing separate economic interests" in a manner that prohibits "independent centers of decisionmaking," thereby restraining actual or potential competition. (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768–769 (1984)).

[207] Marc Edelman, *NFL Lawyers Lose Again In American Needle; Case Likely Headed For Trial*, FORBES (Apr. 16, 2014), http://www.forbes.com/sites/marcedelman/2014/04/16/nfl-lawyers-lose-again-in-american-needle-case-likely-headed-for-trial/print/.

factors such as product output. Moreover, the preference may be to simply license the rights on a team-by-team basis where practicable, as currently the practice of the NCAA with respect to categories, such as athletic apparel and other merchandise. In addition, CALA can itself mitigate potential financial liability by requiring the NCAA, athletic conferences, universities and/or third-party licensees to indemnify CALA and its members from any claims and damages arising from such exclusive agreements, to the extent permitted by law.

3. Discriminatory Pricing & Price Gouging

Another common antitrust challenge to PRO business practices concerns discriminatory pricing. The Second AFJ expressly prohibits ASCAP from entering into or enforcing any license that "discriminates in license fees or other terms and conditions between licensees similarly situated."[208] In other words, CALA could not price gouge TBS while charging less to a competitor, like ESPN, for equivalent rights. As a result, the rule hinders ASCAP from entering *de facto* exclusive arrangements by pricing out other potential licensees. In addition, a court would likely view a regional network differently from a national cable or broadcast network, since such local channels would not be similarly situated with respect to viewership numbers and advertising dollars, so CALA may need to provide alternative licensing fees. The Second AFJ further prohibits ASCAP from unilaterally instituting compensation structures wherein ASCAP would receive a percentage of revenues from television programs that include no ASCAP music.[209] If CALA were to base the licensing fee on a percentage of advertising revenues, CALA could not demand a percentage of revenues for the entire broadcast day, if the rights would only be used in connection within a single three-hour game broadcast window. Overall such discriminatory practices may be avoided by CALA in implementing, for example, a semi-blanket license in television or the compulsory license for certain merchandising, since all licensees would pay an equivalent licensing fee.

C. *New NCAA Rules Providing Procompetitive Justifications by Less Restrictive Means*

Although the hypothetical rule previously analyzed, which instituted a cap on remuneration paid to college athletes for publicity rights would unlikely withstand federal antitrust challenge, the NCAA may seek to implement certain rules relating to such compensation that would either avoid injuring competition in the relevant markets or

[208] US v. ASCAP, No. 41-1395, 2001 WL 1589999 at *3 (S.D.N.Y. 2001).
[209] *Id* at. *7.

would otherwise be consistent with the pro-competitive justifications argued in *O'Bannon*.[210]

1. The Right to Hold Licensing Compensation in Trust

The *O'Bannon* court noted that a less restrictive alternative to the blanket prohibition on NIL compensation would be to hold the funds in trust during a college athlete's period of eligibility.[211] The Court determined that doing so would not negatively affect consumer demand because the college athlete would not receive the compensation while participating in intercollegiate athletics.[212] The evidence presented, which failed to establish any correlation between consumer opinion polls and actual demand, does not support any of the procompetitive justifications set forth by the NCAA. Realistically, the licensing fees would not likely be calculated until the end of a full season, at the earliest, since CALA would have to determine the proportion due its members prior to disbursement. Consequently, CALA would hold such funds in a trust account for all of its members, until such payments are calculated and distributed according to the annual schedule. Moreover, although it seems paternalistic to hold such monies in trust during a collegiate athlete's period of eligibility, it would be difficult to argue any injury to college athletes under antitrust theories because such a practice would not harm competition among buyers or sellers, since the rule would apply to all current collegiate athletes.

2. Revenue Sharing by Athletic Conferences and Universities

In *Major League Baseball Properties v. Salvino, Inc*., the Second Circuit concluded that an agreement to share profits does not constitute a *per se* price-fixing scheme where there is no agreement concerning the actual prices charged to third parties, in this case, licensees of intellectual property.[213] Hence, a less restrictive alternative to capping compensation would be to distribute revenues more equally among member institutions with respect to certain revenues streams currently retained exclusively by the universities in order to maintain a level of competitive balance. The NCAA may establish a mechanism by which various revenue sources would be distributed across the athletic conferences and its teams to mitigate certain competitive advantages. For instance, in the event one university is able to generate significantly higher revenues in jersey sales, the university could theoretically offer a better compensation package to potential athletes and have an additional

[210] The hypothetical rules discussed in this section would only apply to current college athletes, as former college athletes are not bound by the rules and regulations of the NCAA.
[211] O'Bannon v. NCAA, 7 F.Supp.3d 955, 983 (N.D. Cal. 2014).
[212] *Id.*
[213] MLBP v. Salvino, Inc., 542 F.3d 290, 320 (2d Cir. 2008).

edge in the recruiting process with respect to other universities. With hundreds of universities, it may not be equitable to share revenues across the entire Division I or FBS. However, a revenue sharing arrangement could, at a minimum, ensure a greater level of competitive balance across each athletic conference.

3. No Direct Endorsements by Collegiate Athletes

The *O'Bannon* court affirmed that the NCAA could maintain its rules that prohibit current college athletes from directly endorsing any third party products or services. In reaching its conclusion, the court found that permitting direct endorsements did not constitute a less restrictive means and would "undermine the efforts of both the NCAA and its member schools to protect against the 'commercial exploitation' of student-athletes."[214] The validity of the court's position is questionable since the facts support the NCAA as a commercial enterprise, distinguishable from professional sports, predominantly on the basis of the millions of dollars paid to professional athletes. Nevertheless, while the notion of "amateurism" is outmoded and inconsistently applied, there is unique value in the preservation of the "collegiate spirit," the concept of the university as a whole before the individual. The collegiate spirit is grounded in the idea of promoting the greater, non-commercial good of the university community—from research, into the classroom, and onto the athletic field, distinguishable from professional sports where the primary purpose of the organization is the commercial business of sport and generation of profits. From the collegiate spirit perspective, permitting college athletes to directly endorse third party products and services, especially without the markings of his or her university, conflicts with the principle of promoting the university first. A less restrictive means, however, would be to permit such use solely under a group license, where the athletes appear in uniform.

4. Prohibiting a Collegiate Athletes' Right to "Opt Out"

As a companion rule to promote the pro-competitive justification of preserving collegiate spirit, the NCAA may elect to institute a rule whereby current collegiate athletes would be unable to "opt-out" of CALA and pursue individual or direct licensing opportunities until their eligibility has expired or earlier terminated. As a consequence, opting into CALA and its licensing arrangements, would establish more parity amongst college athletes, thereby mitigating the advantages that more successful universities may have, if they are able to use prospective royalties as a benefit in the recruiting process. For the sake of clarity,

214 *O'Bannon*, 7 F.Supp.3d 955 at 984.

such a rule would not be effective once a college athlete's eligibility expires or is terminated, and the former college athletes would be able to "opt-out" of CALA and directly pursue any such business opportunities since former college athletes would not be subject to the rules and regulations of the NCAA. However, due to potentially high transactional costs, the class of former college athletes opting out would most likely include elite professional athletes whose names and brands would carry enough leverage for the benefit of compensation to outweigh the cost of management. Therefore, the number of athletes electing to opt out would in all probability be minimal and in such event, may be limited to specific categories of products. Per the NCAA's own estimates, only about 1.7% of college football players and 1.2% of men's basketball players advance to play in professional leagues, and fewer still become Hall of Fame caliber.[215]

5. No Compensation for Gratis Promotional Use of Publicity Rights by the NCAA, et al.

In addition, the NCAA could prohibit compensation to college athletes arising from use of their publicity rights for NCAA promotional materials, its athletic conferences and/or respective universities. All college athletes would thereby agree that as consideration for their athletic scholarship, the athlete would permit use of their personal attributes in perpetuity to promote or market the NCAA or respective athletic conference or university, provided that such use occur on a gratis, promotional basis. In other words, if the NCAA or any of its members received remuneration or earned a profit from a third party sponsor for such promotion or marketing content, the former college athlete would share in such revenues.[216]

V. HOW CALA, NOT AMATEURISM, PRESERVES INTERCOLLEGIATE ATHLETICS

In *Banks v. NCAA*, the Seventh Circuit Court of Appeals expressed a now unequivocally misplaced concern that introducing professional athletics into the collegiate athletic experience would commercialize the industry, interfere with the educational pursuits of college athletes, and destroy their amateur status.[217] In fact, professional revenues, not professional athletes, have commercialized collegiate athletics, impeding the educational pursuits of amateurs, and professionalizing every aspect of the business but the college athlete. Instituting a royalty-based compensation system represents a pragmatic compromise that

215 *How Do Athletic Scholarships Work?*, NCAA.ORG, http://www.ncaa.org/about/resources/media-center/how-do-athletics-scholarships-work (last visited Mar. 15, 2015).
216 *See e.g.*, RESTATEMENT (SECOND) OF TORTS, § 652C cmt. b (1977).
217 Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992).

would lead to more adequate compensation for college athletes, and potentially other student-athletes, while balancing the interests of the universities, athletic conferences, and the NCAA in preserving the fundamentals of the collegiate spirit.

A. *Maintaining Compliance with Title IX*

The potential impact of the *O'Bannon* decision on Title IX was not an issue before the district court. However, a university rule or practice that compensates only male athletes, at the exclusion of female athletes--even where male athletes of nonrevenue generating sports are similarly excluded, will likely lead to challenges under Title IX. Title IX of the Education Amendments of 1972 is a federal law that prevents discrimination in educational opportunities on the basis of gender as follows: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[218]

The development of Title IX legislation and jurisprudence has led to its application to athletic programs at both public and private institutions, where such institutions, or any of its students, receive any form of government funding. This development has a profound effect on intercollegiate athletics.[219] The Policy Interpretations of 1979 provided three specific requirements for Title IX compliance: (1) financial aid, (2) equivalence in benefits and program areas, and (3) meeting the interests and abilities of the students.[220] The *O'Bannon* Court acknowledged that its ruling would not alter the number of athletic programs offered to meet the needs of a university's student population, hence, would not affect the third requirement.[221]

With respect to financial aid, an institution may not "limit eligibility for assistance *which is of any particular type or source*, apply different criteria, or otherwise discriminate [on the basis of gender]" in providing scholarships and other financial aid to student-athletes.[222] Although financial aid does not have to be disbursed on a dollar-for-dollar basis between male and female athletes, the allocation must be "substantially equal."[223] Consequently, a rule that grants football and

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218 Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (2000).

219 *See* NCAA, v. Smith, 525 U.S. 459, 468 (1999). *See generally*, Paul Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325 (2012) (providing a history of the development of Title IX legislation and jurisprudence).

220 A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 239 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 26).

221 O'Bannon v. NCAA, 7 F.Supp.3d 955, 983 (N.D. Cal. 2014).

222 34 C.F.R. § 106.37(a) (2000) (emphasis added).

223 Title IX Policy Interpretation, 44 Fed. Reg. at 239.

men's basketball players the right to compensation arising from NIL exploitation, but continues to prohibit female athletes from an *opportunity* to receive similar compensation may be deemed a violation of Title IX. By contrast, a new rule granting all collegiate athletes the right to receive compensation for their publicity rights, and therefore the *equal opportunity* for female athletes to seek comparable opportunities or otherwise obtain representation under CALA, may withstand judicial scrutiny. Notably, the Policy Interpretation acknowledges that disparities may exist in the financial awards to each male and female athlete based upon, "legitimate, nondiscriminatory factors."[224] As a result, even where football and men's basketball players generate more income than female athletes from their publicity rights, a court could reason that their publicity rights are likewise licensed at disproportionately higher rates, justifying the disparity in related distributions.

With respect to equivalence in benefits and programs, such benefits, include, without limitation, equipment, facilities, scheduling of competitions, publicity, recruitment, tutoring, coaching and support services.[225] If, as offered by the *O'Bannon* Court, a university would manage the publicity rights of its college athletes, such services may be considered a benefit, subject to Title IX requirements, if such benefit excludes female athletes.[226] However, CALA would be owned and operated independent of the NCAA and universities, and therefore, would not likely be considered a benefit for Title IX purposes.

B. *Economic Benefits of a Royalty-Based System to "Nonrevenue Generating" Athletic Programs*

Pay-for-play opponents, including the NCAA's defense in *O'Bannon* defense, argue that additional compensation to college athletes will adversely affect the number of athletic scholarships a university may offer.[227] Ultimately, the *O'Bannon* Court found the argument unpersuasive, but the argument is also misleading.[228] Although the cost of an athletic scholarship may be valued on average at around $30,000 per year, providing tuition, room and board, represents an operational loss but not an actual hard cost to the university and the related fees are amortized across the entire campus, and such costs would be paid by the university regardless of the

224 *Id.*

225 *See id.*

226 Apart from Title IX considerations, granting universities the authority to negotiate and manage the publicity rights of its athletes would likely induce conflicts of interest detrimental to college athletes, since universities may not be incentivized to secure the best deal on their behalf, in trying to achieve the most favorable terms to the university.

227 *See* O'Bannon v. NCAA, 7 F.Supp.3d 955, 1004 (N.D. Cal. 2014).

228 *Id.*

presence or absence of an individual athlete or other student.[229] Therefore, payment of licensing compensation to college athletes would not impede the ability of a university to offer at minimum, the same number of scholarships that a university currently offers. In addition, the university may directly pass along such costs to third party licensees or aggregate the fees from budget reductions or athletic department profits, which can net in the tens of millions of dollars among universities in the major athletic conferences.

So-called nonrevenue generating sports can also benefit from a royalty-based system. In addition to the potential to earn royalties from licensing arrangements, subsequent costs that may result from the payment of royalties to college athletes may encourage the NCAA and its member institutions to market other sports and identify potential revenue sources for these programs. Theoretically, women's athletic programs could become more profitable and independent, thereby increasing their respective budgets, and in turn, their benefits and opportunities. Although Title IX requires equivalent benefits in publicity, the requirement does not take into account sponsorships, advertisements and coverage of football and men's basketball by third party corporate partners and media distributors.[230] These externals produce a significant disparity in exposure. Division I men's basketball receives significant national exposure on television via the NCAA's agreements with CBS, ESPN and Turner throughout the season. By comparison, when the Division I women's tournament moved from CBS to ESPN in 1996, the viewership declined over 50% in the subsequent year and has remained stagnant since.[231] Additionally, unlike the men's tournament, certain games in the initial rounds of the women's NCAA tournament face regional blackouts.[232] Similarly, ESPN reported that the 2015 Women's College World Series was the most-viewed in history, acknowledging that the ratings success followed the most comprehensive coverage of the college softball *regular* season by ESPN.[233] One potential benefit of a royalty-based system would be that it allows the universities to package additional rights to more sporting events in their deals as an accommodation for

[229] SNYDER, T.D., AND DILLOW, S.A., DIGEST OF EDUCATION STATISTICS 2012, NAT'L CTR. FOR EDUC. STATISTICS, INST. OF EDUC. SCI., U.S. DEPT. OF EDUC. (2013).

[230] Title IX Policy Interpretation, 44 Fed. Reg. at 239.

[231] Danielle Kurtzleben, *Three Big March Madness Losers*, U.S. NEWS & WORLD REPORT, (Mar, 19, 2012), http://www.usnews.com/news/articles/2012/03/19/three-big-march-madness-losers. *See also* Jeré Longman, *A Push to Invigorate Women's Basketball*, N.Y. TIMES (June 17, 2013), http://www.nytimes.com/2013/06/18/sports/ncaabasketball/official-offers-ways-to-invigorate-womens-basketball.html.

[232] Kurtzleben, *supra* note 231; Longman, *supra* note 231.

[233] Derek Volner, *ESPN Televises Most-Viewed Women's College World Series Ever*, ESPNMediaZone.com (June 4, 2015), http://espnmediazone.com/us/press-releases/2015/06/espn-televises-viewed-womens-college-world-series-ever/.

the anticipated higher licensing fees. Although a limited amount of television programming real estate would remain available, licensors may elect to exploit the additional rights to other sports across digital platforms in particular, as the overall demand for content across digital platforms continues to grow. The exploitation across digital platforms may demand more marketing and promotion of alternative sporting events, creating new audiences and unique sponsorship and revenue opportunities, as a result. In addition, certain major athletic conferences control programming via their own cable network, which provides additional programming and marketing opportunities beneficial to alternative athletic programs. Arguably, the goodwill of the Olympics transcends many of the sporting events themselves; however, the Olympic trials and other programs featuring nonrevenue generating athletic competitions also carry substantial audiences.[234] Digital platforms and targeted programming of conference networks creates opportunities for niche marketing and financial growth for nonrevenue generating intercollegiate athletic competitions. Given the current financial model, neither the NCAA nor its member institutions are incentivized to explore opportunities for women's intercollegiate athletics or other "nonrevenue" generating sports, which a royalty-based system may necessarily demand.

CONCLUSION

In his 2006 state-of-the-association address, Myles Brand boldly proclaimed that "'[a]mateur' defines the participants, not the enterprise."[235] This philosophy has lead the system to a crossroads, as it has become increasingly difficult for the NCAA to justify its commercial activities under the guise of amateurism for the sake of predominantly educational pursuits. While the *O'Bannon* decision is under appeal, the holding reveals that the courts are finally catching up to the business of college athletics in reevaluating outmoded jurisprudence. The *O'Bannon* decision was a significant step in a new direction, but still shortsighted in some respects. . The trial record did not support any valid procompetitive justification for artificially imiting NIL remuneration. The results and proceeds of contributions made by college athletes, and the exploitation of their publicity rights, generate

234 Sara Bibel, *TV Ratings Saturday: Olympic Trials Beat Baseball by a Full Length of the Pool; 'The Firm' Flat*, TV BY THE NUMBERS (July 1, 2012), http://tvbythenumbers.zap2it.com/2012/07/01/tv-ratings-saturday-olympic-trials-beat-baseball-by-a-full-length-of-the-pool/140127/. *See also* Amanda Kondolojy, *NBC Wins the Week of June 25-July1 with 'America's Got Talent and Olympic Trials'*, TV BY THE NUMBERS (July 3, 2012), http://tvbythenumbers.zap2it.com/2012/07/03/nbc-wins-the-week-of-june-25-july-1-with-americas-got-talent-and-olympic-trials/140440/.

235 Robyn Norwood, *NCAA Chief Thinks Revenue*, L.A. TIMES (Jan. 9, 2006), http://articles.latimes.com/2006/jan/09/sports/sp-ncaa9.

revenues comparable to major professional sports, and those revenues feed the mouths of university coffers, conference commissioners, media outlets, corporations, states, cities, and even their fellow athletes. In the ultimate paradox, under the rigid NCAA rules, a college athlete may be sanctioned simply for accepting a complimentary meal. Even if the NCAA membership adopts the recent legislation proposed by the Power Conference, such financial stipends will be negligible in comparison to the related revenues, as any supplemental compensation will inherently be limited by Title IX and its "substantially similar" requirement. The interest of the NCAA and its member institutions' in preserving the educational integrity of the universities and those of college athletes in preserving their personal rights, are all protected by a royalty-based compensation system within which to more adequately compensate college athletes. While there will likely be legal hurdles to overcome in establishing a licensing organization to represent college athletes, the overriding policies and purposes as well as guidance from legal precedent may assist such an organization in the defense of antitrust and Title IX challenges. Ironically, it may be the very principles and legal precedent, which defined "student-athletes" and cultivated the mega-business that is intercollegiate athletics, which ultimately protects and preserves the potential new rules implemented by the NCAA in the pursuit of college athletes to recognize and reap the benefits of their labor.

In opening this conclusion with a quotation from a former NCAA president, this article will also close with a statement from a former NCAA president, Walter Buyers, who many would credit as coining the term "student-athlete" and who was integral in fashioning the related legal theories that have insulated the practices of the NCAA in the face of growing commercialization of the college sports business and its athletes.[236] Walter Byers was the NCAA's first Executive Director and his tenure spanned nearly four decades In one of his final speeches preceding his death, Byers reflects on the state of intercollegiate athletics, approximately ten years following his resignation:

> [S]ports is a fountain of youth because each generation of young persons come along and ask is, 'Coach give me a chance and I can do it . . . and the excitement continues and it's a disservice to these young people that the management of intercollegiate athletics stayed in place committed to an outmoded code of amateurism drawn, quite frankly, in 1956. [These athletes] can count the house, and they can

[236] SCHOOLED: THE PRICE OF COLLEGE SPORTS (Makuhari Media 2013) (discussing the history of intercollegiate athletics, the birth of the term "student-athlete" and condition of the modern college athlete with commentary and interviews featuring, *inter alia*, current and former college athletes, professional athletes, sports analysts, brand executives, economists, and lead counsel representing plaintiffs in the *O'Bannon* antitrust lawsuit discussed herein).

> multiply the tickets prices, and they can read the TV contracts, and it doesn't take any great genius to understand what was real in 1956 can hardly be remembered in the gross commercial climate of intercollegiate athletics today. And I attribute that to the neo-plantation mentality that exists on the campuses of our country and in the [athletic] conference offices and in the NCAA—that the rewards belong to the overseers and the supervisors. The coach owns the athletes' feet, the college owns the athletes' body . . . All is not fair and I predict that the amateur code now based on a foregone philosophy and held in place for sheer economic purposes will not long-stand the test of the law.[237]

Walter Byers made the foregoing remarks in 1998 at the cusp of the 21st Century. Over fifteen years and not millions but billions of dollars later, any artificial, unilateral restrictions on compensation to collegiate athletes, whether arising from publicity rights or other sources cannot, and should not, continue to long-stand the test of the law.

[237] *Id*. The author transcribed the text from audio of the speech by Walter Byers, as featured in the film.