The 5th Annual Entertainment & Sports Law Symposium

Friday, April 12, 2019

Presented by The Entertainment & Sports Law Society

SYRACUSE UNIVERSITY
COLLEGE OF LAW

The Entertainment & Sports Law Society would like to thank the following College of Law faculty for their assistance in planning this event:

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Agenda

CLE Registration: 9:45am – 10:40am

Opening Remarks: 10:40am – 11:00am

Panel 1: 11:00am – 12:15pm
Music Licensing; The Impact of the Music Modernization Act

Imraan Farukhi; Licensed Attorney and Assistant Professor of Television, Radio & Film at the S.I. Newhouse School of Public Communications
Matthew Van Ryn; Attorney at Melvin & Melvin, PLLC
Ryan Raichilson; Director, Business & Legal Affairs at Sony/ATV Music Publishing

1.5 credits, Areas of Professional Practice

Moderated by: Bill Werde; Director, Bandier Program at the S.I. Newhouse School of Public Communications

Lunch: 12:15pm – 12:50pm

Panel 2: 1:00pm – 2:15pm Melanie Gray Ceremonial Courtroom
NCAA Amateurism; How Current Rulings in the Court System Will Affect the College Game

Frank Ryan; L'94, Partner at DLA Piper
James Zesutek; L'75, Partner at Dinsmore and Shohl
Seth Greenberg; ESPN College Basketball Analyst

1.5 credits, Areas of Professional Practice

Moderated by: Kevin Belbey; L'16, Director of Sports Broadcasting, The Montag Group

Panel 3: 2:30pm – 3:30pm
Final Round of Inaugural Advocacy Honor Society and ESLS Sports Negotiation Competition
Judged by:

Kevin Belbey; L'16, Director of Sports Broadcasting, The Montag Group
James Zesutek; L'75, Partner at Dinsmore and Shohl
John Wolohan; Licensed Attorney and Professor of Sports Law

Panelist Bios

Panel 1: *Music Licensing: The Impact of the Music Modernization Act*

Imraan Farukhi- Licensed Attorney and Assistant Professor of Television, Radio & Film at the Newhouse School of Public Communications

Imraan "Immy" Farukhi is an experienced attorney focused on transactions and counseling pertaining to the entertainment, music, film, television, advertising, fashion, sports, and new media industries. He has worked extensively in private practice, having previously been an attorney in the entertainment department of Fox Rothschild LLP, and with prominent boutique entertainment and intellectual property law firms throughout the New York City metro area.

He has worked with Grammy-nominated musicians, and legal teams for Academy Award-winning productions. His clients include film and TV production companies, writers/directors, on-screen talent, music producers/mixers, musicians, models, and advertising productions for prominent lifestyle and technology brands, to name a few.

Prior to becoming an attorney, he began his career in the entertainment industry as a musician.

Mr. Farukhi is also an Assistant Professor at the S.I. Newhouse School of Public Communications at Syracuse University, where he teaches undergraduate and graduate entertainment law courses for students in the Television-Radio-Film program and the Bandier music industry program. He previously taught media law classes at William Paterson University in New Jersey. His speaking engagements have included presentations as a panelist at the Garden State Film Festival and New York City Drone Film Festival.

Education: J.D., Cum Laude, Pace University School of Law; B.A., Cum Laude, Communication, Villanova University

Matthew Van Ryn- Attorney at Melvin & Melvin, PLLC

Matthew Van Ryn is an attorney who practices in the areas of business law and intellectual property, specializing in working with start-ups and mid-market clients. He advises clients in areas such as entity formation, buy-sell, shareholder and operating agreements, business strategy, employment and stock option agreements, intellectual property protection and licensing, mergers and acquisitions.

Mr. Van Ryn has substantial experience negotiating and drafting commercial contracts, commercial lease transactions, joint ventures, software and technology development, manufacture, sales and distribution agreements.

He has secured funding through private placements, loans and grants for numerous start up and growing businesses under a wide variety of programs.

Mr. Van Ryn also has extensive experience as a technology marketing and business strategy consultant. He has created award winning marketing communications campaigns for IBM's Software and Internet business units, launching over a dozen business initiatives within IBM, and literally hundreds of products over a ten year period.

Mr. Van Ryn received a Bachelor of Arts from Cornell University, and his J.D. from Rutgers Law School.

Ryan Raichilson- Director, Business & Legal Affairs at Sony/ATV Music Publishing

Ryan Raichilson serves as Director, Business & Legal Affairs at Sony/ATV Music Publishing, where he negotiates, drafts, and finalizes various types of music publishing agreements with the entertainment industry's most prominent attorneys, including multi-million dollar songwriting deals with world-renowned artists. He also handles complex copyright-related issues, such as infringements, dispute resolutions, U.S. copyright termination rights, and purchases. Upon graduating from Syracuse University in 2007, Ryan began his career at Sony/ATV as executive assistant to the Chairman and CEO, Martin Bandier. In 2011, while continuing to work full-time for Sony/ATV, he began the evening law program at Rutgers School of Law – Newark. While in law school, Ryan transitioned to Sony/ATV's Business & Legal Affairs department as a contract administrator, and after graduating from Rutgers in 2015, became in-house counsel.

Moderated by Bill Werde- Director, Brandier Program

Bill Werde served as editorial director for Billboard, during which time he directed content strategy, planning and execution across all Billboard properties, including Billboard magazine and billboard.com, helping transition the company from a print business-to-business trade magazine to a rapidly growing digital consumer brand. He led the 2010 relaunch of billboard.com, created a video department and expanded across social platforms and into branded content. The relaunch earned a 2010 Ellie Award for Digital Media from the American Society of Magazine Editors. Under Werde's direction, Billboard also earned Eddie Awards for Best Media and Entertainment Publication from Folio magazine in 2006 and 2007.

Werde's recent strategic consulting clients include PEN America, Oak View Group, PBS' "Landmarks Live" music performance series and singer/songwriter Andy Grammer. He was previously an associate editor at Rolling Stone magazine, and his work has appeared in The New York Times, Wired, the Washington Post and elsewhere.

Panel 2: *NCAA Amateurism: How Current Rulings in the Court System will Affect the College Game*

Frank Ryan- Partner at DLA Piper, L'94

In addition to being a Partner at DLA Piper, Frank Ryan is the Global Co-Chair and US Co-Chair of Intellectual Property and Technology department, and Deputy Chair of Media, Sports and Entertainment Sector. Frank provides legal and strategic advice to domestic and multinational clients who draw on his experience in litigation, intellectual property, media and sports, and complex commercial matters. He has handled numerous cases and jury trials in the media and sport arenas and has particular experience in patent, trademark, copyright, trade secret, false advertising and business litigation. Frank's experience includes numerous engagements for ESPN, Disney, ABC, NCAA related matters, Nike, as well as for a number of other prominent networks, media and sports related entities, among them professional sports clubs. Frank is a member of DLA Piper's Executive Committee and Global Board.

Frank earned his Bachelor's of Science from Syracuse University and was a Four Year Varsity Letter Winner. He also earned a Juris Doctor from Syracuse University College of Law with special distinctions including Magna Cum Laude and Order of the Coif.

In terms of recognitions, *The Legal 500 United States* has recommended Frank for his work within the sports sector. He also serves on the Syracuse University College of Law Board of Advisors. And he is a member of the International Trademark Association, the American Bar Association (Litigation and Media and Communications sections), New York State Bar Association, and Bar Association of the City of New York.

James Zesutek- Partner at Dinsmore and Shohl, L'75

James Zesutek is the former managing partner of the firm's Pittsburgh office. He is involved in the defense of pharmaceutical and medical device products on behalf of the products' manufacturers. James is also involved in the defense of chemical and fiber products including products that contain asbestos, talc, benzene and acrylamide. He has an active NCAA practice in which he represents coaches in hearings before the Committee on Infractions, defending against allegations of NCAA bylaw violations and has been involved in the Committee on Infractions hearings involving numerous universities and colleges.

The entirety of James' post-secondary education took place at Syracuse University starting with the Bachelor of Science degree in 1972. This was followed by completion of Juris Doctor at College of Law in 1975 and Master of Public Administration at Maxwell in 1976.

James currently serves on several Syracuse University boards including the Syracuse University Athletic Development Advisory Board (Board of Directors) and Syracuse University College of Law Board of Advisors. In addition, some of his distinctions include recognition from *Best Lawyers* publication for Commercial Litigation, Insurance Law, Banking and Finance, Bankruptcy Litigation, Mass Tort Litigation, Class Actions and Product Liability Litigation, a "Lawyer of the Year" Pittsburgh Award in 2012 for Mass Tort Litigation/Class Actions – Defendants, Syracuse University Letter Winner of Distinction Award, and recognition from *Pennsylvania Super Lawyers* publication.

Seth Greenberg- ESPN College Basketball Analyst

Seth Greenberg is a college basketball analyst at ESPN, having joined the network in 2012. Seth appears on various platforms, most notably College GameDay, ESPN's popular Saturday college basketball show. He also appears on SportsCenter, ESPN Radio and other programming.

Prior to broadcasting, Seth coached college basketball for 35 years. His head coaching stints included Long Beach State, South Florida and Virginia Tech, where he was twice named ACC Coach of the Year. Seth led the Hokies to the post-season six times in nine seasons, and his teams beat the nation's #1 ranked team three times during that stretch (vs UNC, @ Wake Forest, vs Duke). He also led Long Beach State to a win at #1 ranked Kansas as well as two NCAA tournament appearances. He won a total of 383 games during his career, including victories over coaching legends Mike Krzyzewski, Roy Williams, Gary Williams, Jim Calhoun and Denny Crum. Over the years Seth walked off the court a winner in Cameron Indoor Stadium, Allen Fieldhouse, Dean Smith Center, Comcast Center and Freedom Hall. Seth is a member of both the Long Beach State Hall of Fame and the Jewish Hall of Fame.

Seth has leveraged his success into numerous appearances and speaking engagements. He has partnered with major brands including Coca-Cola, New York Life Insurance, Buffalo Wild Wings and The Economist. Seth has spoken on leadership, coaching, program building and the art of the upset, among other topics. He has also supported a variety of charities including but not limited to Coaches v. Cancer, All Coaches Care and The V Foundation.

Moderated by Kevin Belbey- Director of Sports Broadcasting at The Montag Group, L'16

As an Agent at The Montag Group, Kevin Belbey represents sports broadcasting clients from national networks to local markets. His clients include play-by-play announcers, analysts, radio hosts, writers and reporters. Kevin works out of The Montag Group's New York and White Plains offices. In March of 2017, Kevin was named to Front Office Sports' "Rising 25" list of up-and-coming sports business professionals.

Kevin is a graduate of Syracuse University, where he received his Bachelor's degree in Broadcast Journalism from the S.I. Newhouse School of Public Communications, and his Master's degree in New Media Management from Newhouse.

Kevin graduated from Syracuse University College of Law in 2016, where he served as the Executive Director of the school's Moot Court Honor Society, a Law Ambassador, Vice President of the Communications Law & Policy Society, a Student Attorney with the Children's Rights & Family Law Clinic, competed on the 2015 Tournament of Champions & 2014 National Civil Trial Competition mock trial teams, and played on the Syracuse Law basketball team.

Due to his contributions to Syracuse University College of Law, Kevin was honored with the Paul Shipman Andrews Award, the Law Ambassador Award, the Office of Student Life Dean's Award, the Ralph E. Kharas Leadership Award, and the Robert W. Miller Trial Advocacy Award.

In 2015, Kevin founded Boeheim's Army – a team of former Syracuse Men's Basketball legends to compete for a $2 million winner-take-all prize in The Basketball Tournament (TBT) on ESPN. He has worked as the team's General Manager the past four summers.

He currently serves on several Syracuse University boards including the Syracuse University Law Alumni Association, The Newhouse 44 and the Generation Orange Leadership Council.

Panel 3: *Syracuse University College of Law Sports Negotiation Competition*

Judged by- Kevin Belbey, James Zesutek, and John Wolohan

John Wolohan- Licensed Attorney and Professor of Sports Law and Management at the David B. Falk College of Sport and Human Dynamics and the Syracuse University College of Law

John Wolohan is an attorney and professor of Sports Law and Principles & Contemporary Issues in Sport Management in the David B. Falk College of Sport and Human Dynamics at Syracuse University, as well as at Syracuse University College of Law. He specializes in sport law, sport doping, antitrust and labor law, image rights, and rights of athletes.

Professor Wolohan is one of the lead editors of the book "Law for Recreation and Sport Managers" by Cotten and Wolohan, and is the author of the "Sports Law Report," a monthly article in Athletic Business. Professor Wolohan has also published many articles and book chapters in the areas of athlete's rights, intellectual property and antitrust issues in sport in Journals such as the Marquette Sports Law Journal, Seton Hall Journal of Sports Law, Villanova Sports & Entertainment Law Journal, University of Missouri- Kansas City Law Review, Educational Law Reporter, International Sports Law Journal, Journal of the Legal Aspects of Sport and the Journal of Sport Management.

Additionally, Professor Wolohan has made several presentations in the area of sports law to organizations such as the American Bar Association, Asser Sports Law Institute, Athletic Business, Australian & New Zealand Sports Law Association, European Association for Sport Management, International Sports Lawyers Association, North American Society of Sport Management, Sport and Recreation Law Association, US Indoor Sports Association and the United States Sport Congress.

Professor Wolohan, is a member of the Massachusetts Bar Association, received his B.A. from the University of Massachusetts – Amherst, and his J.D. from Western New England University, School of Law.

United States Code Annotated
Title 17. Copyrights (Refs & Annos)
Chapter 1. Subject Matter and Scope of Copyright (Refs & Annos)

17 U.S.C.A. § 115

§ 115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords

Effective: October 11, 2018
Currentness

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106, to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) Availability and scope of compulsory license in general.--

(1) Eligibility for compulsory license.--

(A) Conditions for compulsory license.--A person may by complying with the provisions of this section obtain a compulsory license to make and distribute phonorecords of a nondramatic musical work, including by means of digital phonorecord delivery. A person may obtain a compulsory license only if the primary purpose in making phonorecords of the musical work is to distribute them to the public for private use, including by means of digital phonorecord delivery, and--

(i) phonorecords of such musical work have previously been distributed to the public in the United States under the authority of the copyright owner of the work, including by means of digital phonorecord delivery; or

(ii) in the case of a digital music provider seeking to make and distribute digital phonorecord deliveries of a sound recording embodying a musical work under a compulsory license for which clause (i) does not apply--

(I) the first fixation of such sound recording was made under the authority of the musical work copyright owner, and the sound recording copyright owner has the authority of the musical work copyright owner to make and distribute digital phonorecord deliveries embodying such work to the public in the United States; and

(II) the sound recording copyright owner, or the authorized distributor of the sound recording copyright owner, has authorized the digital music provider to make and distribute digital phonorecord deliveries of the sound recording to the public in the United States.

(B) Duplication of sound recording.--A person may not obtain a compulsory license for the use of the work in the making of phonorecords duplicating a sound recording fixed by another, including by means of digital phonorecord delivery, unless--

(i) such sound recording was fixed lawfully; and

(ii) the making of the phonorecords was authorized by the owner of the copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.

(2) Musical arrangement.--A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

(b) Procedures to obtain a compulsory license.--

(1) Phonorecords other than digital phonorecord deliveries.--A person who seeks to obtain a compulsory license under subsection (a) to make and distribute phonorecords of a musical work other than by means of digital phonorecord delivery shall, before, or not later than 30 calendar days after, making, and before distributing, any phonorecord of the work, serve notice of intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served, it shall be sufficient to file the notice of intention with the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(2) Digital phonorecord deliveries.--A person who seeks to obtain a compulsory license under subsection (a) to make and distribute phonorecords of a musical work by means of digital phonorecord delivery--

(A) prior to the license availability date, shall, before, or not later than 30 calendar days after, first making any such digital phonorecord delivery, serve a notice of intention to do so on the copyright owner (but may not file the notice with the Copyright Office, even if the public records of the Office do not identify the owner or the owner's address), and such notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation; or

(B) on or after the license availability date, shall, before making any such digital phonorecord delivery, follow the procedure described in subsection (d)(2), except as provided in paragraph (3).

(3) Record company individual download licenses.--Notwithstanding paragraph (2)(B), a record company may, on or after the license availability date, obtain an individual download license in accordance with the notice requirements described in paragraph (2)(A) (except for the requirement that notice occur prior to the license availability date). A record company that obtains an individual download license as permitted under this paragraph shall provide statements of account and pay royalties as provided in subsection (c)(2)(I).

(4) Failure to obtain license.--

(A) Phonorecords other than digital phonorecord deliveries.--In the case of phonorecords made and distributed other than by means of digital phonorecord delivery, the failure to serve or file the notice of intention required by paragraph (1) forecloses the possibility of a compulsory license under paragraph (1). In the absence of a voluntary license, the failure to obtain a compulsory license renders the making and distribution of phonorecords actionable as acts of infringement under section 501 and subject to the remedies provided by sections 502 through 506.

(B) Digital phonorecord deliveries.--

(i) In general.--In the case of phonorecords made and distributed by means of digital phonorecord delivery:

(I) The failure to serve the notice of intention required by paragraph (2)(A) or paragraph (3), as applicable, forecloses the possibility of a compulsory license under such paragraph.

(II) The failure to comply with paragraph (2)(B) forecloses the possibility of a blanket license for a period of 3 years after the last calendar day on which the notice of license was required to be submitted to the mechanical licensing collective under such paragraph.

(ii) Effect of failure.--In either case described in subclause (I) or (II) of clause (i), in the absence of a voluntary license, the failure to obtain a compulsory license renders the making and distribution of phonorecords by means of digital phonorecord delivery actionable as acts of infringement under section 501 and subject to the remedies provided by sections 502 through 506.

(c) General conditions applicable to compulsory license.--

(1) Royalty payable under compulsory license.--

(A) Identification requirement.--To be entitled to receive royalties under a compulsory license obtained under subsection (b)(1) the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed.

(B) Royalty for phonorecords other than digital phonorecord deliveries.--Except as provided by subparagraph (A), for every phonorecord made and distributed under a compulsory license under subsection (a) other than by means of digital phonorecord delivery, with respect to each work embodied in the phonorecord, the royalty shall be the royalty prescribed under subparagraphs (D) through (F), paragraph (2)(A), and chapter 8. For purposes of this subparagraph, a phonorecord is considered 'distributed' if the person exercising the compulsory license has voluntarily and permanently parted with its possession.

(C) Royalty for digital phonorecord deliveries.--For every digital phonorecord delivery of a musical work made under a compulsory license under this section, the royalty payable shall be the royalty prescribed under subparagraphs (D) through (F), paragraph (2)(A), and chapter 8.

(D) Authority to negotiate.--Notwithstanding any provision of the antitrust laws, any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a) may negotiate and agree upon the terms and rates of royalty payments under this section and the proportionate division of fees paid among copyright owners, and may designate common agents on a nonexclusive basis to negotiate, agree to, pay or receive such royalty payments. Such authority to negotiate the terms and rates of royalty payments includes, but is not limited to, the authority to negotiate the year during which the royalty rates prescribed under this subparagraph, subparagraphs (E) and (F), paragraph (2)(A), and chapter 8 shall next be determined.

(E) Determination of reasonable rates and terms.--Proceedings under chapter 8 shall determine reasonable rates and terms of royalty payments for the activities specified by this section during the period beginning with the effective date of such rates and terms, but not earlier than January 1 of the second year following the year in which the petition requesting the proceeding is filed, and ending on the effective date of successor rates and terms, or such other period as the parties may agree. Any copyright owners of nondramatic musical works and any persons entitled to obtain a compulsory license under subsection (a) may submit to the Copyright Royalty Judges licenses covering such activities. The parties to each proceeding shall bear their own costs.

(F) Schedule of reasonable rates.--The schedule of reasonable rates and terms determined by the Copyright Royalty Judges shall, subject to paragraph (2)(A), be binding on all copyright owners of nondramatic musical works and persons entitled to obtain a compulsory license under subsection (a) during the period specified in subparagraph (E), such other period as may be determined pursuant to subparagraphs (D) and (E), or such other period as the parties may agree. The Copyright Royalty Judges shall establish rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. In determining such rates and terms for digital phonorecord deliveries, the Copyright Royalty Judges shall base their decision on economic, competitive, and programming information presented by the parties, including--

(i) whether use of the compulsory licensee's service may substitute for or may promote the sales of phonorecords or otherwise may interfere with or may enhance the musical work copyright owner's other streams of revenue from its musical works; and

(ii) the relative roles of the copyright owner and the compulsory licensee in the copyrighted work and the service made available to the public with respect to the relative creative contribution, technological contribution, capital investment, cost, and risk.

(2) Additional terms and conditions.--

(A) Voluntary licenses and contractual royalty rates.--

(i) In general.--License agreements voluntarily negotiated at any time between one or more copyright owners of nondramatic musical works and one or more persons entitled to obtain a compulsory license under subsection (a) shall be given effect in lieu of any determination by the Copyright Royalty Judges. Subject to clause (ii), the royalty rates determined pursuant to subparagraphs (E) and (F) of paragraph (1) shall be given effect as to digital phonorecord deliveries in lieu of any contrary royalty rates specified in a contract pursuant to which a recording artist who is the author of a nondramatic musical work grants a license under that person's exclusive rights in the musical work under paragraphs (1) and (3) of section 106 or commits another person to grant a license in that musical work under paragraphs (1) and (3) of section 106, to a person desiring to fix in a tangible medium of expression a sound recording embodying the musical work.

(ii) Applicability.--The second sentence of clause (i) shall not apply to--

(I) a contract entered into on or before June 22, 1995, and not modified thereafter for the purpose of reducing the royalty rates determined pursuant to subparagraphs (E) and (F) of paragraph (1) or of increasing the number of musical works within the scope of the contract covered by the reduced rates, except if a contract entered into on or before June 22, 1995, is modified thereafter for the purpose of increasing the number of musical works within the scope of the contract, any contrary royalty rates specified in the contract shall be given effect in lieu of royalty rates determined pursuant to subparagraphs (E) and (F) of paragraph (1) for the number of musical works within the scope of the contract as of June 22, 1995; and

(II) a contract entered into after the date that the sound recording is fixed in a tangible medium of expression substantially in a form intended for commercial release, if at the time the contract is entered into, the recording artist retains the right to grant licenses as to the musical work under paragraphs (1) and (3) of section 106.

(B) Sound recording information.--Except as provided in section 1002(e), a digital phonorecord delivery licensed under this paragraph shall be accompanied by the information encoded in the sound recording, if any, by or under the authority of the copyright owner of that sound recording, that identifies the title of the sound recording, the

featured recording artist who performs on the sound recording, and related information, including information concerning the underlying musical work and its writer.

(C) Infringement remedies.--

(i) In general.--A digital phonorecord delivery of a sound recording is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, unless--

(I) the digital phonorecord delivery has been authorized by the sound recording copyright owner; and

(II) the entity making the digital phonorecord delivery has obtained a compulsory license under subsection (a) or has otherwise been authorized by the musical work copyright owner, or by a record company pursuant to an individual download license, to make and distribute phonorecords of each musical work embodied in the sound recording by means of digital phonorecord delivery.

(ii) Other remedies.--Any cause of action under this subparagraph shall be in addition to those available to the owner of the copyright in the nondramatic musical work under subparagraph (J) and section 106(4) and the owner of the copyright in the sound recording under section 106(6).

(D) Liability of sound recording owners.--The liability of the copyright owner of a sound recording for infringement of the copyright in a nondramatic musical work embodied in the sound recording shall be determined in accordance with applicable law, except that the owner of a copyright in a sound recording shall not be liable for a digital phonorecord delivery by a third party if the owner of the copyright in the sound recording does not license the distribution of a phonorecord of the nondramatic musical work.

(E) Recording devices and media.--Nothing in section 1008 shall be construed to prevent the exercise of the rights and remedies allowed by this paragraph, subparagraph (J), and chapter 5 in the event of a digital phonorecord delivery, except that no action alleging infringement of copyright may be brought under this title against a manufacturer, importer or distributor of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or against a consumer, based on the actions described in such section.

(F) Preservation of rights.--Nothing in this section annuls or limits--

(i) the exclusive right to publicly perform a sound recording or the musical work embodied therein, including by means of a digital transmission, under paragraphs (4) and (6) of section 106;

(ii) except for compulsory licensing under the conditions specified by this section, the exclusive rights to reproduce and distribute the sound recording and the musical work embodied therein under paragraphs (1) and (3) of section 106, including by means of a digital phonorecord delivery; or

(iii) any other rights under any other provision of section 106, or remedies available under this title, as such rights or remedies exist before, on, or after the date of enactment of the Digital Performance Right in Sound Recordings Act of 1995.

(G) Exempt transmissions and retransmissions.--The provisions of this section concerning digital phonorecord deliveries shall not apply to any exempt transmissions or retransmissions under section 114(d)(1). The exemptions created in section 114(d)(1) do not expand or reduce the rights of copyright owners under paragraphs (1) through (5) of section 106 with respect to such transmissions and retransmissions.

(H) Distribution by rental, lease, or lending.--A compulsory license obtained under subsection (b)(1) to make and distribute phonorecords includes the right of the maker of such a phonorecord to distribute or authorize distribution of such phonorecord, other than by means of a digital phonorecord delivery, by rental, lease, or lending (or by acts or practices in the nature of rental, lease, or lending). With respect to each nondramatic musical work embodied in the phonorecord, the royalty shall be a proportion of the revenue received by the compulsory licensee from every such act of distribution of the phonorecord under this clause equal to the proportion of the revenue received by the compulsory licensee from distribution of the phonorecord under subsection (a)(1)(A)(ii)(II) that is payable by a compulsory licensee under that clause and under chapter 8. The Register of Copyrights shall issue regulations to carry out the purpose of this subparagraph.

(I) Payment of royalties and statements of account.--Except as provided in paragraphs (4)(A)(i) and (10)(B) of subsection (d), royalty payments shall be made on or before the twentieth day of each month and shall include all royalties for the month next preceding. Each monthly payment shall be made under oath and shall comply with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall also prescribe regulations under which detailed cumulative annual statements of account, certified by a certified public accountant, shall be filed for every compulsory license under subsection (a). The regulations covering both the monthly and the annual statements of account shall prescribe the form, content, and manner of certification with respect to the number of records made and the number of records distributed.

(J) Notice of default and termination of compulsory license.--In the case of a license obtained under paragraph (1), (2)(A), or (3) of subsection (b), if the copyright owner does not receive the monthly payment and the monthly and annual statements of account when due, the owner may give written notice to the licensee that, unless the default is remedied not later than 30 days after the date on which the notice is sent, the compulsory license will be automatically terminated. Such termination renders either the making or the distribution, or both, of all phonorecords for which the royalty has not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506. In the case of a license obtained under subsection (b)(2)(B), license authority under the compulsory license may be terminated as provided in subsection (d)(4)(E).

(d) Blanket license for digital uses, mechanical licensing collective, and digital licensee coordinator.--

(1) Blanket license for digital uses.--

(A) In general.--A digital music provider that qualifies for a compulsory license under subsection (a) may, by complying with the terms and conditions of this subsection, obtain a blanket license from copyright owners through the mechanical licensing collective to make and distribute digital phonorecord deliveries of musical works through one or more covered activities.

(B) Included activities.--A blanket license--

(i) covers all musical works (or shares of such works) available for compulsory licensing under this section for purposes of engaging in covered activities, except as provided in subparagraph (C);

(ii) includes the making and distribution of server, intermediate, archival, and incidental reproductions of musical works that are reasonable and necessary for the digital music provider to engage in covered activities licensed under this subsection, solely for the purpose of engaging in such covered activities; and

(iii) does not cover or include any rights or uses other than those described in clauses (i) and (ii).

(C) Other licenses.--A voluntary license for covered activities entered into by or under the authority of 1 or more copyright owners and 1 or more digital music providers, or authority to make and distribute permanent downloads of a musical work obtained by a digital music provider from a sound recording copyright owner pursuant to an individual download license, shall be given effect in lieu of a blanket license under this subsection with respect to the musical works (or shares thereof) covered by such voluntary license or individual download authority and the following conditions apply:

(i) Where a voluntary license or individual download license applies, the license authority provided under the blanket license shall exclude any musical works (or shares thereof) subject to the voluntary license or individual download license.

(ii) An entity engaged in covered activities under a voluntary license or authority obtained pursuant to an individual download license that is a significant nonblanket licensee shall comply with paragraph (6)(A).

(iii) The rates and terms of any voluntary license shall be subject to the second sentence of clause (i) and clause (ii) of subsection (c)(2)(A) and paragraph (9)(C), as applicable.

(D) Protection against infringement actions.--A digital music provider that obtains and complies with the terms of a valid blanket license under this subsection shall not be subject to an action for infringement of the exclusive rights provided by paragraphs (1) and (3) of section 106 under this title arising from use of a musical work (or share thereof) to engage in covered activities authorized by such license, subject to paragraph (4)(E).

(E) Other requirements and conditions apply.--Except as expressly provided in this subsection, each requirement, limitation, condition, privilege, right, and remedy otherwise applicable to compulsory licenses under this section shall apply to compulsory blanket licenses under this subsection.

(2) Availability of blanket license.--

(A) Procedure for obtaining license.--A digital music provider may obtain a blanket license by submitting a notice of license to the mechanical licensing collective that specifies the particular covered activities in which the digital music provider seeks to engage, as follows:

(i) The notice of license shall comply in form and substance with requirements that the Register of Copyrights shall establish by regulation.

(ii) Unless rejected in writing by the mechanical licensing collective not later than 30 calendar days after the date on which the mechanical licensing collective receives the notice, the blanket license shall be effective as of the date on which the notice of license was sent by the digital music provider, as shown by a physical or electronic record.

(iii) A notice of license may only be rejected by the mechanical licensing collective if--

(I) the digital music provider or notice of license does not meet the requirements of this section or applicable regulations, in which case the requirements at issue shall be specified with reasonable particularity in the notice of rejection; or

(II) the digital music provider has had a blanket license terminated by the mechanical licensing collective during the 3-year period preceding the date on which the mechanical licensing collective receives the notice pursuant to paragraph (4)(E).

(iv) If a notice of license is rejected under clause (iii)(I), the digital music provider shall have 30 calendar days after receipt of the notice of rejection to cure any deficiency and submit an amended notice of license to the mechanical licensing collective. If the deficiency has been cured, the mechanical licensing collective shall so confirm in writing, and the license shall be effective as of the date that the original notice of license was provided by the digital music provider.

(v) A digital music provider that believes a notice of license was improperly rejected by the mechanical licensing collective may seek review of such rejection in an appropriate district court of the United States. The district court shall determine the matter de novo based on the record before the mechanical licensing collective and any additional evidence presented by the parties.

(B) Blanket license effective date.--Blanket licenses shall be made available by the mechanical licensing collective on and after the license availability date. No such license shall be effective prior to the license availability date.

(3) Mechanical licensing collective.--

(A) In general.--The mechanical licensing collective shall be a single entity that--

(i) is a nonprofit entity, not owned by any other entity, that is created by copyright owners to carry out responsibilities under this subsection;

(ii) is endorsed by, and enjoys substantial support from, musical work copyright owners that together represent the greatest percentage of the licensor market for uses of such works in covered activities, as measured over the preceding 3 full calendar years;

(iii) is able to demonstrate to the Register of Copyrights that the entity has, or will have prior to the license availability date, the administrative and technological capabilities to perform the required functions of the mechanical licensing collective under this subsection and that is governed by a board of directors in accordance with subparagraph (D)(i); and

(iv) has been designated by the Register of Copyrights, with the approval of the Librarian of Congress pursuant to section 702, in accordance with subparagraph (B).

(B) Designation of mechanical licensing collective.--

(i) Initial designation.--Not later than 270 days after the enactment date, the Register of Copyrights shall initially designate the mechanical licensing collective as follows:

(I) Not later than 90 calendar days after the enactment date, the Register shall publish notice in the Federal Register soliciting information to assist in identifying the appropriate entity to serve as the mechanical licensing collective, including the name and affiliation of each member of the board of directors described under subparagraph (D)(i) and each committee established pursuant to clauses (iii), (iv), and (v) of subparagraph (D).

(II) After reviewing the information requested under subclause (I) and making a designation, the Register shall publish notice in the Federal Register setting forth--

(aa) the identity of and contact information for the mechanical licensing collective; and

(bb) the reasons for the designation.

(ii) Periodic review of designation.--Following the initial designation of the mechanical licensing collective, the Register shall, every 5 years, beginning with the fifth full calendar year to commence after the initial designation, publish notice in the Federal Register in the month of January soliciting information concerning whether the existing designation should be continued, or a different entity meeting the criteria described in clauses (i) through (iii) of subparagraph (A) shall be designated. Following publication of such notice, the Register shall--

(I) after reviewing the information submitted and conducting additional proceedings as appropriate, publish notice in the Federal Register of a continuing designation or new designation of the mechanical licensing collective, as the case may be, and the reasons for such a designation, with any new designation to be effective as of the first day of a month that is not less than 6 months and not longer than 9 months after the date on which the Register publishes the notice, as specified by the Register; and

(II) if a new entity is designated as the mechanical licensing collective, adopt regulations to govern the transfer of licenses, funds, records, data, and administrative responsibilities from the existing mechanical licensing collective to the new entity.

(iii) Closest alternative designation.--If the Register is unable to identify an entity that fulfills each of the qualifications set forth in clauses (i) through (iii) of subparagraph (A), the Register shall designate the entity that most nearly fulfills such qualifications for purposes of carrying out the responsibilities of the mechanical licensing collective.

(C) Authorities and functions.--

(i) In general.--The mechanical licensing collective is authorized to perform the following functions, subject to more particular requirements as described in this subsection:

(I) Offer and administer blanket licenses, including receipt of notices of license and reports of usage from digital music providers.

(II) Collect and distribute royalties from digital music providers for covered activities.

(III) Engage in efforts to identify musical works (and shares of such works) embodied in particular sound recordings, and to identify and locate the copyright owners of such musical works (and shares of such works).

(IV) Maintain the musical works database and other information relevant to the administration of licensing activities under this section.

(V) Administer a process by which copyright owners can claim ownership of musical works (and shares of such works), and a process by which royalties for works for which the owner is not identified or located are equitably distributed to known copyright owners.

(VI) Administer collections of the administrative assessment from digital music providers and significant nonblanket licensees, including receipt of notices of nonblanket activity.

(VII) Invest in relevant resources, and arrange for services of outside vendors and others, to support the activities of the mechanical licensing collective.

(VIII) Engage in legal and other efforts to enforce rights and obligations under this subsection, including by filing bankruptcy proofs of claims for amounts owed under licenses, and acting in coordination with the digital licensee coordinator.

(IX) Initiate and participate in proceedings before the Copyright Royalty Judges to establish the administrative assessment under this subsection.

(X) Initiate and participate in proceedings before the Copyright Office with respect to activities under this subsection.

(XI) Gather and provide documentation for use in proceedings before the Copyright Royalty Judges to set rates and terms under this section.

(XII) Maintain records of the activities of the mechanical licensing collective and engage in and respond to audits described in this subsection.

(XIII) Engage in such other activities as may be necessary or appropriate to fulfill the responsibilities of the mechanical licensing collective under this subsection.

(ii) Restrictions concerning licensing and administrative activities.--With respect to the administration of licenses, except as provided in clauses (i) and (iii) and subparagraph (E)(v), the mechanical licensing collective may only--

(I) issue blanket licenses pursuant to subsection (d)(1); and

(II) administer blanket licenses for reproduction or distribution rights in musical works for covered activities, including collecting and distributing royalties, pursuant to blanket licenses.

(iii) Additional administrative activities.--Subject to paragraph (11)(C), the mechanical licensing collective may also administer, including by collecting and distributing royalties, voluntary licenses issued by, or individual download licenses obtained from, copyright owners only for reproduction or distribution rights in musical works for covered activities, for which the mechanical licensing collective shall charge reasonable fees for such services.

(iv) Restriction on lobbying.--The mechanical licensing collective may not engage in government lobbying activities, but may engage in the activities described in subclauses (IX), (X), and (XI) of clause (i).

(D) Governance.--

(i) Board of directors.--The mechanical licensing collective shall have a board of directors consisting of 14 voting members and 3 nonvoting members, as follows:

(I) Ten voting members shall be representatives of music publishers--

(aa) to which songwriters have assigned exclusive rights of reproduction and distribution of musical works with respect to covered activities; and

(bb) none of which may be owned by, or under common control with, any other board member.

(II) Four voting members shall be professional songwriters who have retained and exercise exclusive rights of reproduction and distribution with respect to covered activities with respect to musical works they have authored.

(III) One nonvoting member shall be a representative of the nonprofit trade association of music publishers that represents the greatest percentage of the licensor market for uses of musical works in covered activities, as measured for the 3-year period preceding the date on which the member is appointed.

(IV) One nonvoting member shall be a representative of the digital licensee coordinator, provided that a digital licensee coordinator has been designated pursuant to paragraph (5)(B). Otherwise, the nonvoting member shall be the nonprofit trade association of digital licensees that represents the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding 3 full calendar years.

(V) One nonvoting member shall be a representative of a nationally recognized nonprofit trade association whose primary mission is advocacy on behalf of songwriters in the United States.

(ii) Bylaws.--

(I) Establishment.--Not later than 1 year after the date on which the mechanical licensing collective is initially designated by the Register of Copyrights under subparagraph (B)(i), the collective shall establish bylaws to determine issues relating to the governance of the collective, including, but not limited to--

(aa) the length of the term for each member of the board of directors;

(bb) the staggering of the terms of the members of the board of directors;

(cc) a process for filling a seat on the board of directors that is vacated before the end of the term with respect to that seat;

(dd) a process for electing a member to the board of directors; and

(ee) a management structure for daily operation of the collective.

(II) Public availability.--The mechanical licensing collective shall make the bylaws established under subclause (I) available to the public.

(iii) Board meetings.--The board of directors shall meet not less frequently than biannually and discuss matters pertinent to the operations of the mechanical licensing collective, including the mechanical licensing collective budget.

(iv) Operations advisory committee.--The board of directors of the mechanical licensing collective shall establish an operations advisory committee consisting of not fewer than 6 members to make recommendations to the board of directors concerning the operations of the mechanical licensing collective, including the efficient investment in and deployment of information technology and data resources. Such committee shall have an equal number of members of the committee who are--

(I) musical work copyright owners who are appointed by the board of directors of the mechanical licensing collective; and

(II) representatives of digital music providers who are appointed by the digital licensee coordinator.

(v) Unclaimed royalties oversight committee.--The board of directors of the mechanical licensing collective shall establish and appoint an unclaimed royalties oversight committee consisting of 10 members, 5 of which shall be musical work copyright owners and 5 of which shall be professional songwriters whose works are used in covered activities.

(vi) Dispute resolution committee.--The board of directors of the mechanical licensing collective shall establish and appoint a dispute resolution committee that shall--

(I) consist of not fewer than 6 members; and

(II) include an equal number of representatives of musical work copyright owners and professional songwriters.

(vii) Mechanical licensing collective annual report.--

(I) In general.--Not later than June 30 of each year commencing after the license availability date, the mechanical licensing collective shall post, and make available online for a period of not less than 3 years, an annual report that sets forth information regarding--

(aa) the operational and licensing practices of the collective;

(bb) how royalties are collected and distributed;

(cc) budgeting and expenditures;

(dd) the collective total costs for the preceding calendar year;

(ee) the projected annual mechanical licensing collective budget;

(ff) aggregated royalty receipts and payments;

(gg) expenses that are more than 10 percent of the annual mechanical licensing collective budget; and

(hh) the efforts of the collective to locate and identify copyright owners of unmatched musical works (and shares of works).

(II) Submission.--On the date on which the mechanical licensing collective posts each report required under subclause (I), the collective shall provide a copy of the report to the Register of Copyrights.

(viii) Independent officers.--An individual serving as an officer of the mechanical licensing collective may not, at the same time, also be an employee or agent of any member of the board of directors of the collective or any entity represented by a member of the board of directors, as described in clause (i).

(ix) Oversight and accountability.--

(I) In general.--The mechanical licensing collective shall--

(aa) ensure that the policies and practices of the collective are transparent and accountable;

(bb) identify a point of contact for publisher inquiries and complaints with timely redress; and

(cc) establish an anti-comingling policy for funds not collected under this section and royalties collected under this section.

(II) Audits.--

(aa) In general.--Beginning in the fourth full calendar year that begins after the initial designation of the mechanical licensing collective by the Register of Copyrights under subparagraph (B)(i), and in every fifth calendar year thereafter, the collective shall retain a qualified auditor that shall--

(AA) examine the books, records, and operations of the collective;

(BB) prepare a report for the board of directors of the collective with respect to the matters described in item (bb); and

(CC) not later than December 31 of the year in which the qualified auditor is retained, deliver the report described in subitem (BB) to the board of directors of the collective.

(bb) Matters addressed.--Each report prepared under item (aa) shall address the implementation and efficacy of procedures of the mechanical licensing collective--

(AA) for the receipt, handling, and distribution of royalty funds, including any amounts held as unclaimed royalties;

(BB) to guard against fraud, abuse, waste, and the unreasonable use of funds; and

(CC) to protect the confidentiality of financial, proprietary, and other sensitive information.

(cc) Public availability.--With respect to each report prepared under item (aa), the mechanical licensing collective shall--

(AA) submit the report to the Register of Copyrights; and

(BB) make the report available to the public.

(E) Musical works database.--

(i) Establishment and maintenance of database.--The mechanical licensing collective shall establish and maintain a database containing information relating to musical works (and shares of such works) and, to the extent known, the identity and location of the copyright owners of such works (and shares thereof) and the sound recordings in which the musical works are embodied. In furtherance of maintaining such database, the mechanical licensing collective shall engage in efforts to identify the musical works embodied in particular sound recordings, as well as to identify and locate the copyright owners of such works (and shares thereof), and update such data as appropriate.

(ii) Matched works.--With respect to musical works (and shares thereof) that have been matched to copyright owners, the musical works database shall include--

(I) the title of the musical work;

(II) the copyright owner of the work (or share thereof), and the ownership percentage of that owner;

(III) contact information for such copyright owner;

(IV) to the extent reasonably available to the mechanical licensing collective--

(aa) the international standard musical work code for the work; and

(bb) identifying information for sound recordings in which the musical work is embodied, including the name of the sound recording, featured artist, sound recording copyright owner, producer, international standard recording code, and other information commonly used to assist in associating sound recordings with musical works; and

(V) such other information as the Register of Copyrights may prescribe by regulation.

(iii) Unmatched works.--With respect to unmatched musical works (and shares of works) in the database, the musical works database shall include--

(I) to the extent reasonably available to the mechanical licensing collective--

(aa) the title of the musical work;

(bb) the ownership percentage for which an owner has not been identified;

(cc) if a copyright owner has been identified but not located, the identity of such owner and the ownership percentage of that owner;

(dd) identifying information for sound recordings in which the work is embodied, including sound recording name, featured artist, sound recording copyright owner, producer, international standard recording code, and other information commonly used to assist in associating sound recordings with musical works; and

(ee) any additional information reported to the mechanical licensing collective that may assist in identifying the work; and

(II) such other information relating to the identity and ownership of musical works (and shares of such works) as the Register of Copyrights may prescribe by regulation.

(iv) Sound recording information.--Each musical work copyright owner with any musical work listed in the musical works database shall engage in commercially reasonable efforts to deliver to the mechanical licensing collective, including for use in the musical works database, to the extent such information is not then available in the database, information regarding the names of the sound recordings in which that copyright owner's musical works (or shares thereof) are embodied, to the extent practicable.

(v) Accessibility of database.--The musical works database shall be made available to members of the public in a searchable, online format, free of charge. The mechanical licensing collective shall make such database available in a bulk, machine-readable format, through a widely available software application, to the following entities:

(I) Digital music providers operating under the authority of valid notices of license, free of charge.

(II) Significant nonblanket licensees in compliance with their obligations under paragraph (6), free of charge.

(III) Authorized vendors of the entities described in subclauses (I) and (II), free of charge.

(IV) The Register of Copyrights, free of charge (but the Register shall not treat such database or any information therein as a Government record).

(V) Any other person or entity for a fee not to exceed the marginal cost to the mechanical licensing collective of providing the database to such person or entity.

(vi) Additional requirements.--The Register of Copyrights shall establish requirements by regulations to ensure the usability, interoperability, and usage restrictions of the musical works database.

(F) Notices of license and nonblanket activity.--

(i) Notices of licenses.--The mechanical licensing collective shall receive, review, and confirm or reject notices of license from digital music providers, as provided in paragraph (2)(A). The collective shall maintain a current, publicly accessible list of blanket licenses that includes contact information for the licensees and the effective dates of such licenses.

(ii) Notices of nonblanket activity.--The mechanical licensing collective shall receive notices of nonblanket activity from significant nonblanket licensees, as provided in paragraph (6)(A). The collective shall maintain a current, publicly accessible list of notices of nonblanket activity that includes contact information for significant nonblanket licensees and the dates of receipt of such notices.

(G) Collection and distribution of royalties.--

(i) In general.--Upon receiving reports of usage and payments of royalties from digital music providers for covered activities, the mechanical licensing collective shall--

(I) engage in efforts to--

(aa) identify the musical works embodied in sound recordings reflected in such reports, and the copyright owners of such musical works (and shares thereof);

(bb) confirm uses of musical works subject to voluntary licenses and individual download licenses, and the corresponding pro rata amounts to be deducted from royalties that would otherwise be due under the blanket license; and

(cc) confirm proper payment of royalties due;

(II) distribute royalties to copyright owners in accordance with the usage and other information contained in such reports, as well as the ownership and other information contained in the records of the collective; and

(III) deposit into an interest-bearing account, as provided in subparagraph (H)(ii), royalties that cannot be distributed due to--

(aa) an inability to identify or locate a copyright owner of a musical work (or share thereof); or

(bb) a pending dispute before the dispute resolution committee of the mechanical licensing collective.

(ii) Other collection efforts.--Any royalties recovered by the mechanical licensing collective as a result of efforts to enforce rights or obligations under a blanket license, including through a bankruptcy proceeding or other legal action, shall be distributed to copyright owners based on available usage information and in accordance with the procedures described in subclauses (I) and (II) of clause (i), on a pro rata basis in proportion to the overall percentage recovery of the total royalties owed, with any pro rata share of royalties that cannot be distributed deposited in an interest-bearing account as provided in subparagraph (H)(ii).

(H) Holding of accrued royalties.--

(i) Holding period.--The mechanical licensing collective shall hold accrued royalties associated with particular musical works (and shares of works) that remain unmatched for a period of not less than 3 years after the date on which the funds were received by the mechanical licensing collective, or not less than 3 years after the date on which the funds were accrued by a digital music provider that subsequently transferred such funds to the mechanical licensing collective pursuant to paragraph (10)(B), whichever period expires sooner.

(ii) Interest-bearing account.--Accrued royalties for unmatched works (and shares thereof) shall be maintained by the mechanical licensing collective in an interest-bearing account that earns monthly interest--

(I) at the Federal, short-term rate; and

(II) that accrues for the benefit of copyright owners entitled to payment of such accrued royalties.

(I) Musical works claiming process.--When a copyright owner of an unmatched work (or share of a work) has been identified and located in accordance with the procedures of the mechanical licensing collective, the collective shall--

(i) update the musical works database and the other records of the collective accordingly; and

(ii) provided that accrued royalties for the musical work (or share thereof) have not yet been included in a distribution pursuant to subparagraph (J)(i), pay such accrued royalties and a proportionate amount of accrued interest associated with that work (or share thereof) to the copyright owner, accompanied by a cumulative statement of account reflecting usage of such work and accrued royalties based on information provided by digital music providers to the mechanical licensing collective.

(J) Distribution of unclaimed accrued royalties.--

(i) Distribution procedures.--After the expiration of the prescribed holding period for accrued royalties provided in subparagraph (H)(i), the mechanical licensing collective shall distribute such accrued royalties, along with a proportionate share of accrued interest, to copyright owners identified in the records of the collective, subject to the following requirements, and in accordance with the policies and procedures established under clause (ii):

(I) The first such distribution shall occur on or after January 1 of the second full calendar year to commence after the license availability date, with not less than 1 such distribution to take place during each calendar year thereafter.

(II) Copyright owners' payment shares for unclaimed accrued royalties for particular reporting periods shall be determined in a transparent and equitable manner based on data indicating the relative market shares of such copyright owners as reflected in reports of usage provided by digital music providers for covered activities for the periods in question, including, in addition to usage data provided to the mechanical licensing collective, usage data provided to copyright owners under voluntary licenses and individual download licenses for covered activities, to the extent such information is available to the mechanical licensing collective. In furtherance of the determination of equitable market shares under this subparagraph--

(aa) the mechanical licensing collective may require copyright owners seeking distributions of unclaimed accrued royalties to provide, or direct the provision of, information concerning the usage of musical works under voluntary licenses and individual download licenses for covered activities; and

(bb) the mechanical licensing collective shall take appropriate steps to safeguard the confidentiality and security of usage, financial, and other sensitive data used to compute market shares in accordance with the confidentiality provisions prescribed by the Register of Copyrights under paragraph (12)(C).

(ii) Establishment of distribution policies.--The unclaimed royalties oversight committee established under subparagraph (D)(v) shall establish policies and procedures for the distribution of unclaimed accrued royalties and accrued interest in accordance with this subparagraph, including the provision of usage data to copyright owners to allocate payments and credits to songwriters pursuant to clause (iv), subject to the approval of the board of directors of the mechanical licensing collective.

(iii) Public notice of unclaimed accrued royalties.--The mechanical licensing collective shall--

(I) maintain a publicly accessible online facility with contact information for the collective that lists unmatched musical works (and shares of works), through which a copyright owner may assert an ownership claim with respect to such a work (and a share of such a work);

(II) engage in diligent, good-faith efforts to publicize, throughout the music industry--

(aa) the existence of the collective and the ability to claim unclaimed accrued royalties for unmatched musical works (and shares of such works) held by the collective;

(bb) the procedures by which copyright owners may identify themselves and provide contact, ownership, and other relevant information to the collective in order to receive payments of accrued royalties;

(cc) any transfer of accrued royalties for musical works under paragraph (10)(B), not later than 180 days after the date on which the transfer is received; and

(dd) any pending distribution of unclaimed accrued royalties and accrued interest, not less than 90 days before the date on which the distribution is made; and

(III) as appropriate, participate in music industry conferences and events for the purpose of publicizing the matters described in subclause (II).

(iv) Songwriter payments.--Copyright owners that receive a distribution of unclaimed accrued royalties and accrued interest shall pay or credit a portion to songwriters (or the authorized agents of songwriters) on whose behalf the copyright owners license or administer musical works for covered activities, in accordance with applicable contractual terms, but notwithstanding any agreement to the contrary--

(I) such payments and credits to songwriters shall be allocated in proportion to reported usage of individual musical works by digital music providers during the reporting periods covered by the distribution from the mechanical licensing collective; and

(II) in no case shall the payment or credit to an individual songwriter be less than 50 percent of the payment received by the copyright owner attributable to usage of musical works (or shares of works) of that songwriter.

(K) Dispute resolution.--The dispute resolution committee established under subparagraph (D)(vi) shall establish policies and procedures--

(i) for copyright owners to address in a timely and equitable manner disputes relating to ownership interests in musical works licensed under this section and allocation and distribution of royalties by the mechanical licensing collective, subject to the approval of the board of directors of the mechanical licensing collective;

(ii) that shall include a mechanism to hold disputed funds in accordance with the requirements described in subparagraph (H)(ii) pending resolution of the dispute; and

(iii) except as provided in paragraph (11)(D), that shall not affect any legal or equitable rights or remedies available to any copyright owner or songwriter concerning ownership of, and entitlement to royalties for, a musical work.

(L) Verification of payments by mechanical licensing collective.--

(i) Verification process.--A copyright owner entitled to receive payments of royalties for covered activities from the mechanical licensing collective may, individually or with other copyright owners, conduct an audit of the mechanical licensing collective to verify the accuracy of royalty payments by the mechanical licensing collective to such copyright owner, as follows:

(I) A copyright owner may audit the mechanical licensing collective only once in a year for any or all of the 3 calendar years preceding the year in which the audit is commenced, and may not audit records for any calendar year more than once.

(II) The audit shall be conducted by a qualified auditor, who shall perform the audit during the ordinary course of business by examining the books, records, and data of the mechanical licensing collective, according to generally accepted auditing standards and subject to applicable confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C).

(III) The mechanical licensing collective shall make such books, records, and data available to the qualified auditor and respond to reasonable requests for relevant information, and shall use commercially reasonable efforts to facilitate access to relevant information maintained by third parties.

(IV) To commence the audit, any copyright owner shall file with the Copyright Office a notice of intent to conduct an audit of the mechanical licensing collective, identifying the period of time to be audited, and shall simultaneously deliver a copy of such notice to the mechanical licensing collective. The Register of Copyrights shall cause the notice of audit to be published in the Federal Register not later than 45 calendar days after the date on which the notice is received.

(V) The qualified auditor shall determine the accuracy of royalty payments, including whether an underpayment or overpayment of royalties was made by the mechanical licensing collective to each auditing copyright owner, except that, before providing a final audit report to any such copyright owner, the qualified

auditor shall provide a tentative draft of the report to the mechanical licensing collective and allow the mechanical licensing collective a reasonable opportunity to respond to the findings, including by clarifying issues and correcting factual errors.

(VI) The auditing copyright owner or owners shall bear the cost of the audit. In case of an underpayment to any copyright owner, the mechanical licensing collective shall pay the amounts of any such underpayment to such auditing copyright owner, as appropriate. In case of an overpayment by the mechanical licensing collective, the mechanical licensing collective may debit the account of the auditing copyright owner or owners for such overpaid amounts, or such owner or owners shall refund overpaid amounts to the mechanical licensing collective, as appropriate.

(ii) Alternative verification procedures.--Nothing in this subparagraph shall preclude a copyright owner and the mechanical licensing collective from agreeing to audit procedures different from those described in this subparagraph, except that a notice of the audit shall be provided to and published by the Copyright Office as described in clause (i)(IV).

(M) Records of mechanical licensing collective.--

(i) Records maintenance.--The mechanical licensing collective shall ensure that all material records of the operations of the mechanical licensing collective, including those relating to notices of license, the administration of the claims process of the mechanical licensing collective, reports of usage, royalty payments, receipt and maintenance of accrued royalties, royalty distribution processes, and legal matters, are preserved and maintained in a secure and reliable manner, with appropriate commercially reasonable safeguards against unauthorized access, copying, and disclosure, and subject to the confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C) for a period of not less than 7 years after the date of creation or receipt, whichever occurs later.

(ii) Records access.--The mechanical licensing collective shall provide prompt access to electronic and other records pertaining to the administration of a copyright owner's musical works upon reasonable written request of the owner or the authorized representative of the owner.

(4) Terms and conditions of blanket license.--A blanket license is subject to, and conditioned upon, the following requirements:

(A) Royalty reporting and payments.--

(i) Monthly reports and payment.--A digital music provider shall report and pay royalties to the mechanical licensing collective under the blanket license on a monthly basis in accordance with clause (ii) and subsection (c)(2)(I), except that the monthly reporting shall be due on the date that is 45 calendar days, rather than 20 calendar days, after the end of the monthly reporting period.

(ii) Data to be reported.--In reporting usage of musical works to the mechanical licensing collective, a digital music provider shall provide usage data for musical works used under the blanket license and usage data for musical works used in covered activities under voluntary licenses and individual download licenses. In the report of usage, the digital music provider shall--

(I) with respect to each sound recording embodying a musical work--

(aa) provide identifying information for the sound recording, including sound recording name, featured artist, and, to the extent acquired by the digital music provider in connection with its use of sound recordings of musical works to engage in covered activities, including pursuant to subparagraph (B), sound recording copyright owner, producer, international standard recording code, and other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody;

(bb) to the extent acquired by the digital music provider in the metadata provided by sound recording copyright owners or other licensors of sound recordings in connection with the use of sound recordings of musical works to engage in covered activities, including pursuant to subparagraph (B), provide information concerning authorship and ownership of the applicable rights in the musical work embodied in the sound recording (including each songwriter, publisher name, and respective ownership share) and the international standard musical work code; and

(cc) provide the number of digital phonorecord deliveries of the sound recording, including limited downloads and interactive streams;

(II) identify and provide contact information for all musical work copyright owners for works embodied in sound recordings as to which a voluntary license, rather than the blanket license, is in effect with respect to the uses being reported; and

(III) provide such other information as the Register of Copyrights shall require by regulation.

(iii) Format and maintenance of reports.--Reports of usage provided by digital music providers to the mechanical licensing collective shall be in a machine-readable format that is compatible with the information technology systems of the mechanical licensing collective and meets the requirements of regulations adopted by the Register of Copyrights. The Register shall also adopt regulations setting forth requirements under which records of use shall be maintained and made available to the mechanical licensing collective by digital music providers engaged in covered activities under a blanket license.

(iv) Adoption of regulations.--The Register of Copyrights shall adopt regulations--

(I) setting forth requirements under which records of use shall be maintained and made available to the mechanical licensing collective by digital music providers engaged in covered activities under a blanket license; and

(II) regarding adjustments to reports of usage by digital music providers, including mechanisms to account for overpayment and underpayment of royalties in prior periods.

(B) Collection of sound recording information.--A digital music provider shall engage in good-faith, commercially reasonable efforts to obtain from sound recording copyright owners and other licensors of sound recordings made available through the service of such digital music provider information concerning--

(i) sound recording copyright owners, producers, international standard recording codes, and other information commonly used in the industry to identify sound recordings and match them to the musical works the sound recordings embody; and

(ii) the authorship and ownership of musical works, including songwriters, publisher names, ownership shares, and international standard musical work codes.

(C) Payment of administrative assessment.--A digital music provider and any significant nonblanket licensee shall pay the administrative assessment established under paragraph (7)(D) in accordance with this subsection and applicable regulations.

(D) Verification of payments by digital music providers.--

(i) Verification process.--The mechanical licensing collective may conduct an audit of a digital music provider operating under the blanket license to verify the accuracy of royalty payments by the digital music provider to the mechanical licensing collective as follows:

(I) The mechanical licensing collective may commence an audit of a digital music provider not more frequently than once in any 3-calendar-year period to cover a verification period of not more than the 3 full calendar years preceding the date of commencement of the audit, and such audit may not audit records for any such 3-year verification period more than once.

(II) The audit shall be conducted by a qualified auditor, who shall perform the audit during the ordinary course of business by examining the books, records, and data of the digital music provider, according to generally accepted auditing standards and subject to applicable confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C).

(III) The digital music provider shall make such books, records, and data available to the qualified auditor and respond to reasonable requests for relevant information, and shall use commercially reasonable efforts to provide access to relevant information maintained with respect to a digital music provider by third parties.

(IV) To commence the audit, the mechanical licensing collective shall file with the Copyright Office a notice of intent to conduct an audit of the digital music provider, identifying the period of time to be audited, and shall simultaneously deliver a copy of such notice to the digital music provider. The Register of Copyrights shall cause the notice of audit to be published in the Federal Register not later than 45 calendar days after the date on which notice is received.

(V) The qualified auditor shall determine the accuracy of royalty payments, including whether an underpayment or overpayment of royalties was made by the digital music provider to the mechanical licensing collective, except that, before providing a final audit report to the mechanical licensing collective, the qualified auditor shall provide a tentative draft of the report to the digital music provider and allow the digital music provider a reasonable opportunity to respond to the findings, including by clarifying issues and correcting factual errors.

(VI) The mechanical licensing collective shall pay the cost of the audit, unless the qualified auditor determines that there was an underpayment by the digital music provider of not less than 10 percent, in which case the digital music provider shall bear the reasonable costs of the audit, in addition to paying the amount of any underpayment to the mechanical licensing collective. In case of an overpayment by the digital music provider, the mechanical licensing collective shall provide a credit to the account of the digital music provider.

(VII) A digital music provider may not assert section 507 or any other Federal or State statute of limitations, doctrine of laches or estoppel, or similar provision as a defense to a legal action arising from an audit under this subparagraph if such legal action is commenced not more than 6 years after the commencement of the audit that is the basis for such action.

(ii) Alternative verification procedures.--Nothing in this subparagraph shall preclude the mechanical licensing collective and a digital music provider from agreeing to audit procedures different from those described in this subparagraph, except that a notice of the audit shall be provided to and published by the Copyright Office as described in clause (i)(IV).

(E) Default under blanket license.--

(i) Conditions of default.--A digital music provider shall be in default under a blanket license if the digital music provider--

(I) fails to provide 1 or more monthly reports of usage to the mechanical licensing collective when due;

(II) fails to make a monthly royalty or late fee payment to the mechanical licensing collective when due, in all or material part;

(III) provides 1 or more monthly reports of usage to the mechanical licensing collective that, on the whole, is or are materially deficient as a result of inaccurate, missing, or unreadable data, where the correct data was available to the digital music provider and required to be reported under this section and applicable regulations;

(IV) fails to pay the administrative assessment as required under this subsection and applicable regulations; or

(V) after being provided written notice by the mechanical licensing collective, refuses to comply with any other material term or condition of the blanket license under this section for a period of not less than 60 calendar days.

(ii) Notice of default and termination.--In case of a default by a digital music provider, the mechanical licensing collective may proceed to terminate the blanket license of the digital music provider as follows:

(I) The mechanical licensing collective shall provide written notice to the digital music provider describing with reasonable particularity the default and advising that unless such default is cured not later than 60 calendar days after the date of the notice, the blanket license will automatically terminate at the end of that period.

(II) If the digital music provider fails to remedy the default before the end of the 60-day period described in subclause (I), the license shall terminate without any further action on the part of the mechanical licensing collective. Such termination renders the making of all digital phonorecord deliveries of all musical works (and shares thereof) covered by the blanket license for which the royalty or administrative assessment has not been paid actionable as acts of infringement under section 501 and subject to the remedies provided by sections 502 through 506.

(iii) Notice to copyright owners.--The mechanical licensing collective shall provide written notice of any termination under this subparagraph to copyright owners of affected works.

(iv) Review by Federal district court.--A digital music provider that believes a blanket license was improperly terminated by the mechanical licensing collective may seek review of such termination in an appropriate district court of the United States. The district court shall determine the matter de novo based on the record before the mechanical licensing collective and any additional supporting evidence presented by the parties.

(5) Digital licensee coordinator.--

(A) In general.--The digital licensee coordinator shall be a single entity that--

(i) is a nonprofit, not owned by any other entity, that is created to carry out responsibilities under this subsection;

(ii) is endorsed by and enjoys substantial support from digital music providers and significant nonblanket licensees that together represent the greatest percentage of the licensee market for uses of musical works in covered activities, as measured over the preceding 3 calendar years;

(iii) is able to demonstrate that it has, or will have prior to the license availability date, the administrative capabilities to perform the required functions of the digital licensee coordinator under this subsection; and

(iv) has been designated by the Register of Copyrights, with the approval of the Librarian of Congress pursuant to section 702, in accordance with subparagraph (B).

(B) Designation of digital licensee coordinator.--

(i) Initial designation.--The Register of Copyrights shall initially designate the digital licensee coordinator not later than 270 days after the enactment date, in accordance with the same procedure described for designation of the mechanical licensing collective in paragraph (3)(B)(i).

(ii) Periodic review of designation.--Following the initial designation of the digital licensee coordinator, the Register of Copyrights shall, every 5 years, beginning with the fifth full calendar year to commence after the initial designation, determine whether the existing designation should be continued, or a different entity meeting the criteria described in clauses (i) through (iii) of subparagraph (A) should be designated, in accordance with the same procedure described for the mechanical licensing collective in paragraph (3)(B)(ii).

(iii) Inability to designate.--If the Register of Copyrights is unable to identify an entity that fulfills each of the qualifications described in clauses (i) through (iii) of subparagraph (A) to serve as the digital licensee coordinator, the Register may decline to designate a digital licensee coordinator. The determination of the Register not to designate a digital licensee coordinator shall not negate or otherwise affect any provision of this subsection except to the limited extent that a provision references the digital licensee coordinator. In such case, the reference to the digital licensee coordinator shall be without effect unless and until a new digital licensee coordinator is designated.

(C) Authorities and functions.--

(i) In general.--The digital licensee coordinator is authorized to perform the following functions, subject to more particular requirements as described in this subsection:

(I) Establish a governance structure, criteria for membership, and any dues to be paid by its members.

(II) Engage in efforts to enforce notice and payment obligations with respect to the administrative assessment, including by receiving information from and coordinating with the mechanical licensing collective.

(III) Initiate and participate in proceedings before the Copyright Royalty Judges to establish the administrative assessment under this subsection.

(IV) Initiate and participate in proceedings before the Copyright Office with respect to activities under this subsection.

(V) Gather and provide documentation for use in proceedings before the Copyright Royalty Judges to set rates and terms under this section.

(VI) Maintain records of its activities.

(VII) Assist in publicizing the existence of the mechanical licensing collective and the ability of copyright owners to claim royalties for unmatched musical works (and shares of works) through the collective.

(VIII) Engage in such other activities as may be necessary or appropriate to fulfill its responsibilities under this subsection.

(ii) Restriction on lobbying.--The digital licensee coordinator may not engage in government lobbying activities, but may engage in the activities described in subclauses (III), (IV), and (V) of clause (i).

(iii) Assistance with publicity for unclaimed royalties.--The digital licensee coordinator shall make reasonable, good-faith efforts to assist the mechanical licensing collective in the efforts of the collective to locate and identify copyright owners of unmatched musical works (and shares of such works) by encouraging digital music providers to publicize the existence of the collective and the ability of copyright owners to claim unclaimed accrued royalties, including by--

(I) posting contact information for the collective at reasonably prominent locations on digital music provider websites and applications; and

(II) conducting in-person outreach activities with songwriters.

(6) Requirements for significant nonblanket licensees.--

(A) In general.--

(i) Notice of activity.--Not later than 45 calendar days after the license availability date, or 45 calendar days after the end of the first full calendar month in which an entity initially qualifies as a significant nonblanket licensee, whichever occurs later, a significant nonblanket licensee shall submit a notice of nonblanket activity to the mechanical licensing collective. The notice of nonblanket activity shall comply in form and substance with requirements that the Register of Copyrights shall establish by regulation, and a copy shall be made available to the digital licensee coordinator.

(ii) Reporting and payment obligations.--The notice of nonblanket activity submitted to the mechanical licensing collective shall be accompanied by a report of usage that contains the information described in paragraph (4)(A)(ii), as well as any payment of the administrative assessment required under this subsection and applicable regulations. Thereafter, subject to clause (iii), a significant nonblanket licensee shall continue to provide monthly reports of usage, accompanied by any required payment of the administrative assessment, to the mechanical licensing collective. Such reports and payments shall be submitted not later than 45 calendar days after the end of the calendar month being reported.

(iii) Discontinuation of obligations.--An entity that has submitted a notice of nonblanket activity to the mechanical licensing collective that has ceased to qualify as a significant nonblanket licensee may so notify the collective in writing. In such case, as of the calendar month in which such notice is provided, such entity shall no longer be required to provide reports of usage or pay the administrative assessment, but if such entity later qualifies as a significant nonblanket licensee, such entity shall again be required to comply with clauses (i) and (ii).

(B) Reporting by mechanical licensing collective to digital licensee coordinator.--

(i) Monthly reports of noncompliant licensees.--The mechanical licensing collective shall provide monthly reports to the digital licensee coordinator setting forth any significant nonblanket licensees of which the collective is aware that have failed to comply with subparagraph (A).

(ii) Treatment of confidential information.--The mechanical licensing collective and digital licensee coordinator shall take appropriate steps to safeguard the confidentiality and security of financial and other sensitive data shared under this subparagraph, in accordance with the confidentiality requirements prescribed by the Register of Copyrights under paragraph (12)(C).

(C) Legal enforcement efforts.--

(i) Federal court action.--Should the mechanical licensing collective or digital licensee coordinator become aware that a significant nonblanket licensee has failed to comply with subparagraph (A), either may commence an action in an appropriate district court of the United States for damages and injunctive relief. If the significant nonblanket licensee is found liable, the court shall, absent a finding of excusable neglect, award damages in an amount equal to three times the total amount of the unpaid administrative assessment and, notwithstanding anything to the contrary in section 505, reasonable attorney's fees and costs, as well as such other relief as the court determines

appropriate. In all other cases, the court shall award relief as appropriate. Any recovery of damages shall be payable to the mechanical licensing collective as an offset to the collective total costs.

(ii) Statute of limitations for enforcement action.--Any action described in this subparagraph shall be commenced within the time period described in section 507(b).

(iii) Other rights and remedies preserved.--The ability of the mechanical licensing collective or digital licensee coordinator to bring an action under this subparagraph shall in no way alter, limit or negate any other right or remedy that may be available to any party at law or in equity.

(7) Funding of mechanical licensing collective.--

(A) In general.--The collective total costs shall be funded by--

(i) an administrative assessment, as such assessment is established by the Copyright Royalty Judges pursuant to subparagraph (D) from time to time, to be paid by--

(I) digital music providers that are engaged, in all or in part, in covered activities pursuant to a blanket license; and

(II) significant nonblanket licensees; and

(ii) voluntary contributions from digital music providers and significant nonblanket licensees as may be agreed with copyright owners.

(B) Voluntary contributions.--

(i) Agreements concerning contributions.--Except as provided in clause (ii), voluntary contributions by digital music providers and significant nonblanket licensees shall be determined by private negotiation and agreement, and the following conditions apply:

(I) The date and amount of each voluntary contribution to the mechanical licensing collective shall be documented in a writing signed by an authorized agent of the mechanical licensing collective and the contributing party.

(II) Such agreement shall be made available as required in proceedings before the Copyright Royalty Judges to establish or adjust the administrative assessment in accordance with applicable statutory and regulatory provisions and rulings of the Copyright Royalty Judges.

(ii) Treatment of contributions.--Each voluntary contribution described in clause (i) shall be treated for purposes of an administrative assessment proceeding as an offset to the collective total costs that would otherwise be recovered through the administrative assessment. Any allocation or reallocation of voluntary contributions between or among individual digital music providers or significant nonblanket licensees shall be a matter of private negotiation and agreement among such parties and outside the scope of the administrative assessment proceeding.

(C) Interim application of accrued royalties.--In the event that the administrative assessment, together with any funding from voluntary contributions as provided in subparagraphs (A) and (B), is inadequate to cover current collective total costs, the collective, with approval of its board of directors, may apply unclaimed accrued royalties on an interim basis to defray such costs, subject to future reimbursement of such royalties from future collections of the assessment.

(D) Determination of administrative assessment.--

(i) Administrative assessment to cover collective total costs.--The administrative assessment shall be used solely and exclusively to fund the collective total costs.

(ii) Separate proceeding before Copyright Royalty Judges.--The amount and terms of the administrative assessment shall be determined and established in a separate and independent proceeding before the Copyright Royalty Judges, according to the procedures described in clauses (iii) and (iv). The administrative assessment determined in such proceeding shall--

(I) be wholly independent of royalty rates and terms applicable to digital music providers, which shall not be taken into consideration in any manner in establishing the administrative assessment;

(II) be established by the Copyright Royalty Judges in an amount that is calculated to defray the reasonable collective total costs;

(III) be assessed based on usage of musical works by digital music providers and significant nonblanket licensees in covered activities under both compulsory and nonblanket licenses;

(IV) may be in the form of a percentage of royalties payable under this section for usage of musical works in covered activities (regardless of whether a different rate applies under a voluntary license), or any other usage-based metric reasonably calculated to equitably allocate the collective total costs across digital music providers and significant nonblanket licensees engaged in covered activities, and shall include as a component a minimum fee for all digital music providers and significant nonblanket licensees; and

(V) take into consideration anticipated future collective total costs and collections of the administrative assessment, including, as applicable--

(aa) any portion of past actual collective total costs of the mechanical licensing collective not funded by previous collections of the administrative assessment or voluntary contributions because such collections or contributions together were insufficient to fund such costs;

(bb) any past collections of the administrative assessment and voluntary contributions that exceeded past actual collective total costs, resulting in a surplus; and

(cc) the amount of any voluntary contributions by digital music providers or significant nonblanket licensees in relevant periods, described in subparagraphs (A) and (B) of paragraph (7).

(iii) Initial administrative assessment.--The procedure for establishing the initial administrative assessment shall be as follows:

(I) Not later than 270 days after the enactment date, the Copyright Royalty Judges shall commence a proceeding to establish the initial administrative assessment by publishing a notice in the Federal Register seeking petitions to participate.

(II) The mechanical licensing collective and digital licensee coordinator shall participate in the proceeding described in subclause (I), along with any interested copyright owners, digital music providers or significant nonblanket licensees that have notified the Copyright Royalty Judges of their desire to participate.

(III) The Copyright Royalty Judges shall establish a schedule for submission by the parties of information that may be relevant to establishing the administrative assessment, including actual and anticipated collective total costs of the mechanical licensing collective, actual and anticipated collections from digital music providers and significant nonblanket licensees, and documentation of voluntary contributions, as well as a schedule for further proceedings, which shall include a hearing, as the Copyright Royalty Judges determine appropriate.

(IV) The initial administrative assessment shall be determined, and such determination shall be published in the Federal Register by the Copyright Royalty Judges, not later than 1 year after commencement of the proceeding described in this clause. The determination shall be supported by a written record. The initial administrative assessment shall be effective as of the license availability date, and shall continue in effect unless and until an adjusted administrative assessment is established pursuant to an adjustment proceeding under clause (iv).

(iv) Adjustment of administrative assessment.--The administrative assessment may be adjusted by the Copyright Royalty Judges periodically, in accordance with the following procedures:

(I) Not earlier than 1 year after the most recent publication of a determination of the administrative assessment by the Copyright Royalty Judges, the mechanical licensing collective, the digital licensee coordinator, or one or more interested copyright owners, digital music providers, or significant nonblanket licensees, may file a petition with the Copyright Royalty Judges in the month of May to commence a proceeding to adjust the administrative assessment.

(II) Notice of the commencement of such proceeding shall be published in the Federal Register in the month of June following the filing of any petition, with a schedule of requested information and additional proceedings, as described in clause (iii)(III). The mechanical licensing collective and digital licensee coordinator shall participate in such proceeding, along with any interested copyright owners, digital music providers, or significant nonblanket licensees that have notified the Copyright Royalty Judges of their desire to participate.

(III) The determination of the adjusted administrative assessment, which shall be supported by a written record, shall be published in the Federal Register during June of the calendar year following the commencement of the proceeding. The adjusted administrative assessment shall take effect January 1 of the year following such publication.

(v) Adoption of voluntary agreements.--In lieu of reaching their own determination based on evaluation of relevant data, the Copyright Royalty Judges shall approve and adopt a negotiated agreement to establish the amount and terms of the administrative assessment that has been agreed to by the mechanical licensing collective and the digital licensee coordinator (or if none has been designated, interested digital music providers and significant nonblanket licensees representing more than half of the market for uses of musical works in covered activities), except that the Copyright Royalty Judges shall have the discretion to reject any such agreement for good cause shown. An administrative assessment adopted under this clause shall apply to all digital music providers and significant nonblanket licensees engaged in covered activities during the period the administrative assessment is in effect.

(vi) Continuing authority to amend.--The Copyright Royalty Judges shall retain continuing authority to amend a determination of an administrative assessment to correct technical or clerical errors, or modify the terms of implementation, for good cause, with any such amendment to be published in the Federal Register.

(vii) Appeal of administrative assessment.--The determination of an administrative assessment by the Copyright Royalty Judges shall be appealable, not later than 30 calendar days after publication in the Federal Register, to the Court of Appeals for the District of Columbia Circuit by any party that fully participated in the proceeding. The administrative assessment as established by the Copyright Royalty Judges shall remain in effect pending the final outcome of any such appeal, and the mechanical licensing collective, digital licensee coordinator, digital music providers, and significant nonblanket licensees shall implement appropriate financial or other measures not later than 90 days after any modification of the assessment to reflect and account for such outcome.

(viii) Regulations.--The Copyright Royalty Judges may adopt regulations to govern the conduct of proceedings under this paragraph.

(8) Establishment of rates and terms under blanket license.--

(A) Restrictions on ratesetting participation.--Neither the mechanical licensing collective nor the digital licensee coordinator shall be a party to a proceeding described in subsection (c)(1)(E), except that the mechanical licensing collective or the digital licensee coordinator may gather and provide financial and other information for the use of a party to such a proceeding and comply with requests for information as required under applicable statutory and regulatory provisions and rulings of the Copyright Royalty Judges.

(B) Application of late fees.--In any proceeding described in subparagraph (A) in which the Copyright Royalty Judges establish a late fee for late payment of royalties for uses of musical works under this section, such fee shall apply to covered activities under blanket licenses, as follows:

(i) Late fees for past due royalty payments shall accrue from the due date for payment until payment is received by the mechanical licensing collective.

(ii) The availability of late fees shall in no way prevent a copyright owner or the mechanical licensing collective from asserting any other rights or remedies to which such copyright owner or the mechanical licensing collective may be entitled under this title.

(C) Interim rate agreements in general.--For any covered activity for which no rate or terms have been established by the Copyright Royalty Judges, the mechanical licensing collective and any digital music provider may agree to an interim rate and terms for such activity under the blanket license, and any such rate and terms--

(i) shall be treated as nonprecedential and not cited or relied upon in any ratesetting proceeding before the Copyright Royalty Judges or any other tribunal; and

(ii) shall automatically expire upon the establishment of a rate and terms for such covered activity by the Copyright Royalty Judges, under subsection (c)(1)(E).

(D) Adjustments for interim rates.--The rate and terms established by the Copyright Royalty Judges for a covered activity to which an interim rate and terms have been agreed under subparagraph (C) shall supersede the interim rate and terms and apply retroactively to the inception of the activity under the blanket license. In such case, not later than 90 days after the effective date of the rate and terms established by the Copyright Royalty Judges--

(i) if the rate established by the Copyright Royalty Judges exceeds the interim rate, the digital music provider shall pay to the mechanical licensing collective the amount of any underpayment of royalties due; or

(ii) if the interim rate exceeds the rate established by the Copyright Royalty Judges, the mechanical licensing collective shall credit the account of the digital music provider for the amount of any overpayment of royalties due.

(9) Transition to blanket licenses.--

(A) Substitution of blanket license.--On the license availability date, a blanket license shall, without any interruption in license authority enjoyed by such digital music provider, be automatically substituted for and supersede any existing compulsory license previously obtained under this section by the digital music provider from a copyright owner to engage in 1 or more covered activities with respect to a musical work, except that such substitution shall not apply to any authority obtained from a record company pursuant to a compulsory license to make and distribute permanent downloads unless and until such record company terminates such authority in writing to take effect at the end of a monthly reporting period, with a copy to the mechanical licensing collective.

(B) Expiration of existing licenses.--Except to the extent provided in subparagraph (A), on and after the license availability date, licenses other than individual download licenses obtained under this section for covered activities prior to the license availability date shall no longer continue in effect.

(C) Treatment of voluntary licenses.--A voluntary license for a covered activity in effect on the license availability date will remain in effect unless and until the voluntary license expires according to the terms of the voluntary license, or the parties agree to amend or terminate the voluntary license. In a case where a voluntary license for a covered activity entered into before the license availability date incorporates the terms of this section by reference, the terms so incorporated (but not the rates) shall be those in effect immediately prior to the license availability date, and those terms shall continue to apply unless and until such voluntary license is terminated or amended, or the parties enter into a new voluntary license.

(D) Further acceptance of notices for covered activities by copyright office.--On and after the enactment date--

(i) the Copyright Office shall no longer accept notices of intention with respect to covered activities; and

(ii) notices of intention filed before the enactment date will no longer be effective or provide license authority with respect to covered activities, except that, before the license availability date, there shall be no liability under section 501 for the reproduction or distribution of a musical work (or share thereof) in covered activities if a valid notice of intention was filed for such work (or share) before the enactment date.

(10) Prior unlicensed uses.--

(A) Limitation on liability in general.--A copyright owner that commences an action under section 501 on or after January 1, 2018, against a digital music provider for the infringement of the exclusive rights provided by paragraph (1) or (3) of section 106 arising from the unauthorized reproduction or distribution of a musical work by such digital music provider in the course of engaging in covered activities prior to the license availability date, shall, as the copyright owner's sole and exclusive remedy against the digital music provider, be eligible to recover the royalty prescribed under subsection (c)(1)(C) and chapter 8, from the digital music provider, provided that such digital

music provider can demonstrate compliance with the requirements of subparagraph (B), as applicable. In all other cases the limitation on liability under this subparagraph shall not apply.

(B) Requirements for limitation on liability.--The following requirements shall apply on the enactment date and through the end of the period that expires 90 days after the license availability date to digital music providers seeking to avail themselves of the limitation on liability described in subparagraph (A):

(i) Not later than 30 calendar days after first making a particular sound recording of a musical work available through its service via one or more covered activities, or 30 calendar days after the enactment date, whichever occurs later, a digital music provider shall engage in good-faith, commercially reasonable efforts to identify and locate each copyright owner of such musical work (or share thereof). Such required matching efforts shall include the following:

(I) Good-faith, commercially reasonable efforts to obtain from the owner of the corresponding sound recording made available through the digital music provider's service the following information:

(aa) Sound recording name, featured artist, sound recording copyright owner, producer, international standard recording code, and other information commonly used in the industry to identify sound recordings and match them to the musical works they embody.

(bb) Any available musical work ownership information, including each songwriter and publisher name, percentage ownership share, and international standard musical work code.

(II) Employment of 1 or more bulk electronic matching processes that are available to the digital music provider through a third-party vendor on commercially reasonable terms, except that a digital music provider may rely on its own bulk electronic matching process if that process has capabilities comparable to or better than those available from a third-party vendor on commercially reasonable terms.

(ii) The required matching efforts shall be repeated by the digital music provider not less than once per month for so long as the copyright owner remains unidentified or has not been located.

(iii) If the required matching efforts are successful in identifying and locating a copyright owner of a musical work (or share thereof) by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall provide statements of account and pay royalties to such copyright owner in accordance with this section and applicable regulations.

(iv) If the copyright owner is not identified or located by the end of the calendar month in which the digital music provider first makes use of the work, the digital music provider shall accrue and hold royalties calculated under the applicable statutory rate in accordance with usage of the work, from initial use of the work until the

accrued royalties can be paid to the copyright owner or are required to be transferred to the mechanical licensing collective, as follows:

(I) Accrued royalties shall be maintained by the digital music provider in accordance with generally accepted accounting principles.

(II) If a copyright owner of an unmatched musical work (or share thereof) is identified and located by or to the digital music provider before the license availability date, the digital music provider shall--

(aa) not later than 45 calendar days after the end of the calendar month during which the copyright owner was identified and located, pay the copyright owner all accrued royalties, such payment to be accompanied by a cumulative statement of account that includes all of the information that would have been provided to the copyright owner had the digital music provider been providing monthly statements of account to the copyright owner from initial use of the work in accordance with this section and applicable regulations, including the requisite certification under subsection (c)(2)(I);

(bb) beginning with the accounting period following the calendar month in which the copyright owner was identified and located, and for all other accounting periods prior to the license availability date, provide monthly statements of account and pay royalties to the copyright owner as required under this section and applicable regulations; and

(cc) beginning with the monthly royalty reporting period commencing on the license availability date, report usage and pay royalties for such musical work (or share thereof) for such reporting period and reporting periods thereafter to the mechanical licensing collective, as required under this subsection and applicable regulations.

(III) If a copyright owner of an unmatched musical work (or share thereof) is not identified and located by the license availability date, the digital music provider shall--

(aa) not later than 45 calendar days after the license availability date, transfer all accrued royalties to the mechanical licensing collective, such payment to be accompanied by a cumulative statement of account that includes all of the information that would have been provided to the copyright owner had the digital music provider been serving monthly statements of account on the copyright owner from initial use of the work in accordance with this section and applicable regulations, including the requisite certification under subsection (c)(2)(I), and accompanied by an additional certification by a duly authorized officer of the digital music provider that the digital music provider has fulfilled the requirements of clauses (i) and (ii) of subparagraph (B) but has not been successful in locating or identifying the copyright owner; and

(bb) beginning with the monthly royalty reporting period commencing on the license availability date, report usage and pay royalties for such musical work (or share thereof) for such period and reporting periods thereafter to the mechanical licensing collective, as required under this subsection and applicable regulations.

(v) A digital music provider that complies with the requirements of this subparagraph with respect to unmatched musical works (or shares of works) shall not be liable for or accrue late fees for late payments of royalties for such works until such time as the digital music provider is required to begin paying monthly royalties to the copyright owner or the mechanical licensing collective, as applicable.

(C) Adjusted statute of limitations.--Notwithstanding anything to the contrary in section 507(b), with respect to any claim of infringement of the exclusive rights provided by paragraphs (1) and (3) of section 106 against a digital music provider arising from the unauthorized reproduction or distribution of a musical work by such digital music provider in the course of engaging in covered activities that accrued not more than 3 years prior to the license availability date, such action may be commenced not later than the later of--

(i) 3 years after the date on which the claim accrued; or

(ii) 2 years after the license availability date.

(D) Other rights and remedies preserved.--Except as expressly provided in this paragraph, nothing in this paragraph shall be construed to alter, limit, or negate any right or remedy of a copyright owner with respect to unauthorized use of a musical work.

(11) Legal protections for licensing activities.--

(A) Exemption for compulsory license activities.--The antitrust exemption described in subsection (c)(1)(D) shall apply to negotiations and agreements between and among copyright owners and persons entitled to obtain a compulsory license for covered activities, and common agents acting on behalf of such copyright owners or persons, including with respect to the administrative assessment established under this subsection.

(B) Limitation on common agent exemption.--Notwithstanding the antitrust exemption provided in subsection (c)(1)(D) and subparagraph (A) of this paragraph (except for the administrative assessment referenced in such subparagraph (A) and except as provided in paragraph (8)(C)), neither the mechanical licensing collective nor the digital licensee coordinator shall serve as a common agent with respect to the establishment of royalty rates or terms under this section.

(C) Antitrust exemption for administrative activities.--Notwithstanding any provision of the antitrust laws, copyright owners and persons entitled to obtain a compulsory license under this section may designate the mechanical licensing collective to administer voluntary licenses for the reproduction or distribution of musical works in covered activities on behalf of such copyright owners and persons, subject to the following conditions:

(i) Each copyright owner shall establish the royalty rates and material terms of any such voluntary license individually and not in agreement, combination, or concert with any other copyright owner.

(ii) Each person entitled to obtain a compulsory license under this section shall establish the royalty rates and material terms of any such voluntary license individually and not in agreement, combination, or concert with any other digital music provider.

(iii) The mechanical licensing collective shall maintain the confidentiality of the voluntary licenses in accordance with the confidentiality provisions prescribed by the Register of Copyrights under paragraph (12)(C).

(D) Liability for good-faith activities.--The mechanical licensing collective shall not be liable to any person or entity based on a claim arising from its good-faith administration of policies and procedures adopted and implemented to carry out the responsibilities described in subparagraphs (J) and (K) of paragraph (3), except to the extent of correcting an underpayment or overpayment of royalties as provided in paragraph (3)(L)(i)(VI), but the collective may participate in a legal proceeding as a stakeholder party if the collective is holding funds that are the subject of a dispute between copyright owners. For purposes of this subparagraph, the term "good-faith administration" means administration in a manner that is not grossly negligent.

(E) Preemption of State property laws.--The holding and distribution of funds by the mechanical licensing collective in accordance with this subsection shall supersede and preempt any State law (including common law) concerning escheatment or abandoned property, or any analogous provision, that might otherwise apply.

(F) Rule of construction.--Except as expressly provided in this subsection, nothing in this subsection shall negate or limit the ability of any person to pursue an action in Federal court against the mechanical licensing collective or any other person based upon a claim arising under this title or other applicable law.

(12) Regulations.--

(A) Adoption by Register of Copyrights and Copyright Royalty Judges.--The Register of Copyrights may conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions of this subsection, except for regulations concerning proceedings before the Copyright Royalty Judges to establish the administrative assessment, which shall be adopted by the Copyright Royalty Judges.

(B) Judicial review of regulations.--Except as provided in paragraph (7)(D)(vii), regulations adopted under this subsection shall be subject to judicial review pursuant to chapter 7 of title 5.

(C) Protection of confidential information.--The Register of Copyrights shall adopt regulations to provide for the appropriate procedures to ensure that confidential, private, proprietary, or privileged information contained in the records of the mechanical licensing collective and digital licensee coordinator is not improperly disclosed or used,

including through any disclosure or use by the board of directors or personnel of either entity, and specifically including the unclaimed royalties oversight committee and the dispute resolution committee of the mechanical licensing collective.

(13) Savings clauses.--

(A) Limitation on activities and rights covered.--This subsection applies solely to uses of musical works subject to licensing under this section. The blanket license shall not be construed to extend or apply to activities other than covered activities or to rights other than the exclusive rights of reproduction and distribution licensed under this section, or serve or act as the basis to extend or expand the compulsory license under this section to activities and rights not covered by this section on the day before the enactment date.

(B) Rights of public performance not affected.--The rights, protections, and immunities granted under this subsection, the data concerning musical works collected and made available under this subsection, and the definitions under subsection (e) shall not extend to, limit, or otherwise affect any right of public performance in a musical work.

(e) Definitions.--As used in this section:

(1) Accrued interest.--The term "accrued interest" means interest accrued on accrued royalties, as described in subsection (d)(3)(H)(ii).

(2) Accrued royalties.--The term "accrued royalties" means royalties accrued for the reproduction or distribution of a musical work (or share thereof) in a covered activity, calculated in accordance with the applicable royalty rate under this section.

(3) Administrative assessment.--The term "administrative assessment" means the fee established pursuant to subsection (d)(7)(D).

(4) Audit.--The term "audit" means a royalty compliance examination to verify the accuracy of royalty payments, or the conduct of such an examination, as applicable.

(5) Blanket license.--The term "blanket license" means a compulsory license described in subsection (d)(1)(A) to engage in covered activities.

(6) Collective total costs.--The term "collective total costs"--

(A) means the total costs of establishing, maintaining, and operating the mechanical licensing collective to fulfill its statutory functions, including--

(i) startup costs;

(ii) financing, legal, audit, and insurance costs;

(iii) investments in information technology, infrastructure, and other long-term resources;

(iv) outside vendor costs;

(v) costs of licensing, royalty administration, and enforcement of rights;

(vi) costs of bad debt; and

(vii) costs of automated and manual efforts to identify and locate copyright owners of musical works (and shares of such musical works) and match sound recordings to the musical works the sound recordings embody; and

(B) does not include any added costs incurred by the mechanical licensing collective to provide services under voluntary licenses.

(7) Covered activity.--The term "covered activity" means the activity of making a digital phonorecord delivery of a musical work, including in the form of a permanent download, limited download, or interactive stream, where such activity qualifies for a compulsory license under this section.

(8) Digital music provider.--The term "digital music provider" means a person (or persons operating under the authority of that person) that, with respect to a service engaged in covered activities--

(A) has a direct contractual, subscription, or other economic relationship with end users of the service, or, if no such relationship with end users exists, exercises direct control over the provision of the service to end users;

(B) is able to fully report on any revenues and consideration generated by the service; and

(C) is able to fully report on usage of sound recordings of musical works by the service (or procure such reporting).

(9) Digital licensee coordinator.--The term "digital licensee coordinator" means the entity most recently designated pursuant to subsection (d)(5).

(10) Digital phonorecord delivery.--The term "digital phonorecord delivery" means each individual delivery of a phonorecord by digital transmission of a sound recording that results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any musical work embodied therein, and includes a permanent download, a limited download, or an interactive stream. A digital phonorecord delivery does not result from a real-time, noninteractive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible. A digital phonorecord delivery does not include the digital transmission of sounds accompanying a motion picture or other audiovisual work as defined in section 101.

(11) Enactment date.--The term "enactment date" means the date of the enactment of the Musical Works Modernization Act.

(12) Individual download license.--The term "individual download license" means a compulsory license obtained by a record company to make and distribute, or authorize the making and distribution of, permanent downloads embodying a specific individual musical work.

(13) Interactive stream.--The term "interactive stream" means a digital transmission of a sound recording of a musical work in the form of a stream, where the performance of the sound recording by means of such transmission is not exempt under section 114(d)(1) and does not in itself, or as a result of a program in which it is included, qualify for statutory licensing under section 114(d)(2). An interactive stream is a digital phonorecord delivery.

(14) Interested.--The term "interested", as applied to a party seeking to participate in a proceeding under subsection (d)(7)(D), is a party as to which the Copyright Royalty Judges have not determined that the party lacks a significant interest in such proceeding.

(15) License availability date.--The term "license availability date" means January 1 following the expiration of the 2-year period beginning on the enactment date.

(16) Limited download.--The term "limited download" means a digital transmission of a sound recording of a musical work in the form of a download, where such sound recording is accessible for listening only for a limited amount of time or specified number of times.

(17) Matched.--The term "matched", as applied to a musical work (or share thereof), means that the copyright owner of such work (or share thereof) has been identified and located.

(18) Mechanical licensing collective.--The term "mechanical licensing collective" means the entity most recently designated as such by the Register of Copyrights under subsection (d)(3).

(19) Mechanical licensing collective budget.--The term "mechanical licensing collective budget" means a statement of the financial position of the mechanical licensing collective for a fiscal year or quarter thereof based on estimates of expenditures during the period and proposals for financing those expenditures, including a calculation of the collective total costs.

(20) Musical works database.--The term "musical works database" means the database described in subsection (d)(3)(E).

(21) Nonprofit.--The term "nonprofit" means a nonprofit created or organized in a State.

(22) Notice of license.--The term "notice of license" means a notice from a digital music provider provided under subsection (d)(2)(A) for purposes of obtaining a blanket license.

(23) Notice of nonblanket activity.--The term "notice of nonblanket activity" means a notice from a significant nonblanket licensee provided under subsection (d)(6)(A) for purposes of notifying the mechanical licensing collective that the licensee has been engaging in covered activities.

(24) Permanent download.--The term "permanent download" means a digital transmission of a sound recording of a musical work in the form of a download, where such sound recording is accessible for listening without restriction as to the amount of time or number of times it may be accessed.

(25) Qualified auditor.--The term "qualified auditor" means an independent, certified public accountant with experience performing music royalty audits.

(26) Record company.--The term "record company" means an entity that invests in, produces, and markets sound recordings of musical works, and distributes such sound recordings for remuneration through multiple sales channels, including a corporate affiliate of such an entity engaged in distribution of sound recordings.

(27) Report of usage.--The term "report of usage" means a report reflecting an entity's usage of musical works in covered activities described in subsection (d)(4)(A).

(28) Required matching efforts.--The term "required matching efforts" means efforts to identify and locate copyright owners of musical works as described in subsection (d)(10)(B)(i).

(29) Service.--The term "service", as used in relation to covered activities, means any site, facility, or offering by or through which sound recordings of musical works are digitally transmitted to members of the public.

(30) Share.--The term "share", as applied to a musical work, means a fractional ownership interest in such work.

(31) Significant nonblanket licensee.--The term "significant nonblanket licensee"--

(A) means an entity, including a group of entities under common ownership or control that, acting under the authority of one or more voluntary licenses or individual download licenses, offers a service engaged in covered activities, and such entity or group of entities--

(i) is not currently operating under a blanket license and is not obligated to provide reports of usage reflecting covered activities under subsection (d)(4)(A);

(ii) has a direct contractual, subscription, or other economic relationship with end users of the service or, if no such relationship with end users exists, exercises direct control over the provision of the service to end users; and

(iii) either--

(I) on any day in a calendar month, makes more than 5,000 different sound recordings of musical works available through such service; or

(II) derives revenue or other consideration in connection with such covered activities greater than $50,000 in a calendar month, or total revenue or other consideration greater than $500,000 during the preceding 12 calendar months; and

(B) does not include--

(i) an entity whose covered activity consists solely of free-to-the-user streams of segments of sound recordings of musical works that do not exceed 90 seconds in length, are offered only to facilitate a licensed use of musical works that is not a covered activity, and have no revenue directly attributable to such streams constituting the covered activity; or

(ii) a "public broadcasting entity" as defined in section 118(f).

(32) Songwriter.--The term "songwriter" means the author of all or part of a musical work, including a composer or lyricist.

(33) State.--The term "State" means each State of the United States, the District of Columbia, and each territory or possession of the United States.

(34) Unclaimed accrued royalties.--The term "unclaimed accrued royalties" means accrued royalties eligible for distribution under subsection (d)(3)(J).

(35) Unmatched.--The term "unmatched", as applied to a musical work (or share thereof), means that the copyright owner of such work (or share thereof) has not been identified or located.

(36) Voluntary license.--The term "voluntary license" means a license for use of a musical work (or share thereof) other than a compulsory license obtained under this section.".

CREDIT(S)

(Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2561; Pub.L. 98-450, § 3, Oct. 4, 1984, 98 Stat. 1727; Pub.L. 104-39, § 4, Nov. 1, 1995, 109 Stat. 344; Pub.L. 105-80, §§ 4, 10, 12(a)(7), Nov. 13, 1997, 111 Stat. 1531, 1534; Pub.L.108-419, § 5(d), Nov. 30, 2004, 118 Stat. 2364; Pub.L. 109-303, § 4(c), Oct. 6, 2006, 120 Stat. 1482; Pub.L. 110-403, Title II, § 209(a)(3), Oct. 13, 2008, 122 Stat. 4264; Pub.L. 111-295, § 6(g), Dec. 9, 2010, 124 Stat. 3181; Pub.L. 115-264, Title I, § 102(a), Oct. 11, 2018, 132 Stat. 3677.)

Notes of Decisions (25)

17 U.S.C.A. § 115, 17 USCA § 115
Current through P.L. 116-5. Title 26 current through 116-7.

1 Patry on Copyright § 1:119

Patry on Copyright | March 2019 Update
William F. Patry

Chapter 1. Historical Background

III. Copyright Acts and Amendments

E. 1976 Act

§ 1:119. Amendments to the 1976 Act: 115th Congress, 2017-2018

A 20-year drought in amendments to the Copyright Act that began in 1998, after the passage of the DMCA and term extension, ended in 2018 with passage of the mammoth Music Modernization Act (MMA)[1] and the Marrakesh Treaty Implementation Act (MTIA).[2] Title I of the MMA, which deals with reform of the Section 115 compulsory license provision, is an epic 145½ pages. Title II of the MMA, which involves pre-1972 sound recordings, is 27½ pages. Title III of the MMA, which covers royalty payments for sound recording producers, mixers, and sound engineers is a svelte 9 pages.

Marrakesh Treaty

The "Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled," was adopted on June 27, 2013 by the member states of WIPO. On September 30, 2016, the treaty entered into force with twenty member states. When the US deposits the required documents, seventy-two countries will be members. The US had signed the treaty on October 2, 2013. The wheels of adherence and implementing legislation move slowly indeed. Part of the reason for the foot dragging was that the US was already (or at least largely) in compliance with its treaty obligations due to the existence of 17 U.S.C.A. § 121 (known as the Chafee Amendment). The treaty implementation legislation (MTIA) liberalizes section 121, as described by the Copyright Office:

> Before the MTIA, section 121 already allowed "authorized entities" to reproduce or distribute copies of previously published "nondramatic literary works" in "specialized formats exclusively for use by blind or other persons with disabilities."
>
> The MTIA amends several of these terms and provides new definitions, but leaves the fundamental activity the same. Specifically, the MTIA:
>
> - Expands the types of works allowed to be copied from nondramatic literary works to all literary works, plus musical works fixed in the form of text or notation.
> - Changes the term "specialized formats," the definition of which was limited to specific technologies, to "accessible formats," which is defined more broadly as an "alternative manner or format" that allows an eligible person to have access to a work that is equivalent to a person without a disability. The Senate Report accompanying the MTIA adds that "accessible formats" includes related illustrations integrated with the text or notation.

- Updates the beneficiaries of section 121, which were originally termed "blind or other persons with disabilities," to "eligible person," which is defined as someone who is either blind, has a "visual impairment or perceptual or reading disability" rendering them unable to read printed works "to substantially the same degree as a person without an impairment or disability," or has a physical disability making them unable to hold or manipulate a book or focus or move their eyes to read.

Additionally, the Senate Report states that a condition making one an "eligible person" must be "determined by a competent authority possessing experience in making such determinations." [3]

There are also revisions to Section 121's importation and exportation provisions through the addition of a new Section 121A, again as described by the Copyright Office:

> Because section 121 is focused on limitations and exceptions for activities taking place within the United States, additional provisions were needed to address the important crossborder aspects of the Marrakesh Treaty. The MTIA adds a new section 121A to address the importing and exporting of accessible format copies to eligible persons. Specifically:
>
> - Authorized entities (defined in section 121 as nonprofit or governmental entities with a primary mission to serve eligible persons) may export works in accessible formats to either another authorized entity in a country that has signed the Marrakesh Treaty, or an eligible person in such a country.
>
> # Note: At this time, the NLS will not be able to export materials under section 121A because another provision of the U.S. Code limits its activities to the United States.
>
> - Authorized entities, eligible persons, and agents of eligible persons may import works in accessible formats.
> - Authorized entities engaged in either export or import under section 121A must establish and follow their own practices to:
>
> # Make sure they are only serving eligible persons;
>
> # Limit the distribution of accessible format copies to eligible persons;
>
> # Discourage the further reproduction and distribution of unauthorized copies;
>
> # Maintain due care in, and records of, the handling of copies of works by the authorized entity, while respecting the privacy of eligible persons; and
>
> # Make publicly available the titles of all of its accessible format works, as well as information on its policies, practices, and overseas authorized entity partners.

Music Modernization Act

The many recent efforts to reform music licensing can be viewed in the rearview mirror much like the line of Burma Shave advertisements that used to dot the American highways ("Cheer up, face - the war is over! Burma-Shave."). [4] The Music Modernization Act (MMA), signed into law on October 1, 2018 as Public Law 115-264, is the rare example these days of a bipartisan, industry-wide agreement to make a broken system work. It also helped that the legislation retroactively preempted litigation (in the form of limitations on remedies) from January 1, 2018 forward if digital music providers meet payment and matching obligations.

Integral to the legislation is the creation of a new musical database containing information such as the title of a work, its copyright owner and shares owned, contact information for the copyright owner(s), International Standard Recordings Codes and International Standard Work Codes, relevant information for the sound recordings a musical work is embodied in, and any other information that the Register of Copyrights prescribes by regulation. The biggest problem in musical licensing has been the lack of information about who owns what, so hopefully this new database will be of assistance outside of Section 115. The database is to be managed by a new collecting society, and available to the Copyright Office and the public without charge, with the exception of recovery of the marginal cost of providing access in bulk to the public.

Here is a brief history of its passage:

10/11/2018	Became Public Law No: 115-264.
10/11/2018	Signed by President.
10/04/2018	Presented to President.
09/25/2018	Resolving differences—House actions: On motion that the House agree to the Senate amendment, Agreed to without objection.
09/18/2018	Passed/agreed to in Senate: Passed Senate with an amendment by Voice Vote.
06/20/2017	Passed/agreed to in House: On motion to suspend the rules and pass the bill, as amended, Agreed to by voice vote. (Text: CR H4958)
06/20/2017	Reported (Amended) by the Committee on Ways and Means. H. Rept. 115-183.
03/15/2017	Introduced in the House.

The full story is told in years of meetings, roundtables, and hearings. The Act consists of three separate pieces of legislation that originally were pursued separately: (1) the MMA proper, which concerns 17 U.S.C.A. § 115, title I of the legislation; (2) the "Classics Act," which concerns pre-1972 sound recordings, title II of the legislation; and, (3) the "AMP Act," which concerns royalty payments for producers, mixers, and sound engineers, title III of the legislation.

The legislation underwent considerable change throughout the process, which is not unusual. The Classics Act in particular was changed substantially in the Senate, and as a result of the press of the electoral season, no formal conference committee was held, and thus there is no conference committee report explaining the final bill. In lieu of a conference committee report, the Judiciary Committees of both chambers posted a helpful section-by-section analysis, which can be found at: https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf.

A very helpful version of the sections of the statute as they now read as a result of the amendments may be found at: https://www.copyright.gov/legislation/2018_mma_amendments.pdf.

The MMA

The MMA contemplates three types of licensing: blanket licensing, "significant nonblanket licenses," and voluntary licenses.

A. Blanket Licenses

The principal change made by the MMA concerns the availability of blanket licensing in lieu of the previous individual mechanical compulsory license and its attendant paperwork burdens. As the Judiciary Committees' section-by-section analysis explains:

> The majority of Title I creates a new section 115(d) that establishes a blanket compulsory licensing system for qualified digital music providers. The Committee has regularly heard from various parties in the music industry that the existing music licensing system does not functionally work to meet the needs of the digital music economy where commercial services strive to have available to their customers as much music as possible. Song-by-song licensing negotiations increase the transaction costs to the extent that only a limited amount of music would be worth engaging in such licensing discussions, depriving artists of revenue for less popular works and encouraging piracy of such works by customers looking for such music.

In light of this there is a new procedure for obtaining licenses:

> The amended section 115 provides two separate means of obtaining a compulsory mechanical license. Subsection (b)(1) maintains the ability to obtain a compulsory license to reproduce and distribute phonorecords other than DPDs (digital phonorecord deliveries) on a work-by-work basis. This is the historical method by which record labels have obtained compulsory licenses.

> A new subsection (b)(2) provides the blanket mechanical license for digital music providers to make and distribute DPDs. If the digital music provider is making and distributing the DPDs before the date the blanket license is available, which is defined in subsection (e)(15) as January 1 following the expiration of the 2 year period beginning on the date the legislation is enacted, then the digital music provider must file a notice of intent on the musical work copyright owner, if the identity and location of the musical work copyright owner is known. Unlike the current section 115, however, under the legislation, in the event the musical work copyright owner is unknown, the digital music provider does not file a notice of intent on the Copyright Office. Instead, the digital music provider continues to search for the musical work copyright owner until the license availability date and, if the musical work copyright owner has not been located by such time, the digital music provider is required to turn over to the mechanical licensing collective any accrued royalties and reports of usage for such unmatched works pursuant to subsection (d)(10). If the digital music provider is making and distributing DPDs after the date the blanket license is available, then the digital music provider may obtain the blanket license by submitting a notice of license to the mechanical licensing collective as described in subsection (d)(2).

> Subsection (b)(3) maintains the "pass-through" license for record labels to obtain and pass through mechanical license rights for individual permanent downloads. Under the Music Modernization Act, a record label will no longer be eligible to obtain and pass through a Section 115 license to a digital music provider to engage in activities related to interactive streams or limited downloads.
>
> Subsection (b)(4)(A) maintains the current practice whereby record labels that fail to serve or file a notice of intent are foreclosed from the possibility of obtaining a compulsory license for that work. Subsection (b)(4)(B) provides penalties for a digital music provider for failing to file a notice of intent or notice of license. Again, this subsection distinguishes between activities that occur prior to the date of availability of the blanket license and activities that occur after. Before the date of availability of the blanket license, if the digital music provider fails to serve a notice of intent on the musical work copyright owner (as described in subsection (b)(2)), then the digital music provider is foreclosed from obtaining a compulsory license for use of that particular work under such subsection. After the date the blanket license is available, if the digital music provider fails to submit the notice of license on the mechanical licensing collective, then the digital music provider is foreclosed from obtaining a blanket license for 3 years.

Blanket licenses must be administered by some entity: payments received and royalties distributed, although the old joke reminds us that collecting societies are called collecting societies and not distribution societies for good reason. Given that Section 115 concerns the reproduction and distribution rights and not the public performance right, the traditional public performance rights collecting societies, ASCAP and BMI, were not candidates. A new collecting society was required. This in turn led to the most difficult issues in the MMA, specifically, the management and financing of the collecting society.

On the management issue, the Judiciary Committees' section-by-section analysis explains:

> The Board of Directors of the new collective is required to be composed of individuals matching specific criteria. The detailed requirements concerning the overall framework of the Board of Directors of the collective and its three committees, the criteria used to select individuals to serve on them, and the advance publication of their names and affiliations all highlight the importance of selecting the appropriate individuals. Service on the Board or its committees is not a reward for past actions, but is instead a serious responsibility that must not be underestimated. With the advance notification requirement, the Register is expected to allow the public to submit comments on whether the individuals and their affiliations meet the criteria specified in the legislation; make some effort of its own as it deems appropriate to verify that the individuals and their affiliations actually meet the criteria specified in the legislation; and allow the public to submit comments on whether they support such individuals being appointed for these positions. It has been agreed to by all parties that songwriters should be responsible for identifying and choosing representatives that faithfully reflect the entire songwriting community on the Board. [5]

There is, in short, a great deal of difficult work to be done. The problems of having a collecting society that can serve independently and serve all its constituents fairly and well will also depend on all its constituents working cooperatively for the good of the whole.

On financing, one can question Congress's belief that the benefits of licensing are enjoyed solely by those who pay in to the system. Most people would assume, and rightly, that those who receive money benefit from that money: If they don't, then why are the fights always over money? The Judiciary Committees' section-by-section analysis takes a different view:

> Digital music services and musical works copyright owners reached an agreement to transfer the reasonable costs of the new mechanical licensing collective to the licensees. The Committee supports a true free market for copyrighted works and, in the limited number of situations in which a compulsory license exists, believes that the licensees benefit most from the reduction in transaction costs. The Committee rejects statements that copyright owners benefit from paying for the costs of collectives to administer compulsory licenses in lieu of a free market. Therefore, the legislation directs that licensees should bear the reasonable costs of establishing and operating the new mechanical licensing collective. This transfer of costs is not unlimited, however, since it is strongly cabined by the term "reasonable."

> The legislation directs the Copyright Royalty Judges to undertake a proceeding to determine the amount of an administrative assessment fee to be paid by blanket and significant nonblanket licensees for the reasonable costs of starting up and continuing to operate the new mechanical licensing collective. There are several other licensing collectives, such as SoundExchange, American Society of Composers, Authors and Publishers (ASCAP), and Broadcast Music Inc. (BMI), that the Copyright Royalty Judges should look to for comparison points, although their expenditures are simply comparison points. The Copyright Royalty Judges shall make their own determination(s) based upon the evidence provided to them about the appropriate administrative assessment for such reasonable costs that are identified with specificity. [6]

Given that the new collective doesn't exist yet, the need for a transition period as we go from the current work-by-work license system and its notices of intent to a blanket license, is obvious. The Judiciary Committees' section-by-section analysis explains:

> The legislation creates a transition period in order to move from the current work-by-work license to the new blanket license. After the date of enactment, a digital music provider will no longer be able to serve notices of intent on the Copyright Office for uses of musical works for which the musical work copyright owner cannot be identified or located. Notices of intent filed before the enactment date will no longer be effective. However, prior to the blanket license availability date a digital music provider is immune from copyright infringement liability for any use of any musical work for which the digital music provider was unable to identify or locate the musical work copyright owner so long as the digital music provider engages in good-faith, commercially reasonable efforts to identify and locate musical work copyright owners. The digital music provider is required to use one or more bulk electronic matching processes, and must continue using these processes, on a monthly basis for so long as the musical work copyright owner is unidentified.

> If the musical work copyright owner is identified or located during this search process, then the digital music provider is required to report and pay that copyright owner any royalties owed. If the musical work copyright owner remains unidentified between the date of enactment and the date the blanket license is available, then the digital music provider is required to provide a cumulative usage report and accrued royalties to the mechanical licensing collective. There are no late fees associated with these accrued royalties.
>
> When the blanket license becomes available, the blanket license will be substituted automatically for the compulsory licenses obtained pursuant to notices of intent, without any interruption in license authority. Because the new blanket license replaces the previous work-by work compulsory license, the compulsory licenses obtained under notices of intent served on musical work copyright owners prior to the availability of the blanket license will no longer be valid. However, any voluntary license agreement between a digital music provider and a musical work copyright owner continues to be effective and takes precedence over the blanket license until such license expires according to its own terms.

Obtaining a blanket license

After the blanket license availability date, digital music services interested in obtaining a blanket license shall provide advance notice to the mechanical licensing collective. The collective has 30 calendar days to reject such notice in writing, listing with specificity why such notice was rejected, either because it does meet the requirements of the legislation or applicable regulations established the Copyright Office or if the digital music service provider has had a blanket license terminated by the collective within the past three years. There is an additional 30-day cure period for a potential licensee. Should a provider believe that their notice was improperly rejected, they have the right to seek review in federal district court on a de novo basis. Once obtained, the license covers the making and distribution of server, intermediate, archival, and incidental reproductions of musical works that are reasonable and necessary. [7]

B. Significant nonblanket licenses

Funding the new copyright collective was a preoccupation of Congress, and so the class of significant, nonblanket licensees still have to pony up, as the section-by-section analysis explains:

> The legislation creates a category of licensees, identified as significant nonblanket licensees, who operate outside the blanket licensing context, but who are required to provide notice to the collective of their existence and to help pay for the operation of the new collective. Such licensees are subject to a cause of action in federal court brought by either the mechanical licensing collective or the digital licensee coordinator if they fail to make monthly usage reports or pay the administrative assessment fee. This fee is made applicable to such licensees because they are presumed to benefit from the new database and as a way to avoid parties attempting to avoid funding of the mechanical licensing collective by engaging in direct deals outside the blanket license. Two specific exceptions to the definition of a significant nonblanket

> licensee are incorporated in the definition of such licensee, one concerning certain free-to-the-user streams of less than 90 seconds and the other in regards to public broadcasting entities. [8]

C. Voluntary licenses

Despite the existence of blanket licensing, voluntary licenses are still permitted with these limitations:

> Musical work copyright owners may designate the mechanical licensing collective to administer voluntary licenses only for reproduction and distribution rights in musical works for covered activities so long as the rates and terms of the voluntary license were negotiated individually between a musical work copyright owner and digital music provider. Musical work copyright owners may not require as a condition for entering into a direct license that the mechanical licensing collective administer a voluntary license. The collective may not provide administration services that include the right of public performance in musical works. [9]

The Classics Act

Title II of the MMA creates a new sui generis right in new Chapter 14 of title 17, covering the digital audio transmission of sound recordings first fixed before February 15, 1972 (the date federal protection for sound recordings began). In granting the new right, the purpose was to achieve parity with post-February 15, 1972 sound recordings by extending the statutory license regime that currently applies to public performances and ephemeral reproductions under existing sections 114 and 112(e). Music services seeking to avail themselves of the statutory licenses must comply with all the same statutory license requirements for post-1972 sound recordings, including filing a notice of use, providing timely statements of account and reports of use, and timely payment of statutory royalties calculated in the same manner as for other recordings.

The legislation ensures that section 1401(f) copyright defenses such as "fair use" and provisions from the Digital Millennium Copyright Act apply to the new right, even though it is sui generis. In light of the inability of these works to have been registered with the Copyright Office, the issue of whether to permit statutory damages was debated. If such damages were allowed without regard to registration, pre- February 15, 1972 works would receive far better treatment than post- February 15, 1972 sound recordings. An elaborate compromise was worked out in new Section 1401(f)(5), establishing a filing requirement linked to a transitional period:

> (5) FILING REQUIREMENT FOR STATUTORY DAMAGES AND ATTORNEYS' FEES.—
>
> (A) FILING OF INFORMATION ON SOUND RECORDINGS.—
>
> (i) FILING REQUIREMENT.—Except in the case of a transmitting entity that has filed contact information for that transmitting entity under subparagraph (B), in any action under

this section, an award of statutory damages or of attorneys' fees under section 504 or 505 may be made with respect to an unauthorized use of a sound recording under subsection (a) only if—

(I) the rights owner has filed with the Copyright Office a schedule that specifies the title, artist, and rights owner of the sound recording and contains such other information, as practicable, as the Register of Copyrights prescribes by regulation; and

(II) the use occurs after the end of the 90-day period beginning on the date on which the information described in subclause (I) is indexed into the public records of the Copyright Office.

(ii) REGULATIONS.—Not later than 180 days after the date of enactment of this section, the Register of Copyrights shall issue regulations that—

(I) establish the form, content, and procedures for the filing of schedules under clause (i);

(II) provide that a person may request that the person receive timely notification of a filing described in subclause (I); and

(III) set forth the manner in which a person may make a request under subclause (II).

(B) FILING OF CONTACT INFORMATION FOR TRANSMITTING ENTITIES.—

(i) FILING REQUIREMENT.—Not later than 30 days after the date of enactment of this section, the Register of Copyrights shall issue regulations establishing the form, content, and procedures for the filing of contact information by any entity that, as of the date of enactment of this section, performs a sound recording fixed before February 15, 1972, by means of a digital audio transmission.

(ii) TIME LIMIT ON FILINGS.—The Register of Copyrights may accept filings under clause (i) only until the 180th day after the date of enactment of this section.

(iii) LIMITATION ON STATUTORY DAMAGES AND ATTORNEYS' FEES.—

(I) LIMITATION.—An award of statutory damages or of attorneys' fees under section 504 or 505 may not be made against an entity that has filed contact information for that entity under clause (i) with respect to an unauthorized use by that entity of a sound recording under subsection (a) if the use occurs before the end of the 90-day period beginning on the date on which the entity receives a notice that—

(aa) is sent by or on behalf of the rights owner of the sound recording;

(bb) states that the entity is not legally authorized to use that sound recording under subsection (a); and

(cc) identifies the sound recording in a schedule conforming to the requirements prescribed by the regulations issued under subparagraph (A)(ii).

(II) UNDELIVERABLE NOTICES.—In any case in which a notice under subclause (I) is sent to an entity by mail or courier service and the notice is returned to the sender because the entity either is no longer located at the address provided in the contact information filed under clause (i) or has refused to accept delivery, or the notice is sent by electronic mail and is undeliverable, the 90-day period under subclause (I) shall begin on the date of the attempted delivery.

(C) SECTION 412.—Section 412 shall not limit an award of statutory damages under section 504(c) or attorneys' fees under section 505 with respect to a covered activity in violation of subsection (a).

Simplified, the transition works like this:

1. Service providers would send their contact information to the Copyright Office. Since there would be a 180-day period before the Office issues registration/recordation regulations, this is ample time to send in the contact information.
2. Rights holders would, after the 180-day period, be able to file their contact information. The filing would be effective when it is publicly available.

3. After the filing is effective, the rights holder can contact the service provider and say, "let's negotiate." There is a 90-day window to negotiate a deal.
4. After the expiration of the 90-day period, but not before, statutory damages would be available, but only for post-90-day transmissions.

Similarly elaborate provisions apply to the duration of the new rights. The duration of available remedies is 95 years after first publication of the recording, ending on December 31 of that year, subject to certain additional periods. These periods provide varying additional protection for pre-1972 sound recordings, based on when the sound recording was first published:

> (B) TRANSITION PERIODS.—
>
> > (i) PRE-1923 RECORDINGS.—In the case of a sound recording first published before January 1, 1923, the transition period described in subparagraph (A)(i)(II) shall end on December 31 of the year that is 3 years after the date of enactment of this section.
> >
> > (ii) 1923-1946 RECORDINGS.—In the case of a sound recording first published during the period beginning on January 1, 1923, and ending on December 31, 1946, the transition period described in subparagraph (A)(i)(II) shall end on the date that is 5 years after the last day of the period described in subparagraph (A)(i)(I).
> >
> > (iii) 1947-1956 RECORDINGS.—In the case of a sound recording first published during the period beginning on January 1, 1947, and ending on December 31, 1956, the transition period described in subparagraph (A)(i)(II) shall end on the date that is 15 years after the last day of the period described in subparagraph (A)(i)(I).
> >
> > (iv) POST-1956 RECORDINGS.—In the case of a sound recording fixed before February 15, 1972, that is not described in clause (i), (ii), or (iii), the transition period described in subparagraph (A)(i)(II) shall end on February 15, 2067.

The Amp Act

The "rump" of the MMA, the Amp Act is a codification of SoundExchange's existing practices regarding royalty payments for sound recording producers, mixers, and engineers, as stated by the Copyright Office:

> Section 301. Short Title.

> Section 301 designates the short title of this section of the bill as the "Allocation for Music Producers Act" or the "AMP Act."
>
> Sec. 302. Payment of Statutory Performance Royalties.
>
> Section 302(a) codifies an existing practice of SoundExchange to accept letters of direction in order to pay producers, sound engineers, and mixers a portion of the webcasting royalties that it collects. Section 302(b) expands this program to cover new royalties for pre-1995 works that will be received by SoundExchange due to enactment of Title II. The new program requires, in the absence of a letter of direction, at least four months' notice to a copyright owner with no objections from the copyright owner before a set percentage of royalties (2% of all webcasting royalties from a particular work) is then paid to producers, sound engineers, and mixers. The preemption of state escheatment and abandoned property laws is expanded to cover SoundExchange, or its successor, in addition to independent administrators.
>
> Sec. 303. Effective Date.
>
> Section 303 sets the effective date of all three Titles of the bill as the date of enactment with the exception of certain changes to 114(g) made in Title III. [10]

In an amended opinion issued October 31, 2018, the Ninth Circuit, in *ABS Entertainment, Inc. v. CBS Corp.*, [11] spoke of the different contributions that sound engineers and remixers make:

> The initial producer/engineer's role is often to work in collaboration with the performing artists to make many of the creative decisions that define the overall sound of the recording as fixed, including such things as microphone choice, microphone placement, setting sound levels, equipment used, processing filters employed, tapes selected, session structure, and other similar decisions analogous to the creative choices of photographers that courts have consistently held to be original….
>
> The role of remastering engineers, however is usually very different from the role of the studio engineers. Studio engineers' decisions almost always contribute to the essential character and identity contained in the original sound recording. By contrast, the remastering engineer's role is ordinarily to preserve and protect the essential character and identity of the original sound recording, and to present that original sound recording in the best light possible by taking advantage of technological improvements. For example, Inglot testified that his goal was to "do a better version of maybe what the production process was at that time because you have a little more control than maybe they had" by "taking advantage of the technology." Although we do not hold that a remastered sound recording cannot be eligible for a derivative work

copyright, a digitally remastered sound recording made as a copy of the original analog sound recording will rarely exhibit the necessary originality to qualify for independent copyright protection. [12]

This issue is discussed further in Chapter 3, § 3:162.

Footnotes

1 Act of October 11, 2018, Pub. L. No. 115-264, 115th Cong. 2d Sess.; H.R. Rep. No. 115-651; S. Rep. No. 115-339.

2 Act of October 10, 2018, Pub. L. No. 115—, 115th Cong., 2d Sess.; Report No. 115-261 by the Senate Judiciary Committee (June 4, 2018); Errata to Report No. 115-261 (June 4, 2018); Treaty Doc 114-6, Message from the President of the United States transmitting the Marrakesh Treaty to the Senate (February 10, 2016).

3 *See* https://www.copyright.gov/legislation/2018_marrakesh_faqs.pdf. The amendments themselves may be found here: https://www.copyright.gov/legislation/2018_marrakesh_amendments.pdf]][4]. *See* Frank Rowsome and Carl Rose, "The Verse by the Side of the Road: The Story of the Burma-Shave Signs and Jingles" (1965, Stephen Greene Press).

4 ABS Entertainment, Inc. v. CBS Corp., 908 F.3d 405 (9th Cir. 2018).

5 Committee on the Judiciary, H.R. 1551, The Music Modernization Act (background and section-by-section analysis), p.4, available at https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf (last visited Dec. 10, 2018).

6 Committee on the Judiciary, H.R. 1551, The Music Modernization Act (background and section-by-section analysis), p.4-5, available at https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf (last visited Dec. 10, 2018).

7 Committee on the Judiciary, H.R. 1551, The Music Modernization Act (background and section-by-section analysis), p.9, available at https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf (last visited Dec. 10, 2018).

8 Committee on the Judiciary, H.R. 1551, The Music Modernization Act (background and section-by-section analysis), p.10, available at https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf (last visited Dec. 10, 2018).

9 Committee on the Judiciary, H.R. 1551, The Music Modernization Act (background and section-by-section analysis), p.8, available at https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf (last visited Dec. 10, 2018).

10 Committee on the Judiciary, H.R. 1551, The Music Modernization Act (background and section-by-section analysis), p.27, available at https://judiciary.house.gov/wp-content/uploads/2018/04/Music-Modernization-Act.pdf (last visited Dec. 10, 2018).

11 ABS Entertainment, Inc. v. CBS Corp., 908 F.3d 405 (9th Cir. Oct. 31, 2018).

12 908 F.3d at 423.

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Communications Lawyer
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MUSIC LICENSING TRANSFORMED BY THE PASSAGE OF THE MUSIC MODERNIZATION ACT

On October 11, 2018, the president signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA). [1] This major piece of bipartisan legislation touches on nearly every aspect of U.S. copyright law that relates to licensing of either musical compositions or sound recordings. The legislation is the result of many years of examination of reform proposals by Congress and the Copyright Office and many years of negotiations among industry stakeholders. The lengthy MMA makes five principal sets of changes to the Copyright Act:

(1) Creation of a blanket statutory mechanical license for digital music providers, which will be administered by a new "Mechanical Licensing Collective";

(2) Substantial federalization of protection for pre-1972 sound recordings, which generally had been protected only under state law;

(3) Adoption of a "willing buyer, willing seller" rate standard to be used when setting rates for musical compositions and sound recordings under statutory licenses;

(4) Changes to procedures for "rate court" proceedings for public performance licenses administered by ASCAP and BMI, including randomized assignment of judges to hear those proceedings and permitting those judges to consider royalty rates for sound recordings; and

(5) Provision of statutory procedures for producers, mixers, and sound engineers to receive royalties for the use of sound recordings under a statutory license.

Blanket License for Digital Reproduction and Distribution of Musical Compositions

The MMA's centerpiece is a major rewrite of the "mechanical" compulsory license provisions in section 115 of the Copyright Act. That license was originally created as part of the Copyright Act of 1909 to provide a mechanism for licensing reproduction and distribution of musical compositions embodied in piano rolls. Even as recording technology progressed to vinyl records, compact discs, and eventually downloaded digital files, the licensing procedures remained substantially the same. Under section 115, a compulsory mechanical license was available by serving on a copyright owner a notice of intent (NOI) that listed the individual musical compositions that the licensee intended to use, and then paying statutory royalties on those individual compositions. In some cases, an NOI could be filed with the Copyright Office instead.

However, after more than a century since the 1909 Act, the mechanical license system was under strain, as ownership of musical composition copyrights became increasingly fractured and the music market migrated from the sale of products such as CDs and permanent downloads and toward Internet streaming. Digital music providers found it difficult and expensive to obtain and administer mechanical licenses for all the compositions in their vast libraries, while music publishers and songwriters believed that providers often did not obtain valid licenses or pay required royalties and began filing litigation against streaming services on that basis. [2]

The goal of the MMA's blanket license is to make compulsory mechanical license administration for digital uses simpler and more efficient and to ensure that a higher proportion of usage results in payment of statutory royalties to the proper music publishers and songwriters. To do so, the MMA establishes the Mechanical Licensing Collective, a nonprofit organization that will administer the blanket license industrywide at the expense of digital music providers. [3] Among other things, the Mechanical Licensing Collective will develop and provide a publicly accessible database of current ownership information for musical compositions. [4] The database will address a long-felt need for more accurate and timely ownership information for musical compositions, which should simplify licensing of musical works for all uses.

Because it will take some time to get the Collective up and running, the blanket license will not be available until January 1, 2021. [5] To obtain a blanket license once they become available, a digital music provider will need only submit a notice to the Collective. [6] During the transition period (i.e., prior to the availability of blanket licenses on January 1, 2021), a digital music provider's potential exposure to liability for copyright infringement is limited, so long as the digital music ***18** provider engages in good-faith, commercially reasonable efforts to identify, locate, and pay royalties to the owners of musical compositions, and pays any remaining unpayable royalties to the Collective once it is up and running. [7]

Efforts to implement the new mechanical licensing procedures have begun in earnest. On November 5, 2018, the Copyright Royalty Board published a notice in the *Federal Register* soliciting comments on "necessary and appropriate modifications and amendments" to its regulations following enactment of the MMA. [8] Industry groups also have begun the process of identifying proposed leaders for the Collective. [9]

Federal Protection for Pre-1972 Sound Recordings

A separate title of the MMA, referred to as the "Classics Protection and Access Act," or the "Classics Act," extends copyright-like federal protection to sound recordings fixed before February 15, 1972, commonly referred to as "pre-1972 recordings." Previously, such recordings were largely excluded from the federal copyright system. [10]

Instead, prior to the enactment of the MMA, pre-1972 recordings were potentially protected under state statutory and common law until February 15, 2067. [11] As a result, the law across the country lacked uniformity. For example, while

most states gave the owner of a pre-1972 recording the right to control reproduction and distribution of its recording, and one federal district court found that a state statute provided a property right in the public performance of a pre-1972 recording, [12] the highest courts of two states determined that their state law provided no public performance right in pre-1972 sound recordings. [13] Some large digital music services refused to pay the artists who created those works for the use of their recordings.

The Classics Act was originally designed as a response to judicial decisions finding no public performance right under state law, and earlier bills would have created only a federal public performance right in pre-1972 sound recordings. However, a last-minute compromise resulted in substantially full federalization of protection of pre-1972 recordings in the enacted version of the MMA.

Now, under a new section 1401 of Title 17, owners of pre-1972 sound recordings have federal protection against unauthorized use of their recordings that largely mirrors the scope of federal copyright protection. That protection will continue for the following periods:

- For recordings published before 1923, the term of protection ends on December 31, 2021;

- For recordings published between 1923 and 1946, the term of protection continues until December 31 of the year 100 years after publication;

- For recordings published between 1947 and 1956, the term of protection continues until December 31 of the year 110 years after publication; and

- For all other recordings (including unpublished recordings and ones published after 1956), the term of protection ends on February 15, 2067. [14]

While protection under section 1401 largely mirrors federal copyright protection, there are important differences. For example, formalities such as registration do not apply, but there is a special statutory process for rights owners to record claims to works to be eligible to recover statutory damages. [15] Additional provisions address settlements of state law claims. [16] The Classics Act also includes a special statutory process for seeking permission for noncommercial uses of pre-1972 recordings that are not being commercially exploited. [17]

The continuation of state protection for pre-1972 recordings when all other works were brought into the federal system in the Copyright Act of 1976 was a historical anomaly. That anomaly made increasingly less sense as the music market migrated away from physical product distribution and toward distribution by digital services with national reach. Federalizing protection for these works will provide uniform legal treatment that should facilitate commerce involving these recordings and result in consistent payment for the use of these works.

Willing Buyer, Willing Seller Rate Standard

Previously, some users of music under statutory licenses paid statutory royalties set under a "willing buyer, willing seller" standard, while others paid statutory royalties set under an older standard that had been interpreted to allow the Copyright Royalty Board to set below-market rates. The MMA establishes a "willing buyer, willing seller" standard for setting royalty rates for mechanical licenses under section 115 of the Copyright Act [18] and for all users of sound recordings under the statutory license in section 114 of the Copyright Act. [19]

Changes to ASCAP and BMI Rate Court Proceedings

For many decades, royalty rates under performance licenses for musical compositions issued by the performing rights organizations ASCAP and BMI have been subject to oversight by federal judges in the Southern District of New York, pursuant to consent decrees between those organizations and the Department of Justice dating back to 1941. Proceedings to set rates under those consent decrees are commonly referred to as "rate court" proceedings. Music publishers and songwriters have long sought changes to certain aspects of those proceedings. The MMA makes two such changes.

First, assignments of judges to hear rate-setting proceedings will now be made randomly, on a case-by-case basis. [20] Previously, one judge had retained jurisdiction over each consent decree for many years. The aim of this change is to neutralize any perceived biases and bring a fresh perspective to each rate court case. It also means, however, that the outcomes of proceedings may be less predictable.

Second, the MMA removes a provision in section 114(i) that previously prohibited the rate courts ***19** from considering evidence of royalty rates for sound recordings when setting rates for public performances of musical compositions. When Congress created the digital performance right in sound recordings, that provision was intended to protect musical composition rates from erosion. However, more than twenty years later, it seemed like an unnecessary constraint on the conduct of rate court proceedings.

Payment of Statutory Royalties to Producers, Mixers, and Sound Engineers

Yet another title of the MMA is referred to as the "Allocation for Music Producers Act" or "AMP Act." The AMP Act codifies procedures used to pay producers, mixers, and sound engineers who participated in the creative process that created a sound recording their share of section 114 statutory royalties. [21] It also creates a new process for such persons who contributed to pre-1995 recordings to claim a share of royalties when they are not able to obtain a "letter of direction" of the kind now contemplated by many producer agreements. [22] Finally, the AMP Act simplifies the tax treatment of situations where a producer is paid out of the artist's share of statutory royalties. [23]

Footnotes

a1 *Steven R. Englund, Alison I. Stein, and Ava U. McAlpin are attorneys with Jenner & Block. Jenner & Block advised various clients in the industry negotiations in connection with enactment of the MMA. This article is based on an article that originally appeared in the MLRC MediaLawLetter.*

1 Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, 132 Stat. 3676 (2018).

2 *See, e.g.*, Wixen Music Publ'g, Inc. v. Spotify USA, Inc., consolidated with Ferrick v. Spotify USA, Inc., 16-cv-08412-AJN (S.D.N.Y.).

3 17 U.S.C. § 115(d)(3), *as amended by* Pub. L. No. 115-264, tit. I, § 102, 132 Stat. at 3686-88.

4 17 U.S.C. § 115(d)(3)(C)(i)(IV) & (E), *as amended by* Pub. L. No. 115-264, tit. I, § 102, 132 Stat. at 3687, 3692.

5 17 U.S.C. § 115(b)(2)(B), (d)(2) (B), (e)(15), *as amended by* Pub. L. No. 115-264, tit. I, § 102, 132 Stat. at 3678, 3685-86, 3720.

6 17 U.S.C. § 115(d)(2)(A), *as amended by* Pub. L. No. 115-264, tit. I, § 102, 132 Stat. at 3684.

7 17 U.S.C. § 115(d)(10), *as amended by* Pub. L. No. 115-264, tit. I, § 102, 132 Stat. at 3713-16.

8 Modification and Amendment of Regulations to Conform to the MMA, 83 Fed. Reg. 55,334 (Nov. 5, 2018); *see also* Extension of Comment Period, 83 Fed. Reg. 60,384 (Nov. 26, 2018).

9 *E.g.*, Ed Christman, *Licensing Experts Wanted: Now That the Music Modernization Act Is Law, Who Will Lay It Down?*, BILLBOARD (Oct. 19, 2018), https://www.bill-board.com/articles/business/8480843/music-modernization-act-law-licensing-experts-wanted; Nat'l Music Publishers' Ass'n, *Music Publishers: Please Read the Music Modernization Act (MMA) Mechanical Licensing Collective (MLC) Board Submission Guide: Apply to Serve on the MLC Board and Committees*, http://nmpa.org/music-publishers-please-read-the-music-modernization-act-mma-mechanical-licensing-collective-mlc-board-submission-guide-apply-to-serve-on-the-mlc-board-and-committees/.

10 Sound recordings did not receive any protection under federal law at all until the Sound Recording Amendment of 1971. Sound Recordings Act, Pub. L. No. 140, 85 Stat. 39 (1971). Even then, the Sound Recording Amendment of 1971 excluded protections for sound recordings that were made prior to February 15, 1972. *Id.* Some foreign-origin pre-1972 recordings were "restored" to federal protection during the 1990s. 17 U.S.C. § 104A.

11 *See* 17 U.S.C. § 301(c), *prior to amendment by* Pub. L. No. 115-264.

12 Flo & Eddie, Inc. v. Pandora Media, Inc., 113 U.S.P.Q.2d 2031 (C.D. Cal. 2015)Flo & Eddie, Inc. v. Pandora Media, Inc., 113 U.S.P.Q.2d 2031 (C.D. Cal. 2015), *question certified*, 851 F.3d 950 (9th Cir. 2017). As of this writing, the case is pending before the California Supreme Court.

13 *See, e.g.*, Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 229 So. 3d 305 (Fla. 2017); Flo & Eddie, Inc. v. Sirius XM Radio, Inc., 28 N.Y.3d 583 (N.Y. 2016).

14 17 U.S.C. § 1401, *as amended by* Pub. L. No. 115-264, tit. II, § 202, 132 Stat. at 3728-3737.

15 17 U.S.C. § 1401(f)(5), *as amended by* Pub. L. No. 115-264, tit. II, § 202, 132 Stat. at 3735. The Copyright Office has announced interim rules for the recordation of claims to pre-1972 recordings by rights owners. Filing of Schedules by Rights Owners and Contact Information by Transmitting Entities Relating to Pre-1972 Sound Recordings, 83 Fed. Reg. 52,150 (Oct. 11, 2018) (to be codified at 27 C.F.R. pt. 201).

16 17 U.S.C. § 1401(d)(2)(B), (e)(1), *as amended by* Pub. L. No. 115-264, tit. II, § 202, 132 Stat. at 3732, 3733-34.

17 17 U.S.C. § 1401(c), *as amended by* Pub. L. No. 115-264, tit. II, § 202, 132 Stat. at 3729-32. The Copyright Office has commenced a rulemaking proceeding to provide details concerning this process. Noncommercial Use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited, 83 Fed. Reg. 52,176 (Oct. 11, 2018); *see also* Extension of Comment Period, 83 Fed. Reg. 57,386 (Nov. 15, 2018).

18 17 U.S.C. § 115(c)(1)(F), *as amended by* Pub. L. No. 115-264, tit. I, § 102, 132 Stat. at 3680.

19 17 U.S.C. § 114(f)(1)(B), *as amended by* Pub. L. No. 115-264, tit. I, § 103, 132 Stat. at 3723.

20 28 U.S.C. § 137(b), *as amended by* Pub. L. No. 115-264, tit. I, § 104, 132 Stat. at 3726.

21 17 U.S.C. § 114(g), *as amended by* Pub. L. No. 115-264, tit. II, § 301, 132 Stat. at 3737-3741.

22 *Id.*

23 *Id.*

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Music Streaming Cos. To Fight Copyright Board Royalty Hike

By Mike LaSusa

Law360 (March 7, 2019, 11:35 PM EST) -- Some of the most powerful companies in the music streaming business, including Google, Spotify and Pandora, announced on Thursday that they will challenge the Copyright Royalty Board's ruling last year ordering streaming services to pay more in so-called mechanical royalties to songwriters and publishers.

The companies said that the CRB issued its final decision on the streaming issue "in a manner that raises serious procedural and substantive concerns," according to a joint statement first reported by Variety on Thursday and confirmed to Law360 by spokespeople for Google and Pandora.

"If left to stand, the CRB's decision harms both music licensees and copyright owners," the companies said. "Accordingly, we are asking the U.S. Court of Appeals for the D.C. Circuit to review the decision."

Variety reported that Amazon would also join the challenges, which the news outlet said will be filed separately. An Amazon spokesperson said the Seattle-based retail behemoth didn't sign on to the joint statement but did not respond to a question about whether it also plans to challenge the CRB ruling.

The National Music Publishers Association criticized the move by the streaming companies.

"The CRB's final determination gave songwriters only their second meaningful rate increase in 110 years," NMPA head David Israelite said in a statement. "Instead of accepting the CRB's decision, which still values songs less than their fair market value, Spotify and Amazon have declared war on the songwriting community by appealing that decision."

Variety reported that Apple Music will not challenge the CRB ruling, a decision Israelite

hailed in his statement.

"We thank Apple Music for accepting the CRB decision and continuing its practice of being a friend to songwriters," he said.

It wasn't immediately clear on what specific grounds the streamers plan to challenge the CRB's ruling, which said the mechanical royalties — paid when a musical composition is recorded or reproduced — should increase gradually from the current rate of 10.5 percent of revenue to 15.1 percent of revenue by 2022.

However, in a dissent to the CRB's final decision made public in late November, Judge David R. Strickler said the majority had improperly ordered a rate structure that wasn't discussed during the course of the case that led to the ruling.

"Because this particular rate structure was not proffered at the hearing, the parties had no ability to mount a challenge to it during the proceeding," Judge Strickler wrote.

The CRB's publication of its ruling came just a month after President Donald Trump signed into law new copyright legislation known as the Music Modernization Act, which will make major changes to how streaming music services such as Google, Pandora and Spotify pay royalties.

The law aims to simplify how digital services pay mechanical royalties by creating a centralized "Mechanical Licensing Collective" to collect royalties and then distribute them to whomever is owed money. As long as digital services pay that entity, they will receive a blanket license that allows them to use any song and immunizes them from infringement lawsuits.

The other major change will require digital services to pay for songs recorded prior to 1972, which were not retroactively covered when Congress created sound recording copyrights. That issue, too, has led to protracted litigation between rights holders and digital services in recent years.

Other provisions of the law will tweak how the Copyright Royalty Board sets rates for mechanical royalties, require that different judges hear disputes involving royalty groups the American Society of Composers Authors and Publishers and Broadcast Music Inc.,

and allocate a portion of royalties to record producers and sound engineers.

Spotify did not respond to a request for comment Thursday.

Case information wasn't immediately available for the challenges reportedly filed in the D.C. Circuit appeals court.

The copyright owners were represented in the CRB proceedings by Donald S. Zakarin, Frank P. Scibilia and Benjamin K. Semel of Pryor Cashman LLP.

Amazon was represented by Kellogg Hansen Todd Figel & Frederick PLLC and Winston & Strawn LLP. Apple was represented by Kirkland & Ellis. Pandora was represented by Weil Gotshal & Manges LLP. Google was represented by King & Spalding LLP. Spotify was represented by Mayer Brown LLP.

The case is Determination of Rates and Terms for Making and Distributing Phonorecords, 16–CRB–0003, the Library of Congress' Copyright Royalty Board.

After Big Music Bill, 3 Other Copyright Proposals To Watch

By Bill Donahue

Law360 (October 2, 2018, 9:13 PM EDT) -- The sweeping Music Modernization Act is getting all the attention since it passed both houses of Congress last month, but there are also a raft of other copyright proposals floating around on Capitol Hill.

When the Modernization Act, a major overhaul of how streaming music services like Spotify pay royalties, was sent to President Donald Trump's desk on Sept. 25, it was the first big copyright bill to pass Congress in years — but lawmakers might not be done yet.

Several other amendments to copyright law, albeit more targeted tweaks than the far-reaching Modernization Act, are pending before lawmakers, promising substantial changes if they are eventually passed.

Of course, the normal caveats apply. It's hard to predict anything in Washington, D.C., these days, not least the success of proposed copyright legislation, which is often opposed by at least one industry group with the power to scuttle it.

But here are three pending copyright bills to keep an eye on.

Copyright Alternative in Small-Claims Enforcement Act

The idea of a small claims court for copyright law has been floating around for years, the point being to give small businesses or individual authors, like photojournalists or singer-songwriters, a cheaper way to sue over small-scale infringements.

The Copyright Alternative in Small-Claims Enforcement Act, or CASE Act, introduced last fall by Rep. Hakeem Jeffries, D-N.Y., and Rep. Tom Marino, R-Pa., is the latest effort aimed at turning that idea into a reality.

The bill would create a "Copyright Claims Board," housed within the Copyright Office, which

would adjudicate copyright disputes capped at $30,000. The tribunal would not be an Article III court and defendants would be given the chance to opt out. Plaintiffs would then have to file a full infringement lawsuit, but the hope is that defendants would also like a cheaper route for litigating small disputes.

"Creators, solo entrepreneurs, photographers and artists often struggle to enforce their copyright in a timely and cost-efficient manner," Marino said at the time. "This can hinder creativity and prevent these professionals from being able to sustain a profitable livelihood."

As currently constituted, the CASE Act faces long odds. That's because although the bill is widely supported by creative unions and entertainment companies, it faces major opposition from tech and internet companies.

At a hearing last week at the House Judiciary Committee, the Computer and Communications Industry Association, which represents Microsoft Corp. and other big tech companies, warned that the bill could be abused by so-called copyright trolls.

The Internet Association, which represented Google LLC, Facebook Inc. and other web giants, urged changes to prevent the new small-claims process from interfering with the Digital Millennium Copyright Act's safe harbors, which shield websites from billions in potential damages over actions by their users.

"Section 512 appropriately balances the interests of users, service providers and rights-holders," the association wrote in its prepared statement, referring to the DMCA's safe harbor by section number. "IA member companies have strong concerns about any legislation that would disturb the sensible allocation of responsibilities that it provides."

American Royalties Too Act

Mirroring a California state statute that has repeatedly been struck down in the courts, the American Royalties Too Act, or ART Act, would give visual artists a cut of the money when their works are later resold at auction.

The bill, another long-sought copyright change that was introduced for the latest time last week, would force auction houses that sell more than $1 million in art per year to pay a 5 percent royalty to the original artists.

That idea is an alien one under American copyright law, where the so-called first-sale doctrine generally allows for a particular copy of a copyrighted work to be resold without such restrictions.

According to proponents, the measure is needed to provide downstream revenue for visual artists similar to royalties received by musicians. It will also bring the U.S. into alignment with more than 70 countries that already provide such a right.

"Collectors and auction houses make millions when art is resold," said co-sponsor Sen. Orrin Hatch, R-Utah, in a statement announcing the bill. "It's only fair that the artist who created the work in the first place receive a share as well."

If that all sounds familiar, it should: The ART Act is basically a federal version of California's Resale Royalty Act, which auctioneers Christie's Inc., Sotheby's Inc. and eBay Inc. have spent years fighting in court.

In 2012, a federal court ruled that the RRA violated the Constitution's commerce clause by improperly regulating out-of-state sales. Later, after an appeals court revived part of the law, a different judge ruled that the state statute was preempted by federal copyright law because it interfered with the first-sale doctrine.

As introduced last week, the ART Act would exempt any piece sold for less than $5,000, and would cap the total royalties at $35,000 per work. It would also exclude any direct private art sales.

Register of Copyrights Selection and Accountability Act

Approved by the full House last year but not considered in the Senate until a committee hearing last week, H.R. 1695 would turn the register of copyrights into a presidentially appointed position.

Currently, the register is appointed by the librarian of Congress, since the Copyright Office is housed within the Library of Congress. The legislation, if approved, would make it more like a cabinet position, nominated by the president and subject to approval by the Senate.

Why the need for the switch? Depends who you ask.

Proponents of the bill like the Copyright Alliance, a group made up of record labels, film studios and other major content companies, say the move is about modernizing the Copyright Office by giving it more independence from the Library of Congress.

According to the alliance's written testimony at last week's hearing, the library has "neglected" the Copyright Office's IT infrastructure for years. Making the register a presidential appointee, the group said, would give the office "a greater say in how it operates and enable it to improve its operations."

The bill — which would require a congressional panel to offer options from which the president would pick a nominee — would also provide "a more transparent, balanced and neutral selection process" compared to the librarian simply filling the role.

Opponents have a very different view: that the bill is at best unnecessary, and at worst a move to "politicize" the register by industry groups with a vested interest in stronger copyright laws.

"The rationale for [the act] is elusive," said Jonathan Band, a professor at Georgetown University Law, in written testimony ahead of last week's hearing. "Why Congress would voluntarily cede its own librarian's authority to select and oversee a key congressional adviser on copyright matters to the executive branch is hard to comprehend."

--Editing by Kelly Duncan and Katherine Rautenberg.

NCAA BYLAW ARTICLE 12

Amateurism

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12.01 GENERAL PRINCIPLES

12.01.1 Eligibility for Intercollegiate Athletics. Only an amateur student-athlete is eligible for intercollegiate athletics participation in a particular sport.

12.01.2 Clear Line of Demarcation. Member institutions' athletics programs are designed to be an integral part of the educational program. The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.

12.01.3 "Individual" vs. "Student-Athlete." NCAA amateur status may be lost as a result of activities prior to enrollment in college. If NCAA rules specify that an "individual" may or may not participate in certain activities, this term refers to a person prior to and after enrollment in a member institution. If NCAA rules specify a "student-athlete," the legislation applies only to that person's activities after enrollment.

12.01.4 Permissible Grant-in-Aid. A grant-in-aid administered by an educational institution is not considered to be pay or the promise of pay for athletics skill, provided it does not exceed the financial aid limitations set by the Association's membership.

12.01.5 Compliance with Legislation for Emerging Sports. Beginning with the second year of the Association's identification of an emerging sport for women (see Bylaw 20.02.5), the institution shall comply fully in that program with all applicable amateurism legislation set forth in Bylaw 12. *(Adopted: 1/10/95, Revised: 2/24/03)*

12.02 DEFINITIONS AND APPLICATIONS

12.02.1 Individual. An individual, for purposes of this bylaw, is any person of any age without reference to enrollment in an educational institution or status as a student-athlete.

12.02.2 Pay. Pay is the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics.

12.02.3 Professional Athlete. A professional athlete is one who receives any kind of payment, directly or indirectly, for athletics participation except as permitted by the governing legislation of the Association.

12.02.4 Professional Athletics Team. A professional team is any organized team that:

(a) Provides any of its players more than actual and necessary expenses for participation on the team, except as otherwise permitted by NCAA legislation. Actual and necessary expenses are limited to the following, provided the value of these items is commensurate with the fair market value in the locality of the player(s) and is not excessive in nature: *(Revised: 4/25/02 effective 8/1/02)*
   (1) Meals directly tied to competition and practice held in preparation for such competition;
   (2) Lodging directly tied to competition and practice held in preparation for such competition;
   (3) Apparel, equipment and supplies;
   (4) Coaching and instruction;
   (5) Health/medical insurance;
   (6) Transportation (expenses to and from practice competition, cost of transportation from home to training/practice site at the beginning of the season and from training/practice site to home at the end of season);
   (7) Medical treatment and physical therapy;
   (8) Facility usage; *(Revised: 4/24/03)*
   (9) Entry fees; and *(Revised: 4/24/03)*
   (10) Other reasonable expenses; or *(Adopted: 4/24/03, Revised: 10/28/04)*

(b) Declares itself to be professional (see Bylaw 12.2.3.2.4). *(Revised: 8/8/02)*

12.02.5 Student-Athlete. A student-athlete is a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program. Any other student becomes a student-athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department, as specified in Constitution 3.2.4.5. A student is not deemed a student-athlete solely on the basis of prior high school athletics participation.

12.1 GENERAL REGULATIONS

An individual must comply with the following to retain amateur status. (See Bylaw 14 regarding the eligibility restoration process.)

12.1.1 Validity of Amateur Status. As a condition and obligation of membership, it is the responsibility of an institution to determine the validity of the information on which the amateur status of a prospective student-athlete (including two-year and four-year college transfers initially enrolling at an NCAA Division I institution) and student-athlete is based. (See Bylaw 14.01.3.) *(Adopted: 1/9/06 effective 8/1/06, for all final certifications for student-athletes initially enrolling at a Division I or Division II institution on or after 8/1/07, Revised: 1/8/07, 4/30/07)*

12.1.1.1 Amateurism Certification Process. An institution shall use an initial eligibility center approved by the Executive Committee to determine the validity of the information on which the amateur status of a student-athlete is based. *(Adopted: 1/9/06 effective 8/1/06, for final certifications for student-athletes initially enrolling at a Division I or Division II institution on or after 8/1/07, Revised: 4/30/07)*

12.1.1.1.1 Scope. The certification of amateur status issued by the NCAA Eligibility Center is limited to activities that occur prior to a prospective student-athlete's request for final amateurism certification or his or her initial full-time enrollment at an NCAA Division I or II institution, whichever occurs earlier. *(Adopted: 4/30/07)*

12.1.1.1.2 Institutional Responsibilities.

12.1.1.1.2.1 Amateur Status After Certification. An institution is responsible for certifying the amateur status of a prospective student-athlete (including two-year and four-year college transfers initially enrolling at an NCAA Division I institution) from the time he or she requests that a final certification be issued by the NCAA Eligibility Center or from the time he or she initially enrolls as a full-time student at an NCAA Division I or II institution (whichever occurs earlier). *(Adopted: 4/30/07)*

12.1.1.1.2.2 Sharing Information and Reporting Discrepancies. If an institution receives additional information or otherwise has cause to believe that a prospective student-athlete's amateur status has been jeopardized, the institution is responsible for promptly notifying the NCAA Eligibility Center of such information. Further, an institution is responsible for promptly reporting to the NCAA Eligibility Center all discrepancies in information related to a student-athlete's amateurism certification. *(Adopted: 4/30/07)*

12.1.1.1.3 Eligibility for Practice or Competition. Prior to engaging in practice or competition, a student-athlete shall receive a final certification of amateur status based on activities that occur prior to his or her request for final certification or initial full-time enrollment at an NCAA Division I or II institution (whichever occurs earlier). *(Adopted: 4/30/07)*

12.1.1.1.3.1 Temporary Certification—Recruited Student-Athlete. If a recruited prospective student-athlete reports for athletics participation before the student's amateur status has been certified, the student may practice, but not compete, for a maximum period of 14 days. After this period, the student shall have his or her amateur status certified to continue to practice or compete. *(Adopted: 1/9/06 effective 8/1/06, for all final certifications for student-athletes initially enrolling at a Division I or Division II institution on or after 8/1/07)*

12.1.1.1.3.2 Temporary Certification—Nonrecruited Student-Athlete. If a nonrecruited prospective student-athlete reports for athletics participation before the student's amateur status has been certified, the student may practice, but not compete, for a maximum period of 45 days. After this period, the student shall have had his or her amateur status certified to continue to practice or to compete. *(Adopted: 1/9/06 effective 8/1/06, for all final certifications for student-athletes initially enrolling at a Division I or Division II institution on or after 8/1/07)*

12.1.1.1.4 Eligibility for Practice After a Final Not-Certified Certification. After a final not-certified certification is rendered, a student-athlete may continue to engage in practice activities, provided the institution has submitted a notice of appeal. At the point in which all appeal opportunities have been exhausted and no eligibility has been granted, the student-athlete may no longer participate in practice activities. *(Adopted: 3/21/07)*

12.1.2 Amateur Status. An individual loses amateur status and thus shall not be eligible for intercollegiate competition in a particular sport if the individual:

(a) Uses his or her athletics skill (directly or indirectly) for pay in any form in that sport;

(b) Accepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation;

(c) Signs a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received;

(d) Receives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations;

(e) Competes on any professional athletics team per Bylaw 12.02.4, even if no pay or remuneration for expenses was received; *(Revised: 4/25/02 effective 8/1/02)*

(f) After initial full-time collegiate enrollment, enters into a professional draft (see Bylaw 12.2.4); or *(Revised: 4/25/02 effective 8/1/02, 4/24/03 effective 8/1/03 for student-athletes entering a collegiate institution on or after 8/1/03)*

(g) Enters into an agreement with an agent. *(Adopted: 4/25/02 effective 8/1/02)*

12.1.2.1 Prohibited Forms of Pay. "Pay," as used in Bylaw 12.1.2 above, includes, but is not limited to, the following:

12.1.2.1.1 Salary, Gratuity or Compensation. Any direct or indirect salary, gratuity or comparable compensation.

12.1.2.1.2 Division or Split of Surplus. Any division or split of surplus (bonuses, game receipts, etc.).

12.1.2.1.3 Educational Expenses. Educational expenses not permitted by the governing legislation of this Association (see Bylaw 15 regarding permissible financial aid to enrolled student-athletes).

12.1.2.1.3.1 Educational Expenses or Services—Prior to Collegiate Enrollment. A prospective student-athlete may receive educational expenses or services (e.g., tuition, fees, room and board, books, tutoring, standardized test preparatory classes) prior to collegiate enrollment from any individual or entity other than an agent, professional sports team/organization, member institution or a representative of an institution's athletics interests, provided the payment for such expenses or services is disbursed directly to the individual, organization or educational institution (e.g., high school, preparatory school) providing the educational expense or service. *(Adopted: 4/25/02 effective 8/1/02, Revised: 1/14/08)*

12.1.2.1.3.2 Educational Expenses from Outside Sports Team or Organization—After Collegiate Enrollment. Educational expenses provided to an individual after initial collegiate enrollment by an outside sports team or organization that are based on any degree on the recipient's athletics ability [except as specified in Bylaw 15.2.6.4-(h)], even if the funds are given to the institution to administer to the recipient. *(Revised: 1/10/95, 4/25/02 effective 8/1/02)*

12.1.2.1.3.2.1 Educational Expenses—Olympic Committee. A student-athlete may receive educational expenses awarded by the U.S. Olympic Committee (or for international student-athletes, expenses awarded by the equivalent organization of a foreign country) pursuant to the applicable conditions set forth in Bylaw 15.2.6.5. *(Adopted: 4/15/97, Revised: 11/1/00, 4/25/02 effective 8/1/02)*

12.1.2.1.3.2.2 Educational Expenses—National Governing Body. A student-athlete may receive educational expenses awarded by a U.S. national governing body (or, for international student-athletes, expenses awarded by the equivalent organization of a foreign country) pursuant to the applicable conditions set forth in Bylaw 15.2.6.5. *(Adopted: 10/28/97 effective 8/1/98, Revised: 11/1/00, 4/25/02 effective 8/1/02)*

12.1.2.1.4 Expenses, Awards and Benefits. Excessive or improper expenses, awards and benefits (see Bylaw 16 regarding permissible awards, benefits and expenses to enrolled student-athletes).

12.1.2.1.4.1 Cash or Equivalent Award. Cash, or the equivalent thereof (e.g., trust fund), as an award for participation in competition at any time, even if such an award is permitted under the rules governing an amateur, noncollegiate event in which the individual is participating. An award or a cash prize that an individual could not receive under NCAA legislation may not be forwarded in the individual's name to a different individual or agency. *(Revised: 4/25/02 effective 8/1/02)*

12.1.2.1.4.1.1 Exception—Prospective Student-Athlete's Educational Institution. A financial award may be provided to a prospective student-athlete's educational institution in conjunction with the prospective student-athlete being recognized as part of an awards program in which athletics participation, interests or ability is a criterion, but not the sole criterion, in the selection process. Such an award must also include nonathletics criteria, such as the prospective student-athlete's academic record and nonathletics extracurricular activities and may not be based on the prospective student-athlete's place finish or performance in a particular athletics event. In addition, it is permissible for an outside organization (other than a professional sports organization) to provide actual and necessary expenses for the prospective student-athlete (and the prospective student-athlete's parents or other relatives) to travel to a recognition event designed to recognize the prospective student-athlete's accomplishments in conjunction with his or her selection as the recipient of a regional, national or international award. *(Adopted: 10/28/99)*

12.1.2.1.4.1.2 Operation Gold Grant. An individual (prospective student-athlete or student-athlete) may accept funds that are administered by the U.S. Olympic Committee pursuant to its Operation Gold program. *(Adopted: 4/26/01 effective 8/1/01)*

12.1.2.1.4.2 Expenses/Awards Prohibited by Rules Governing Event. Expenses incurred or awards received by an individual that are prohibited by the rules governing an amateur, noncollegiate event in which the individual participates.

12.1.2.1.4.3 Expenses from Outside Team or Organization. Expenses received from an outside amateur sports team or organization in excess of actual and necessary travel, room and board expenses, and apparel and equipment (for individual and team use only from teams or organizations not affiliated with member institutions, including local sports clubs as set forth in Bylaw 13.11.2.3) for competition and practice held in preparation for such competition. Practice must be conducted in a continuous time period preceding the competition except for practice sessions conducted by a national team, which occasionally may be interrupted for specific periods of time preceding the competition. *(Revised: 1/10/90, 1/10/92)*

12.1.2.1.4.3.1 Expenses/Benefits Related to Olympic Games. It is permissible for members of an Olympic team to receive all nonmonetary benefits and awards provided to members of an Olympic team beyond actual and necessary expenses, including entertainment, equipment, clothing, long distance telephone service, Internet access, and any other item or service for which it can be demonstrated that the same benefit is available to all members of that nation's Olympic team or the specific sport Olympic team in question. *(Adopted: 11/1/00)*

12.1.2.1.4.3.2 Operation Gold Grant. An individual (prospective student-athlete or student-athlete) may accept funds that are administered by the U.S. Olympic Committee pursuant to its Operation Gold program. *(Adopted: 4/26/01)*

12.1.2.1.4.4 Unspecified or Unitemized Expenses. Payment to individual team members or individual competitors for unspecified or unitemized expenses beyond actual and necessary travel, room and board expenses for practice and competition.

12.1.2.1.4.5 Expenses from Sponsor Other Than Parents/Legal Guardians or Nonprofessional Sponsor of Event. Actual and necessary expenses or any other form of compensation to participate in athletics competition (while not representing an educational institution) from a sponsor other than an individual upon whom the athlete is naturally or legally dependent or the nonprofessional organization that is sponsoring the competition.

12.1.2.1.4.6 Expenses for Parents/Legal Guardians of Participants in Athletics Competition. Expenses received by the parents or legal guardians of a participant in athletics competition from a nonprofessional organization sponsoring the competition in excess of actual and necessary travel, room and board expenses, or any entertainment expenses, unless such expenses are made available to the parents or legal guardians of all participants in the competition. *(Adopted: 1/16/93, Revised: 1/11/97)*

12.1.2.1.4.6.1 Postseason Bowl Event. [FBS] On one occasion per year, a student-athlete may designate either additional individuals or substitutes (not to exceed a total of six individuals) to receive entertainment expenses related to an event organized by the nonprofessional sponsor of a postseason bowl game specifically for the parents or legal guardians of student-athletes participating in the postseason bowl. The additional individuals or substitutes designated by the student-athlete shall be subject to the review and approval of the institution's athletics director, or his or her designee. *(Adopted: 4/29/04 effective 8/1/04)*

12.1.2.1.5 Payment Based on Performance. Any payment, including actual and necessary expenses, conditioned on the individual's or team's place finish or performance or given on an incentive basis, or receipt of expenses in excess of the same reasonable amount for permissible expenses given to all individuals or team members involved in the competition. *(Revised: 4/25/02 effective 8/1/02)*

12.1.2.1.5.1 Operation Gold Grant. An individual (prospective student-athlete or student-athlete) may accept funds that are administered by the U.S. Olympic Committee pursuant to its Operation Gold program. *(Adopted: 4/26/01)*

12.1.2.1.6 Preferential Treatment, Benefits or Services. Preferential treatment, benefits or services because of the individual's athletics reputation or skill or pay-back potential as a professional athlete, unless such treatment, benefits or services are specifically permitted under NCAA legislation. For violations of this bylaw in which the value of the benefit is $100 or less, the eligibility of the individual shall not be affected, conditioned on the individual repaying the value of the benefit to a charity of his or her choice. The individual, however, shall remain ineligible from the time the institution has knowledge of the receipt of the benefit until the individual repays the benefit. If the violation involves institutional responsibility, it remains an institutional violation per Constitution 2.8.1, and documentation of the individual's repayment shall be forwarded to the enforcement staff. *(Revised: 1/11/94, 1/14/08)*

12.1.2.1.7 Prize for Participation in Institution's Promotional Activity. Receipt of a prize for participation (involving the use of athletics ability) in a member institution's promotional activity that is inconsistent with the provisions of Bylaw 12.5 or approved official interpretations. *(Revised: 11/1/07 effective 8/1/08)*

12.1.2.2 Use of Overall Athletics Skill—Effect on Eligibility. Participation for pay in competition that involves the use of overall athletics skill (e.g., "superstars" competition) constitutes a violation of the Association's amateur-status regulations; therefore, an individual participating for pay in such competition is ineligible for intercollegiate competition in all sports. (See Bylaw 12.5.2.3.3 for exception related to promotional contests.) *(Revised: 4/25/02 effective 8/1/02)*

12.1.2.3 Road Racing. "Road racing" is essentially the same as cross country or track and field competition and cannot be separated effectively from those sports for purposes of Bylaw 12. Therefore, a student-athlete who accepts pay in any form for participation in such a race is ineligible for intercollegiate cross country or track and field competition. *(Revised: 4/25/02 effective 8/1/02)*

12.1.2.4 Exceptions to Amateurism Rule.

12.1.2.4.1 Exception for Prize Money Prior to Full-Time Collegiate Enrollment. Prior to collegiate enrollment, an individual may accept prize money based on his or her place finish or performance in an open athletics event (an event that is not invitation only). Such prize money may not exceed actual and necessary expenses and may be provided only by the sponsor of the open event. The calculation of actual and necessary expenses shall not include the expenses or fees of anyone other than the prospective student-athlete (e.g., coach's fees or expenses, parent's expenses). *(Adopted: 4/25/02 effective 8/1/02, Revised: 12/12/06 applicable to any expenses received by a prospective student-athlete on or after 8/23/06)*

12.1.2.4.2 Exception for Prize Money for Student-Athletes—Outside the Playing Season During the Summer Vacation Period. In individual sports, a student-athlete may accept prize money based on his or her place finish or performance in an open athletics event (an event that is not invitation only), provided the competition occurs outside the institution's declared playing and practice season during the institution's summer vacation period. Such prize money may not exceed actual and necessary expenses and may be provided only by the sponsor of the open event. The calculation of actual and necessary expenses shall not include the expenses or fees of anyone other than the student-athlete (e.g., coach's fees or expenses, parent's expenses). *(Adopted: 4/30/09)*

12.1.2.4.3 Exception for Insurance against Disabling Injury or Illness. An individual may borrow against his or her future earnings potential from an established, accredited commercial lending institution exclusively for the purpose of purchasing insurance (with no cash surrender value) against a disabling injury or illness that would prevent the individual from pursuing a chosen career, provided a third party (including a member institution's athletics department staff members, its professional sports counseling panel or representatives of its athletics interests) is not involved in arrangements for securing the loan. The student-athlete shall report all such transactions and shall file copies of any loan documents associated with disability insurance with the member institution, regardless of the source of the collateral for the loan. The student-athlete also shall file copies of the insurance policy with the member institution, regardless of whether a loan is secured to purchase the insurance policy. *(Revised: 1/16/93, 1/14/97 effective 8/1/97)*

12.1.2.4.4 Exception for Institutional Fundraising Activities Involving the Athletics Ability of Student-Athletes. Institutional, charitable or educational promotions or fundraising activities that involve the use of athletics ability by student-athletes to obtain funds (e.g., "swim-a-thons") are permitted only if:

(a) All money derived from the activity or project go directly to the member institution, member conference or the charitable, educational or nonprofit agency; *(Revised: 5/11/05)*

(b) The student-athletes receive no compensation or prizes for their participation; and

(c) The provisions of Bylaw 12.5.1 are satisfied.

12.1.2.4.5 Exception for USOC Elite Athlete Health Insurance Program. An individual may receive the comprehensive benefits of the USOC Elite Athlete Health Insurance Program. *(Adopted: 1/10/90)*

12.1.2.4.6 Exception for Training Expenses. An individual (prospective or enrolled student-athlete) may receive actual and necessary expenses [including grants, but not prize money, whereby the recipient has qualified for the grant based on his or her performance in a specific event(s)] to cover developmental training, coaching, facility usage, equipment, apparel, supplies, comprehensive health insurance, travel, room and board without jeopardizing the individual's eligibility for intercollegiate athletics, provided such expenses are approved and provided directly by the U.S. Olympic Committee (USOC) or the appropriate national governing body (NGB) in the sport (or, for international student-athletes, the equivalent organization of that nation). *(Adopted: 1/10/91, Revised: 4/27/00)*

12.1.2.4.7 Exception for Family Travel to Olympic Games. A commercial company (other than a professional sports organization) or members of the local community may provide actual and necessary expenses for an individual's spouse, parents, legal guardians or other relatives to attend the Olympic Games in which the individual will participate. *(Adopted: 1/11/94)*

12.1.2.4.8 Exception for Payment of NCAA Eligibility Center Fee. A high school booster club (as opposed to specific individuals) may pay the necessary fee for prospective student-athletes at that high school to be certified by the NCAA Eligibility Center, provided no particular prospective student-athlete(s) is singled out because of his or her athletics ability or reputation. *(Adopted: 1/11/94, Revised: 5/9/07)*

12.1.2.4.9 Exception for Camp or Academy Sponsored by a Professional Sports Organization. An individual may receive actual and necessary expenses from a professional sports organization to attend an academy, camp or clinic, provided: *(Adopted: 1/10/95, Revised: 11/1/01 effective 8/1/02)*

(a) No NCAA institution or conference owns or operates the academy, camp or clinic;

(b) No camp participant is above the age of 15;

(c) The professional sports organization provides to the participants nothing more than actual and necessary expenses to attend the camp or clinic and equipment/apparel necessary for participation;

(d) Athletics ability or achievements may not be the sole criterion for selecting participants; and

(e) Academy participants must be provided with academic services (e.g., tutoring).

12.1.2.4.10 Exception for Receipt of Free Equipment and Apparel Items by a Prospective Student-Athlete. It is permissible for prospective student-athletes (as opposed to student-athletes) to receive free equipment and apparel items for personal use from apparel or equipment manufacturers or distributors under the following circumstances: *(Adopted: 1/11/97)*

(a) The apparel or equipment items are related to the prospective student-athlete's sport and are received directly from an apparel or equipment manufacturer or distributor;

(b) The prospective student-athlete does not enter into an arrangement (e.g., open account) with an apparel or equipment manufacturer or distributor that permits the prospective student-athlete to select apparel and equipment items from a commercial establishment of the manufacturer or distributor; and

(c) A member institution's coach is not involved in any manner in identifying or assisting an apparel or equipment manufacturer or distributor in determining whether a prospective student-athlete is to receive any apparel or equipment items.

12.1.2.4.11 Expenses for Participation in Olympic Exhibitions. An individual may receive actual and necessary expenses from the U.S. Olympic Committee (USOC), national governing body (NGB) or the nonprofessional organizations sponsoring the event to participate in Olympic tours or exhibitions involving Olympic team members and/or members of the national team, provided that if the individual is a student-athlete, he or she misses no class time, and the exhibition does not conflict with dates of institutional competition. *(Adopted: 10/28/97 effective 8/1/98)*

12.1.2.4.12 Commemorative Items for Student-Athletes Participating in Olympic Games, World University Games, Pan American Games, World Championships and World Cup Events. It is permissible for student-athletes to receive commemorative items incidental to participation in the Olympic Games, World University Games, Pan American Games, World Championships and World Cup events through the applicable national governing body. These benefits may include any and all apparel, leisure wear, footwear and other items that are provided to all athletes participating in the applicable event. *(Adopted: 11/1/00 effective 8/1/01)*

12.1.2.4.13 Exception—NCAA First-Team Program. A prospective student-athlete who is a participant in the NCAA First-Team Mentoring Program may receive actual and necessary expenses to attend the First-Team Program's annual educational conference and training seminar. *(Adopted: 8/7/03)*

12.1.3 Amateur Status if Professional in Another Sport. A professional athlete in one sport may represent a member institution in a different sport and may receive institutional financial assistance in the second sport. *(Revised: 4/27/06 effective 8/1/06)*

12.2 INVOLVEMENT WITH PROFESSIONAL TEAMS

12.2.1 Tryouts.

12.2.1.1 Tryout Before Enrollment. A student-athlete remains eligible in a sport even though, prior to enrollment in a collegiate institution, the student-athlete may have tried out with a professional athletics team in a sport or received not more than one expense-paid visit from each professional team (or a combine including that team), provided such a visit did not exceed 48 hours and any payment or compensation in connection with the visit was not in excess of actual and necessary expenses. The 48-hour tryout period begins at the time the individual arrives at the tryout location. At the completion of the 48-hour period, the individual must depart the location of the tryout immediately in order to receive return transportation expenses. A tryout may extend beyond 48 hours if the individual self-finances additional expenses, including return transportation. A self-financed tryout may be for any length of time. *(Revised: 12/22/08)*

12.2.1.1.1 Exception for Predraft Basketball Camp. In basketball, prior to full-time enrollment in a collegiate institution, a prospective student-athlete may accept actual and necessary expenses from a professional sports organization to attend that organization's predraft basketball camp regardless of the length of the camp. *(Adopted: 4/27/06)*

12.2.1.2 Tryout After Enrollment. After initial full-time collegiate enrollment, an individual who has eligibility remaining may try out with a professional athletics team (or participate in a combine including that team) at any time, provided the individual does not miss class. The individual may receive actual and necessary expenses in conjunction with one 48-hour tryout per professional team (or a combine including that team). The 48-hour tryout period shall begin at the time the individual arrives at the tryout location. At the completion of the 48-hour period, the individual must depart the location of the tryout immediately in order to receive return transportation expenses. A tryout may extend beyond 48 hours if the individual self-finances additional expenses, including return transportation. A self-financed tryout may be for any length of time, provided the individual does not miss class. *(Revised: 1/10/92, 4/24/03, 5/26/06, 4/26/07 effective 8/1/07)*

12.2.1.2.1 Exception for Predraft Basketball Camp. In basketball, a student-athlete may accept actual and necessary travel, and room and board expenses from a professional sports organization to attend that organization's predraft basketball camp regardless of the duration of the camp. [See Bylaws 14.7.3.2-(e) and 16.10.1.9 for more information on predraft basketball camps.] *(Adopted: 4/23/03, Revised: 5/26/06, 4/26/07 effective 8/1/07)*

12.2.1.3 Outside Competition Prohibited. During a tryout, an individual may not take part in any outside competition (games or scrimmages) as a representative of a professional team.

12.2.1.4 Professional Team Representative at College Practice. A tryout with a professional team is not considered to have occurred when a representative of a professional team visits a member institution during the academic year and evaluates a student-athlete while the institution is conducting a regular practice session, physical education class or off-season conditioning program session that includes physical activities (e.g., speed trials, agility tests, strength tests), provided these activities are normally a part of and take place during regular practice, class or conditioning sessions.

12.2.2 Practice Without Competition. An individual may participate in practice sessions conducted by a professional team, provided such participation meets the requirements of NCAA legislation governing tryouts with professional athletics teams (see Bylaw 12.2.1) and the individual does not:

(a) Receive any compensation for participation in the practice sessions;

(b) Enter into any contract or agreement with a professional team or sports organization; or

(c) Take part in any outside competition (games or scrimmages) as a representative of a professional team.

12.2.2.1 Prohibited Involvement of Institution's Coach. An institution's coaching staff member may not arrange for or direct student-athletes' participation in football or basketball practice sessions conducted by a professional team.

12.2.3 Competition.

12.2.3.1 Competition against Professionals. An individual may participate singly or as a member of an amateur team against professional athletes or professional teams. *(Revised: 8/24/07)*

12.2.3.2 Competition with Professionals. An individual shall not be eligible for intercollegiate athletics in a sport if the individual ever competed on a professional team (per Bylaw 12.02.4) in that sport. However, an individual may compete on a tennis, golf, two-person sand volleyball or two-person synchronized diving team with persons who are competing for cash or a comparable prize, provided the individual does not receive payment of any kind for such participation. *(Revised: 1/9/96 effective 8/1/96, 1/14/97, 4/25/02 effective 8/1/02)*

12.2.3.2.1 Professional Player as Team Member. An individual may participate with a professional on a team, provided the professional is not being paid by a professional team or league to play as a member of that team (e.g., summer basketball leagues with teams composed of both professional and amateur athletes).

12.2.3.2.2 Professional Coach or Referee. Participation on a team that includes a professional coach or referee does not cause the team to be classified as a professional team.

12.2.3.2.3 Major Junior A Ice Hockey. Ice hockey teams in the United States and Canada, classified by the Canadian Amateur Hockey Association as major junior A teams, are considered professional teams under NCAA legislation.

12.2.3.2.3.1 Limitation on Restoration of Eligibility. An appeal for restoration of eligibility may be submitted on behalf of an individual who has participated on a major junior A ice hockey team under the provisions of Bylaw 14.12; however, such individual shall be denied at least the first year of intercollegiate athletics competition in ice hockey at the certifying institution and shall be charged with the loss of at least one season of eligibility in ice hockey. *(Revised: 1/11/89)*

12.2.3.2.4 Exception—Olympic/National Teams. It is permissible for an individual (prospective student-athlete or student-athletes) to participate on Olympic or national teams that are competing for

prize money or are being compensated by the governing body to participate in a specific event, provided the student-athlete does not accept prize money or any other compensation (other than actual and necessary expenses). *(Adopted: 8/8/02)*

12.2.3.3 Competition in Professional All-Star Contest. A student-athlete who agrees to participate in a professional (players to be paid) all-star game becomes ineligible to compete in any intercollegiate contest that occurs after that agreement. Thus, a senior entering into such an agreement immediately following the last regular-season intercollegiate contest would not be eligible to compete in a bowl game, an NCAA championship or any other licensed postseason intercollegiate contest.

12.2.4 Draft and Inquiry.

12.2.4.1 Inquiry. An individual may inquire of a professional sports organization about eligibility for a professional-league player draft or request information about the individual's market value without affecting his or her amateur status.

12.2.4.2 Draft List. After initial full-time collegiate enrollment, an individual loses amateur status in a particular sport when the individual asks to be placed on the draft list or supplemental draft list of a professional league in that sport, even though: *(Revised: 4/25/02 effective 8/1/02)*

(a) The individual asks that his or her name be withdrawn from the draft list prior to the actual draft;

(b) The individual's name remains on the list but he or she is not drafted; or

(c) The individual is drafted but does not sign an agreement with any professional athletics team.

12.2.4.2.1 Exception—Basketball—Four-Year College Student-Athlete.

12.2.4.2.1.1 Men's Basketball. In men's basketball, an enrolled student-athlete may enter a professional league's draft one time during his collegiate career without jeopardizing eligibility in that sport, provided: *(Adopted: 4/30/09 effective 8/1/09)*

(a) The student-athlete requests that his name be removed from the draft list and declares his intent to resume intercollegiate participation no later than the end of May 8 of the year in which the draft will occur;

(b) The student-athlete's declaration of intent is submitted in writing to the institution's director of athletics; and

(c) The student-athlete is not drafted.

12.2.4.2.1.2 Women's Basketball. In women's basketball, an enrolled student-athlete may enter a professional league's draft one time during her collegiate career without jeopardizing eligibility in that sport, provided the student-athlete is not drafted by any team in that league and the student-athlete declares her intention to resume intercollegiate participation within 30 days after the draft. The student-athlete's declaration of intent shall be in writing to the institution's director of athletics. *(Adopted: 1/11/94, Revised: 1/10/95, 1/14/97 effective 4/16/97, 4/24/03 effective 8/1/03 for student-athletes entering a collegiate institution on or after 8/1/03, 4/30/09 effective 8/1/09)*

12.2.4.2.2 Exception—Basketball—Two-Year College Prospective Student-Athlete. A prospective student-athlete enrolled at a two-year collegiate institution in basketball may enter a professional league's draft one time during his or her collegiate career without jeopardizing eligibility in that sport, provided the prospective student-athlete is not drafted by any team in that league. *(Adopted: 4/24/03 effective 8/1/03, for student-athletes entering a collegiate institution on or after 8/1/03)*

12.2.4.2.3 Exception—Football. [FBS/FCS] In football, an enrolled student-athlete (as opposed to a prospective student-athlete) may enter the National Football League draft one time during his collegiate career without jeopardizing eligibility in that sport, provided the student-athlete is not drafted by any team in that league and the student-athlete declares his intention to resume intercollegiate participation within 72 hours following the National Football League draft declaration date. The student-athlete's declaration of intent shall be in writing to the institution's director of athletics. *(Adopted: 10/31/02, Revised: 4/14/03, 12/15/06)*

12.2.4.2.4 Exception—Sports Other Than Basketball and Football. An enrolled student-athlete in a sport other than basketball or football may enter a professional league's draft one time during his or her collegiate career without jeopardizing his or her eligibility in the applicable sport, provided the student-athlete is not drafted and within 72 hours following the draft he or she declares his or her intention to resume participation in intercollegiate athletics. The student-athlete's declaration of intent shall be in writing to the institution's director of athletics. *(Adopted: 4/26/07 effective 8/1/07)*

12.2.4.3 Negotiations. An individual may request information about professional market value without affecting his or her amateur status. Further, the individual, his or her legal guardians or the institution's professional sports counseling panel may enter into negotiations with a professional sports organization without the loss of the individual's amateur status. An individual who retains an agent shall lose amateur status. *(Adopted: 1/10/92)*

12.2.5 Contracts and Compensation. An individual shall be ineligible for participation in an intercollegiate sport if he or she has entered into any kind of agreement to compete in professional athletics, either orally or in writing, regardless of the legal enforceability of that agreement. *(Revised: 1/10/92)*

12.2.5.1 Nonbinding Agreement. An individual who signs a contract or commitment that does not become binding until the professional organization's representative or agent also signs the document is ineligible, even if the contract remains unsigned by the other parties until after the student-athlete's eligibility is exhausted.

12.3 USE OF AGENTS

12.3.1 General Rule. An individual shall be ineligible for participation in an intercollegiate sport if he or she ever has agreed (orally or in writing) to be represented by an agent for the purpose of marketing his or her athletics ability or reputation in that sport. Further, an agency contract not specifically limited in writing to a sport or particular sports shall be deemed applicable to all sports, and the individual shall be ineligible to participate in any sport.

12.3.1.1 Representation for Future Negotiations. An individual shall be ineligible per Bylaw 12.3.1 if he or she enters into a verbal or written agreement with an agent for representation in future professional sports negotiations that are to take place after the individual has completed his or her eligibility in that sport.

12.3.1.2 Benefits from Prospective Agents. An individual shall be ineligible per Bylaw 12.3.1 if he or she (or his or her relatives or friends) accepts transportation or other benefits from: *(Revised: 1/14/97)*

(a) Any person who represents any individual in the marketing of his or her athletics ability. The receipt of such expenses constitutes compensation based on athletics skill and is an extra benefit not available to the student body in general; or

(b) An agent, even if the agent has indicated that he or she has no interest in representing the student-athlete in the marketing of his or her athletics ability or reputation and does not represent individuals in the student-athlete's sport. *(Adopted: 1/14/97)*

12.3.2 Legal Counsel. Securing advice from a lawyer concerning a proposed professional sports contract shall not be considered contracting for representation by an agent under this rule, unless the lawyer also represents the individual in negotiations for such a contract.

12.3.2.1 Presence of a Lawyer at Negotiations. A lawyer may not be present during discussions of a contract offer with a professional organization or have any direct contact (in person, by telephone or by mail) with a professional sports organization on behalf of the individual. A lawyer's presence during such discussions is considered representation by an agent.

12.3.3 Athletics Scholarship Agent. Any individual, agency or organization that represents a prospective student-athlete for compensation in placing the prospective student-athlete in a collegiate institution as a recipient of institutional financial aid shall be considered an agent or organization marketing the individual's athletics ability or reputation.

12.3.3.1 Talent Evaluation Services and Agents. A prospective student-athlete may allow a scouting service or agent to distribute personal information (e.g., high school academic and athletics records, physical statistics) to member institutions without jeopardizing his or her eligibility, provided the fee paid to such an agent is not based on placing the prospective student-athlete in a collegiate institution as a recipient of institutional financial aid.

12.3.4 Professional Sports Counseling Panel. It is permissible for an authorized institutional professional sports counseling panel to:

(a) Advise a student-athlete about a future professional career;

(b) Provide direction on securing a loan for the purpose of purchasing insurance against a disabling injury; *(Adopted: 1/16/93)*

(c) Review a proposed professional sports contract;

(d) Meet with the student-athlete and representatives of professional teams;

(e) Communicate directly (e.g., in-person, by mail or telephone) with representatives of a professional athletics team to assist in securing a tryout with that team for a student-athlete; *(Adopted: 1/11/94)*

(f) Assist the student-athlete in the selection of an agent by participating with the student-athlete in interviews of agents, by reviewing written information player agents send to the student-athlete and by having direct communication with those individuals who can comment about the abilities of an agent (e.g., other agents, a professional league's players' association); and *(Adopted: 1/11/94)*

(g) Visit with player agents or representatives of professional athletics teams to assist the student-athlete in determining his or her market value (e.g., potential salary, draft status). *(Adopted: 1/11/94)*

12.3.4.1 Appointment by President or Chancellor. This panel shall consist of at least three persons appointed by the institution's president or chancellor (or his or her designated representative from outside the athletics department). *(Revised: 3/8/06)*

12.3.4.2 Composition. The majority of panel members shall be full-time employees outside of the institution's athletics department. No more than one panel member may be an athletics department staff member. No sports agent or any person employed by a sports agent or agency may be a member of the panel. All panel members shall be identified to the NCAA national office. *(Revised: 1/11/94, 1/10/05)*

12.4 EMPLOYMENT

12.4.1 Criteria Governing Compensation to Student-Athletes. Compensation may be paid to a student-athlete: *(Revised: 11/22/04)*

(a) Only for work actually performed; and

(b) At a rate commensurate with the going rate in that locality for similar services.

12.4.1.1 Athletics Reputation. Such compensation may not include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation, fame or personal following that he or she has obtained because of athletics ability.

12.4.2 Specific Athletically Related Employment Activities.

12.4.2.1 Fee-for-Lesson Instruction. A student-athlete may receive compensation for teaching or coaching sport skills or techniques in his or her sport on a fee-for-lesson basis, provided: *(Revised: 1/9/96 effective 8/1/96, 4/25/02 effective 8/1/02)*

(a) Institutional facilities are not used; *(Adopted: 4/25/02 effective 8/1/02)*

(b) Playing lessons shall not be permitted; *(Adopted: 4/25/02 effective 8/1/02)*

(c) The institution obtains and keeps on file documentation of the recipient of the lesson(s) and the fee for the lesson(s) provided during any time of the year; and *(Adopted: 4/25/02 effective 8/1/02)*

(d) The compensation is paid by the lesson recipient (or the recipient's family) and not another individual or entity. *(Adopted: 4/25/02 effective 8/1/02)*

(e) Instruction to each individual is comparable to the instruction that would be provided during a private lesson when the instruction involves more than one individual at a time. *(Adopted: 4/2/03 effective 8/1/03)*

(f) The student-athlete does not use his or her name, picture or appearance to promote or advertise the availability of fee-for-lesson sessions. *(Adopted: 4/2/03 effective 8/1/03)*

12.4.2.2 Broken-Time Payments. An individual may not receive "broken-time" payments except as authorized and administered by the U.S. Olympic Committee during the period immediately preceding and including actual Olympic competition. A permitted broken-time payment may cover financial loss as a result of absence from employment to prepare for or participate in the Olympic Games. Such compensation during any other period and payments administered independently of the USOC by other sports governing bodies (e.g., the U.S. Ski Association) are prohibited.

12.4.2.2.1 Exception When Individual Not Enrolled in Regular Term. An individual may receive broken-time payments administered by the U.S. Olympic Committee or the national governing body in the sport during a period when the individual is not enrolled (full or part time) in a regular term to cover financial loss as a result of absence from employment as a direct result of practicing and competing on a national team (defined in Bylaw 14.02.8), provided the amounts are consistent with the principles set forth in Bylaw 12.4.1 and do not exceed $300 per week, and the payment period covers no more than the period from the date the individual begins practice with the national team following selection to that team to one week after the conclusion of the competition. *(Adopted: 1/10/90, Revised: 1/9/96 effective 8/1/96)*

12.4.2.3 Athletics Equipment Sales. A student-athlete may not be employed to sell equipment related to the student-athlete's sport if his or her name, picture or athletics reputation is used to advertise or promote the product, the job or the employer. If the student-athlete's name, picture or athletics reputation is not used for advertising or promotion, the student-athlete may be employed in a legitimate sales position, provided he or she is reimbursed at an hourly rate or set salary in the same manner as any nonathlete salesperson.

12.4.2.4 Goodwill Tour Commissions. A student-athlete representing the institution in a goodwill tour during summer months, in conjunction with the tour, may sell such items as jackets, blazers or similar institutional promotional items to booster groups or other friends of the institution on a salary, but not a commission, basis.

12.4.2.5 Restitution. For violations of Bylaw 12.4.2 and its subsections in which the value of the benefit is $100 or less, the eligibility of the individual shall not be affected conditioned on the individual repaying the value of the benefit to a charity of his or her choice. However, the individual shall remain ineligible from the time the institution has knowledge of receipt of the impermissible benefit until the individual repays the benefit. Violations of this bylaw remain institutional violations per Constitution 2.8.1, and documentation of the individual's repayment shall be forwarded to the enforcement staff. *(Adopted: 8/5/04)*

12.4.3 Camp/Clinic Employment, General Rule. A student-athlete may be employed by his or her institution, by another institution, or by a private organization to work in a camp or clinic as a counselor, unless otherwise restricted by NCAA legislation (see Bylaw 13.12 for regulations relating to camps and clinics). Out-of-

season playing and practice limitations may restrict the number of student-athletes from the same institution who may be employed in that institution's camp (see the specific sport in Bylaw 17 for these employment restrictions and Bylaw 13.12).

12.4.4 Self-Employment. A student-athlete may establish his or her own business, provided the student-athlete's name, photograph, appearance or athletics reputation are not used to promote the business. *(Adopted: 12/12/06)*

12.5 PROMOTIONAL ACTIVITIES

12.5.1 Permissible.

12.5.1.1 Institutional, Charitable, Education or Nonprofit Promotions. A member institution or recognized entity thereof (e.g., fraternity, sorority or student government organization), a member conference or a noninstitutional charitable, educational or nonprofit agency may use a student-athlete's name, picture or appearance to support its charitable or educational activities or to support activities considered incidental to the student-athlete's participation in intercollegiate athletics, provided the following conditions are met: *(Revised: 1/11/89, 1/10/91, 1/10/92)*

(a) The student-athlete receives written approval to participate from the director of athletics (or his or her designee who may not be a coaching staff member), subject to the limitations on participants in such activities as set forth in Bylaw 17; *(Revised: 1/11/89, 4/26/01)*

(b) The specific activity or project in which the student-athlete participates does not involve cosponsorship, advertisement or promotion by a commercial agency other than through the reproduction of the sponsoring company's officially registered regular trademark or logo on printed materials such as pictures, posters or calendars. The company's emblem, name, address, telephone number and Web site address may be included with the trademark or logo. Personal names, messages and slogans (other than an officially registered trademark) are prohibited; *(Revised: 1/11/89, 1/10/91, 5/6/08)*

(c) The name or picture of a student-athlete with remaining eligibility may not appear on an institution's printed promotional item (e.g., poster, calendar) that includes a reproduction of a product with which a commercial entity is associated if the commercial entity's officially registered regular trademark or logo also appears on the item; *(Adopted: 11/12/97)*

(d) The student-athlete does not miss class; *(Revised: 1/11/89)*

(e) All moneys derived from the activity or project go directly to the member institution, member conference or the charitable, educational or nonprofit agency; *(Revised: 1/11/89, 1/10/92)*

(f) The student-athlete may accept actual and necessary expenses from the member institution, member conference or the charitable, educational or nonprofit agency related to participation in such activity; *(Revised: 1/11/89, 1/10/92, 4/28/05)*

(g) The student-athlete's name, picture or appearance is not used to promote the commercial ventures of any nonprofit agency; *(Adopted: 1/10/92)*

(h) Any commercial items with names, likenesses or pictures of multiple student-athletes (other than highlight films or media guides per Bylaw 12.5.1.7) may be sold only at the member institution at which the student-athletes are enrolled, institutionally controlled (owned and operated) outlets or outlets controlled by the charitable or educational organization (e.g., location of the charitable or educational organization, site of charitable event during the event). Items that include an individual student-athlete's name, picture or likeness (e.g., name on jersey, name or likeness on a bobble-head doll), other than informational items (e.g., media guide, schedule cards, institutional publications), may not be sold; and *(Adopted: 1/16/93, Revised: 1/9/96, 4/27/06 effective 8/1/06)*

(i) The student-athlete and an authorized representative of the charitable, educational or nonprofit agency sign a release statement ensuring that the student-athlete's name, image or appearance is used in a manner consistent with the requirements of this section. *(Revised: 1/11/89, 1/10/92)*

12.5.1.1.1 Promotions Involving NCAA Championships, Events, Activities or Programs. The NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of an enrolled student-athlete to generally promote NCAA championships or other NCAA events, activities or programs. *(Adopted: 8/7/03)*

12.5.1.1.2 Promotions Involving Commercial Locations/Sponsors. A member institution or a charitable, educational or nonprofit organization may use the appearance, name or picture of an enrolled student-athlete to promote generally its fundraising activities at the location of a commercial establishment, provided the commercial establishment is not a cosponsor of the event and the student-athlete does not promote the sale of a commercial product in conjunction with the fundraising activity. A commercial establishment would become a cosponsor if the commercial establishment either advertises the presence of the student-athlete at the commercial location or is involved directly or indirectly in promoting the activity. *(Adopted: 1/10/92)*

12.5.1.1.3 Distribution of Institutional Items through Commercial Outlets. A member institution may distribute noncommercial items that include names or pictures of student-athletes (items not for sale) at commercial establishments, provided the institution generally distributes such items to other commercial establishments in the community and the distribution of the items does not require the recipient to make a purchase at the commercial establishment. *(Adopted: 1/16/93, Revised: 5/21/08)*

12.5.1.1.4 Player/Trading Cards. A member institution or recognized entity thereof (e.g., fraternity, sorority or student government organization), a member conference or a noninstitutional charitable, educational or nonprofit agency may distribute but may not sell player/trading cards that bear a student-athlete's name or picture. *(Adopted: 1/11/94 effective 8/1/94)*

12.5.1.1.4.1 Exception—Olympic/National Team. A national governing body may sell player/trading cards that bear the name or picture of a student-athlete who is a member of the Olympic/national team in that sport, provided all of the funds generated through the sale of such cards are deposited directly with the applicable Olympic/national team. *(Adopted: 1/6/96)*

12.5.1.1.5 Schedule Cards. An advertisement on an institution's wallet-size playing schedule that includes the name or picture of a student-athlete may include language other than the commercial product's name, trademark or logo, provided the commercial language does not appear on the same page as the picture of the student-athlete. A violation of this bylaw shall be considered an institutional violation per Constitution 2.8.1; however, such a violation shall not affect the student-athlete's eligibility. *(Adopted: 1/10/92, Revised: 1/14/08, 5/21/08)*

12.5.1.1.6 Effect of Violations. If an institution, without the student-athlete's knowledge or consent, uses or permits the use of the student-athlete's name or picture in a manner contrary to Bylaw 12.5.1.1, the violation shall be considered an institutional violation; however, the student-athlete's eligibility shall not be affected. In addition, a violation of Bylaw 12.5.1.1 related to any permissible promotional activity in which the only condition of the legislation not satisfied is the failure to obtain written approval from the director of athletics (or his or her designee who may not be a coaching staff member) shall be considered an institutional violation; however, the student-athlete's eligibility shall not be affected, provided the approval would have been granted if requested. *(Adopted: 1/14/97, Revised: 4/26/07)*

12.5.1.2 U.S. Olympic Committee/National Governing Body Advertisement Prior to Collegiate Enrollment. Prior to initial, full-time collegiate enrollment, an individual may receive payment for the display of athletics skill in a commercial advertisement, provided: *(Adopted: 1/11/94)*

(a) The individual receives prior approval to appear in the advertisement from the U.S. Olympic Committee or the applicable national governing body;

(b) The U.S. Olympic Committee or national governing body approves of the content and the production of the advertisement;

(c) The individual forwards the payment to the U.S. Olympic Committee or national governing body for the general use of the organization(s); and

(d) The funds are not earmarked for the individual.

12.5.1.3 Continuation of Modeling and Other Nonathletically Related Promotional Activities after Enrollment. If an individual accepts remuneration for or permits the use of his or her name or picture to advertise or promote the sale or use of a commercial product or service prior to enrollment in a member institution, continued remuneration for the use of the individual's name or picture (under the same or similar circumstances) after enrollment is permitted without jeopardizing his or her eligibility to participate in intercollegiate athletics only if all of the following conditions apply: *(Revised: 1/14/97, 3/10/04)*

(a) The individual's involvement in this type of activity was initiated prior to his or her enrollment in a member institution;

(b) The individual became involved in such activities for reasons independent of athletics ability;

(c) No reference is made in these activities to the individual's name or involvement in intercollegiate athletics;

(d) The individual does not endorse the commercial product; and *(Revised: 3/10/04)*

(e) The individual's remuneration under such circumstances is at a rate commensurate with the individual's skills and experience as a model or performer and is not based in any way upon the individual's athletics ability or reputation.

12.5.1.4 Congratulatory Advertisement. It is permissible for a student-athlete's name or picture, or the group picture of an institution's athletics squad, to appear in an advertisement of a particular business, commercial product or service, provided: *(Revised 5/21/08)*

(a) The primary purpose of the advertisement is to publicize the sponsor's congratulations to the student-athlete or team;

(b) The advertisement does not include a reproduction of the product with which the business is associated or any other item or description identifying the business or service other than its name or trademark;

(c) There is no indication in the makeup or wording of the advertisement that the squad members, individually or collectively, or the institution's endorses the product or service of the advertiser;

(d) The student-athlete has not signed a consent or release granting permission to use the student-athlete's name or picture in a manner inconsistent with the requirements of this section; and

(e) If the student-athlete has received a prize from a commercial sponsor in conjunction with participation in a promotional contest and the advertisement involves the announcement of receipt of the prize, the receipt of the prize is consistent with the provisions of Bylaw 12.5.2.3.3 and official interpretations. *(Revised: 11/1/07 effective 8/1/08)*

12.5.1.5 Educational Products Related to Sport-Skill Instruction. It is permissible for a student-athlete's name or picture to appear in books, articles and other publications, films, videotapes, and other types of electronic reproduction related to sport-skill demonstration, analysis or instruction, provided:

(a) Such print and electronic media productions are for educational purposes;

(b) There is no indication that the student-athlete expressly or implicitly endorses a commercial product or service;

(c) The student-athlete does not receive, under any circumstances, any remuneration for such participation; however, the student-athlete may receive actual and necessary expenses related to his or her participation; and *(Revised: 1/9/06 effective 8/1/06)*

(d) The student-athlete has signed a release statement ensuring that the student-athlete's name or image is used in a manner consistent with the requirements of this section and has filed a copy of the statement with the student-athlete's member institution.

12.5.1.6 Camps. An institutional or privately owned camp may use a student-athlete's name, picture and institutional affiliate only in the camp counselor section in its camp brochure to identify the student-athlete as a staff member. A student-athlete's name or picture may not be used in any other way to directly advertise or promote the camp. Violations of this bylaw shall be considered institutional violations per Constitution 2.8.1; however, and do not affect the student-athlete's elgibility. *(Revised: 4/26/01 effective 8/1/01 for camps that occur during the 2001 academic year and thereafter, 4/17/02, 7/12/04, 1/9/06)*

12.5.1.7 Promotion by Third Party of Highlight Film, Videotape or Media Guide. Any party other than the institution or a student-athlete (e.g., a distribution company) may sell and distribute an institutional highlight film or videotape or an institutional or conference media guide that contains the names and pictures of enrolled student-athletes only if: *(Revised: 1/16/93)*

(a) The institution specifically designates any agency that is authorized to receive orders for the film, videotape or media guide; *(Revised: 1/16/93)*

(b) Sales and distribution activities have the written approval of the institution's athletics director;

(c) The distribution company or a retail store is precluded from using the name or picture of an enrolled student-athlete in any poster or other advertisement to promote the sale or distribution of the film or media guide; and *(Revised: 1/16/93)*

(d) There is no indication in the makeup or wording of the advertisement that the squad members, individually or collectively, or the institution endorses the product or services of the advertiser.

12.5.1.8 Promotion of NCAA and Conference Championships. The NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of a student-athlete to generally promote NCAA championships. A student-athlete's name or picture may appear in a poster that promotes a conference championship, provided the poster is produced by a member that hosts a portion of the championship or by the conference. *(Adopted: 1/11/89, Revised: 8/7/03)*

12.5.1.9 Olympic, Pan American, World Championships, World Cup and World University Games. A student-athlete's name or picture may be used to promote Olympic, Pan American, World Championships, World Cup or World University Games as specified in this section. *(Adopted: 1/10/92, Revised: 1/9/96 effective 8/1/96)*

12.5.1.9.1 Sale and Distribution of Promotional Items. Promotional items (e.g., posters, postcards, film, videotapes) bearing the name or picture of a student-athlete and related to these events may be sold or distributed by the national or international sports governing body sponsoring these events or its designated third-party distributors. It is not permissible for such organizations to sell player/trading cards that bear a student-athlete's name or picture, except as noted in Bylaw 12.5.1.1.4.1. Promotional items may include a corporate sponsor's trademark or logo but not a reproduction of the product with which the business is associated. The name or picture of the student-athlete may not be used by the distribution company or retail store on any advertisement to promote the sale or distribution of the commercial item. *(Adopted: 1/10/92, Revised: 1/16/93, 1/11/94 effective 8/1/94)*

12.5.1.9.1.1 Corporate Sponsors. A corporate sponsor may sell a promotional item related to these events that uses the name or picture of a team but not an individual student-athlete. *(Adopted: 1/10/92)*

12.5.2 Nonpermissible.

12.5.2.1 Advertisements and Promotions After Becoming a Student-Athlete. After becoming a student-athlete, an individual shall not be eligible for participation in intercollegiate athletics if the individual:

(a) Accepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or

(b) Receives remuneration for endorsing a commercial product or service through the individual's use of such product or service.

12.5.2.1.1 Exceptions. The individual's eligibility will not be affected, provided the individual participated in such activities prior to enrollment and the individual:

(a) Meets the conditions set forth in Bylaw 12.5.1.3 that would permit continuation of such activities; or

(b) Takes appropriate steps upon becoming a student-athlete to retract permission for the use of his or her name or picture and ceases receipt of any remuneration for such an arrangement.

12.5.2.1.2 Improper Use of Student-Athlete's Name or Picture. If an institution, without the student-athlete's knowledge or consent, uses or permits the use of the student-athlete's name or picture in a manner contrary to Bylaw 12.5.2.1, the violation shall be considered an institutional violation; however, the student-athlete's eligibility shall not be affected. *(Adopted: 1/11/97)*

12.5.2.2 Use of a Student-Athlete's Name or Picture without Knowledge or Permission. If a student-athlete's name or picture appears on commercial items (e.g., T-shirts, sweatshirts, serving trays, playing cards, posters) or is used to promote a commercial product sold by an individual or agency without the student-athlete's knowledge or permission, the student-athlete (or the institution acting on behalf of the student-athlete) is required to take steps to stop such an activity in order to retain his or her eligibility for intercollegiate athletics. Such steps are not required in cases in which a student-athlete's photograph is sold by an individual or agency (e.g., private photographer, news agency) for private use. *(Revised: 1/11/97, 5/12/05)*

12.5.2.3 Specifically Restricted Activities. A student-athlete's involvement in promotional activities specified in this section is prohibited.

12.5.2.3.1 Name-the-Player Contest. A student-athlete may not permit use of his or her name or picture in a "name-the-player" contest conducted by a commercial business for the purpose of promoting that business.

12.5.2.3.2 Athletics Equipment Advertisement. A student-athlete's name or picture may not be used by an athletics equipment company or manufacturer to publicize the fact that the institution's team uses its equipment.

12.5.2.3.3 Promotional Contests. Receipt of a prize for winning an institutional or noninstitutional promotional activity (e.g., making a half-court basketball shot, being involved in a money scramble) by a prospective or enrolled student-athlete (or a member of his or her family) does not affect his or her eligibility, provided the prize is won through a random drawing in which all members of the general public or the student body are eligible to participate. *(Revised: 1/9/96 effective 8/1/96, 3/25/05, 6/12/07)*

12.5.2.4 Other Promotional Activities. A student-athlete may not participate in any promotional activity that is not permitted under Bylaw 12.5.1. *(Adopted: 11/1/01)*

12.5.3 Media Activities.

(a) **During the Playing Season.** During the playing season, a student-athlete may appear on radio and television programs (e.g., coaches' shows) or engage in writing projects when the student-athlete's appearance or participation is related in any way to athletics ability or prestige, provided the student-athlete does not receive any remuneration for the appearance or participation in the activity. The student-athlete shall not make any endorsement, expressed or implied, of any commercial product or service. The student-athlete may, however, receive actual and necessary expenses directly related to the appearance or participation in the activity. A student-athlete participating in media activities during the playing season may not miss class, except for class time missed in conjunction with away-from-home competition or to participate in a conference-sponsored media day. *(Revised: 1/16/93, 1/14/97, 1/9/06, 4/27/06)*

(b) **Outside the Playing Season.** Outside the playing season, a student-athlete may participate in media activities (e.g., appearance on radio, television, in films or stage productions or participation in writing projects) when such appearance or participation is related in any way to athletics ability or prestige, provided the student-athlete is eligible academically to represent the institution and does not receive any remuneration for such appearance or participation. The student-athlete may not make any endorsement, expressed or implied, of any commercial product or service. The student-athlete may, however, receive legitimate and normal expenses directly related to such appearance or participation, provided the source of the expenses is the entity sponsoring the activity. *(Revised: 1/16/93, 1/14/97)*

12.5.4 Use of Logos on Equipment, Uniforms and Apparel. A student-athlete may use athletics equipment or wear athletics apparel that bears the trademark or logo of an athletics equipment or apparel manu-

facturer or distributor in athletics competition and pre- and postgame activities (e.g., celebrations on the court, pre- or postgame press conferences), provided the following criteria are met. Violations of this bylaw shall be considered institutional violations per Constitution 2.8.1; however, they shall not affect the student-athlete's eligibility. *(Revised: 1/11/94, 1/10/95, 1/9/96 effective 8/1/96)*

(a) Athletics equipment (e.g., shoes, helmets, baseball bats and gloves, batting or golf gloves, hockey and lacrosse sticks, goggles and skis) shall bear only the manufacturer's normal label or trademark, as it is used on all such items for sale to the general public; and *(Revised: 1/10/95)*

(b) The student-athlete's institution's official uniform (including numbered racing bibs and warm-ups) and all other items of apparel (e.g., socks, head bands, T-shirts, wrist bands, visors or hats, swim caps and towels) shall bear only a single manufacturer's or distributor's normal label or trademark (regardless of the visibility of the label or trademark), not to exceed 2 1/4 square inches in area (rectangle, square, parallelogram) including any additional material (e.g., patch) surrounding the normal trademark or logo. The student-athlete's institution's official uniform and all other items of apparel shall not bear a design element similar to the manufacturer's trademark/logo that is in addition to another trademark/logo that is contrary to the size restriction. *(Revised: 1/11/94, 1/10/95, 2/16/00)*

12.5.4.1 Laundry Label. If an institution's uniform or any item of apparel worn by a student-athlete in competition contains washing instructions on the outside of the apparel on a patch that also includes the manufacturer's or distributor's logo or trademark, the entire patch must be contained within a four-sided geometrical figure (rectangle, square, parallelogram) that does not to exceed 2 1/4 square inches. *(Adopted: 1/10/95)*

12.5.4.2 Pre- or Postgame Activities. The restriction on the size of a manufacturer's or distributor's logo is applicable to all apparel worn by student-athletes during the conduct of the institution's competition, which includes any pre- or postgame activities (e.g., postgame celebrations on the court, pre- or postgame press conferences) involving student-athletes. *(Adopted: 1/10/95)*

12.5.4.3 Outside Team Uniforms and Apparel. The provisions of Bylaw 12.5.4-(b) do not apply to the official uniforms and apparel worn by outside teams.

12.5.4.4 Title-Sponsor Recognition. Racing bibs and similar competition identification materials (e.g., bowl-game patches) worn by participants may include the name of the corporate sponsor of the competition, provided the involved commercial company is the sole title sponsor of the competition.

12.6 FINANCIAL DONATIONS FROM OUTSIDE ORGANIZATIONS

12.6.1 Professional Sports Organizations.

12.6.1.1 To Intercollegiate Event. A professional sports organization may not serve as a financial sponsor of intercollegiate competition. Violations of this bylaw shall be considered institutional violations per Constitution 2.8.1; however, such violations shall not affect the student-athlete's eligibility. *(Adopted: 1/10/92, Revised: 8/5/04)*

12.6.1.1.1 Exception—Sports Other Than Football and Men's Basketball. In sports other than football and men's basketball, an institution's marketing department may enter into a reciprocal contractual relationship with a professional sports organization for the specific purpose of marketing and promoting an institutionally sponsored sport. *(Adopted: 4/29/04 effective 8/1/04)*

12.6.1.2 Developmental Funds to NCAA. A professional sports organization may provide funds for intercollegiate athletics developmental purposes in a particular sport (e.g., officiating expenses, research and educational projects, the conduct of summer leagues, purchase of equipment). However, such funds shall be provided in an unrestricted manner and administered through the Association's national office.

12.6.1.3 To Institution, Permissible. A member institution may receive funds from a professional sports organization, provided: *(Revised: 4/29/04 effective 8/1/04)*

(a) The money is placed in the institution's general fund and used for purposes other than athletics;

(b) The money is placed in the institution's general scholarship fund and commingled with funds for the assistance of all students generally; or

(c) The money is received by the institution as a result of a reciprocal contractual marketing relationship and is placed in the athletics department's budget for the specific purpose of marketing and promoting any institutionally sponsored sport other than football and men's basketball. *(Adopted: 4/29/04 effective 8/1/04)*

12.6.1.4 To Institution, Nonpermissible. A member institution shall not accept funds from a professional sports organization if:

(a) The funds are for the purpose of recognizing the development of a former student-athlete in a particular sport. The receipt of such funds by an institution would make additional money available that could benefit student-athletes and thus result in student-athletes indirectly receiving funds from a professional sports organization;

(b) The money, even though not earmarked by the donor, is received and credited to institutional funds for the financial assistance of student-athletes generally; or

(c) The money is placed in the institution's general fund and credited to the athletics department for an unspecified purpose.

12.6.1.5 Revenues Derived from Pro-Am Events. The distribution of revenues from an event involving an intercollegiate athletics team and a professional sports team (e.g., a baseball game in which a member institution's team plays against a professional baseball team) or pro-am event (e.g., golf, tennis) that results in a member institution's receiving a share of receipts from such a contest is permitted, provided the institution has a formal agreement with the professional sports team regarding the institution's guarantee or share of receipts and the contractual terms are consistent with agreements made by the professional team or individuals for similar intercollegiate or nonprofessional competition.

12.6.1.6 Promotion of Professional Athletics Contests. A member institution may host and promote an athletics contest between two professional teams from recognized professional sports leagues as a fundraising activity for the institution. *(Revised: 1/9/96 effective 8/1/96)*

12.6.2 Organizations (Nonprofessional Sports Organizations).

12.6.2.1 Individual Athletics Performance. A member institution shall not accept funds donated from a nonprofessional sports organization based on the place finish of a student-athlete or the number of student-athletes representing the institution in an event. However, the organization may donate an equal amount of funds to every institution with an athlete or team participating in a particular event.

12.6.2.2 Individual and Team Rankings. A member institution may accept funds donated to its athletics program from a nonprofessional sports organization based on an individual's or a team's national or regional ranking. *(Revised: 1/9/06 effective 8/1/06)*

12.6.2.3 Academic Performance. A member institution may accept funds donated to its athletics program from a nonprofessional sports organization based on an individual's or a team's academic performance (e.g., the number of academic all-American award recipients).

Jenkins v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.)

United States District Court for the Northern District of California

December 4, 2015, Decided; December 4, 2015, Filed

No.: 4:14-md-02541-CW; No.: 4:14-cv-02758-CW

Reporter
311 F.R.D. 532 *; 2015 U.S. Dist. LEXIS 163878 **; 93 Fed. R. Serv. 3d (Callaghan) 616; 2015-2 Trade Cas. (CCH) P79,381

IN RE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION ATHLETIC GRANT-IN-AID CAP ANTITRUST LITIGATION.MARTIN JENKINS et al., Plaintiffs, v. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION et al., Defendants.

Subsequent History: Motion denied by *Jenkins v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 2016 U.S. Dist. LEXIS 103703 (N.D. Cal., Aug. 5, 2016)*

Motion granted by, Settled by *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2017 U.S. Dist. LEXIS 201104 (N.D. Cal., Dec. 6, 2017)*

Costs and fees proceeding at, Motion granted by, Objection overruled by, Request denied by *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2017 U.S. Dist. LEXIS 201108 (N.D. Cal., Dec. 6, 2017)*

Motion denied by *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2018 U.S. Dist. LEXIS 24240 (N.D. Cal., Jan. 3, 2018)*

Summary judgment granted, in part, summary judgment denied, in part by *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2018 U.S. Dist. LEXIS 52230 (N.D. Cal., Mar. 28, 2018)*

Motion granted by, in part, Motion denied by, in part *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2018 U.S. Dist. LEXIS 54861 (N.D. Cal., Mar. 30, 2018)*

Motion granted by, Motion granted by, in part, Motion denied by, in part, Motion denied by, Without prejudice *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2018 U.S. Dist. LEXIS 70144 (N.D. Cal., Apr. 25, 2018)*

Motion denied by *Duncan v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 2018 U.S. App. LEXIS 23675 (9th Cir. Cal., Aug. 22, 2018)*

Later proceeding at *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2018 U.S. Dist. LEXIS 153318 (N.D. Cal., Sept. 3, 2018)*

Findings of fact/conclusions of law at, Injunction granted at, Judgment entered by *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2019 U.S. Dist. LEXIS 44512 (N.D. Cal., Mar. 8, 2019)*

Prior History: *In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 2014 U.S. Dist. LEXIS 115122 (J.P.M.L., Aug. 19, 2014)*

Core Terms

athletes, cap, schools, student-athletes, players, Consolidated, class certification, Plaintiffs', basketball, class member, proposed class, football, antitrust, certification, injunction, injunctive relief, moot, intra-class, predicts, requirements, conflicts, cases, marginal, parties, percent, eligibility, Collegiate, compensate, superstars, certify

Case Summary

Overview

HOLDINGS: [1]-The granting of the joint motion for the athletes' class certification in an action involving compensation for student-athletes was proper because all proposed class members shared asserted characteristics, claims and injuries, and thus, plaintiffs satisfied *Fed. R. Civ. P. 23(a)(3)*; [2]-Plaintiffs also showed commonality under *Rule 23(a)(2)* because they identified several common questions regarding defendants' alleged violations of federal antitrust law and the injunctive relief sought; [3]-Although defendants suggested that class members might prefer to leave an unlawful restraint in place because they otherwise would have to compete against one another, such preference

for non-competition did not justify denying injunctive relief class certification.

Outcome
Motion granted.

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Prerequisites for Class Action

HN1 **Prerequisites for Class Action**

Plaintiffs seeking to represent a class first must satisfy the threshold requirements of Fed. R. Civ. P. 23(a). Also, plaintiffs must meet the requirements of one of the subsections of Rule 23(b). Rule 23(b)(2) applies where the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN2 **Certification of Classes**

Plaintiffs seeking class certification bear the burden of demonstrating that they satisfy each Fed. R. Civ. P. 23 requirement at issue. The court must conduct a rigorous analysis, which may require it to probe behind the pleadings before coming to rest on the certification question.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > Preliminary Considerations > Justiciability > Mootness

HN3 **Certification of Classes**

If the plaintiff's claim becomes moot before the district court certifies the class, the class action normally also becomes moot. The inherently transitory exception to mootness permits a court to certify the class even though Consolidated Plaintiffs' representatives' claims are moot. When this exception applies, a court may avoid the spectre of plaintiffs filing lawsuit after lawsuit, only to see their claims mooted before they can be resolved. Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Typicality

HN4 **Typicality**

A class representative must be part of the class and possess the same interest and suffer the same injury as the class members. The purpose of the requirement is to assure that the interest of the named representative aligns with the interests of the class. In the antitrust context, generally, typicality will be established by plaintiffs and all class members alleging the same antitrust violation by defendants.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN5 **Adequacy of Representation**

Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Fed. R. Civ. P. 23(a)(4) adequacy requirement.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN6 **Certification of Classes**

The mere potential for a conflict of interest is not sufficient to defeat class certification; the conflict must be actual, not hypothetical. The denial of class certification is not favored on the basis of speculative conflicts.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

HN7 **Certification of Classes**

When the Fed. R. Civ. P. 23 requirements are met, class certification helps the absent parties. It guarantees that their interests will be adequately represented, and it provides them notice and an opportunity to be heard about any settlement and/or attorney's fees request.

Governments > Courts > Judicial Precedent

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN8 **Judicial Precedent**

The Fed. R. Civ. P. 23(b)(2) requirements as stated in caselaw are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole. That inquiry does not require an examination of the viability or bases of the class members' claims for relief, does not require that the issues common to the class satisfy a Rule 23(b)(3)-like predominance test, and does not require a finding that all members of the class have suffered identical injuries. Rather, as the text of the rule makes clear, this inquiry asks only whether the party opposing the class has acted or refused to act on grounds that apply generally to the class, Rule 23(b)(2).

Governments > Courts > Authority to Adjudicate

HN9 **Authority to Adjudicate**

There is a generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district. The court in which the second action was filed may transfer, stay, or dismiss that action.

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For Kenyata Johnson, Barry Brunetti, Dalenta Jameral "D.J." Stephens, Plaintiffs (4:14-md-02541-CW): Lawrence Timothy Fisher, LEAD ATTORNEY, Bursor & Fisher, P.A., Walnut Creek, CA; Bruce Lee Simon, Pearson Simon & Warshaw, LLP, San Francisco, CA; David G. Feher, David L. Greenspan, Jeffrey L. Kessler, **[**12]** Winston & Strawn LLP, New York, NY; Derek J Sarafa, Winston and Strawn LLP, Chicago, IL; Jeanifer Ellen Parsigian, Sean D. Meenan, Winston and Strawn, San Francisco, CA; Joseph A. Litman, Timothy M, Nevius, Winston and Strawn, New York, NY.

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For The Big Twelve Conference, Inc., Defendant (4:14-md-02541-CW): Wesley Douglas Hurst, LEAD ATTORNEY, Polsinelli LLP, Los Angeles, CA; Amy Dawn Fitts, Kansas City, MO; Caitlin Jemilha Morgan, Leane K Capps, Polsinelli, PC, Dallas, TX; Matthew P. O'Malley, Tompkins McGuire Wachenfeld & Barry LLP, Newark, NJ; Milton Winter, Polsinelli PC, Kansas City, MO.

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For Conference USA, Defendant (4:14-md-02541-CW): Leane K Capps, LEAD ATTORNEY, Caitlin Jemilha **[**15]** Morgan, Milton Winter, Polsinelli PC, Dallas, Tx; Amy Dawn Fitts, Kansas City, MO.

For American Athletic Conference, Defendant (4:14-md-02541-CW): Benjamin C. Block, LEAD ATTORNEY, Covington and Burling LLP, Washington, DC; Rebecca Ariel Jacobs, Covington and Burling LLP, San Francisco, CA.

For Mid-American Conference, Defendant (4:14-md-02541-CW): Andrew B. Downs, LEAD ATTORNEY, Bullivant Houser Bailey PC, San Francisco, CA; Robert Todd Hunt, LEAD ATTORNEY, Benjamin G. Chojnacki, Walter Haverfield LLP, Cleveland, OH.

For Mountain West Conference, Defendant (4:14-md-02541-CW): Richard Young, LEAD ATTORNEY, Bryan Cave LLP, Colorado Springs, CO; Adam Paul Brezine, Bryan Cave LLP, San Francisco, CA; Brent Rychener, PRO HAC VICE, Bryan Cave LLP, Colorado Springs, CO.

For Sun Belt Conference, Defendant (4:14-md-02541-CW): Mark Aaron Cunningham, LEAD ATTORNEY, Jones Walker LLP, New Orleans, LA.

For Western Athletic Conference, Defendant (4:14-md-02541-CW): Karen Hoffman Lent, LEAD ATTORNEY, Jeffrey A. Mishkin, Skadden Arps Slate Meagher Flom LLP, New York, NY.

Judges: CLAUDIA WILKEN, United States District Judge.

Opinion by: CLAUDIA WILKEN

Opinion

[*536] ORDER GRANTING MOTION FOR *RULE 23(b)(2)* CLASS CERTIFICATION

Consolidated Plaintiffs and Jenkins **[**16]** Plaintiffs, current and former collegiate athletes, jointly move for certification of injunctive relief classes. Defendants, the National Collegiate Athletic Association (NCAA) and a group of Division I conferences, oppose the motion. After considering the parties' submissions, arguments at the hearing and supplemental filings, the Court GRANTS the joint motion for class certification.

BACKGROUND

Plaintiffs are student-athletes who played NCAA Division I Football Bowl Subdivision football[1] and men's and women's basketball between March 5, 2014 and the present.

Plaintiffs' challenges relate to NCAA restrictions on the compensation of student-athletes for their athletic performance. The NCAA sets a cap on the grant-in-aid (GIA) that student-athletes may receive.[2] At the time these complaints were filed, the GIA was capped at the value of tuition, fees, room and board and required course books. After Plaintiffs initiated this litigation, the NCAA permitted conferences to allow schools to compensate student-athletes with GIAs for up **[**17]** to their cost of attendance.

Consolidated Plaintiffs and Jenkins Plaintiffs allege in their complaints that the NCAA and its member institutions[3] violate federal antitrust law by conspiring to impose the cap on the amount of compensation a school may provide a student-athlete. Plaintiffs assert that, without the NCAA's cap on GIAs, schools would compete in recruiting student-athletes by providing more generous GIAs. Plaintiffs seek an injunction against the GIA cap. Consolidated Plaintiffs seek, in addition to an injunction, damages for the difference between the GIAs awarded and the cost of attendance. They have not yet moved to certify a *Rule 23(b)(3)* class.[4]

This Court previously certified a class in In re NCAA Student-Athlete Name & Likeness Licensing Litigation (later titled, *O'Bannon v. National Collegiate Athletic Association), 2013 U.S. Dist. LEXIS 160739, 2013 WL 5979327 (N.D. Cal.)*. That certification decision was not

[1] The NCAA organizes member schools into Divisions I, II and III. Division I football includes two subdivisions: the Football Bowl Subdivision (FBS) and the Football Championship Subdivision (FCS).

[2] A grant-in-aid is a scholarship or form of financial aid that the NCAA does not consider "pay or the promise of pay for athletics skill" and that meets certain NCAA requirements. See 2014-15 NCAA Manual at 57 (Bylaw 12.01.4); 189 (Bylaw 15.02.5).

[3] Jenkins Plaintiffs name as conference Defendants the Atlantic Coast Conference; the Big 12 Conference; the Big Ten Conference; the Pac-12 Conference; and the Southeastern Conference. Consolidated Plaintiffs name all of those as well as the American Athletic Conference; Conference USA; the Mid-American **[**18]** Conference; the Mountain West Conference; the Sun Belt Conference; and the Western Athletic Conference.

[4] Consolidated Plaintiffs indicated at the hearing that they no longer pursue a claim under California's Unfair Competition Act. That claim is dismissed.

appealed. After a bench trial, the Court ruled that the NCAA's restrictions on student-athletes receiving compensation for the use of their names, images and likenesses violated the Sherman Antitrust Act, and ordered injunctive relief. *O'Bannon, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014)*. In *O'Bannon v. National Collegiate Athletic Association, 802 F.3d 1049 (9th Cir. 2015)*, the Ninth Circuit affirmed this Court's ruling on the NCAA's violation of antitrust law and vacated part of this Court's injunctive remedy. See *id. at 1053*. On October 26, 2015, the Ninth Circuit directed the NCAA to file a response to the plaintiffs' petition for rehearing en banc. See No. 14-16601, Docket No. 114. The NCAA filed its response on November 16, 2015. See id., Docket No. 115.

LEGAL STANDARD

HN1[↑] Plaintiffs seeking to represent a class first must satisfy the threshold requirements of **[*537]** *Rule 23(a)*. *Rule 23(a)* provides that a case is appropriate for certification as **[**19]** a class action if:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Also, Plaintiffs must meet the requirements of one of the subsections of *Rule 23(b)*. In this motion, Plaintiffs seek certification under *Rule 23(b)(2)*. *Rule 23(b)(2)* applies where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." *Fed. R. Civ. P. 23(b)(2)*.

HN2[↑] Plaintiffs seeking class certification bear the burden of demonstrating that they satisfy each *Rule 23* requirement at issue. *Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 158-61, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*; *Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977)*. The court must conduct a "'rigorous analysis,'" which may require it "'to probe behind the pleadings before coming to rest on the certification question.'" *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)* (quoting *Falcon, 457 U.S. at 160-61*).

DISCUSSION

Plaintiffs move to certify classes to seek injunctive relief against Defendants. Consolidated Plaintiffs propose three classes:[5]

> Division I FBS Football Class: Any and all **[**20]** NCAA Division I Football Bowl Subdivision ("FBS") football players who, at any time from the date of the Complaint through the date of the final judgment, or the date of the resolution of any appeals therefrom, whichever is later, received or will receive a written offer for a full grant-in-aid as defined in NCAA Bylaw 15.02.5, or who received or will receive such a full grant-in-aid.
>
> Division I Men's Basketball Class: Any and all NCAA Division I men's basketball players who, at any time from the date of the Complaint through the date of the final judgment, or the date of the resolution of any appeals therefrom, whichever is later, received or will receive a written offer for a full grant-in-aid as defined in NCAA Bylaw 15.02.5, or who received or will receive such a full grant-in-aid.
>
> Division I Women's Basketball Class: Any and all NCAA Division I women's basketball players who, at any time from the date of the Complaint through the date of the final judgment, or the date of the resolution of any appeals therefrom, whichever is later, received or will receive a written offer for a full grant-in-aid as defined in NCAA Bylaw 02.5, or who received or will receive such a full grant-in-aid. **[**21]**

Docket No. 291-1, Ex. 1. Jenkins Plaintiffs seek to represent two classes, identical to the first two of Consolidated Plaintiffs' proposed classes. Id.

I. Consolidated Plaintiffs' Class Representatives and Mootness

A student-athlete is eligible to participate in NCAA athletics and receive a GIA for a limited period of time. Defendants argue that the claims of Consolidated Plaintiffs' proposed class representatives are moot because they are no longer eligible to participate in NCAA athletics, precluding this Court from granting their motion for class certification. Although their opposition brief alludes to "standing," Defendants clarified at the hearing and in their supplemental brief that they argue

[5] As suggested by the Court at the hearing, Plaintiffs proposed revised class definitions for consistency between the two actions. See Docket No. 291-1, Ex. 1.

mootness at the time of class certification, not lack of standing at the time of filing the complaints.[6] The Jenkins Plaintiffs' complaint **[*538]** names representatives with claims that are not moot. Although Consolidated Plaintiffs do not dispute that their class representatives' claims are moot, the Court applies the exception to mootness for **[**22]** inherently transitory claims.

Defendants are correct that, if HN3[] "the plaintiff's claim becomes moot before the district court certifies the class, the class action normally also becomes moot." *Slayman v. FedEx Ground Package Sys., Inc., 765 F.3d 1033, 1048 (9th Cir. 2014)*.

However, Plaintiffs argue that the "inherently transitory" exception to mootness permits this Court to certify the class even though Consolidated Plaintiffs' representatives' claims are moot. When this exception applies, a court may "avoid[] the spectre of plaintiffs filing lawsuit after lawsuit, only to see their claims mooted before they can be resolved." *Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1090 (9th Cir. 2011)*. "'Some claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" Id. (quoting *Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 52, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991)*) (brackets omitted); *Haro v. Sebelius, 747 F.3d 1099, 1110 (9th Cir. 2014)*. Such a claim will repeat as to the class because other persons similarly situated will have the **[**23]** same complaint. *Pitts, 653 F.3d at 1090*.

Defendants respond that Consolidated Plaintiffs' interests are insufficiently "short-lived" to warrant applying the exception because student-athletes have up to four seasons of eligibility over the course of five years. See 2014-15 NCAA Manual at 75. Defendants continue that the named Consolidated Plaintiffs knew of their eligibility period and could have filed their complaints sooner than in their final seasons of eligibility. Consolidated Plaintiffs counter that few student-athletes would be expected to bring litigation against their school shortly after beginning their first year on campus. Further, some student-athletes receive one-year GIAs. Consolidated Plaintiffs have been diligent in seeking class certification since they filed their complaints.

The Court finds that, in the particular circumstances of this case, Consolidated Plaintiffs' claims are transitory enough that there was insufficient time to obtain a ruling on the motion for class certification before the proposed representatives' interests in injunctive relief expired. See *Pitts, 653 F.3d at 1090*; *Haro, 747 F.3d at 1110*. The first cases that eventually became part of this multidistrict litigation were filed in California (Alston v. Nat'l Collegiate **[**24]** Athletic Ass'n) and New Jersey (Jenkins) in March 2014. A motion to transfer the then-pending actions was 7 filed with the Judicial Panel on Multidistrict Litigation (JPMDL) later that month. In April, John Bohannon, one of Consolidated Plaintiffs' proposed representatives, filed his complaint in Minnesota (Floyd et al. v. Nat'l Collegiate Athletic Ass'n); he was in his final year of NCAA eligibility. Another case was filed in Louisiana in May. The JPMDL issued orders transferring the cases to this district in June. In July, all Plaintiffs except those in Jenkins filed a Consolidated Amended Complaint. That month, another case was filed in this district and related to this case. In August, another case was filed in Minnesota and transferred to this district by the JPMDL. And another case was filed in this district and related to this case in November 2014. In January 2015, Justine Hartman, Consolidated Plaintiffs' proposed women's basketball representative, filed her complaint in this district (Hartman et al. v. Nat'l Collegiate Athletic Ass'n); she also was in her final year of eligibility. Her case was related to this case and her claims were incorporated into the Consolidated Amended **[**25]** Complaint in February. Although this coordination and consolidation took time, it will, as the JPMDL found in its June 2014 transfer order, "eliminate duplicative discovery; prevent inconsistent pretrial rulings, including with respect to class certification; and conserve the resources of the parties, their counsel, **[*539]** and the judiciary." No. 14-md-02541-CW, Docket No. 1.

Meanwhile, in November 2014, Plaintiffs had filed a Joint Motion for Class Certification, which the Court indicated would be heard in February 2015. In February 2015, the Court adopted a stipulation allowing Plaintiffs to file the Amended Joint Motion for Class Certification to account for new and substituted class representatives; the motion was noticed to be heard on May 14, 2015. The class certification hearing was later delayed due to requests from both sides because of various issues, including weather, athletic schedules,

[6] Defendants suggest in a footnote that this Court cannot certify a class if any members of the proposed classes are ineligible to play NCAA athletics and, thus, lack standing. But because Defendants clarified at the hearing that they raise mootness rather than standing issues, this argument is not applicable.

attorneys' schedules and discovery.

Also contributing to this delay were recent changes in the law, which require consideration of the merits of a case on a class certification motion. See *Ellis v. Costco Wholesale Corp., 657 F.3d 970, 981 (9th Cir. 2011)*; *Dukes, 131 S. Ct. at 2551-52*. These changes are resulting in a perceived need for more discovery and expert testimony before class certification **[**26]** than was the case in years past. Here, Defendants submitted expert reports with their opposition to class certification. The parties agreed that, if Plaintiffs filed expert reports with their reply, which they did, Defendants would be given additional time to depose Plaintiffs' experts and file a sur-reply. Thus, the hearing was reset for October 1, 2015.

The complexity, pace and cutting edge nature of this multidistrict litigation affected the timing of this Court's class certification hearing and decision. There is nothing to be gained by denying class certification only for class members to file a new lawsuit to be included in this litigation. Accordingly, the Court finds that the inherently transitory exception to mootness applies to Consolidated Plaintiffs' claims. Consolidated Plaintiffs represent that they could add named Plaintiffs who are still eligible to receive GIAs. In an abundance of caution, it might behoove them to move to do so.

II. Class Certification and *Rule 23(a)* Requirements

Defendants do not dispute that Plaintiffs satisfy the requirements of *Rule 23(a)(1)*, *(2)* and *(3)*. The Court addresses each requirement in turn.

A. *Rule 23 (a)(1)*: Numerosity

Plaintiffs assert, and Defendants do not dispute, that the proposed **[**27]** classes comprise thousands of potential members because of the numerous FBS football and Division I men's and women's basketball programs implicated and the numerous GIAs the NCAA permits each school to award. Thus, Plaintiffs meet this requirement. See *In re Citric Acid Antitrust Litig., 1996 U.S. Dist. LEXIS 16409, 1996 WL 655791, at *3 (N.D. Cal.)*.

B. *Rule 23(a)(2)*: Commonality

Plaintiffs identify several common questions regarding Defendants' alleged violations of federal antitrust law and the injunctive relief sought. See *In re NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 U.S. Dist. LEXIS 160739, 2013 WL 5979327, at *4 (N.D. Cal.)* (class certification decision in case later titled, O'Bannon v. National Collegiate Athletic Association). Such questions include the characteristics of the markets Plaintiffs identify in their complaints, "whether NCAA rules have harmed competition in those markets," and "whether the NCAA's procompetitive justifications for its conduct are legitimate." See id. Thus, Plaintiffs sufficiently show commonality.

C. *Rule 23(a)(3)*: Typicality

HN4[] "'[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'" *Falcon, 457 U.S. at 156* (quoting *E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S. Ct. 1891, 52 L. Ed. 2d 453 (1977))* (some quotation marks omitted). The purpose of the requirement is "to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992)*. In the antitrust context, generally, "'typicality **[**28]** will be established by plaintiffs and all class members alleging the same antitrust violation by defendants.'" *White v. Nat'l Collegiate Athletic Ass'n, 2006 U.S. Dist. LEXIS 101374, 2006 WL 8066803, at *2 (C.D. Cal.)* (quoting *In re Rubber Chemicals **[*540]** Antitrust Litig., 232 F.R.D. 346, 351 (N.D. Cal. 2005))*.

Here, named Consolidated Plaintiffs participated in NCAA Division I men's and women's basketball,[7] and named Jenkins Plaintiffs participate in FBS football and Division I men's basketball. All received or will receive full GIAs subject to NCAA Bylaws restricting the amount of such GIAs. Named

Plaintiffs assert that such NCAA restrictions constitute antitrust violations that lead to cognizable antitrust injuries. Because all proposed class members share these asserted characteristics, claims and injuries, Plaintiffs satisfy *Rule 23(a)(3)*. See *NCAA Student-Athlete Name & Likeness Licensing, 2013 U.S. Dist. LEXIS 160739, 2013 WL 5979327, at *5*; *In re NCAA I-A Walk-On Football Players Litig., 2006 U.S. Dist. LEXIS 28824, 2006 WL 1207915, at *6 (W.D. Wash.)*; *White, 2006 U.S. Dist. LEXIS 101374, 2006 WL 8066803, at*

[7] Defendants do not dispute that a Division I men's basketball player may represent an FBS football player. Because the players challenge the same type of restriction in Division I men's basketball and FBS football, the Court finds that Consolidated Plaintiffs' representative—a Division I men's basketball player—may represent Consolidated Plaintiffs' proposed men's basketball and football classes.

*2.

D. Rule 23(a)(4): Adequacy

Defendants claim that conflicts of interest among proposed class members preclude all named Plaintiffs from meeting Rule 23(a)(4)'s adequacy requirement. **[**29]** Defendants present two theories that some proposed class members have interests in maintaining the challenged restrictions in conflict with those of named Plaintiffs: the "substitution effect" and the "economics of superstars." To the extent either of Defendants' theories could be read to rely on potential harm to high school students, players who will not receive full GIAs or walk-on players who receive no compensation, the Court notes that the proposed class definitions do not include these individuals. For the reasons discussed below, the Court finds that named Plaintiffs meet Rule 23(a)(4)'s adequacy requirement and that Defendants' theories for intra-class conflicts are without support.

HN5[] "Resolution of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998). "'Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.'" In re Online DVD-Rental Antitrust Litig., 779 F.3d 934, 942 (9th Cir. 2015) (quoting 1 William B. Rubenstein et al., Newberg on Class Actions § 3.58 (5th ed. 2011)); see **[**30]** Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625-27, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997).

Defendants' "substitution effects" theory predicts the following chain of events: removing the GIA cap would lead to some student-athletes receiving greater compensation; greater compensation is an incentive for players to opt in to, or remain in, NCAA athletics who otherwise would have pursued more lucrative opportunities; that incentive would lead to more players competing for finite school resources; and that competition would result in less valued student-athlete class members losing their full GIAs.

Defendants also argue that an "economics of superstars" effect would occur absent the GIA cap. The relief Plaintiffs seek, goes Defendants' theory, would lead to a scenario in which "some players would receive a high level of compensation due to their high level of talent, but many more players would receive a much lower level of compensation, or none at all, and the overall income distribution would be highly skewed." Report of Defendants' Expert, Dr. James Ordover (Ordover Report) ¶ 48. According to Defendants, giving schools the freedom to compensate "superstar" or highly valued athletes above the GIA cap while continuing to accept—and possibly accepting more—walk-on players would **[**31]** lead to a wage distribution among student-athletes similar to that seen in professional leagues and would cause some members of the proposed classes to earn less than they earn with the current restrictions. See id. ¶¶ 45-68. Dr. Ordover opines that **[*541]** schools pay many players who currently receive full GIAs more than the incremental amount of revenue they produce for the school. He refers to this as paying these athletes more than their "marginal revenue product." He opines that if schools could compensate without a GIA cap, they would compensate these players at their lower marginal revenue product level. Id. ¶¶ 71-73.

1. Speculation as to the Relief Plaintiffs Seek

Defendants' theories for intra-class conflict assume that Plaintiffs seek an injunction that would create a completely unrestricted open market in which schools would compete to pay higher and higher amounts to a select few student-athletes without any requirements to provide a minimum number of full GIAs. In fact, although Plaintiffs challenge NCAA rules capping the GIA amount, they do not challenge existing rules—or Defendants' ability to enact new rules—setting minimum numbers of full GIAs.

It is speculative, not inevitable, **[**32]** that Defendants would change other NCAA rules or that the Court would order such an unrestrained market. Defendants could carry out alternatives, such as requiring a minimum number of full GIAs or requiring that schools not reduce or eliminate existing GIAs.[8] If Defendants wanted to spread financial aid broadly and ensure the existing numbers of full GIAs, they could do so. For instance, the NCAA currently, with limited exemptions, requires that FBS schools "[p]rovide an average of at least 90 percent

[8] Plaintiffs posit more possible alternatives: conferences, not schools, could pay athletes; **[**33]** schools could be required to provide all GIA recipients in one sport full cost of attendance before they could provide any other player in that sport more compensation; and schools could be required to pay each player on their teams the same amount. See Report of Plaintiffs' Expert, Dr. Daniel Rascher (Rascher Report) ¶ 32.

of the permissible maximum number of overall football grants-in-aid per year during a rolling two-year period" and, each year, "offer a minimum of 200 athletics grants-in-aids or expend at least $4 million on grants-in-aid to student-athletes in athletics programs." 2014-15 NCAA Manual at 354. Plaintiffs do not challenge this requirement. Also, Plaintiffs' experts, Dr. Roger Noll and Dr. Edward Lazear, explain that any substitution effect is unlikely in the event that both the cap on GIA and the limit on the number of GIAs a school may award were removed. See, e.g., Lazear Report ¶¶ 56, 61, 74; Noll Report at 5.

In speculating about intra-class conflicts, Defendants fail to recognize their own role in determining how compensation amounts would be set even if this Court were to enjoin the current GIA cap. *HN6*[↑] "[T]he mere potential for a conflict of interest is not sufficient to defeat class certification; the conflict must be actual, not hypothetical." Berrien v. New Raintree Resorts Int'l, LLC, hypothetical." *Berrien v. New Raintree Resorts Int'l, LLC, 276 F.R.D. 355, 359 (N.D. Cal. 2011)*; see *Cummings v. Connell, 316 F.3d 886, 896 (9th Cir. 2003)* ("[T]his circuit does not favor denial of class certification on the basis of speculative conflicts.").[9]

Defendants also argue that due process concerns are raised by certifying a class to pursue an injunction that would disadvantage some unnamed members of the proposed classes. Plaintiffs respond that, in an injunctive relief case such as this one, "divergent interests within the class militate in favor of certification—because certification gives affected parties a greater voice in the litigation." *Laumann v. National Hockey League, 105 F. Supp. 3d 384, 2015 U.S. Dist. LEXIS 63745, 2015 WL 2330107, *10 (S.D.N.Y.)*. Here, although the proposed class members may be competitors rather than consumers as in *Laumann*, they are thousands of student-athletes who, because they **[*542]** receive GIAs, are subject to the same challenged restraint. A single student-athlete could sue to obtain an injunction against the GIA cap which would implicate all proposed **[**35]** class members' interests. In deciding whether to certify a *(b)(2)* class, the court considers that, in an individual case, "there is a real risk that the individual case will impact the absent parties' interests, with those parties being neither represented nor heard." Rubenstein et al., Newberg on Class Actions § 4:34. *HN7*[↑] When the *Rule 23* requirements are met, "Class certification helps the absent parties—it guarantees that their interests will be adequately represented, and it provides them notice and an opportunity to be heard about any settlement and/or attorney's fees request." Id. (footnotes omitted).

Further, Plaintiffs contend that Defendants should not be heard to argue that class certification should be denied because some members of the proposed classes might be benefitted by, and thus prefer, continuation of antitrust violations. See *Probe v. State Teachers' Retirement System, 780 F.2d 776, 781 (9th Cir. 1986)*. Defendants' response that there may be no antitrust violation begs the question. Plaintiffs also argue that if competition among class members precluded certification of a class, then classes of employees could not be certified in employment cases and classes of sellers could not be certified in monopsony antitrust cases such as this one. Such is not the case. **[**36]** See *Meiresonne v. Marriott Corp., 124 F.R.D. 619, 625 (N.D. Ill. 1989)*. In Laumann, the court recognized, "If the fact that illegal restraints operate to the economic advantage of certain class members were enough to defeat certification, the efficacy of classwide antitrust suits—and the deterrence function they serve— would wither." *2015 U.S. Dist. LEXIS 63745, 2015 WL 2330107 at *10*. Here, although Defendants suggest that class members might prefer to leave an unlawful restraint in place because they otherwise would have to compete against one another, such preference for non-competition does not justify denying injunctive relief class certification.

2. Expert Evidence and Intra-Class Conflicts

Defendants argue that Plaintiffs fail to provide expert testimony of an economic model to analyze a scenario with a hypothetical injunction and that this failure should preclude certification. Plaintiffs respond that their

[9] Nor is Defendants' reliance on *Walk-On Football Players* persuasive. In that case, a putative class sought to eliminate a cap on the number of scholarships a school could award. The class included a group of "Division I-A walk-ons . . . ." *Walk-On Football Players, 2006 U.S. Dist. LEXIS 28824, 2006 WL 1207915, at *2*. The plaintiffs sought injunctive relief and money damages under *Rule 23(b)(3)*. See id. The court concluded that the **[**34]** plaintiffs did not meet *Rule 23(a)(4)*, reasoning that "to prove that he is entitled to a particular piece of the damages pie, each class member will have to offer proof that necessarily will involve arguing that a threshold number of other players (class members and non-class members) would not have gotten that same scholarship money." *2006 U.S. Dist. LEXIS 28824, [WL] at *8*. Here, however, Plaintiffs seek only injunctive relief aimed at the GIA cap on behalf of players who have received or will receive a full GIA.

pleadings sufficiently support class certification and that no expert testimony is needed. Because Defendants base their argument regarding conflicts of interest on a form of relief that Plaintiffs do not seek, the Court agrees with Plaintiffs that economic modeling of a scenario with an injunction is unnecessary to determine *Rule 23(a)(4)* adequacy in this case.

Nonetheless, Plaintiffs counter Defendants' **[**37]** economic analyses from Dr. Ordover with their own expert reports from Dr. Noll, Dr. Rascher and Dr. Lazear.

The Court finds that Dr. Ordover's reports fail to show intra-class conflicts of interest because, even if Plaintiffs sought the relief he assumes, his reports fail to demonstrate that enjoining the GIA cap would induce additional players to participate in NCAA athletics, and would induce schools, to attract those additional players, to reduce or deny GIAs to members of the proposed classes who receive full GIAs. Nor do they demonstrate that schools would change how they have valued members of the proposed classes because of an injunction against a GIA cap or that schools, despite their past actions and sources of revenue, would be forced by economic circumstances to harm certain members of the proposed classes.

a. Substitution Effect

Dr. Ordover predicts that some members of the proposed classes will be harmed by any player compensation system that does not include the GIA cap. So long as schools compensate some student-athletes at a higher level after an injunction than they did before, Dr. Ordover posits that "increases in the amount of athletics-based aid would naturally induce **[**38]** some people to accept or continue to receive such scholarships that otherwise would choose not to participate as FBS/D-I scholarship student-athletes." Ordover Report ¶ 21. He refers to these athletes as "additional players." Id. Plaintiffs' expert, Dr. Noll, provides multiple persuasive reasons why current recipients of full GIAs **[*543]** would not be harmed if the GIA cap were lifted. See Noll Report at 4-6.

With the cap, few athletes offered GIAs for FBS football or Division I basketball turn them down; ten percent of them did not join an FBS football program and five percent of them did not join a Division I men's basketball program between 2007 and 2011, according to Dr. Noll's report. Id. at 15-16. And some who decline GIAs or who leave a school do so for non-financial reasons, such as health or academics. Id. at 14-15. In addition, among the athletes who turn down or give up GIAs, many have skill levels so low that they are unlikely to receive compensation offers large enough to prompt them to accept a scholarship absent the GIA cap. See id. at 17. As Dr. Noll explains, "[N]early all athletes who plausibly decline or terminate scholarships for financial reasons are in the two lowest quality groups of high school players." Id. at 13, 16-17 (noting **[**39]** that "73 percent of those declining a DI men's basketball scholarship were rated as zero-star recruits" and that "80 percent of students who decline FBS offers are in the two lowest quality groups"). The Court finds that such additional individuals will not be induced to accept GIA offers and displace class members absent the cap, and, thus, will not create intra-class conflicts.

Dr. Ordover opines that players who declared themselves eligible to play in professional leagues, either in the United States or abroad, would potentially displace class members. Plaintiffs' expert, Dr. Lazear, explains that Dr. Ordover provides no evidence that college pay would rival that of the professional leagues, nor evidence regarding the role that "non-monetary considerations" play in deciding whether to attend college. Lazear Report ¶¶ 66, 69-70. Also, Dr. Lazear identifies "college basketball players in 2013 who entered the draft and did not make an NBA roster," and "football players in 2014 who entered the draft and did not get drafted, " but finds only nineteen and forty-five such examples, respectively. Id. ¶ 66; see also Rascher Report ¶ 110.

Finally, Dr. Lazear challenges Dr. Ordover's prediction **[**40]** that the displaced players would be current full-GIA recipients rather than other student-athletes, such as "current partial GIA recipients, marginal high school athletes who would be the last to be given scholarships, and walk-ons who might have gotten a scholarship had additional players not chosen to stay." See Lazear Report ¶ 72. Dr. Ordover does not cite examples of schools rescinding scholarships to full GIA recipients. Although Dr. Ordover indicates that there are no national rules that protect a GIA recipient from losing a scholarship because of athletic performance, the NCAA could adopt such rules. The Court finds insufficient support to conclude that schools would rescind scholarships to class members absent the GIA cap, rather than displace non-class members.

In sum, Dr. Ordover identifies a potential group of athletes who might seek to displace members of the proposed classes absent the GIA cap, but fails to provide sufficient basis from which this Court can

conclude that lifting the GIA cap for all student-athletes would induce this group to participate in NCAA athletics and schools to respond by withdrawing full GIAs from some class members so as to create intra-class **[**41]** conflicts.

b. Economics of Superstars

Because schools provide full GIAs to members of the proposed classes although they are not required to do so and because Plaintiffs do not oppose alternative NCAA rules regarding the distribution of GIAs, the Court finds insufficient basis in Dr. Ordover's reports for intra-class conflicts of interest arising from a hypothetical "economics of superstars." The Court does not find sufficient basis for his prediction that, absent the GIA cap, schools would pay some student-athletes on the basis of their lower marginal revenue product.

Based on his "economics of superstars" theory, Dr. Ordover predicts that roughly forty percent of FBS players and sixty percent of men's basketball players would receive a GIA valued at less than what they currently receive. See Ordover Report ¶¶ 57-61. Those percentages may be even higher, he adds, due to walk-on players who receive no compensation, the lack of collective bargaining in student athletics and the possibility that schools may offer fewer roster spots **[*544]** absent the GIA cap. See id. ¶¶ 62-68. To arrive at his percentages, he assumes that student-athletes would be compensated at an amount equal to fifty percent **[**42]** of their team's gross revenues, basing that assumption on an amicus brief filed by economists and professors of sports management in support of the plaintiffs in O'Bannon. Id. ¶¶ 57-61. Dr. Ordover states that he is unaware of any support for the claim by these economists, but he uses that assumption and divides the teams' gross revenues by the limit on the number of full GIAs a school may award—eighty-five in FBS football and thirteen in men's basketball—to estimate an amount that would be paid to players. Id. Then, he assumes that salaries would be distributed among student-athletes in a way similar to that among professional athletes. Id. ¶¶ 60-61. Also, Dr. Ordover hypothesizes that without the GIA cap schools would pay student-athletes only their marginal revenue product and that this amount in some cases would be less than a full GIA.

Dr. Lazear raises a serious concern with Dr. Ordover's predictions, however, by explaining that they cannot account for schools' "revealed preference"—making a choice repeatedly over time reveals that the benefits of the choice exceed the costs. Lazear Report ¶ 79. Members of the proposed classes have received or will receive full GIAs. "[T]hat a college **[**43]** has already chosen to award a student athlete a GIA means that the benefit, broadly defined, from doing that must exceed the cost to the college, at least in expectation." Id. Dr. Ordover responds that "revealed preference" under the GIA cap does not necessarily predict schools' preference absent the GIA cap. See Ordover Reply ¶¶ 19-20. Dr. Ordover predicts "a regime change in the way student-athletes are evaluated and awarded financial aid" absent the GIA cap because schools would base player compensation on the player's "expected value" and "have stronger incentives to more closely align compensation to the player's 'value.'" Id. ¶ 22. Still, Dr. Ordover does not explain why schools today provide full GIAs to purportedly overvalued class members without being required to do so and would stop doing so absent the GIA cap.

Even assuming that Dr. Ordover's marginal revenue product estimates are accurate and that some are below the current GIA cap, Dr. Noll points out, "The fact that nearly all scholarship athletes have been paid the GIA cap for decades, notwithstanding that colleges do not need to use all of their scholarships or to pay athletes as much as the NCAA rules allow, supports **[**44]** the conclusion that the [marginal revenue products] of these players are not less than the GIA cap." Noll Report at 27; 29-30. And Dr. Noll explains that marginal revenue product values reflect a student-athlete's performance after a season concludes, but relevant here is how a school values a student-athlete before the student-athlete performs. See id. at 27-28. "Expected marginal revenue product" is "almost certain to diverge from the actual [marginal revenue product] of an athlete in any specific year because initial expectations about an athlete's contribution to the team are unlikely to be perfect . . . ." Id.

In sum, Dr. Ordover's "economics of superstars" prediction lacks sufficient support to demonstrate intraclass conflicts of interest.

Both the "substitution effect" and "economics of superstars" theories also depend on the assumption that schools could not afford to spend more money compensating all student-athletes rather than cutting payments to some. That assumption is also not supported, as discussed in the next section.

c. NCAA Financial Data on Athletic Departments

Defendants predict that an injunction would increase the costs to schools of participating in FBS and Division I

athletics **[**45]** and, in turn, schools would stop participating in FBS and Division I athletics or take steps to lower their costs, such as offering fewer GIAs. Yet again, Plaintiffs do not seek an unrestricted market for player compensation. Defendants would maintain a role in determining how compensation would be set without the current GIA cap.

Further, Defendants assume that any increase in student-athlete compensation resulting from an injunction would force schools to offset such cost by disadvantaging **[*545]** some members of the proposed classes. The Court finds insufficient basis for such an assumption, because of schools' past behavior and alternative available sources of funds. Dr. Ordover posits that, according to NCAA data, "most athletic departments, many FBS football and Division I men's basketball programs, and all Division I women's basketball programs have consistently higher expenses than revenues." Ordover Report ¶ 75. He predicts harm to some class members to the extent that an injunction leads to any increase in costs. Id.

Plaintiffs' experts challenge Dr. Ordover's conclusions. For instance, Dr. Noll notes that, recently, "revenues from college sports at FBS institutions have grown far **[**46]** more rapidly than the rate of increase in the value of an athletic scholarship." Noll Report at 24. "The growth in revenues from college sports has been used to increase expenditures in football and men's basketball, especially on the salaries of coaches and administrators, recruiting activities, and facilities for those sports." Id. Similarly, Dr. Lazear asserts that Dr. Ordover's revenue analysis fails to account for alternative sources of funds to compensate student-athletes and does not consider that colleges allocate funds to departments on the basis of more criteria than simply revenue generation. See Lazear Report ¶¶ 122-38. Other sources of funds include:

> (1) redirections from other school expenditures (not necessarily sports), (2) changes in additions to or subtractions from the endowment, (3) increased alumni donations specifically made to cover athlete salaries . . . , (4) reductions in spending on other factors that are complements with players, such as spending on coach's salaries or on facilities (athletic or other).

Id. ¶ 129; see Noll Report at 23-25; Rascher Report ¶¶ 8297. Also, according to Dr. Lazear, "with the exception of the PAC-12, revenues grew 4 percent to 7 **[**47]** percent for public schools in the power conferences between 2013 and 2014." Lazear Report ¶ 124. That other schools "continue to invest in their sports programs even when net revenues are negative means that schools value the programs at least as much as the amount they spend on them." Id. ¶ 133.

Dr. Ordover responds that not all schools are benefitting from revenue increases and that "some incremental deterioration in the financial position of athletics departments will cause some schools to reevaluate their participation in FBS/D-I athletics." Ordover Reply Report ¶¶ 52-54. Dr. Rascher notes that, after schools recently were allowed to pay up to cost of attendance, "no Division I school announced a unilateral reduction in GIA offers, and . . . no school reduced its offers to some football/basketball athletes in order to fund the increase to other athletes." Rascher Report ¶¶ 77-78; see also *O'Bannon, 7 F. Supp. 3d at 982* (finding, on the basis of evidence relating to NCAA revenues, that "schools would not exit FBS football and Division I basketball if they were permitted to pay their student-athletes a limited amount of compensation beyond the value of their scholarships").

Accordingly, Plaintiffs persuasively **[**48]** demonstrate that Dr. Ordover's bases for predicting that schools would be forced by budgetary constraints to make decisions leading to intra-class conflicts are flawed.

Defendants lack sufficient support to show intra-class conflicts arising from their "substitution effects" and "economics of superstars" theories. Plaintiffs meet *Rule 23(a)(4)*'s requirements. In addition, the Court finds that counsel is experienced in class action litigation and litigation on behalf of athletes, a point that Defendants do not dispute.

In sum, Plaintiffs satisfy *Rule 23(a)*.

III. *Rule 23(b)(2)* Requirements

The Ninth Circuit has explained that ***HN8***[↑] the *Rule 23(b)(2)* requirements as stated in *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 131 S. Ct. 2541, 2557, 180 L. Ed. 2d 374 (2011)*, "are unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole." *Parsons v. Ryan, 754 F.3d 657, 688 (9th Cir. 2014)* (citing *Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9th Cir. 2010)*). "That inquiry does not require an examination of the viability **[*546]** or bases of the class members' claims for relief, does not require that the issues common to the class satisfy a *Rule 23(b)(3)*-like

predominance test, and does not require a finding that all members of the class have suffered identical injuries." Id. (footnote omitted). "Rather, as the text of the rule makes clear, this **[**49]** inquiry asks only whether 'the party opposing the class has acted or refused to act on grounds that apply generally to the class.'" Id. (quoting *Fed. R. Civ. P. 23(b)(2)*).

Here, Defendants argue that the purported intra-class conflicts discussed above also make injunctive relief inappropriate. As discussed above, the Court finds no such conflicts. Plaintiffs allege that all members of the proposed classes suffer antitrust harms by being undercompensated for the services they offer as student-athletes. The NCAA's GIA cap applies generally to the class by precluding schools from paying any class member more than the cap. Plaintiffs seek to enjoin the cap on GIAs—an injunction that would apply to all class members by permitting schools to compensate them independent of the GIA cap. See *id. at 689* (noting that "every [plaintiff] in the proposed class is allegedly suffering the same (or at least a similar) injury and that injury can be alleviated for every class member by uniform changes in . . . policy and practice"). Thus, Plaintiffs satisfy *Rule 23(b)(2)*.

IV. Request to Dismiss Jenkins as Duplicative

Defendants argue that, rather than certify the Jenkins classes, the Court should simply dismiss the Jenkins case because it was later-filed, **[**50]** names fewer Defendants, and proposes classes encompassed by, but more limited than, Consolidated Plaintiffs' proposed classes. Plaintiffs characterize this suggestion as untimely, given that this Court previously denied a motion to dismiss the complaints. See Docket No. 131. Although Defendants argue that the request for certification of identical classes in two cases creates new grounds for dismissal, they cite no authority requiring dismissal.

Defendants cite cases involving the "first-to-file" rule, but these cases fail to provide grounds for dismissing Jenkins Plaintiffs' action. ***HN9***[] "There is a generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 94-95 (9th Cir. 1982)* . The court in which the second action was filed may "transfer, stay, or dismiss" that action. *Alltrade, Inc. v. Uniweld Products, Inc., 946 F.2d 622, 623 (9th Cir. 1991)*.

Congress created a procedural tool for use when similar cases are filed in multiple districts—a transfer by the JPMDL. See *28 U.S.C. § 1407*. That panel has already addressed these cases and decided to transfer them to this Court for pretrial proceedings, which include class certification motions. This **[**51]** Court may not transfer a multidistrict litigation case to itself for trial. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 28, 40, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998)*. Jenkins Plaintiffs repeatedly have asserted their right to a remand to the District of New Jersey for trial. Under these circumstances, to dismiss a transferred case rather than remanding it would subvert the multidistrict litigation process.

In support of their opposition to certification of the Jenkins classes, Defendants also cite the potential for duplicative discovery and duplicative work by counsel that could affect a later motion for attorneys' fees. Consolidated Plaintiffs and Jenkins Plaintiffs alleviate concerns regarding duplication by requesting that lead counsel for each serve as co-lead counsel for all injunctive relief classes, agreeing to serve joint discovery requests and expert reports. Concerns about duplicative work by counsel may be raised in opposition to any attorneys' fees motions. Duplication at trial can be mitigated by staying one action while the other proceeds to trial. The first ruling may create a collateral estoppel or res judicata effect. If Consolidated Plaintiffs successfully move for certification of a *Rule 23(b)(3)* damages class, Plaintiffs propose to seek to stay the Jenkins **[*547]** action **[**52]** pending completion of a trial by jury in this district by co-lead counsel. If Consolidated Plaintiffs do not succeed in such a motion, Plaintiffs have committed to seek to stay either the consolidated case or the Jenkins case prior to trial of the other.

Defendants also claim that certification of Consolidated Plaintiffs' and Jenkins Plaintiffs' proposed classes would deprive them of their *Seventh Amendment* rights if injunctive relief claims were resolved before damages claims. *Seventh Amendment* rights can be protected by trying the complaint seeking damages first or by declining to apply non-mutual offensive collateral estoppel.

The Court finds no reason to deny certification of all classes, or to dismiss Jenkins Plaintiffs' action.

CONCLUSION

For the reasons above, this Court GRANTS Plaintiffs' amended joint motion for class certification (Docket No.

200). The Court certifies each class defined above.

The Court appoints lead counsel for Consolidated Plaintiffs (Habens Berman Sobol Shapiro LLP and Pearson, Simon, & Warshaw LLP) and lead counsel for Jenkins Plaintiffs (Winston & Strawn LLP) as co-lead counsel for the *Rule 23(b)(2)* injunctive relief classes in both cases.

The Court DISMISSES Consolidated Plaintiffs' claim under California's **[**53]** Unfair Competition Act.

IT IS SO ORDERED.

Dated: December 4, 2015

/s/ Claudia Wilken

CLAUDIA WILKEN

United States District Judge

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ARTICLE: DEBUNKING THE NCAA'S MYTH THAT AMATEURISM CONFORMS WITH ANTITRUST LAW: A LEGAL AND STATISTICAL ANALYSIS

Spring, 2018

Reporter
85 Tenn. L. Rev. 661 *

Length: 10431 words

Author: THOMAS A. BAKER III, J.D., PH.D. [1], MARC EDELMAN, J.D. [2] and NICHOLAS M. WATANABE, PH.D. [3]

Highlight

This article provides the first detailed study to show that paying college football players does not decrease fan interest in watching college football--substantially debunking the NCAA's myth that amateurism conforms to the requirements of antitrust law. Part I of this article details the history of collegiate sports in the United States and the NCAA's amateurism rules. Part II examines the origins and evolution of the NCAA's procompetitive presumption defense of amateurism; a legal fiction that presumes consumer interest in amateurism justifies a quasi-antitrust exemption for the NCAA's "no pay" rules. Part III sets the framework for our empirical study by describing how the Ninth Circuit's reasoning in O'Bannon v. NCAA *established the need for an economic investigation into the influence of amateurism on consumer demand for the NCAA's most popular product, college football. Part IV describes the methods used for the empirical examination in this study and analyzes the results. Finally, Part V concludes with a discussion of the implications drawn from the results of our investigation and explains why the findings in our study disprove the presumption that the consumer demand for college football depends on preservation of regulations that limit athlete compensation*.

Text

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[*662] INTRODUCTION

The National Collegiate Athletic Association (NCAA) has long claimed that its amateurism rules constitute legally necessary requirements to preserve consumer demand for college sports. Nevertheless, in the two years since the U.S. Court of Appeals for the Ninth Circuit held that the NCAA's "no pay" rules violated Section 1 **[*663]** of the Sherman Act, consumer interest in big-time college football has only continued to rise. [4]

This article provides the first detailed study to show that paying college football players does not decrease fan interest in watching college football--substantially debunking the NCAA's myth that amateurism conforms to the requirements of antitrust law. Part I of this article details the history of collegiate sports in the United States and the NCAA's amateurism rules. Part II examines the origins and evolution of the NCAA's procompetitive presumption defense of amateurism; a legal fiction that presumes consumer interest in amateurism justifies a quasi-antitrust exemption for the NCAA's no pay rules. Part III sets the framework for our empirical study by describing how the Ninth Circuit's reasoning in *O'Bannon v. NCAA* established the need for an economic investigation into the influence of amateurism on consumer demand for the NCAA's most popular product, college football. Part IV describes the methods used for the empirical examination in this study and analyzes the results. Finally, Part V concludes with a discussion of the implications drawn from the results of our investigation and explains why the findings in our study disprove the presumption that the consumer demand for college football depends on preservation of regulations that limit athlete compensation.

I. A BRIEF HISTORY OF COLLEGE SPORTS AND NCAA AMATEURISM RULES

College sports in the United States date back to the 1840s when students at Ivy League schools such as Harvard University and Yale University first organized regattas as a form of social entertainment. [5] Initially, college students supervised their own sporting events. [6] But by the late 1800s, some college administrators recognized that college sports served as a marketing opportunity for their schools. [7] **[*664]** Consequently, they began to get involved in overseeing their schools' athletic teams. [8]

With the goal of standardizing game rules and leveling the playing field of competition, college administrators advocated in favor of forming formal collegiate athletic conferences. [9] Among the first athletic conferences to establish player eligibility rules was the Big Ten Conference, which included a number of large Midwestern universities. [10] To ensure that the participants in college sports were truly students and not "ringers," the Big Ten Conference agreed that no college athletes should ever receive a paycheck in exchange for their participation in organized sports. They hoped other conferences would adopt identical rules.

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[4] *See* O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015) (holding that the NCAA violated Section 1 of the Sherman Act by capping college athlete compensation below the full cost of their attendance).

[5] Marc Edelman, *The NCAA's 'Death Penalty' Sanction--Reasonable Self- Governance or an Illegal Group Boycott in Disguise*?, 18 LEWIS & CLARK L. REV. 385, 388-89 (2014).

[6] *Id. at 389.*

[7] Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 989-90 & n. 24 (1987).

[8] Edelman, *supra* note 5, at 389.

[9] *Id.*

[10] *Id.*

On a national level, a formal organization of collegiate sports emerged in 1905 when President Theodore Roosevelt encouraged college presidents to form a more encompassing body to address safety risks in college football. [11] This new, national body, which became known as the National Collegiate Athletic Association, initially included sixty-two members from across various athletic conferences. In time, it grew to over twelve hundred members. The NCAA also moved away from a safety-oriented focus and adopted an important role in setting "playing rules, standards or amateurisms, standards for academic eligibility, regulations concerning the recruitment of athletes, and rules governing the size of athletic squads and coaching staffs." [12]

At present, the NCAA generates over $ 1 billion in annual revenues, most of which comes from college football and men's basketball. [13] By adopting formal rules that prevent colleges from paying their athletes, much of the revenue derived from college sports remains within the system for other pursuits, including paying coaches and athletic directors. [14] At present, of the 128 head football coaches in the NCAA's Football Bowl Subdivision, more than seventy-five **[*665]** earn annual incomes of more than $ 1 million per year. [15] Meanwhile, the head track and field coach at the University of Kentucky earns $ 429,000, and the school's athletic director makes $ 695,000. [16] Based on the foregoing, it becomes rather difficult to construe college sports as "amateur," despite the NCAA's heartened adherence to the term "amateurism."

II. AMATEURISM, ANTITRUST LAW, AND THE DUBIOUS PROCOMPETITIVE PRESUMPTION

A. An Introduction to Section 1 of the Sherman Act

Given the gross inequity of college sports' revenue sharing arrangement--an arrangement that is skewed in favor of "management" (administrators, athletic directors and coaches)--it is not at all surprising that college athletes have gone to great efforts to seek to reforms. Some college athletes have sought changes through public protest. [17] Others have sought changes through accepting money "under the table." [18] Meanwhile, still a third group of college athletes has sought change through tangible legal action. [19]

Although plaintiffs have challenged the NCAA's amateurism rules under a wide range of theories, the most meaningful legal challenge to the NCAA's no-pay rules arise under antitrust law, and specifically Section 1 of the

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[11] *O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015).*

[12] *Board of Regents v. NCAA, 468 U.S. 85, 88 (1984).* *See also* *O'Bannon, 802 F.3d at 1054-55.*

[13] *Revenue*, NCAA, *http://www.ncaa.org/about/resources/finances/revenue* (last visited June 12, 2017).*See* Alex, *Here's How the NCAA Generated a Billion Dollars in 2017*, SBNATION (Mar. 8, 2018, 7:00 AM), *https://www.sbnation.com/2018/3/8/17092300/ncaa-revenues-financial-statement-2017*.

[14] *Revenue*, NCAA, *http://www.ncaa.org/about/resources/finances/revenue* (last visited June 12, 2017).

[15] *NCAA Salaries*, USA TODAY, *http://sports.usatoday.com/ncaa/salaries/* (last visited June 12, 2017).

[16] Will Hobson, *As NCAA Money Trickles Down, Even Tennis Coaches are Outearning Professors*, WASH. POST (March 13, 2017), *https://www.washingtonpost.com/sports/colleges/as-ncaa-money-trickles-down-even-tennis-coaches-are-outearning-professors/2017/03/13/d40d448e-043b-11e7-b9fa-ed727b644a0b_story.html?utm_term=.4c134b2145d6*.

[17] *See, e.g.*, Tom Ziller, *Nigel Hayes is the Right Athlete to Protest the NCAA* (Oct. 17, 2016, 10:04 AM), *https://www.sbnation.com/college-basketball/2016/10/17/13297796/nigel-hayes-protest-ncaa-paid-athletes*.

[18] *See, e.g.*, Steven Godfrey, *Meet the Bag Man: How to Buy College Football Players, in the Words of the Man who Delivers the Money*, SBNATION (Apr. 10, 2014), *https://www.sbnation.com/college-football/2014/4/10/5594348/college-football-bag-man-interview*.

[19] *See, e.g.*, *O'Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015).*

Sherman Act. Section 1 of the Sherman Act, in pertinent part, states that "[e]very contract, combination[,] . . . or conspiracy in the restraint of trade or commerce . . . is declared to be illegal." [20] Read literally, Section 1 seems to prohibit all commercial **[*666]** contracts. [21] Most courts, however, have restrained Section 1 of the Sherman Act to only contracts that "unreasonably" restrain trade. [22]

A court typically applies a two-part test to determine whether a particular agreement violates Section 1 of the Sherman Act: "First, the court will determine whether the alleged restraint involves concerted action between two legally distinct entities in a manner that affects interstate commerce (threshold requirements). Then, a court whether the alleged restraint "unduly suppresses competition within any relevant market" (competitive effects analysis)." [23]

In assessing the threshold requirements, a court will begin its analysis by making two separate inquiries. [24] First, a court will assess whether there exists the presence of "concerted action" by considering "whether there is evidence of an agreement, either written or implied, between entities that lack a common objective." [25] Next, a court will determine whether the alleged restraint affects interstate commerce based on whether the restraint involves "the exchange of buying and selling of commodities especially on a large scale involving transportation from place to place." [26]

Thereafter, in composing a competitive effects inquiry, a court would apply one of at least two different tests. [27] On one end of the spectrum, if a restraint is so nefarious that there is a high probability that the restraint lacks any redeeming value whatsoever, a court will apply the per se test, which presumes illegality without any further inquiry. [28] On the other end of the spectrum, if a court, upon first glance, believes the restraint may have some competitive benefit, the court will instead apply a full rule of reason inquiry. [29]

Under a full rule of reason inquiry, "a court will examine every aspect of an alleged restraint, including whether the parties involved had the power to control any relevant market, whether the restraint encourages or discourages competition, and whether the restraint **[*667]** causes any 'antitrust harm,' or, stated otherwise, harm to consumers." [30] The rule of reason test is thus highly fact intensive.

B. Early Legal Challenges to NCAA Amateurism

Two federal antitrust decisions from the 1970s set the groundwork for the NCAA's presumption that its amateurism rules comply with antitrust law, albeit both of these cases were resolved at the "threshold issues" stage of the antitrust inquiry rather than the competitive effects stage.

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[20] Sherman Act, ***15 U.S.C. § 1*** (2006).

[21] Marc Edelman, *A Prelude to* Jenkins v. NCAA*: Amateurism, Antirust Law, and the Role of Consumer Demand in a Proper Rule of Reason Analysis*, 78 LOUISIANA L. REV. 227, 231 (2017).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* at 231-32.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

In the first decision, *College Athletic Placement Service, Inc. v. NCAA*, the plaintiff--a company that helped young athletes to find college scholarships--brought suit against the NCAA to enjoin the NCAA from preventing high school students from paying for scholarship services under the guise of amateurism. On review, the U.S. District Court for the District of New Jersey held that the College Athletic Placement Service could not state an antitrust claim within the purview of antitrust laws because the NCAA bylaws related to the pursuit of scholarships served for "preserving the educational standards in member institutions" and not for any commercial purpose. [31] To support this conclusion, the court relied on an earlier decision from the U.S. Court of Appeals for the First Circuit--*Marjorie Webster Junior College, Inc. v. Middles States Association of Colleges*--which held that a college's failure to obtain accreditation from a nonprofit association did not give rise to antitrust harm in situations denying accreditation did not amount to marketplace exclusion.

In the second decision, *Jones v. NCAA*, a college hockey player who was deemed ineligible for competition based on his receipt of an athletic stipend brought suit against the NCAA in the U.S. District Court for the District of Massachusetts. [32] Upon review, the court in *Jones* likewise held that the plaintiff could not challenge the NCAA's rules on antitrust grounds because "the actions of the [NCAA] in setting eligibility guidelines has [no] nexus to commercial or business activities." [33] In other words, the court in *Jones* failed to find that the plaintiffs met their threshold requirement of showing any commercial activity on the part of the NCAA.

[*668] Interestingly, neither of these two decisions truly analyzed the competitive effects of the NCAA's longstanding amateurism rules, as both cases were decided in the context of a threshold inquiry into the presence (or absence) of interstate commerce. [34] Thus, neither case truly provides much information about the court's economic analysis of amateurism. Indeed, perhaps both cases should be removed from the amateurism-antitrust lexicon in their entirety and be disregarded as a relic based on old definitions of "interstate commerce." Nevertheless, both cases from time to time reappear as part of early support for the NCAA's legal presumption that their amateurism rules are procompetitive.

C. The Supreme Court's Creation of the Procompetitive Presumption in Board of Regents

Further groundwork for the NCAA's "procompetitive presumption defense" emerges from the U.S. Supreme Court's 1984 decision in *Board of Regents of the University of Oklahoma*--a case that seems to eschew the "threshold issues" inquiry, from *NCAA v. College Athletic Placement Service, Inc.* and *Jones*, in favor of evaluating NCAA conduct on its competitive merits. [35]

Board of Regents, in pertinent part, involved a legal challenge by the University of Oklahoma and University of Georgia to the NCAA's efforts to limit the number of games that any member school could play on national television. Both plaintiffs argued that it was tantamount to an illegal group boycott for the NCAA to threaten to "take disciplinary action against any [member school] that [scheduled more televised games]." [36]

Ultimately, the U.S. Supreme Court agreed with the plaintiffs by holding that (1) the NCAA constituted two or more parties, (2) the NCAA engaged in interstate commerce, and (3) the NCAA's conduct in the television broadcast

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[31] College Athletic Placement Service, Inc. v. NCAA, No. 74-1144, 1974 WL 998, at *4-5 (D.N.J. Aug. 22, 1974).

[32] *Jones v. NCAA, 392 F. Supp. 295, 296 (D. Mass. 1976).*

[33] *Id. at 303.*

[34] Baker III, T.A., Maxcy, J.G. and Thomas, C., White v. NCAA*: A Chink in the Antitrust Armor*. 21 J. LEGAL ASPECTS SPORT 75, 75-99 (2011-2012).

[35] Thomas A. Baker III & Natasha T. Brison, *From* Board of Regents *to* O'Bannon*: How Antitrust and Media Rights Have Influenced College Football*, *26 MARQ. SPORTS L. REV. 331, 342 (2016).*

[36] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 95 (1984).*

market was anticompetitive because it "eliminated competitors." [37] Nevertheless, even though the NCAA lost this case, it hangs onto certain phrases in dicta that it argues solidifies **[*669]** a "procompetitive presumption" about amateurism under antitrust law.

The first point of dicta on which the NCAA relies to establish this purportedly "procompetitive presumption" of amateurism appears in the section of the *Board of Regents* decision in which the Court debates whether to review the competitive effects of the NCAA's broadcast-market restraints under the per se test or the rule of reason. [38] In opting to review the NCAA's broadcast restraints under the rule of reason rather than the per se test, the Supreme Court explains that collegiate sports is a unique industry because certain horizontal restraints on competition "are essential if the product is to be available at all", and that "in order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like." [39] The Court further opines, as reason in favor of applying the rule of reason, that the NCAA's actions "widen consumer choice--not only the choices available to sports fans but also those available to athletes--and hence can be viewed as procompetitive." [40]

The second point of dicta comes from the final paragraph of the *Board of Regents* decision, in which the majority identifies the NCAA's critical role in maintaining the "revered tradition of amateurism in college sports." [41] Specifically, the majority opinion states that "[t]here can be no question but that [the NCAA] needs ample latitude to play that role, or that preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." [42]

Whether these points of dicta should have any legal relevance whatsoever is subject to debate. It is critical to remember that the Supreme Court's assertions were made in the context of whether the review conduct under the rule of reason or the per se test and not based on the substantive merits of antitrust law. [43] Furthermore, "the exact language from [*Board of Regents*] actually states that the NCAA's amateurism rules should be analyzed under the full rule of reason by a court because they '*can* be viewed as procompetitive,'" and **[*670]** the word "can" is fundamentally different from the word "must." [44] Nevertheless, since the Supreme Court's ruling in *Board of Regents*, four federal circuits have jumped on these dicta to presume the Supreme Court intended to create, at a minimum, a "procompetitive presumption" about amateurism, and, perhaps even, an explicit exception to antitrust law for the NCAA's amateurism rules.

D. How Four Federal Circuits Changed a Presumption into an Exemption

Although the Supreme Court's holding in *Board of Regents* marked an unequivocal win for the plaintiffs, a string of lower court decisions thereafter ran with the decision's loose dicta instead of its holding, in a manner that can best

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[37] *Id. at 120.*

[38] *Id. at 99.*

[39] *Id. at 101-02.*

[40] *Id. at 102.*

[41] *Id. at 120.*

[42] *Id.*

[43] Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, *64 CASE W. RES. L. REV. 61, 94 (2013).*

[44] *Id.*

be likened to a bad game of telephone. [45] Over time, these decisions continuously moved further away from the Supreme Court's original intent in *Board of Regents*, and helped to indoctrinate into the law of several circuits this bizarre myth that the NCAA's amateurism rules, as a matter of law, conform with antitrust scrutiny. [46]

The first lower court decision after *Board of Regents* to apply the Supreme Court's loose dicta about amateurism in a manner favorable to the NCAA was *McCormack v. NCAA*, which was decided by the Fifth Circuit in 1988. [47] There, an alumnus of Southern Methodist University (SMU), along with an SMU football player and several cheerleaders challenged the NCAA's ban for the SMU football program as a punishment for paying its athletes. [48]

The court, in ruling in favor of the NCAA, cited to *Board of Regents* for the proposition that unlike rules that govern college football broadcasts, rules that determine player eligibility "enhance public interest in intercollegiate athletics." [49] The court further opined that the NCAA's rules restricting athlete compensation were essential to product creation because they "allowed for [college football's] survival in the face of commercial pressures." [50] The court further concluded, **[*671]** without one iota of economic investigation, that "[i]t is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition." [51]

After *McCormack*, a similar issue emerged again in the the Seventh Circuit decision of *Banks v. NCAA. Banks* involved an appeal from the dismissal of a former college football player's antitrust challenge to the NCAA's "no-draft" and "no-agent" rules. There, the court upheld a district court's dismissal of the case based on the plaintiff's failure to allege an anticompetitive effect within a relevant market. [52] However, the court justified the role of amateurism in NCAA athletics by citing to the dicta in *Board of Regents* to conclude that the NCAA's "no-draft" and "no-agent rules" were necessary to preserve the character and quality of the NCAA's products and thereby maintain the "bright line of demarcation" that divides college and professional football. [53]

Nevertheless, not every judge on the U.S. Court of Appeals for the Seventh Circuit shared the majority view. Indeed Judge Joel Martin Flaum, in his partially dissenting opininion, challenged the existence of amateurism by classifying the concept as "chimerical." [54] More specifically, he viewed college football as nothing more than a "free farm system" for the NFL. [55] The majority countered Judge Flaum's stance on amateurism by calling it "surprisingly cynical." [56]

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[45] The game "telephone" is one in which a participant whispers a message to another and then that participant shares the same rumor with a different person and the process repeats down a chain of participants. The point of the game is to compare the original message with what was whispered to the last person in the chain. Typically, the original message becomes distorted, comically so, through the process.

[46] Edelman, *supra* note 43, at 94.

[47] *McCormack v. NCAA, 845 F.2d 1338 (5th Cir. 1988).*

[48] *Id. at 1340.*

[49] *Id. at 1344.*

[50] *Id. at 1345.*

[51] *Id. at 1344* (quoting *NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117 (1984)).*

[52] *Banks v. NCAA, 977 F.2d 1081, 1094.*

[53] *Id. at 1090.*

[54] *Id. at 1099* (Flaum, J., concurring in part and dissenting in part).

[55] *Id. at 1099-100* (quoting Fredric C. Klein, *College Football: Keeping 'em Barefoot*, WALL ST. J., Sept. 4. 1987, at 15).

The issue emerged again in *Smith v. NCAA* [57]--a case involving a graduate transfer student who challenged the NCAA's post-baccalaureate bylaw that prohibited her from participating in intercollegiate athletics while enrolled in a graduate degree program at an institution that was not her undergraduate institution. [58] The NCAA denied Smith's request to spend her remaining eligibility playing intercollegiate volleyball at her graduate school despite the fact that the student plaintiff was pursuing her degree program of choice, which her undergraduate institution did not offer. [59] The Third Circuit affirmed a district court's dismissal of Smith's complaint and **[*672]** in doing so focused on the "character of the NCAA's activities" rather than the plaintiff's injuries. [60] Had the court focused on the character of the specific NCAA activity that was at controversy in *Smith*--the post-baccalaureate bylaw--there would have been no reference to the procompetitive presumption because that bylaw did not involve athlete compensation. Instead, the majority in *Smith* characterized all athlete regulation by the NCAA based on the Court's reasoning in *Board of Regents* that gave rise to the procompetitive presumption. [61] Specifically, the court cited *Board of Regents* in finding that NCAA eligibility rules existed to ensure fair competition, [62] enhance public interest in intercollegiate athletics, [63] and, therefore, were not designed to provide the NCAA with a commercial advantage. [64]

Unlike the claims asserted in *Smith*, the controversy before the Sixth Circuit in *Bassett v. NCAA* did involve the NCAA's preservation of amateurism. [65] Although, the plaintiff in *Bassett* was not a student-athlete, but instead a former coach who claimed, among other things, that the NCAA's enforcement of amateurism rules that restricted athlete recruitment violated antitrust law by costing him his coaching career. [66] In dismissing Bassett's antitrust claims, the district court relied on the Third Circuit's ruling in *Smith* that eligibility rules governing amateurism were not related to the NCAA's commercial business activities and, therefore, were not within the purview of antitrust law. [67] Actually, the Sixth Circuit labeled the NCAA's amateurism rules and recruiting restrictions as "anti-commercial" because they promoted the "spirit of amateur athletics." [68]

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[56] *Id. at 1092.*

[57] *See generally* *Smith v. NCAA, 139 F.3d 180 (3d Cir. 1998).*

[58] *Id. at 182.*

[59] *Id. at 183.*

[60] *Id. at 185.*

[61] *Id. at 185-86.*

[62] *Id. at 185.*

[63] *Id. at 186* (citing *NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984)).*

[64] *Id. at 185-86.*

[65] *See generally* *Bassett v. NCAA, 528 F.3d 426 (6th Cir. 2008).*

[66] *Id. at 428.*

[67] *Id. at 430* (citing *Smith v. NCAA, 139 F.3d 180, 186 (3d. Cir. 1998)).*

[68] *Id.* at 433.

In *Agnew v. NCAA*, the Seventh Circuit rejected the interpretation of *Board of Regents* in *Smith* and *Bassett* that led those courts to conclude that the NCAA's regulation of athletes did not involve commercial activity. [69] The facts in *Agnew* involved an antitrust challenge to NCAA bylaws that limited scholarships to one year and prevented schools from offering multi-year scholarships. [70] Twenty **[*673]** years after penning his dissenting opinion in *Banks*, [71] Judge Flaum wrote for the majority in *Agnew*, and in delivering the opinion for the court, he maintained his stance that a labor market exists for college athletes. [72] With this recognition, the court dismissed the non-commercial nature defense and instead found that "[n]o knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a household recruiting program." [73] The problem for the plaintiffs in *Agnew*, however, was that they had asserted nothing resembling a labor market in their amended complaint. [74]

In dicta, Judge Flaum's opinion in *Agnew* addressed the need for preserving amateurism with an interpretation of *Board of Regents* that restricted the procompetitive presumption's reach to protect only those NCAA regulations that courts deemed necessary for preserving the "revered tradition of amateurism." [75] According to the Court in *Agnew*, NCAA regulations that do not safeguard amateurism within NCAA athletics are not essential to product creation and therefore should be subjected to a more searching rule of reason analysis when challenged under antitrust. [76] It should not escape notice that Judge Flaum's description of amateurism as a "revered tradition" was a dramatic departure from his suggestion in *Banks* that the concept of amateurism is "chimerical." [77] This observation aside, it is his opinion in *Agnew* that now controls the Seventh Circuit.

With its description of the procompetitive presumption in *Agnew*, the Seventh Circuit acknowledged the commercial nature of the NCAA's restrictions while still preserving for the NCAA a quasi-exemption from antitrust law that activated anytime amateurism was implicated in an antitrust challenge. It should come as little surprise that the NCAA would rely heavily on *Agnew* in its defense to the antitrust challenges to its amateurism restrictions that were before the Ninth Circuit in *O'Bannon*.

[*674] III. *O'BANNON V. NCAA*: THE NINTH CIRCUIT CHANGES THE GAME AND SETS THE STAGE FOR EMPIRICAL TESTS OF THE PROCOMPETITIVE PRESUMPTION

In 2009, former NCAA All-American basketball player Ed O'Bannon filed a class action lawsuit against the NCAA and the Collegiate Licensing Company (CLC), the entity that licenses the trademarks of the NCAA and a number of its member institutions. [78] O'Bannon alleged that the NCAA's amateurism rules imposed an illegal restraint of

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69 *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 332 (7th Cir. 2012).*

70 *Id. at 332-33.*

71 *Banks v. NCAA, 977 F.2d 1081, 1094-110* (Flaum, J., concurring in part and dissenting in part).

72 *Agnew, 683 F.3d at 346.*

73 *Id. at 340.*

74 *Id. at 347.*

75 *Id. at 342-43.*

76 *Id. at 343.*

77 *Banks v. NCAA, 977 F.2d 1081, 1099* (Flaum, J., concurring in part and dissenting in part).

78 *O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).*

trade under Section 1 of the Sherman Act. [79] Specifically, O'Bannon pointed to the fact that college athletes were unable to financially benefit from the use of their likenesses in television broadcasts and in sport video games produced by Electronic Arts (EA). [80] Judge Claudia Ann Wilken heard *O'Bannon* at the district court level and found that the NCAA's amateurism provisions violated antitrust law because the preservation of amateurism could be achieved through two less restrictive alternatives: (1) allowing schools to extend the NCAA's compensation cap to cover the full cost of attendance, and (2) the provision of $ 5,000 per year in deferred compensation to student-athletes at the close of their intercollegiate athletic careers. [81] The NCAA appealed Judge Wilken's decision to the Ninth Circuit. [82] In deciding *O'Bannon*, the Ninth Circuit deviated from more twenty years of federal district and appellate case law from other circuits that interpreted *Board of Regents* in a way that fortified the NCAA's amateurism rules from rule of reason review. In doing so, the Ninth Circuit in *O'Bannon* opened the door for future classes of student-athlete plaintiffs to challenge the preservation of amateurism via antitrust.

A. The Ninth Circuit Rejects The Quasi-Exemption And The Non-Commercial Activity Defenses

In its appeal, the NCAA argued that Justice Stevens's dicta in *Board of Regents* created a presumption of validity under antitrust law for all NCAA eligibility rules governing amateurism. [83] The Ninth **[*675]** Circuit disagreed with this read of *Board of Regents*, finding instead that Justice Stevens's seminal dicta did nothing more than detail why horizontally-imposed restraints for sport products like the NCAA's were not per se illegal and instead should be subjected to rule of reason analysis. [84] The Ninth Circuit noted that it did not take Justice Stevens's dicta lightly and afforded it the deference due; however, no amount of deference to dicta bound the Ninth Circuit to automatically validate "every NCAA rule that somehow relates to amateurism." [85] Furthermore, the majority found that Justice Stevens' statements on the role of amateurism in college football did not support the "tremendous weight" of the NCAA's argument "even if the language . . . were *not* dicta." [86]

In fact, the Ninth Circuit found that nothing in *Board of Regents* established an antitrust exemption for NCAA regulation of amateurism. [87] In making this finding, the Ninth Circuit also rejected the NCAA's interpretation of a decision from its "sister circuit" in *Agnew*. [88] The Ninth Circuit found that the *Agnew* court read *Board of Regents* too "broadly" in concluding that a procompetitive presumption of validity applies when NCAA bylaws clearly exist to preserve amateurism or to preserve the student-athlete in higher education. [89] The Ninth Circuit found that the *Agnew* court's "procompetitive presumption" depended on a "dubious proposition" that the Court in *Board of*

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[79] *Id.*

[80] *Id.*

[81] *O'Bannon v. NCAA, 7 F. Supp. 3d 955, 999, 1005-06 (N.D. Cal. 2014),* *aff'd in part & reversed in part*, *802 F.3d 1049 (9th Cir. 2015).*

[82] *See* *O'Bannon v. NCAA, 802 F.3d 1049, 1055 (9th Cir. 2015).*

[83] *Id. at 1061-66.*

[84] *Id. at 1063.*

[85] *Id.*

[86] *Id. at 1063-64.*

[87] *Id. at 1064.*

[88] *Id.*

[89] *Id.* (citing *Agnew v. NCAA, 683 F.3d 328, 342-43 (7th Cir. 2012)).* The Ninth Circuit also recognized that like Justice Stevens' version of the presumption in *Board of Regents*, the Seventh Circuit's in *Agnew* was also dicta.

Regents "blessed" the NCAA's amateurism rules as "virtually exempt" from antitrust scrutiny. [90] Conversely, the court doubted that Stevens ever intended to extend antitrust exemption status to any of the NCAA's rules and refused to give the seminal dicta the "aggressive construction" that is found in *Agnew*. [91] For the Ninth Circuit, the NCAA had to prove the validity of its amateurism rules. [92]

The court turned its attention to the possibility that antitrust law did not apply to NCAA eligibility rules regulating student-athletes because those rules were not commercial activity and therefore not **[*676]** subject to scrutiny under the Sherman Act. [93] The court dismissed the non-commercial (or anti-commercial) activity argument as "not credible." [94] Like the Seventh Circuit in *Agnew*, the Ninth Circuit rejected the notion that "big-time" NCAA programs do not anticipate economic gain from their recruitment of high school talents. [95]

Addressing the decisions in *Smith* and *Bassett*, the Ninth Circuit stated that it was not convinced by either to find that the compensation limits were noncommercial. [96] The court found that the post-baccalaureate bylaw in *Smith* could easily be distinguished from compensation limits because the rules regulating athlete compensation actually involved money. [97] To this end, the compensation limits did regulate business activities because the "labor of student-athletes is an integral and essential component of the NCAA's product" and rules setting the price for that labor cut into "the heart of the NCAA's business." [98] The Ninth Circuit admitted that it could not, however, easily distinguish the NCAA rules at controversy in *Bassett* from those before the court in *O'Bannon* because both sets of rules restricted payments to college athletes. [99] Rather, the Ninth Circuit declared that the *Bassett* court's reasoning that "anti-commercial" rules were not commercial was "simply wrong." [100] Accordingly, the NCAA's amateurism regulations at issue in *O'Bannon* were scrutinized by the Ninth Circuit in an application of the rule of reason.

B. The Ninth Circuit Reshapes The Procompetitive Presumption Into A Procompetitive Justification

In subjecting the NCAA's amateurism regulations to the rule of reason review, [101] the *Ninth* Circuit adopted a deferential, rather than skeptical, view of the NCAA's mission in preserving amateurism. [102] **[*677]** Deference

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[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.* at 1064-65.

[94] *Id.* at 1065.

[95] *Id.* (quoting *Agnew v. NCAA, 683 F.3d 328, at 340 (7th Cir. 2012)).*

[96] *Id.* at 1066.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] The purpose of this study concerns the commercial importance placed by courts on amateurism and our examination of *O'Bannon* is limited to this focus.

[102] *Id.* at 1066. The Ninth Circuit's respect for the NCAA's fidelity to preserving amateurism stood in contrast to skepticism from Judge Wilken. In fact, the Ninth Circuit recognized that Judge Wilken "probably underestimated the NCAA's commitment to amateurism" with her refusal to accept the preservation of amateurism as the NCAA's "core principle." Nevertheless, the majority

aside, the fact that the rules have existed for a long time did not matter. [103] The Ninth Circuit cared about whether the amateurism regulations produced a net procompetitive effect. [104] The court found two procompetitive effects produced by the amateurism rules: (a) the preservation of consumer interest in the NCAA's sports products and (b) the integration of academics and athletics. [105] Of the two, only the first putatively affects consumer welfare, but that did not stop the court from valuing both as procompetitive aims. [106]

Perhaps more important to the resolution of future cases than the actual holding is the way in which the court reached its decision that the NCAA's amateurism rules are procompetitive. The court relied on the record as supporting a "concrete procompetitive effect" in preserving the NCAA's version of amateurism based on the concept's appeal to consumers. [107] Furthermore, the court read the district court's reasoning on the appeal of amateurism as "largely consistent" with the conclusion in *Board of Regents* that the "academic tradition" is what differentiated college football from its professional counterpart. [108] Yet, the Ninth Circuit's reading of the record seemingly ignored the fact that the district court did not believe that amateurism serves as a primary driver for consumer demand of college sports. [109] The district court, instead, concluded that what attracts consumers to college sports were aspects unrelated to amateurism, "such as loyalty to their alma mater or affinity for the school in their region of the country." [110] If amateurism was not treated as a "core component" then it could not be treated as essential to product creation and this finding would seemingly remove the regulations from the type of horizontal activity that *Board of Regents* protected from the per se rule's reach.

The Ninth Circuit retreated from the district court's analysis on amateurism's appeal with a recitation of the dicta from *Board of Regents* that established amateurism as essential to product **[*678]** creation. [111] If readers are not careful, the recycling of *Board of Regents* by the court in *O'Bannon* may be misunderstood as nothing more than a deferential reference. Upon closer examination, the Ninth Circuit's reiteration strengthens its insistence that the district court's amateurism analysis was in line with the oft-cited dicta from *Board of Regents*. [112]

Accordingly, the Ninth Circuit has not done away with the presumption from *Board of Regents* that consumer demand in college sport depends on the preservation of amateurism. [113] Based on *O'Bannon*, that presumption now serves as a procompetitive justification rather than an actual presumption of validity. [114] This distinction is not as subtle as it may seem because *O'Bannon* makes clear that the procompetitive presumption will not serve as an

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considered that observation to be irrelevant because the critical question did not involve fidelity to amateurism, but whether amateurism produces a procompetitive effect.

[103] *Id.* at 1073.

[104] *Id.*

[105] *Id.* at 1074.

[106] *See id.*

[107] *Id.* at 1073.

[108] *Id.* at 1074.

[109] *See id.* at 1059; *O'Bannon v. NCAA, 7 F. Supp. 3d 955, 975, 977-78 (N.D. Cal. 2014).*

[110] *O'Bannon, 802 F.3d at 1059* (citing *O'Bannon, 7 F. Supp. 3d at 977-78).*

[111] *Id.* at 1076 (citing *NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984)).*

[112] *See id.*; *see also Bd. of Regents of the Univ. of Okla., 468 U.S. 85 (1984).*

[113] *See O'Bannon, 802 F.3d at 1072-74.*

[114] *See id.*

automatic exemption to antitrust liability for the NCAA when its rules that implicate amateurism are challenged in antitrust actions. [115] The rejection of a quasi-exemption based on the procompetitive presumption means antitrust challenges in the Ninth Circuit to NCAA rules that restrict athlete compensation are now subjected to the more searching rule of reason review. This review allows student-athlete plaintiffs to proffer evidence that discredits the presumption asserting consumers actually care about amateurism. Following *O'Bannon*, the Ninth Circuit instead applies the procompetitive presumption in a way that shifts a burden of *disproof* to student-athlete plaintiffs. [116] In its application of the less-restrictive alternative test, the Ninth Circuit addressed the type of evidence that will not convince it to ignore the presumption that consumers care about amateurism. [117]

C. The Ninth Circuit's Less-Restrictive-Alternative Analysis: A Call For Direct Market Evidence And A Flawed Description Of Cost-Of-Attendance

Recall that the district court found two less-restrictive means for preserving amateurism when it recognized alternatives in (1) the extension of grant-in-aid to cover the full cost-of-attendance and (2) **[*679]** the provision of deferred compensation for use of athlete NILs. [118] The Ninth Circuit agreed with only the first option, and in its analysis of these alternatives the court not only tipped its hand concerning the type of evidence needed to overcome the procompetitive presumption, it also created the opportunity for the collection of that evidence. [119]

In addressing the cost-of-attendance alternative, the Ninth Circuit found that all of the evidence before the district court showed that raising the cap to cover the full cost of attendance would have "virtually no impact on amateurism." [120] The evidence referenced by the Ninth Circuit included testimony from NCAA President Dr. Mark Emmert, who stated at trial that a cost-of-attendance extension would not violate the NCAA's principles because the money would only cover "legitimate costs." [121] Furthermore, no evidence in the record suggested that a cost-of-attendance extension to athletic scholarship allotments would lessen consumer interest in college sports or interfere with the integration of athletes into their academic communities. [122]

The majority in *O'Bannon*, however, rejected the lower court's alternative of deferred compensation for the use of athlete NILs, concluding that this approach was not "virtually as effective" as grant-in-aid in preserving the market for amateur athletics. [123] In doing so, the majority reiterated the presumption from *Board of Regents* that the caps on college athlete compensation preserved consumer demand by preventing college football from morphing into "minor league [football]." [124] The court noted that being a "poorly-paid professional athlete" is not the same as

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115 *Id. at 1063-64.*

116 *Id.*

117 *Id.*

118 *O'Bannon, 7 F. Supp. 3d at 982-83 (N.D. Cal. 2014).*

119 *O'Bannon v. NCAA, 802 F.3d at 1053 (9th Cir. 2015).*

120 *Id. at 1074-75.*

121 *Id. at 1075.*

122 *Id.*

123 *Id. at 1076.*

124 *Id. at 1077.* This section of the majority's opinion again reinforces Justice Stevens' description of amateurism as necessary to the creation of the NCAA's college sport products.

being an "amateur." [125] To reach this conclusion, the majority addressed evidence in the record consisting of a survey conducted by Dr. J. Michael Dennis, testimony from sport management expert Dr. Daniel Rascher, and testimony from television sports consultant Neal Pilson. [126] An examination of how the Ninth Circuit treated the testimonies from Drs. Dennis and Rascher, in particular, provides insight into the type of evidence that is unlikely **[*680]** to persuade the court to deviate from the procompetitive presumption in future cases.

The district court discredited Dennis's survey-designed survey in which participants were asked to provide their opinions on whether college athletes should be paid. [127] The court did so on the grounds that the procedures for the survey primed participants to perceive any form of payments to athletes as illicit. [128] On appeal, the majority highlighted a different threat to the internal validity of Dennis's survey by finding that the survey instrument addressed "the wrong question." [129] The Ninth Circuit noted that the district court relied on Dennis's findings that payments of $ 200,000 per year would alienate the public more than payments $ 20,000 in reaching a less-restrictive alternative that would allow deferred compensation payments limited to $ 5,000 per year ($ 20,000 for four years). [130] However, the Ninth Circuit believed that the district court's use of the survey was misguided because the issue before the court was never whether small cash payments preserved consumer demand more so than bigger cash payments. [131] The issue, as recognized by the Ninth Circuit, was whether paying athletes any sum of money was virtually as effective in preserving amateurism as not paying them at all. [132] The court added that "not paying athletes is precisely what makes them amateurs" and that amateurism is what "differentiates" college sports markets from professional sports markets. [133]

Next, the court addressed testimony from Dr. Rascher, a respected economist with research and teaching specialization in sport management. [134] Rascher explained to the district court how Dennis's survey was no different than surveys used by Major League Baseball in the 1970s that revealed consumer opposition to rising baseball salaries. [135] However, consumer demand in baseball did not dip with the introduction of free agency and dramatic increases in athlete compensation. [136] Perhaps more relevant to the facts at issue in *O'Bannon*, Rascher also explained to the district court how consumer interest in the Olympics did not decrease when amateurism **[*681]** restrictions were lifted. [137] In fact, Rascher's testimony proved that consumer interest in the Olympics increased substantially after the games were opened to professionals. Like college athletics, the concept of amateurism was also once considered as central to the Olympic ideal; it was one of the core principles of the

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125 *Id.*

126 *Id. at 1077-78.*

127 *Id. at 1059.*

128 *Id.*

129 *Id. at 1077.*

130 *Id.*

131 *Id.*

132 *Id.*

133 *Id. at 1076* (quoting *NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 102 (1984)).*

134 *Id.* at 1077.

135 *Id.*

136 *Id.*

137 *Id.*

modern games. [138] Yet, increased commodification of the postmodern Olympics through media right sales and sponsorships resulted in claims of hypocrisy and exploitation that ultimately pressured the International Olympic Committee (IOC) to lift its amateurism restrictions. [139] The IOC's decision to allow professionals to play in the Olympics drew strong criticism from those who believed amateurism to be necessary and essential to the operation of the games, with one pundit cautioning that "the [Olympics] will be destroyed within eight years." [140] The NCAA and its *amici* mongered similar fears in their defenses of amateurism with nothing more than their opinions and the results produced from Dr. Dennis's dubious survey to support their cause. However, neither the lack of credible evidence from the NCAA nor the existence of Dr. Rascher's empirically supported examples influenced the Ninth Circuit's decision concerning the importance consumers place on amateurism. Instead, the majority clung to its conclusion regarding consumer interest in amateurism and casually dismissed Dr. Rascher's comparisons with the simple statement that "professional baseball and the Olympics are not fit analogues to college sports." [141] Based on the court's treatment of Dr. Rascher's testimony, only *direct evidence* of amateurism's influence on consumer interest in intercollegiate sports has the potential to persuade the Ninth Circuit.

The Ninth Circuit had a bit more difficulty with testimonial evidence produced by the NCAA's witness, a former television executive named Neal Pilson. The NCAA held Pilson out as an expert on consumer interest in college athletics. Pilson opined that if college athletes were paid for performance, then they would no longer be **[*682]** amateurs, which would "harm the student-athlete market." [142] When pushed as to whether a line existed as to how much compensation could be afforded without harming the market, Pilsner responded that he was "not sure." [143] He eventually stated that "a million dollars would trouble" him, but "$ 5,000 wouldn't." [144] The court pointed to Pilson's testimony as the "sole support" for the district court's $ 5,000 deferred stipend for the use of NILs. [145] The Ninth Circuit took issue with the district court's finding, concluding that there was "simply not enough" evidence to justify a "far-reaching conclusion" that paying students $ 5,000 per year would be "as effective" in preserving amateurism within NCAA athletics. [146]

However, the Ninth Circuit's reasons for rejecting Pilson's testimony and the deferred compensation alternative seemingly contradict the court's reasoning concerning the cost-of-attendance alternative, as well as its interpretation of the procompetitive presumption. Based on the court's reasoning in *O'Bannon*, the difference between offering college athletes education-related compensation and cash sums untethered to educational

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[138] Michael R. Real, *The Postmodern Olympics: Technology and the Commodification of the Olympic Movement*, 48 QUEST 9, 6 (1996).

[139] *Id.* Very similar to the Olympics, NCAA football and men's basketball at the Division I levels have also ballooned into a multi-billion dollar industries due, in large part, to the leveraging of media rights for television broadcasts. *See* Baker & Brison, *supra* note 35, at 331.

[140] Patrick Hurby, *The Olympics Show Why College Sports Should Give Up on Amateurism*, ATLANTIC (July 27, 2012), http://www.theatlantic.com/entertainment/archive/2012/07/the-olympics-show-why-college-sports-should-give-up-on-amateurism/260275/.

[141] *O'Bannon, 802 F.3d at 1077.*

[142] *Id. at 1077-78.*

[143] *Id. at 1078.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

expenses was a "quantum leap." [147] The court found that once college athletes are paid cash sums for their performance, then a line would be crossed from which there is no return. [148] In that event, the court believed that the NCAA would have surrendered its amateurism principles entirely and college football would be reduced to "minor league status." [149] However, the Ninth Circuit found that the cost-of-attendance calculation for each member institution set a reasonable limit for what colleges could cover for student-athletes while allowing the NCAA to preserve consumer interest in its sports products. [150] The court's reasoning on the cost-of-attendance issue is inconsistent with its application of the procompetitive presumption because cost-of-attendance stipends are, in fact, cash payments to student-athletes that lack any tether to educational expenses.

The costs associated with attendance under cost-of-attendance formulas were designed to provide students and parents with an estimate of the financial amounts in addition to tuition, fees, books, **[*683]** and room and board that are thought necessary to attend a particular institution. [151] Cost of attendance varies from institution to institution, but always includes some mix of personal expenses as part of the equation. Personal expenses covered by the cost of attendance may include materials needed for matriculation at the institution (e.g., pens, paper, and laptops). [152] The personal expense aspect of the cost of attendance is a loose calculation generally formulated to capture the cost of living as a student at a particular institution. [153] With that in mind, the living expenses considered could also encompass payments for personal items and services like cell phone bills and laundry. Some schools even recognize social engagement as a consideration in their cost-of-attendance estimates (i.e., the occasional night out with friends). [154]

When student-athletes are provided with their cost-of-attendance stipends, they may use that money to purchase items necessary for class like bluebooks or calculators. It's equally possible that many will instead spend their stipends on personal items like video games and Beats by Dre(R). [155] Neither the NCAA nor its member institutions have any control over how student-athletes spend their stipends. The Ninth Circuit in *O'Bannon* warned against paying students cash for their athletic performances, [156] but that's exactly what is done with the provision of cost-of-attendance stipends. The fact that the amounts for the payments were calculated in consideration of how much it costs to attend a university does not change the fact that the payments are, effectively, cash-in-hand for student-athletes.

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147 *Id. at 1078-79.*

148 *Id.*

149 *Id. at 1079.*

150 *Id. at 1078-79.*

151 For a description of cost-of-attendance calculations, see *Financial Aid 101: Understanding Your Cost of Attendance*, UNIV. DENVER, *https://www.du.edu/financialaid/internal/emails/101/coa.html* (last visited Jan. 31, 2017).

152 *Id.*

153 Cost-of-attendance amounts vary per university but range from $ 1,000 to $ 6,000. For a more detailed explanation of the amounts students receive, see Jon Solomon, *Cost of Attendance Results: The Chace to Pay College Players*, CBSSPORTS.COM (Aug. 20, 2015), *http://www.cbssports.com/college-football/news/cost-of-attendance-results-the-chase-to-pay-college-players/*.

154 For an example, see *Cost of Attendance*, UNIV. OR., *https://financialaid.uoregon.edu/cost_of_attendance* (last visited Jan. 28, 2017).

155 For a discussion of the discretionary spending of cost-of-attendance stipends by student-athletes, see Steve Berkowitz and Andrew Kreighbaum, "College Athletes Cashing in with Millions in New Benefits," *USA Today*, August 19, 2015.

156 *O'Bannon v. NCAA, 802 F.3d 1049, 1078 (9th Cir. 2015).*

Furthermore, NCAA member institutions set their own cost-of-attendance amounts and this has led to variances among programs that now influence student-athlete recruitment. In fact, some NCAA **[*684]** coaches have alleged that the cost-of-attendance stipends have disadvantaged their recruitment of student-athletes because the institutions for which they coach offer less through stipends than rival institutions provide. [157] Additionally, claims have also been made that some member institutions have increased their cost-of-attendance estimates with the design of gaining recruiting advantages in NCAA sports. [158] Member institution use of cost-of-attendance stipends as a recruiting tool produces the very type of financial competition for athletes that the NCAA's compensation limits serves to prevent. [159]

IV. AN EMPIRICAL ANALYSIS OF CONSUMER IMPACT ON NCAA AMATEURISM RULES

This study follows the Ninth Circuit's reasoning in *O'Bannon* by being the first to directly test the strength of the procompetitive presumption through an examination of the effect that an increase in stipends has on consumer interest in NCAA football. A study of this type is now possible because the amounts provided to college athletes changed for the first time in forty-two years in August 2015.

Recall that Justice Stevens's procompetitive presumption posits that the preservation of consumer interest in college football requires that student-athletes not receive cash payments in exchange for their athletic participation in NCAA sports. [160] For this reason, NCAA eligibility rules that restrict student-athlete compensation to cover only educational expenses have been considered by courts as "essential" to the creation of the NCAA's products, college football in particular. An essential component of a product is something that **[*685]** should result in consumer reactions when modified. [161] If consumers prefer a product component but their consumption of that product is not dependent on the component remaining unchanged, or existing at all, then the component is not essential to product creation in a way that widens consumer choice. [162] If caps that limited athlete compensation to direct academic costs are "essential" to the creation of college football, making it a distinct product alternative to professional football, then a modification that increases compensation to include cash payments that students are free to use for nonacademic purposes should produce a negative consumer response.

V. RESEARCH DESIGN AND DATA COLLECTION

To analyze how consumer interest may fluctuate based on the increase in stipends given to NCAA student-athletes in 2015, this research employs regression analysis, a statistical technique commonly used in fields such as economics and political science to examine how changes in a dependent variable are related to independent

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[157] Jake New, *More Money . . . If You Can Play Ball*, INSIDE HIGHER ED (Aug. 12, 2015, 3:00 AM), https://www.insidehighered.com/news/2015/08/12/colleges-inflate-full-cost-attendance -numbers-increasing-stipends-athletes.

[158] *Id.* (quoting University of Alabama football coach Nick Saban as saying, "You can't create a system that really can almost promote fraud. Even in the NFL, they have a salary cap. When we don't have a cap that makes it equal for everybody, it really goes against everything we've tried to do in the NCAA that we've tried to do for parity." Soon after Saban made those remarks, Alabama recalculated its cost-of-attendance and now offers student-athletes one of the largest amounts in NCAA football.).

[159] The NCAA's rules were necessary because without them "no competitor would assume the restraints on athlete compensation unilaterally." *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984).

[160] O'Bannon, 802 F.3d at 1079 (citing Bd. of Regents of Univ. of Okla., 468 U.S. at 102).

[161] *See* Mark Baimbridge et al., *Satellite Television and the Demand for Football: A Whole New Ball Game*, 43 SCOT. J. POL. ECON. 317, 330 (1996); *see also*, Borland & MacDonald, *Demand for Sport*, 19 OXFORD REV. ECON. POL'Y, 4, 481.

[162] Borland & MacDonald, *supra* note 161, at 481.

variables. [163] Specifically, regression analysis has been defined as an "analysis of numerical data consisting of values of a dependent variable (response variable) and of one or more independent variables (explanatory variables)." [164]

While it is possible to have a regression with just two variables (one being a dependent variable, and the other an independent variable), researchers more commonly use multiple regression analysis; that is, an analysis of one dependent variable and two or more independent variables. [165] The use of multiple explanatory variables allows researchers to control for multiple factors, thus providing a more complex understanding of statistical relationships. [166] Within empirical research analyzing economic demand, including the examination of the demand for sports products, multiple regression analysis is often employed as the main statistical technique within the academic literature. [167]

[*686] Furthermore, multiple regression analysis is extremely beneficial for those conducting research on complex subjects such as the sales of goods in a marketplace, public policy, and other multifaceted issues, as it allows them to build more complex models with multiple variables through which the researcher can examine statistical relationships. [168] Indeed, previous legal studies have discussed the need for and value of regressions in providing information that is helpful in both legal cases and academic literature. [169] As such, the use of regressions as part of an econometric analysis is widely considered to be a rigorous process that requires a great deal of expertise and knowledge of both economics and statistical methods. [170] Importantly, this statistical technique has been recognized as a legitimate methodology to analyze data within antitrust cases for the last several decades, [171] as antitrust deals with the nexus of economics and the law.

VI. SPORTS DEMAND AND METHODOLOGY

Turning our focus to the specific context of this paper--the economics of demand for sports products--we begin by considering the lineage of academic studies focused on this topic. Numerous studies have examined the demand for sports, with a primary focus on the use of attendance numbers to measure consumer interest. [172] Though there has been a growth in the last several decades, the literature itself dates back to the 1950s [173] and *196*0s,

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[163] John N. Matheson, *The Modern Law of Corporate Groups: An Empirical Study of Piercing the Corporate Veil in the Parent-Subsidiary Context*, 87 N.C. L. REV. 1091, 1134 (2009).

[164] *Id. at 1133-34.*

[165] *Id.*

[166] *Id. at 1106-07.*

[167] Borland & MacDonald, *supra* note 161, at 483.

[168] Franklin M. Fisher, *Multiple Regression in Legal Proceedings*. 80 COLUM L. REV. 702, 702 (1980).

[169] Keith Leffler & Ted Tatos, *Competitive Injury and Damages Under the Robinson-Patman Act*: Morton Salt *and Statistical Analysis*, 60 ANTITRUST BULL. 318, 329 (2015).

[170] Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048, 1049-50 (1985).

[171] Leffler & Tatos, *supra* note 169, at 329.

[172] Borland & MacDonald, *supra* note 161, at 483.

[173] Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. POL. ECON. 242, 242 n.1 (1956).

[174] when economists began to consider the uniqueness of the sports industry. Following these seminal theoretical works, economists in the 1970s and 1980s began to analyze data from professional and collegiate sports leagues across the world to try and better understand the intricacies of the sports industry. [175]

[*687] Due to various important ramifications that demand has for the sports industry, the interest that consumers have for sports products has received a great deal of attention within the literature. [176] Generally, sports demand research has placed its primary focus on live attendance for sporting events, though in recent years there has been a growth in analyzing how individuals consume sports through television and other digital channels. [177] Consider this lineage of research studies from the perspective of a team, owner, and league: demand is of high interest because sports consumption of telecasts and tickets is a primary source of revenue for both professional and collegiate sports organizations. [178] Thus, understanding demand allows organizations to make decisions that help increase revenues [179] or meet other organizational goals. [180] Furthermore, it has been argued that demand is not just about understanding the ability to maximize interest and profits, but that it also has the potential to impact the on-field performance of teams. [181] Since increasing revenues allows sports organizations to have greater purchasing power to acquire talent, facilities, equipment, coaching, and so forth, ticket sales and broadcast rights have become a vital part of helping teams to compete on the field. [182] Finally, the demand for sports products is also important to other stakeholders, such as marketers wishing to attach their own goods to the popularity of sports, or even politicians making decisions in regard to whether a team's popularity justifies spending public funds to finance team facilities. [183]

As the core focus of this paper is an example of how consumer interest for NCAA sporting events may be influenced by student-athlete compensation, the following sections will provide an empirical analysis of potential statistical relationships. In order to accomplish this, a model is created to analyze the demand for NCAA Division-I **[*688]** Football Bowl Subdivision Power Five conference regular season games during the 2014 and 2015 seasons. This is accomplished by identifying those key variables which theory dictates should be important in examining the demand for college football. [184] Considering the theoretical backing and the specific focus of this research, this hypothesis is formulated for this study:

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[174] Walter C. Neale, *The Peculiar Economics of Professional Sports: A Contribution to the Theory of the Firm in Sporting Competition and in Market Competition*, 78 Q. J. ECON. 1, 1 (1964).

[175] Borland & MacDonald, *supra* note 161, at 478-79.

[176] *Id.* at 480.

[177] Arne Feddersen & Armin Rott, *Determinants of Demand for Televised Football: Feature of the German National Football Team*, 12 J. SPORTS ECON. 352, 353 (2011).

[178] John L. Fizel & Randall W. Bennett, *The Impact of College Football Telecasts on College Football Attendance*, 70 SOC. SCI. Q. 980 (1989).

[179] Dennis Coates & Brad R. Humphreys, *Ticket Prices, Concessions and Attendance at Professional Sporting Events*, 2 INT'L J. SPORT FIN. 161, 162 (2007).

[180] Brian P. Soebbing & Nicholas M. Watanabe, *The Effect of Price Dispersion on Major League Baseball Attendance*, 28 J. SPORT MGMT. 433, 433 (2014).

[181] Nicolas Scelles et al., *My Team is in Contention? Nice, I Go to the Stadium! Competitive Intensity in the French Football Ligue 1*, 33 ECON. BULL. 2365, 2367 (2013).

[182] Borland & MacDonald, *supra* note 161, at 490.

[183] *Id.* at 480.

[184] *Id.* at 481.

H1: There is no statistical relationship between the consumer interest for NCAA college football and increases in stipends for student-athletes.

This paper specifically uses a null hypothesis as the basis for the research, as the theoretical and empirical literature do not suggest that changes in payments or stipends for athletes will significantly change fan interest in sporting contests.

Next, it is necessary to identify variables to represent the different categories being measured, as well as to collect data so that empirical results can be estimated using regression analysis. [185] In this research, the dependent variables [186] are those that measure the demand for home college football games. Traditional sports economics studies have long focused on using attendance data to measure the demand that consumers have for sporting events. [187] Thus, the first model within this paper measures demand through the use of the attendance numbers announced for each institution's home games. [188] Specifically, this data was gathered by going to the box scores and game statistics of every home football contest, and then finding the attendance number reported by the school. These numbers were then cross-checked against other major sports news websites such as ESPN.com to ensure that the attendance numbers were consistent.

The second form of demand analyzed is the viewership numbers for telecasts of NCAA college football games. [189] In this, the estimated number of households that viewed each game is used as the measure of demand, [190] with these values being derived from the ratings of each game by the television channels. It is important to note that less data **[*689]** is available for television demand, as several networks that broadcast college football games do not publish their ratings or viewership numbers. Thus, the dependent variables in this study are attendance and the television viewership numbers, with each variable included separately in their own regression model. [191]

Turning to independent variables, various factors are included to control for variables which may be significant in regards to consumer interest in college football. [192] First, in measuring the quality of the home team, three specific variables are used. [193] These include: the total number of wins a team has coming in to a game, the number of losses, and a variable measuring the Massey ranking of the home team before each game. [194] The Massey

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185 *Id.* at 483.

186 For more on dependent variables see Fisher, *supra* note 168, at 704.

187 Babatunde Buraimo, *Stadium Attendance and Television Audience Demand in English League Football*, 29 MANAGERIAL & DECISION ECON. 513, 513 (2008).

188 Borland & MacDonald, *supra* note 161, at 487.

189 *Id.*

190 Scott Tainsky & Chad D. McEvoy, *Television Broadcast Demand in Markets Without Local Teams*, 13, J. SPORTS ECON. 205, 253 (2012).

191 Curiously, the average viewership value for televised NCAA football games in our data was about 2.4 million, indicating that about 2.4 million households (not individuals) watched these games. The standard deviation of NCAA football telecasts was 2.2 million, which indicates that about 68% of the NCAA games played had household viewership numbers between 200,000 and 4.6 million. These relatively lower numbers may possibly be attributed to the fact that there are numerous college football games televised at a single time, and thus it may be hard to draw a large number of viewers to any specific game.

192 Mark D. Groza, *NCAA Conference Realignment and Football Game Day Attendance*, 31, MANAGERIAL & DECISION ECON. 517, 522 (2010).

193 *Id.*

194 Borland & MacDonald, *supra* note 161, at 489.

ranking was also used to measure the strength of each opposing team. [195] To account for consumer preferences for NCAA college football games, [196] our study developed measures for the differences in conference affiliation, the varying stipend amounts that student-athletes received, and how games were broadcast on television. A dummy variable is used to capture whether a team is a member of any of the Power Five conferences: the Atlantic Coast Conference (ACC), Southeastern Conference (SEC), Pac Twelve, Big Twelve, or Big Ten. [197] As these conferences represent different regions with varied traditions and history with regard to consuming and watching college football, [198] these measures of consumer preference not only help to control for differences in conference affiliation, but also the makeup of the fan base for each of these conferences.

The next variable included within this research is the dollar amount increase in stipends (*SAStipend*) that student-athletes received from the previous academic year. For 2014, the first year of **[*690]** the data set, there was no increase for teams from 2013, and thus 2014 values are recorded at $ 0. However, after the NCAA passed new regulations allowing individual conferences and schools to decide new stipend amounts to help cover the cost of attendance, [199] there was a good deal of variation in the increased dollar figure that student-athletes received. Using data gathered from *USA Today*'s report on stipends, [200] this research uses these values to model the different amounts of additional money which schools have paid out to each student-athlete. The two-year average of stipend additions is about $ 1,650, but the value is skewed by the fact that the first year had no increases. Thus, focusing just on the increased payments from 2015, the average value across all schools was $ 3,486 per student. Based on data reported by university athletic departments, the lowest increases were $ 1,250 at Boston College and $ 1,270 at Michigan State. At the opposite end of the spectrum, the highest paying schools were both from the SEC conference, with Auburn paying an additional $ 5,586 on average to student-athletes, and Tennessee providing an extra $ 5,666. [201]

The last two consumer preference variables are only included in the second model, focused on television household viewership numbers. [202] Specifically, two dummy variables are created. The first, *OverAir*, measures those channels that are broadcast over the air at no cost to the consumer: ABC, NBC, CBS, and Fox. [203] Conversely, the *Cable* variable indicates when an NCAA football game is shown on a paid channel, such as ESPN, FoxSports, etc. Notably, there were many more games in our data set which were shown on cable television, as these channels are often dedicated to sports, dramatically increasing the number of games that consumers can watch. At the same time, the *OverAir* channels often get the premier matchups for teams because the games they broadcast are shown at peak viewership times. Thus, these variables not only help control for the differences in cost between these channels, but also account for the varied nature of programming and matchups. [204]

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[195] *Id.*

[196] *Id.* at 481.

[197] Groza, *supra* note 192, at 522.

[198] *Id.* at 519.

[199] Berkowitz & Kreighbaum, *supra* note 155.

[200] *Id.*

[201] Berkowitz & Kreighbaum, *supra* note 155.

[202] Borland & MacDonald, *supra* note 161, at 487.

[203] *Id.*

[204] *Id.*

Continuing discussion of variables in our model, the next group includes those which measure the differences in the quality of viewing. [205] First, weather data for each game was gathered to **[*691]** measure temperature, wind speed, and whether it was clear, raining, or snowing during each game. [206] Next, timing variables were included to take into account the month of the year and the day of the week in which each game took place. These are all dummy variables for the following categories: *August, September, October, November, December, Weekday*, and *Weekend*. These variables are important, as the timing within a season often helps to determine the consumer interest in games. [207] For example, many of the prime matchups in conferences occur during the latter months of the football season, while the Power Five teams in this data set play weaker non-conference opponents (often dubbed "Cupcake" opponents for their relative lack of strength) in August and September. [208] Thus, one would expect that there would naturally be a greater level of interest in games that were played later in the season, especially in the months of November and December.

The last grouping of factors in the function represent the market potential for each school. [209] In this regard, the present study follows previous research, [210] by employing the adjusted per capita income (*AdjPCI*) and population (*Population*) for the region in which the team's academic institution's main campus is located. [211] Data for these variables was gathered from the Bureau of Economic Analysis (BEA) data site. Notably, the regional definitions which were used were not city level data, but rather the metropolitan and micropolitan statistical areas (MSA). [212] Research in sports economics often use these regional definitions for the market for sports teams, as they provide a more comprehensive picture of the team's market area. [213] Thus, academic studies tend to avoid city level data in favor of data from broader regions that span multiple counties which are considered to be within a reasonable traveling distance. [214]

While the economic measures of a local market are important in accounting for the potential consumers within the academic institution's area, it is also important to control for the actual size of the school, as well as the financial resources available to the athletic **[*692]** department. [215] As students who attend a university may be more inclined than other consumers to attend games (and in some cases are provided with free or reduced price tickets), it is critical to account for the number of individuals who attend the institution. [216] To account for that factor, the *Enrollment* variable measures the number of students who are enrolled full-time in an academic institution. Additionally, as the athletic department at each institution will have varying financial power because of their prior

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[205] *Id.* at 481.

[206] *Id.*

[207] *Id.*

[208] Groza, *supra* note 192, at 519 (discussing this imbalance in college football).

[209] Groza, *supra* note 192, at 519.

[210] Coates & Humphreys, *supra* note 179, at 166.

[211] Borland & MacDonald, *supra* note 161, at 481.

[212] Coates & Humphreys, *supra* note 179, at 166.

[213] *Id.*

[214] Borland & MacDonald, *supra* note 161, at 481.

[215] Groza, *supra* note 192, at 524.

[216] *Id.*

success, consumer interest, television contracts, and so forth, [217] this research also includes the yearly adjusted revenue (also in 2015 dollars) for each athletic department. This variable is necessary, as athletic departments that have more revenue (*AdjRevenue*) may have larger market potential than other schools because of things like better television contracts. Furthermore, they may have a greater ability to market, build facilities, and attract talent, which in turn could lead to better performance on and off the field. [218] The data for *Enrollment* and *AdjRevenue* were both gathered from the Equity in Athletics Database, a website that reports enrollment, financial data, and other information for a university and its athletic department as part of their Title IX compliance efforts. [219] Finally, the last variable is *Capacity*, which measures the yearly capacities for the venue in which each home game was played. [220] With all the variables now defined for use in the empirical models within the research, the subsequent sections of the paper will discuss the specific treatment of the data, the regression methods used, and the estimated results from the models.

Lastly, an understanding of our empirical methodology requires special attention to, and discussion of, the nature and time span of the data set employed. [221] Whereas many studies collect and examine data which does not include the same entities repeating their appearances, an examination of sports teams over time means that most teams will **[*693]** appear multiple times. [222] A data set of this nature, where an identified group (in this case, NCAA football teams) appears many times, is known as a panel data set. [223] It is necessary to use specific methods when estimating results from the panel data.

Generally, when dealing with panel data, it is important to consider the type of effects which will be used in the estimation process. [224] The ideal situation is one where the researcher estimates results using both fixed effects (FE) and random effects (RE), and then compares the results of these regressions using a Hausman test. [225] Thus, a Hausman test was conducted on models with fixed and random effects, with the tests both returning insignificant results at the five percent level ($p < 0.05$). [226] These results and other statistical tests and corrections indicate that it is appropriate to run the models with random effects. [227] Therefore, the final models for both attendance and television demand use a Generalized Least Squares (GLS) regression with random effects. [228]

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[217] Revenues reported by NCAA athletic departments are often used in econometric studies to control for financial strength. *See, e.g.*, Randy R. Grant, John C. Leadley, & Zenon X. Zygmont, *Just Win Baby? Determinants of NCAA Football Bowl Subdivision Coaching Compensation*, 8, INT'L J. SPORT FIN. 61, 69 (2013).

[218] *Id.*

[219] *EADA Equity in Athletics Data Analysis*, U.S. DEP'T OF EDUC., https://ope.ed.gov/athletics/#/. This data is all available to the public.

[220] The use of capacity to control for the size of stadiums is common with sport demand studies. *See* Borland & MacDonald, *supra* note 161, at 481 (to be an important determinant of demand).

[221] Borland & MacDonald, *supra* note 161, at 483.

[222] *Id.*

[223] *Id.*

[224] Nicholas M. Watanabe, Grace Yan, & Brian P. Soebbing, *Major League Baseball and Twitter Usage: The Economics of Social Media Use*, 29, J. SPORT MGMT. 619, 626 (2015).

[225] DAMODAR N. GUJARATI, BASIC ECONOMETRICS 754-55 (4th ed. 2000).

[226] Watanabe, *supra* note 224, at 626.

[227] The use of a GLS regression is also beneficial for these models, as it allows the inclusion of time-invariant factors, whereas a panel OLS regression with fixed-effects would automatically exclude those variables that do not change between time periods. Additionally, the results were also run using standard errors that were clustered by team. The use of clustered standard errors is a useful statistical technique that allows for the grouping of observations which have similar characteristics. In this manner, sport

VII. RESULTS

First, the results for the live attendance viewership model can be found in Table 1. After cleaning the data, the model included 697 **[*694]** team-game observations, with each observation representing the home-game matchup for a team. The R-squared value for this model returned an overall value of 0.9034, which means that this model explains about ninety percent of the variation in the data. [229] Focusing on the main variable of interest within this study, we found that the stipend (*SAStipend*) did not have a significant statistical relationship with attendance. [230] In other words, there is no discernable change in attendance based on changes in the amounts that schools paid to their student-athletes. Considering the remaining consumer preference factors measuring team membership in different conferences, the model found that the three conferences of the Big Twelve, ACC, and SEC were all statistically insignificant, while the Pac Twelve was negative and significant. As the reference variable was *BigTen*, this means that there is an observable decline in attendance for Pac Twelve football games when compared to the other power conferences in NCAA football. [231]

Next, focusing the on-field strength of teams, the variable measuring home-team wins was insignificant, while the controls for the number of losses and the Massey ranking of a team had a negative relationship with attendance at the one percent level. This means that as teams accumulated more losses, consumers tended to lose interest, with each loss causing an average reduction of 662 attendees. [232] At the same time, because the Massey ranking works in reverse order, the negative relationship indicates that the higher a team's ranking, the greater their attendance. Furthermore, having the opposing team ranked highly (closer to 1) was also significantly related to increased attendance, suggesting that games have higher demand when both home and away teams offer better quality. [233]

The next set of variables measuring economic factors such as market power were all insignificant. That is, there was no statistical relationship between attendance and income level, population, enrollment, and athletic department revenue for the institutions **[*695]** measured in this dataset. Looking at the quality of viewing, we found that all the weather related variables were also insignificant. This suggests that fans who attend NCAA Power Five conference football games are not deterred by weather conditions. [234] Similarly, in examining the factors controlling for the timing of the sporting event, we found that the day of the week was insignificant (when measuring

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researchers use clustering as a way to treat observations of individual teams as being similar to one another in panel data, as is done in the models estimated in this research. Finally, the data was tested for any potential multicollinearity which may exist between variables included in both of the models. By examining the Variance Inflation Factors (VIF) for all of the variables in this dataset, it was found that some of the month dummy variables had high VIF and could thus potentially affect the estimated results from the regression models. From this, additional models were run which omitted the problematic variables and found that there was no significant difference in the results for all models. Thus, the final models presented in this research include all the month variables because their presence does not greatly affect the results.

[228] Watanabe, Yan, & Soebbing, *supra* note 224, at 626.

[229] The R-squared value reported the observed variation in the data, which is commonly done in sports economics research. *See* Grant, Leadley, & Zenon, *supra* note 217, at 72.

[230] *See* Fisher, *supra* note 168 (discussioning the significance of regression results and their meanings).

[231] Research by Groza, *supra* note 192, at 524, highlights that there may be some observable difference between conferences in regards to attendance demand.

[232] Similarly, Gregory A. Falls & Paul A. Natke, *College Football Attendance: A Panel Study of the Football Bowl Subdivision*, 46, APPLIED ECON. 1093, 1100 (2014), found that as NCAA teams had more wins, attendance grew.

[233] Previous research by Groza, *supra* note 192, at 525, likewise found that as teams were ranked higher, fans were more inclined to attend games.

[234] Falls & Natke estimated similar results in regards to temperature having no effect; however, they do find that cloud cover and precipitation caused a decline in consumer interest in college football. Falls & Natke, *supra* note 232, at 1100.

weekday versus weekend), [235] but that most of the month variables were negative and significant. This result suggests that the games in December, which are often the deciding games for many teams to be placed in bowl games or even the College Football Playoff, may draw larger attendance. Notably, attendance in prior months relative to December does generally increase as the season progresses, indicating that fan interest does build throughout the NCAA football season. Finally, the capacity variables controlling for the supply of seats available for consumers was positive and significant, meaning that stadiums with more seats also had higher attendance.

Turning to the second model estimated in this research, the analysis provides an understanding of variables which are important in determining demand for television viewership of NCAA football games. Notably, the data set for television demand has 368 observations, a value lower than the live-attendance model because not all games were televised on channels that recorded and published the number of households that watched games. Finally, the overall R-Squared for the GLS regression from Table 2 returned a value of 0.6447, meaning that the model explained about sixty-four percent of the variation in the data.

First, focusing on the variable of interest, student-athlete stipends, the regression returned similar results as the previous model in that there was no significant relationship with television viewership. Thus, both the models for live attendance and television viewership find no statistical evidence that the increases in stipends have any relationship with consumer interest in college football games. Next, controlling for the conference in which the teams played, the *BigTwelve* and *PacTwelve* variables were negative and significant in relation to television viewership. This means that these two conferences had significantly less households watch their games in **[*696]** comparison to the other Power Five conferences. [236] The last set of consumer preference variables accounted for whether a game was on cable or the free channels. [237] We found that having games on free channels was positive and significant. That is, NCAA football games televised on cable had lower viewership, which would be expected as the large number of games on these channels competing in similar time slots would likely disperse consumer interest.

Moreover, focusing on the on-field performances and quality of teams, the home team's win-loss record had no connection to viewer interest. [238] Rather, the variables measuring the Massey ranking for both the home team and the away team were negative and significant, indicating that viewers at home were most attracted to games that had two highly ranked teams playing against one another. [239] Next, none of the economic variables measuring market size had any significant relationship with attendance, except for the revenue of the athletic department. In other words, the positive relationship between athletic department revenues and television viewership would seem to indicate that those teams which bring in more money are also the ones whose games had higher viewership. [240] These findings could also be a result of the fact that television numbers are measured at the national-level, and thus measuring local markets may not capture the larger audience for NCAA Power Five football games.

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[235] These findings are in line with the results of Falls & Natke, *supra* note 232, at 1100.

[236] As noted before, Groza, *supra* note 192, at 524, finds that there may be some observable difference between conferences in regards to attendance demand.

[237] *See* Feddersen & Rott, *supra* note 177, at 361 (note that the channel a game is on may have an impact on consumer interest in watching a game).

[238] These findings run counter to our results for live-attendance, as well as prior studies. *See, e.g.*, Falls & Natke, *supra* note 232, at 1100.

[239] The result that rankings for home and away teams is similar to that of the attendance model presented earlier, as well as other research on consumer interest in college sport, including Groza, *supra* note 192, at 525.

[240] *See* Grant, Leadley, & Zenon, *supra* note 217, at 72 (arguing that revenues are an important determinant in understanding behaviors of the college sport marketplace).

Furthermore, in considering the quality of viewing, all of the weather-related variables were insignificant, probably because households viewing games will not be affected by weather conditions when they are watching the game at home. [241] The results from the television model also found that day of the week was not a significant determinant of television viewership of NCAA football games. [242] **[*697]** While the natural expectation would be that weekend games would be higher, the early season premier matchups on weekdays and the sheer volume of games on weekends may lead to weekday games actually getting higher household viewership numbers than expected. For the variables measuring months, all months were insignificant.

As a last step in the analysis for this research, a Tobit (censored) regression is included to take into account that some of the observations for the dependent variables could be skewed and thus need to be accounted for. [243] This is especially the case in sports leagues where some teams may experience a large number of games which are sold out, and thus creates attendance observations which are skewed to the right-hand side of a distribution. [244] In order to run the Tobit regression, the same statistical software, data, and model as the previous regressions was employed, except in this case the capacity variable was removed from the models. Tobit regressions were thus estimated for both attendance and television viewership.

The results for the television viewership model reported no significant differences from the previous models, including the *SAStipend* variable which remained insignificant. However, the Tobit regression for live attendance (Table 3) found a positive relationship between attendance and the payment amounts for student-athletes. Thus, the findings from this model suggests that as payments to student-athletes increase, consumer interest in attending games rises, but that there is no significant change in television viewership.

CONCLUSION

While many variables were found to influence the consumption of NCAA Power Five football games, the first change in student-athlete compensation in forty-two years did not. At a minimum, the results from this study validate the Ninth Circuit's determination in *O'Bannon* that increases to student-athlete compensation that include the full cost-of-attendance preserve consumer interest in college football in a way that is less restrictive than the limits imposed by grant-in-aid. For that reason alone, the findings produced by this study contribute significantly to the literature concerning the application of antitrust law to NCAA regulations. Additionally, inferences can also be drawn that rebut the procompetitive presumption that consumer interest in college football is influenced **[*698]** by the NCAA's caps on student-athlete compensation. Inferences that we drew from the results not only extend the literature by making this the first study to produce economic evidence that contradicts the procompetitive presumption, they also serve as valuable ammunition for current and future antitrust actions that challenge the NCAA's caps on student-athlete compensation.

First, if consumers perceive student-athlete compensation limits as essential to the creation of the NCAA's products, then a significant increase in student-athlete compensation should have produced a consumer reaction. After all, an essential component of a product is something that should result in consumer reactions when modified. [245] Yet, the results revealed no change in consumption of Power Five football games following the first significant increase in student-athlete compensation in more than forty-two years. Thus, the results from this study fracture the

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[241] As previously noted, Falls & Natke, *supra* note 232, at 1100, used multiple measures of weather in their modeling of college football attendance.

[242] Similar results have been found regarding the impact of weekends on television viewership for German soccer matches. *See* Feddersen & Rott, *supra* note 177, at 361.

[243] Prior studies of college football attendance such as Falls & Natke, *supra* note 232, at 1100, use a Tobit regression in order to control for capacity.

[244] Groza, *supra* note 192, at 523.

[245] Baimbridge, *supra* note 161; *see also* Borland & MacDonald, *supra* note 161, at 481.

foundation for the procompetitive presumption's premise that consumer demand for the NCAA's products depends on the existence of eligibility rules that cap student-athlete compensation.

Second, the results from this study contradict the Ninth Circuit's determination in *O'Bannon* that consumer demand for college football would be irreparably harmed by schools providing student-athletes with cash sums that are untethered to educational costs. [246] The Ninth Circuit stated that the provision of money to student-athletes for non-educational purposes would transform the NCAA's football products into minor league versions of what the NFL produces. [247] The fundamental flaw with the Ninth Circuit's reasoning is that cost-of-attendance stipends *are* payments to student-athletes that *are* untethered to educational costs. Through cost-of-attendance stipends, student-athletes receive payments of money that they can spend as they see fit. [248] The only tether that ties the NCAA's cost-of-attendance stipends to education is found in the fact that schools consider some education-related expenses in their calculations.

As for the amounts that student-athletes are afforded through the cost-of-attendance stipends, the Ninth Circuit in *O'Bannon* stated that courts should not focus on dollar amounts in preserving consumer **[*699]** interest in amateurism. [249] The Ninth Circuit distinguished consumer interest in sports involving "poorly-paid professional athlete[s]" from those that involved "amateur" athletes and directed courts to focus on prohibiting direct payments to student-athletes that are disconnected to educational costs. [250] Yet, the results from this study failed to find a negative influence on the consumption of Power Five football following an increase in student-athlete compensation that included some degree of discretionary income. Furthermore, no negative influence was found despite allegations from coaches that some institutions have inflated their cost-of-attendance stipends in order to gain recruiting advantages. [251] If restricting the method of payment and limiting student-athlete compensation to educational expenses actually influences market demand for the NCAA's products, then this study should have found a negative change in consumer interest in Power Five football following the implementation of the cost-of-attendance stipends. Instead, the opposite was found for one important measure of consumer interest because the results revealed a correlation between increases in payments to student-athletes and increases in attendance at football games.

The results of this study correlate with similar investigations revealing increases in consumer interest in the Olympics prior to the International Olympic Committee's decision to open competition to professional athletes. [252] Still, the results do not preclude the existence of a financial breaking point at which the amounts provided through stipends to student-athletes harm consumer interest in the NCAA's products. However, even if the NCAA were able to show a decrease in consumer demand for its products following increases in student-athlete compensation, that likely would not provide enough reason to justify the NCAA's constraints because the resulting market already takes considerations like that into account. [253] Therefore, courts should rely on empirically-produced research, rather

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[246] *O'Bannon v. NCAA, 802 F.3d 1049, 1079 (9th Cir. 2015).*

[247] *Id.*

[248] Ray Glier, *Pets, Car Repairs, and Mom: How College Football Players Use Their Stipends*, N.Y. TIMES (Jan. 5, 2017), *http://www.nytimes.com/2017/01/05/sports/ncaafootball/pets-car-repairs-and-mom-how-football-players-use-their-stipends.html*.

[249] *O'Bannon, 802 F.3d at 1078-79.*

[250] *Id.*

[251] New, *supra* note 157.

[252] Alex Moyer, *Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model*, *83 GEO. WASH. L. REV. 761, 827 (2015).*

[253] Andy Schwarz & Richard J. Volante, *The Ninth Circuit Decision in O'Bannon and the Fallacy of Fragile Demand*, *26 MARQ. SPORTS LAW REV. 398, 391-410 (2016)* (stating that the market accounts for consumer interest in compensation by lowering

than assumptions, in determining the procompetitive nature of amateurism by actually measuring consumer interest in the concept. **[*700]** To this end, courts should follow the rule of reason in placing the burden on the NCAA to demonstrate, with actual market-based evidence, that a set limit on student-athlete compensation is needed to preserve consumer interest in its products. [254] Without actual evidence of consumer harm, courts in future antitrust actions should not recognize a procompetitive justification for the NCAA's rules that restrict student-athlete compensation.

[*701] APPENDIX

Table 1

GLS Regression Results -- Dependent Variable is Attendance

Variable	Coefficient	Standard Error	P-Value
Temp	8.90	23.33	0.703
Wind	-51.14	51.87	0.324
Clear	694	432	0.108
Rain	-175	768	0.819
Snow	-741	5,271	0.888
Massey	-71.85	16.69	<0.001***
OppMassey	-46.31	7.74	<0.001***
Wins	-238	221	0.282
Loss	-663	311	0.033**
Capacity	0.8439	0.0798	<0.001***
Population	-0.0003	0.0003	0.397
PCI	-0.1026	0.1052	0.329
AdjRevenue	0.0001	0.0001	0.114
Enrollment	0.0315	0.1341	0.814
SAStipend	-0.1158	0.5118	0.821
PacTwelve	-4,518	2,412	0.061*
BigTwelve	-2,117	2,928	0.470
ACC	-4,848	2,978	0.104
SEC	1,254	2,785	0.653
BigTen	--	--	--
August	-5,822	2,756	0.035**
September	-5,395	2,112	0.011**
October	-4,262	1,569	0.007***
November	-2,357	923	0.011**
December	--	--	--
Weekday	-645	895	0.471
Weekend	--	--	--
Year	46	1,724	0.979
constant	-76,657	3,470,231	0.982

*p<0.10, **p<0.05, ***p<0.01

[*702] Table 2

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the revenue for teams that pay too generously and encouraging teams to stay within consumers' tolerance of acceptable levels of compensation).

[254] For the position that antitrust law does not permit competitors to define a product based on restraints on trade that lack economic evidence that justifies their role in product creation, *see* Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, *41 PEPP. L. REV. 249, 255-56 (2014).*

GLS Regression Results -- Dependent Variable is Television Viewership

Variable	Coefficent	Standard Error	p-value
OverAir	1,833,817	426,549	<0.001***
Cable	85,122	408,107	0.835
Temp	-5,686	6,763	0.401
Wind	-3,847	15,108	0.799
Clear	-168,160	166,061	0.311
Rain	109,240	213,213	0.608
Snow	254,773	399,436	0.524
Massey	-12,769	5,293	0.016**
OppMassey	-34,522	3,358	<0.001***
Wins	113,176	88,296	0.200
Loss	-76,648	76,866	0.319
Capacity	3.53	8.08	0.662
Population	-0.0070	0.0283	0.806
PCI	-21.07	13.05	0.107
AdjRevenue	0.0138	0.0068	0.042**
Enrollment	0.9304	13.65	0.946
SAStipend	-83.71329	101	0.408
PacTwelve	-1,406,375	313,461	<0.001***
BigTwelve	-1,480,978	272,722	<0.001***
ACC	-383,371	359,463	0.286
SEC	-227,930	332,750	0.493

[*703]

Variable	Coefficent	Standard Error	p-value
BigTen	--	--	--
August	838,465	1,065,578	0.431
September	-430,594	846,908	0.611
October	-883,360	692,664	0.202
November	-794,169	587,855	0.177
December	--	--	--
Weekday	355,111	249,943	0.155
Weekend	--	--	--
Year	394,863	362,007	0.275
constant	-791,000	729,000	0.278

*p<0.10, **p<0.05, ***p<0.01

[*704] Table 3

Tobit Regression-- Dependent Variable is Attendance (Upper Limit is Capacity)

Variable	Coefficient	Standard Error	p-value
Temp	24.15	51.81	0.641
Wind	-83.37	108	0.439
Clear	-105	1,076	0.922
Rain	1,393	1,738	0.423
Snow	-3,608	8,647	0.677
Massey	-327	31.87	<0.001***
OppMassey	-34.20	16.22	0.035**
Wins	-791	481	0.100*

Variable	Coefficient	Standard Error	p-value
Loss	460	527	0.383
Population	-0.0001	0.0002	0.503
PCI	-0.1275	0.0770	0.099*
AdjRevenue	0.0005	<0.0001	<0.001***
Enrollment	0.8173	0.0767	<0.001***
SAStipend	1.67	0.7847	0.033**
PacTwelve	-9,523	1,772	<0.001***
BigTwelve	-9,209	1,951	<0.001***
ACC	-1,487	1,936	0.443
SEC	6,653	1,895	<0.001***
BigTen	--	--	--
August	-3,448	8,189	0.674
September	-5,462	6,985	0.435

[*705]

Variable	Coefficient	Standard Error	p-value
October	-4,741	6,148	0.441
November	-2,383	5,642	0.673
December	--	--	--
Weekday	-2,371	1,863	0.204
Year	-6,514	2,912	0.026**
constant	13,100,000	5,863,826	0.025**

*p<0.10, **p<0.05, ***p<0.01

NOTE: Student-Athletes vs. NCAA: PRESERVING AMATEURISM IN COLLEGE SPORTS AMIDST THE FIGHT FOR PLAYER COMPENSATION

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+ J.D. Candidate, Brooklyn Law School, 2016; B.A., American University, 2011. Thank you to the editors and staff of the Brooklyn Law Review for their dedication and hard work, especially Lillian Smith, Michael Piacentini, and Nina Vershuta for their invaluable insight and feedback throughout this process. Also a special thank you to my family and friends for their unconditional support.

Highlight

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

Text

[*865] INTRODUCTION

Student-athletes have a few new opponents on their schedule. They are fighting their own regulatory board, the National Collegiate Athletic Association (NCAA), athletic conferences, broadcasters, and licensing entities. The NCAA's mission is to be "an integral part of the educational program" and to maintain the amateur status of student-athletes. [2] Amateurism, which is codified in the NCAA's bylaws, values the distinction between professional and student athletes and is the crux of the NCAA's argument for maintaining regulations prohibiting the compensation of student-athletes. [3] In line with these values, the NCAA regulates the amateur nature of college athletics to ensure

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

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

[3] *Id.* at 4.

that education is a principal priority. [4] Recently, however, the controversy surrounding the amateur status of college athletes has resulted in challenges under antitrust law to the NCAA's regulations prohibiting compensation of student-athletes. The **[*866]** NCAA is now being confronted with something it has not faced in years: a viable challenge to its amateurism regulations.

While student-athletes are the backbone of the $ 11 billion college sports industry, they never receive any of this revenue. [5] In 2008, Ed O'Bannon, a former All-American basketball player for the UCLA Bruins, saw an avatar of himself in a video game. [6] This virtual player not only physically resembled O'Bannon, it wore a UCLA jersey, which depicted his number, 31. [7] Like all college athletes, O'Bannon waived the right to receive compensation for the use of his "name, image, or likeness" when he joined the NCAA, and therefore he was never compensated for their use in this video game. [8] Soon after, in 2009, O'Bannon brought an antitrust class action lawsuit against the NCAA, challenging the Association's regulations that restrict compensation for the use of Division I athletes' names, images, and likenesses in media, other footage, and merchandise. [9] Around the same time, Sam Keller, a former starting quarterback at Arizona State and Nebraska Universities, filed a similar lawsuit against the NCAA, Electronic Arts (EA), a video game developer, and the Collegiate Licensing Company (CLC), the entity that licenses the NCAA's trademarks. [10]

These cases were initially consolidated, but after EA and CLC settled claims for damages, the cases were deconsolidated, [11] and O'Bannon continued to seek an injunction to enjoin the NCAA from enforcing regulations that prevent Division I football and men's basketball student-athletes from receiving **[*867]** compensation for use of their names, images, or likenesses. [12] The plaintiffs alleged that the NCAA exploited current and former athletes in order to obtain revenue from media rights for televised games, DVD sales, jersey sales, video games, corporate advertising, photographs, action figures, trading cards, posters, rebroadcasts of classic games, and more. [13] The complaint further alleged that by requiring student-athletes to release their rights to compensation, the NCAA

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[4] *Amateurism*, NCAA, http://www.ncaa.org/amateurism [http://perma.cc/9PFPEA3T] (last visited Mar. 4, 2016).

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

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

[7] *Id.*

[8] *Id.*

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

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

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

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

[13] *Id.* at 37-58.

violated antitrust laws by using its bylaws to financially benefit from the names, images, and likenesses of eighteen-year-old student-athletes. [14]

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

The NCAA appealed this decision to the U.S. Court of Appeals for the Ninth Circuit based on defenses of amateurism and First Amendment protection of live television broadcasts. [19] The Ninth Circuit agreed with much of Judge Wilken's analysis and unanimously upheld the finding that the NCAA violated the Sherman Act by limiting compensation to student-athletes. [20] The three-judge panel also affirmed the district court's holding that the NCAA must allow schools to offer scholarships that **[*868]** cover the full cost of attendance. But the Ninth Circuit disagreed with the district court's holding regarding the trust and found it was clearly erroneous to uphold the trust as a substantially less restrictive alternative to the NCAA's amateur-status regulation. [21]

As *O'Bannon* continues, so too does an era of litigation surrounding the NCAA. [22] Plaintiffs continue to challenge the regulations promulgated by the NCAA and the athletic conferences, arguing that the Ninth Circuit erred in not

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[14] *Id.* at 5.

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

[16] *Id. at 962.*

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

[18] *O'Bannon, 7 F. Supp. 3d at 1008.*

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

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

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

[22] Two weeks following the Ninth Circuit decision, plaintiffs asked the court for an en banc rehearing of the case, in which an eleven-member panel of Ninth Circuit judges would review the majority decision of the three-member panel. *See* Plaintiffs-

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

Part I of this note discusses the NCAA's past and present practices in balancing amateurism and the compensation of student-athletes, specifically with respect to the student-athletes' names, images, and likenesses. Part II briefly describes the *O'Bannon* litigation and the NCAA's amateurism defense. It also examines current NCAA regulations and their interaction with antitrust law. Part III analyzes the implications *O'Bannon* is likely to have on amateurism as the foundation of college sports and addresses how the Ninth Circuit's decision may affect the **[*869]** NCAA's future as a regulatory body. Part IV argues that while implementing a trust at the order of the district court in *O'Bannon* was erroneous, the NCAA itself should adopt this type of compensatory structure. Ultimately, this trust model will allow for minimal compensation of student-athletes while still preserving amateurism as the cornerstone of college athletics and distinguishing them from professional sports. Significantly, both the court and consumers in the college sports market have made it clear that they prefer to keep a divide between collegiate and professional sports. [24] While the obvious way to uphold the unique and independent nature of college athletics is to keep the players on an unpaid, amateur level, this may no longer be a viable solution. In order to maintain student-athletes' amateur status while simultaneously complying with antitrust law, this note argues that the NCAA should develop a more hands-off regulatory approach that best serves student-athletes by allowing schools to enter into a revenue sharing system similar to the model used by the International Olympic Committee.

I. OVERVIEW OF NCAA BYLAWS AND COMPLIANCE REQUIREMENTS

A. History of the NCAA's Regulation of Amateurism

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

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

[23] *See infra* Part II.

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

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

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

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

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

group changed **[*870]** its name to the National Collegiate Athletic Association and required that all participants be amateurs. [29]

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

In 1956, the NCAA developed new regulations and amended its bylaws to allow schools to award athletic scholarships to student-athletes. [36] Because this new structure permitted universities to distribute financial aid without consideration of need or academic achievement, monetary inducements became a way for schools to target athletes. [37] Therefore, in order to balance the competing values of commercialization and amateurism, the NCAA gained better control over its member institutions by establishing enforcement authority over the amateurism provisions. [38] It did so through regulations that addressed student-athlete eligibility, limited financial inducements, penalized improper payments, and removed all pay-for-play **[*871]** models from the system. [39] This current--and far more regulatory--structure of the NCAA is made evident by the 420 pages of the Division I Manual. [40]

B. Amateurism and Compensation in the Modern NCAA

Today, the NCAA has approximately 1,200 member institutions and regulates 24 sports. [41] The member institutions are organized into Divisions I, II, and III. [42] Division I, which is at issue in the current litigation, consists of about 350 schools with the largest athletic programs that are each required to sponsor at least 14 varsity teams.

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[29] *Id.* at *1.

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

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

[32] Strom, *supra* note 30, at 426.

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

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

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

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

[37] *Id.* at 334.

[38] Smith, *supra* note 34, at 13-15.

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

[43] As the regulatory body for college athletics, the NCAA has a mission to "initiate, stimulate and improve intercollegiate athletics programs for student-athletes." [44] The NCAA strives to distinguish collegiate athletics from sports of a professional nature by focusing on the amateur nature of the participants.

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

> (a) [u]ses his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) [a]ccepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) [s]igns a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration **[*872]** received . . . ; (d) [r]eceives, directly or indirectly, a salary, reimbursement of expenses or any other form of financial assistance from a professional sports organization based on athletics skill or participation, except as permitted by NCAA rules and regulations; (e) [c]ompetes on any professional athletics team . . . even if no pay or remuneration for expenses was received . . . .; (f) [a]fter initial full-time collegiate enrollment, enters into a professional draft . . . . [; or] (g) [e]nters into an agreement with an agent. [47]

Amateurism is not only an issue at the forefront of the *O'Bannon* litigation--it is the NCAA's basis for maintaining their current regulations, which restrict the compensation of student-athletes. [48] There are very limited instances in which a student-athlete may receive compensation. [49] The NCAA codifies the distinction between college athletics and professional sports in Article 12 of its bylaws, which requires student-athletes to be amateurs in their respective sports in order to participate in NCAA-sponsored events. [50] Student-athletes are not eligible to participate in a sport if they have ever taken pay or the promise of pay for competing in that sport. [51] More specifically, players are not eligible if they have ever accepted money, transportation, or other benefits from an agent, including having an

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

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

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

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

[44] 2013-14 NCAA DIVISION IMANUAL, *supra* note 2, at 1.

[45] *Id.* at 57.

[46] *Id.* at 4.

[47] *Id.* at 59.

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

[49] *See* 2013-14 NCAA DIVISION IMANUAL, *supra* note 2, at 191-214.

[50] *Id.* at 57.

[51] *Id.* at 59.

agent market their athletic ability or reputation in that sport. [52] Recent criticism of Article 12 attacks the founding principle of amateurism, [53] but the NCAA maintains its position, stating that the amateur nature of the NCAA is "crucial to preserving an academic environment in which acquiring a quality education is the first priority." [54]

While member universities may provide scholarships to student-athletes, the NCAA requires that these scholarships follow the same procedures as those awarded to non-student-athletes. [55] Whereas Article 15 previously indicated that student-athletes may receive a scholarship of no more than a "grant-in-aid," [56] **[*873]** the NCAA's amended bylaws permit schools to give scholarships up to the full cost of attendance, "an amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution." [57] The bylaws also explain that an athlete may lose his or her eligibility to compete as a Division I athlete by receiving "financial aid other than that permitted by the Association" or through involvement with professional teams. [58]

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

In addition to its bylaws, the NCAA requires all Division I athletes to sign Form 08-3a, which requires student-athletes to waive their rights to the commercial use of their name, image, and likeness in perpetuity. [63] The form specifically states, "You **[*874]** authorize the NCAA [or a third party acting on behalf of the NCAA] to use your

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[52] *Id.* at 66.

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

[54] *Amateurism, supra* note 4.

[55] *See* 2013-14 NCAA DIVISION 1 MANUAL, *supra* note 2, at 57; *infra* Section III.A.

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

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

[58] *Id.* at 191.

[59] O'Bannon Complaint, *supra* note 9, at 4.

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

[61] Id. at 372-73.

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

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

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

Ed O'Bannon, along with 19 other former and current Division I football and men's basketball players, brought claims against the NCAA and its partner, the Collegiate Licensing Company, a for-profit corporation [66] that oversees all of the licensing and rights distribution for the NCAA. [67] The complaint alleged that the NCAA's regulations forcing student-athletes to release the rights to their names, images, and likenesses without compensation violate section 1 of the Sherman Antitrust Act, which prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." [68] With respect to the class seeking damages, the complaint further alleged that the NCAA unreasonably restrained trade and commercially exploited former student-athletes by continuing to sell products using their images well after they graduated. [69]

[*875] O'Bannon specifically pointed to Form 08-3a [70] as the method for how the NCAA obtained ownership of these rights, and noted that the signatories were coerced and uninformed and in some cases, the forms were even signed by minors. [71] Since failure to sign this form renders a student-athlete ineligible to participate in NCAA athletics, plaintiffs submitted that this put unfair pressure on young students to relinquish their licensing rights not only while they were in college, but for the rest of their lives. [72] Plaintiffs asserted that the NCAA's prohibition of

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[63] NCAA, FORM 08-3A, ACADEMIC YEAR 2010-11: NCAA STUDENT-ATHLETE STATEMENT-DIVISION I, at 4 (2008), http://www.liberty.edu/media/1912/compliance/newformsdec2010/currentflames/compliance/SA%20Statement%20Form.pdf [http://perma.cc/3ZFQ-T8G7].

[64] *Id.*

[65] O'Bannon Complaint, *supra* note 9, at 3-7.

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

[67] *Id.*

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

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

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

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

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

compensation for student-athletes for the use of their names, images, and likenesses was an unlawful restraint of trade under the Sherman Act. [73]

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

> The identification of [college football] with an academic tradition differentiates [it] from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such **[*876]** restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. [77]

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

Under this third prong, suggesting that current regulations were not necessary to maintain amateurism, O'Bannon proposed three alternatives to the current regulations: (1) "allow schools to award stipends derived from . . . licensing revenue[] to student-athletes"; (2) "allow schools to deposit a share of licensing revenue into a trust fund for student-athletes . . . [to] be paid after the student-athlete[] graduate[s]" or leaves school permanently; and (3) "permit student-athletes to receive limited compensation for third-party endorsements" approved by their respective

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[73] *Id.*

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

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

[76] *NCAA, 468 U.S. at 101-11.*

[77] *Id. at 101-02.*

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

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

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

schools. [81] O'Bannon refrained from attacking amateurism as a core value of the NCAA and instead offered reform that would contribute to a more equitable bargaining relationship between the NCAA and student-athletes. [82]

A. O'Bannon *in the District Court*

Prior to *O'Bannon*, antitrust claims against the NCAA had not been successful, as courts followed the Supreme Court's lead and deferred to the amateurism justification in favor of the NCAA's trade restrictions. [83] Thirty years later, however, the U.S. District Court for the Northern District of California broke this **[*877]** trend, holding in *O'Bannon* that the NCAA was in violation of the Sherman Act and entering an injunction requiring reform to the Association's regulations. [84]

In applying the rule of reason test used by the Supreme Court in *Board of Regents*, the district court determined that the NCAA's restraint on compensation violated antitrust law because it did not reasonably support a procompetitive purpose. [85] It first found that in a "college education market," NCAA compensation regulations have a significant anticompetitive effect because they fix the price that schools pay to secure college athletes' services. [86] Next, the court individually addressed each of the NCAA's justifications for its restriction on compensation of student-athletes [87] and acknowledged that the NCAA's rules serve two procompetitive purposes--the promotion of amateurism and the integration of academics with athletics--because both increase consumer demand for college sports. [88] In the third step of the analysis, the court determined whether there were any "substantially less restrictive alternatives" to the NCAA's current rules. [89]

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

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[81] *Id.* at 982.

[82] Welch, *supra* note 75, at 555-56.

[83] *Id.* at 538-40.

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

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

[86] *Id.* at 973.

[87] *Id.* at 1000-04.

[88] *Id.* at 999-1003.

[89] *Id.* at 1005.

[90] *Id.* at 1007-08.

[91] *Id.* at 1008.

[92] *Id.*

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

The district court suggested that holding a limited amount of money in a trust until after student-athletes have left school **[*878]** would compensate them for the use of their names, images, and likenesses while still "integrating academics and athletics." [94] According to Judge Wilken, the NCAA did not provide enough evidence that paying players would affect the procompetitive balance of the market. [95] Most significantly, the district court noted that while amateurism could justify limited restrictions on student-athlete compensation, it could not justify the particular restrictions on receiving compensation for the use of those student-athletes' names, images, and likenesses. [96] Furthermore, the district court found that O'Bannon presented "ample evidence . . . to show that the college sports industry has changed substantially in the thirty years since *Board of Regents* was decided." [97] And therefore, the values served by upholding amateurism "do not justify the rigid prohibition on compensating . . . [for] the use of [players'] names, images and likenesses." [98] Ultimately, the district court determined that the NCAA's blanket restraints on compensation violated antitrust law and held that less restrictive alternatives were available. The court issued an injunction requiring the NCAA to alter its regulations in two ways: first, to permit its member institutions to issue scholarships up to full cost of attendance, and second, to allow its members to hold a maximum of $ 5,000 annually in a trust for each student-athlete.

B. O'Bannon *in the Ninth Circuit*

The NCAA appealed to the Ninth Circuit Court of Appeals, noting that it would continue to fight to preserve the current NCAA model. [99] After an expedited review, [100] the court issued an opinion on September 30, 2015. [101] In this long-anticipated **[*879]** ruling, the three judge panel affirmed the district court's injunction and required the NCAA to allow its member schools to give student-athletes scholarships up to the full cost of attendance because, the court stated, the regulations had "significant anticompetitive effects." [102] The Ninth Circuit also held, however, that the district court's remedy of allowing student-athletes to receive compensation in the form of a trust was erroneous, and the court struck it down as a less restrictive alternative. [103]

The Ninth Circuit agreed with the district court in holding that NCAA rules are subject to antitrust scrutiny and must be tested within the "crucible of the Rule of Reason." [104] In applying the same three-part rule of reason analysis, the Ninth Circuit concluded, in line with the district court, that while under the first step of the analysis, the NCAA's

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[94] *O'Bannon, 7 F. Supp. 3d at 1008.*

[95] *Id. at 1003.*

[96] *Id. at 1001.*

[97] *Id. at 999-1000.*

[98] *Id. at 1001.*

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

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

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

[102] *Id.* at *1, *21.

[103] *Id.* at *1.

[104] *Id.* at *26.

compensation regulations have anticompetitive effects by precluding student-athletes from receiving compensation, they serve two procompetitive purposes under the second step: (1) preserving the NCAA by promoting amateurism and (2) "integrating academics with athletics." [105] The appellate decision found Judge Wilken's analysis of college athletics consistent with the Supreme Court's in *Board of Regents*, in that there is "an academic tradition [that] differentiates [it] from and makes it more popular than professional sports to which it might otherwise be comparable." [106]

The Ninth Circuit emphasized, though, that not *every* NCAA regulation that restricts the market is "necessary to preserving the 'character' of college sports." [107] Thus, the panel moved to the third step of the analysis and looked to reasonable and "substantially less restrictive" alternatives to the NCAA's compensation regulations. [108] The Ninth Circuit upheld setting a grant-in-aid cap at the full cost of attendance, as it is a substantially less restrictive alternative to the trust model that still accomplishes the NCAA's two procompetitive purposes. [109] Ultimately, even before the panel issued its opinion upholding this part of the injunction, the NCAA amended its **[*880]** regulations allowing its members to fund student-athletes' full cost of attendance. [110]

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

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

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[105] *Id.* at *21.

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

[107] *Id.*

[108] *Id.*

[109] *Id.* at *22-23.

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

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

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

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

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

[115] *Id.*

Both the district court and the Ninth Circuit concluded that the NCAA needed to reform its practices; however, neither court felt it necessary to do away with amateurism. Both decisions included strong dicta supporting the value of amateurism in college athletics. Judge Wilken herself conceded that there are limits to the district court's decision and that amateurism "might justify a restriction on large payments to student-athletes while in school." [116] There are significant tensions still at play between the values of education and amateurism and the goals of compensating college athletes. However, by upholding both values **[*881]** in its decisions, perhaps the court left room for the NCAA to adopt a model that incorporates both compensation and amateurism.

C. The Future of Amateurism and O'Bannon

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

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

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

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

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

[119] *Id.* at 14.

[120] *Id.*

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

[122] *See* Solomon, *supra* note 22.

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

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

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

With recruitment letters going out to high school juniors for the 2017 recruit class as early as fall of 2015, athletic departments quickly faced the challenge of determining how to distribute this stipend. [129] Athletic departments, which often project their financial planning for the next three to five years, had to make immediate decisions involving new forms of student-athlete **[*883]** compensation. [130] The University of Pittsburgh set aside $ 1.1 million to cover the $ 3,296 annual cost of attendance stipend for its student-athletes. [131] At West Virginia University, the stipend is one of the lowest in the Big 12 Conference, at $ 2,700 per student-athlete. [132] This will cost the athletic department an additional $ 600,000 annually. [133] Conversely, Pennsylvania State University has one of the highest stipends in the NCAA, at $ 4,700, costing the school $ 1.75 million this year. [134] This is a number that the football department now displays proudly to its recruits, perhaps using it to its competitive advantage. [135] This increase in compensation not only affected the football team; the Division I school made it a priority to distribute the stipend to all 31 of its athletic programs. [136] According to Sandy Barbour, Pennsylvania State's athletic director, the stipend is a priority so students have "access to resources and educational opportunities." [137] Ultimately, the court's reasoning holds true when applied by this athletic director. Here, as the

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

[126] *Id.*

[127] *Id.*

[128] *Id.*

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

[130] *Id.*

[131] Snyder, *supra* note 125.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.*

court suggested it would, the stipend functions as a less restrictive alternative that preserves both the values of amateurism and the integration of academics with athletics.

Prior to the Ninth Circuit decision, many universities began the process of implementing a budget for the $ 5,000 trust. The University of Texas developed a plan to allocate $ 6 million of its annual budget to pay football and men's basketball players through a trust. [138] Ultimately these funds can be reallocated for stipends, but in light of a potential Supreme Court decision in *O'Bannon*, member schools should consider the possibility of eventually compensating student-athletes via a trust. While the district court's ruling did not require schools to compensate student-athletes, [139] in order to remain competitive in the recruitment market, the top athletic schools would understandably want to create trusts to compensate athletes for the use of their **[*884]** names, images, and likenesses in the event that compensation through a trust is reinstated as a legal option for Division I schools.

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

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

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

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

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

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

[143] Id. at 1042 ("For example, between 1950 and 2005, just five college football teams have accounted for a quarter of all top eight finishers . . . [and] just four men's Division I college basketball teams represented nearly a quarter of all Final Four appearances . . . .").

[*885] III. ONGOING LITIGATION AGAINST THE NCAA

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

A. The Grant-in-Aid Cap

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

Plaintiffs are seeking an injunction that would prohibit the NCAA and five of the top athletic conferences from adopting *any* limitations on the amount of compensation that may be paid to student-athletes while in school. [150] This class action complaint argues that the NCAA cannot limit financial aid to tuition, room **[*886]** and board, and books, while excluding incidentals. [151] The plaintiffs argue that former athletes should be awarded damages for incidentals like travel and other costs associated with being student-athletes. [152] The complaint further alleges that there is a disparity between the allowable grant-in-aid cap and the actual cost of attendance, resulting in student-athletes receiving a few thousand dollars less each year than they would in a competitive market. [153] The complaint states that denying players the benefits of economic assistance has imposed significant hardships on these athletes as their lives are much different from the average student. [154] Student-athletes (1) "have much less

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[144] Solomon, *supra* note 125.

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

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

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

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

[149] *Id.*

[150] *Id.* at 4.

[151] *Id.*

[152] *Id.* at 6.

[153] *Id.*

[154] *Id.*

time and ability to earn money through part-time jobs than do other students"; (2) "are more likely to come from low-income households"; and (3) "are more likely to incur substantial travel costs to attend school." [155]

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

B. Broadcast Rights

Litigation surrounding the NCAA's compensation restrictions has expanded to include a variety of defendants. Eleven current and former Football Bowl Subdivision and Division I men's basketball players are challenging the licensing and use of student-athletes' names, images, and likenesses in advertisements and broadcasts, as well as restrictions on student-athletes' compensation for such use. [158] The plaintiffs seek to recover damages from three classes of defendants--the major **[*887]** television networks, licensing companies, and college athletic conferences--that were allegedly unjustly enriched by using the names, images, and likenesses of student-athletes in advertisements and broadcasts without their consent. [159]

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

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

The College Athletes Players Association and Kain Colter, a former Northwestern University quarterback, brought a suit regarding the restrictions on the unionization of student-athletes at Northwestern University. Plaintiffs argued that football players on a scholarship should be granted the right to seek bargaining status and hold elections in favor of unionization. [162] In March 2014, the Chicago National Labor Relations Board agreed that the players had the right to unionize. However, when the National Labor Relations Board (NLRB) granted Northwestern's request

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[155] *Id.*

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

[157] *Id.*

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

[159] *Id.*

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

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

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

for review, it subsequently declined to assert jurisdiction. [163] By statute, the NLRB does not have jurisdiction over state-run schools, which account for 108 of the 125 Football Bowl Subdivision teams. [164] Since the NCAA and the conferences have substantial control over the majority of the teams, the NLRB held that asserting **[*888]** jurisdiction over a single team "would not promote stability in labor relations" across the league. [165] Ultimately, this narrowly focused decision does not preclude reconsideration of the unionization issue in the future.

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

IV. IMPLEMENTING CHANGES TO THE NCAA MODEL

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

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

[*889] *A. International Olympic Committee Trust Model*

The most practical model for reform further develops the trust fund proposed by the plaintiffs in *O'Bannon* and accepted by the Northern District of California. Although the Ninth Circuit held that the creation of a trust capped at $ 5,000 was an erroneous remedy, the NCAA has the ability to implement a similar compensatory structure through its bylaws. Ultimately, the most functional trust for both the NCAA and its member schools is one that mirrors that of the International Olympic Committee (IOC), the governing organization for the Olympics and all of its member institutions. The IOC developed a trust system, very similar to that proposed in *O'Bannon*, which has a distribution scheme that would be valuable to college athletes. [169] Under *O'Bannon*, student-athletes are unable to access the

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

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

[165] *Id.*

[166] Northwestern University's Brief, supra note 162, at 2-3, 74.

[167] Hosick, *supra* note 21.

[168] *See infra* Section IV.B.

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

funds in their trust until after they graduate or otherwise leave school. [170] But under the IOC, revenue from athletes' endorsements is held in a trust that is accessible to them both during and after competition. [171] During competition, only necessary expenses, such as food and incidentals related to competition, may be paid from the trust; after a competition season, however, athletes may personally withdraw the remaining funds. [172] Permitting students to access their trusts *only* for necessary expenses prior to graduation would allow them to finance expenses that may not be covered by tuition and the full cost-of-attendance stipend.

Currently, the NCAA prohibits compensating student-athletes with "funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics." [173] Creation of a trust would involve both the NCAA and its member institutions contributing a percentage of revenue from merchandise, video games, and television network contracts that use the names, images, and likeness of players to the trusts set up for student-athletes. [174] This is a practical compensatory structure that would allow the NCAA, universities, and conferences to regulate the trust while the student-athletes are in school. Furthermore, implementing a spend thrift provision that prohibits student-athletes from accessing the trust without the **[*890]** approval of a trustee--either the NCAA, a conference, or university--would provide a safeguard against unnecessary use of the funds prior to graduation. [175] As a trustee, the NCAA could maintain control over this additional compensation and ensure that it is used in a way that promotes amateurism and integrates academics with athletics. For example, the NCAA could create academic incentives by reducing access to trusts for poor academic standing. [176]

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

B. Revenue Sharing and Complete Education Models

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

Furthermore, if the NCAA revised its amateurism regulations that restrict compensation for student-athletes to allow them to receive a portion of the proceeds generated through personal endorsements or by their team, revenue

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

[171] Wong, *supra* note 169, at 1105.

[172] *Id.*

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

[174] Strom, *supra* note 30, at 438.

[175] *Id.*

[176] *Id.* at 442.

[177] Wong, *supra* note 169, at 1105.

[178] *Id.* at 1103.

[179] *Id.* at 1104.

sharing would allow student-athletes to further their own financial and professional gain. [180] While it is important to allow student-athletes to participate in an open and competitive market when it comes to licensing the rights to their names, images, and likenesses, it is imperative that doing so does not detract from the value of higher education. Arguably, giving student-athletes huge amounts of compensation from third parties would detract from the principle of integrating academics and athletics. Therefore, combining a revenue sharing system with the distribution method **[*891]** of the IOC trust would allow the NCAA to comply with the Sherman Act while continuing to apply the ideals of amateurism. Ultimately, the NCAA could allow student-athletes to be compensated for the use of their names, images, and likenesses via the revenue sharing model and could ensure that student-athletes would not have access to the trust until after their collegiate tenure.

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

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

Title IX, which was enacted in 1972, requires gender equality in educational programs. [183] It does not, however, expressly address the equality of payment of student-athletes, as this was not an issue at the time of its enactment. [184] To determine compliance with Title IX, 10 factors are examined to ensure that male and female student-athletes are afforded equal opportunities, [185] including, among others, "whether the selection of **[*892]** sports and levels

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[180] *Id.* at 1105.

[181] *Id.* at 1102.

[182] *Id.*

[183] *45 C.F.R. § 86.41(a) (2015)*.

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

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

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. Scheduling of games and practice time;
4. Travel and per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Provision of locker rooms, practice and competitive facilities;
8. Provision of medical and training facilities and services;
9. Provision of housing and dining facilities and services;

of competition effectively accommodate the interests and abilities of members of both sexes" and the assignment and compensation of coaches and tutors. [186]

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

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

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

CONCLUSION

Although *O'Bannon*'s ultimate impact on the NCAA is still unknown, it did not hold the death sentence for amateurism that many anticipated it would. It is, however, indicative of the need for a drastic change to the NCAA and its relationship with athletic conferences, universities, and student-athletes. In the words of Mike Krzyzewski, coach for Duke University's men's basketball team, on the need for change in the NCAA, "Many times when you

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10. Publicity.

[186] *Id.* § 86.41(c)(1).

[187] Strom, *supra* note 30, at 448.

[188] *Id.* at 446-54.

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

[190] Strom, *supra* note 30, at 447.

[191] *Id.*

[192] *Id.*

lose, it's the greatest opportunity to improve. You have this unique opportunity to make dramatic change that you probably couldn't make when things seem to be going right." [193]

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

While player compensation has been at the forefront of issues surrounding college athletics, student-athletes deserve more than just compensation; they deserve the stability and protection from exploitation that the NCAA's regulations help to provide. The *O'Bannon* litigation and judicial intervention triggered the **[*894]** necessary action from the NCAA to take regulatory reform into its own hands. The NCAA was compelled to update its practices or else face paying damages to a large, injured class of former student-athletes. The NCAA will best serve student-athletes by continuing to reexamine its own regulatory structure and creating a revenue sharing system distributed via a trust model similar to that of the IOC. By implementing this reform and providing the full cost of attendance in conjunction with deferred compensation in a trust, the NCAA will promote adequate compensation of student-athletes while simultaneously maintaining the core values of amateurism. Perhaps, with some restructuring, it is possible to have the best of both worlds.

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

COMMENT: THE VALUE OF AMATEURISM

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Highlight

Our chief interest should not lie in the great champions in sport. On the contrary, our concern should be most of all to widen the base, the foundation, in athletic sports: to encourage in every way a healthy rivalry which shall give to the largest possible number of students the chance to take part in vigorous outdoor games. [1]

- President Theodore Roosevelt

Text

[*275]

I. Introduction

Collegiate athletic programs are a defining feature at many of the higher education institutions sprawling across North America. [2] Placing a spotlight on the athletic programs makes sense for most institutions. It is an effective

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[1] President Theodore Roosevelt, Speech Before the Harvard Students (Feb. 23, 1907), in Spalding's Official Foot Ball Guide, Aug. 1907, at 9. President Roosevelt is credited for having a major hand in the creation of the NCAA. See Rodney K. Smith, A Brief History of the National College Athletic Association's Role in Regulating Intercollegiate Athletics, *11 Marq. Sports. L. Rev. 9, 10-13 (2000).* Roosevelt sought to preserve amateurism and mitigate the unsavory violence in collegiate sport. Id.

[2] University presidents have been quoted as considering their athletics program as the "front porch" to their university. See Knight Commission on Intercollegiate Athletics: Quantitative and Qualitative Research with Football Bowl Subdivision University Presidents on the Costs and Financing of Intercollegiate Athletics - Report of Findings and Implications 43 (2009) [hereinafter Knight Commission on Intercollegiate Athletics]; see also Dawn Rhodes, With NCAA Success, Loyola Now Looks for Gains Off the Court, Chi. Trib., Mar. 21, 2018, *https://www.chicagotribune.com/sports/college/ct-met-loyola-basketball-university-publicity-20180321-story.html* ("The bottom line is [the basketball team's success] gives the university a chance to tell its story in a very broad, public way.").

way to engage with the local community and, in many cases, the national community as well. [3] This exposure has proven to increase new student applications, **[*276]** especially where the athletic teams win. [4] Additionally, collegiate athletics provide institutions with a means to maintain their relationship with their alumni base, which is often a significant source for funding. [5]

Within the athletic departments themselves, it is Division I Men's Basketball and the Football Bowl Subdivision ("FBS Football") that typically garner the most attention. [6] Commonly referred to as the Revenue Generating Sports, Division I men's basketball and FBS football outperform their sibling sport teams in revenue generation at most institutions. [7] The collegiate sport **[*277]** landscape will likely continue to be dominated by these two sports for some time. The National Collegiate Athletic Association (NCAA) recently signed its most lucrative television agreement to date for the broadcasting rights to the Men's Basketball Championship through 2032. [8] The Big 10, one of the five major NCAA conferences, recently inked a six-year multibillion-dollar deal for the television rights of their Men's Basketball and FBS Football programs. [9] All of the major conferences have followed suit. [10]

Nationwide popularity and high dollar value television agreements have paved way for the construction of unprecedented college football stadiums and basketball arenas. The Carrier Dome, home to the Syracuse Orange, can sit 49,262 attendees. [11] The University of Tennessee stadium holds 106,000 spectators. [12] Michigan football's "The Big House" seats an impressive 107,601 spectators. [13] For comparison, the largest capacity National Football League (NFL) stadium seats 100,000. [14] Across the country, on television and in the stadium, millions of fans are engaging with collegiate sport and this wild popularity has shown no signs of letting up.

While revenues, viewership, and seating capacity have grown, one thing has remained largely the same - student-athletes may not receive cash compensation. [15] The NCAA caps student-athlete financial aid at cost of **[*278]** attendance. [16] The value of a cost of attendance scholarship can be substantial. [17] However, many argue that student-athletes are entitled to more. [18] These critics point to the "highly commercialized, multibillion dollar endeavor" that is the NCAA and claim that it is "profoundly immoral" to restrict student-athletes' compensation "while everyone else profits." [19] Of the five major collegiate **[*279]** conferences, [20] for example, the lowest

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[3] Knight Commission on Intercollegiate Athletics, supra note 2, at 44. "Athletics builds allegiance to the institution and brings national prominence and pride." Id.

[4] Rhodes, supra note 2. Loyola University Chicago's undergraduate admissions page had a 50 percent increase in new visitors during their historic NCAA basketball tournament run. Id. Florida Gulf Coast University and LehighUniversity saw new student application increases of 27.5 percent and 9.2 percent, respectively, the year after their mens basketball teams experienced success in the NCAA postseason tournament. Polly Mosendz et al., NCAA Tournament 2017: What March Madness is Worth to a College, Bloomberg (Mar. 13, 2017), *https://www.bloomberg.com/news/features/2017-03-13/march-madness-more-students-apply-to-schools-that-break-brackets* (noting an "average 4 percent increase for all schools that participated in the NCAA tournament from 2010 to 2014."). See Ahmed E. Taha, Are College Athletes Economically Exploited?,*2 Wake Forest J.L. & Pol'y 69, 74 (2012)* (noting a 22 percent increase in freshman applications after George Mason University's men's basketball team made it to the Final Four of the Division I Men's Basketball Championship tournament); Knight Commission on Intercollegiate Athletics, supra note 2, at 11 ("A significant majority of FBS presidents believe that athletics success provides substantial benefits to their institutions. These include tangible benefits such as increasing applications, quality of the student body, and donations to the university.").

[5] One economist estimates that winning five games more than in the previous year can result in increased alumni donations of 28% for a school. See Michael Anderson, The Benefits of College Athletic Success: An Application of the Propensity Score Design with Instrumental Variables 18 (Nat'l Bureau of Econ. Research, Working Paper No. 18196, 2012) (concluding that FBS football schools that win may expect increases in alumni athletic donations, among other things such as enhances in the school's academic reputation, increases in the number of applicants, reduced acceptance rates, and increased average incoming SAT scores); see also Taha, supra note 4, at 106 (noting the 25% increase in active alumni and a 52% increase in fundraising for the George Mason University athletic department after a successful men's basketball season); Brad Wolverton et al., The $ 10-Billion Sports Tab, Chron. Higher Educ. (Nov. 15, 2015), *http://www.chronicle.com/interactives/ncaa-subsidies-main#id=table_2014* ("College leaders say such investments [in football] help attract prospective students and build connections with donors and other supporters.").

median salary for football coaches was just over $ 2.5 million in 2016. [21] Athletic Directors of these conferences are well-compensated, too. In 2011, athletic directors at FBS Football schools had an average salary of roughly $ 515,000. [22]

A deeper dive arguably suggests that the commonly cited salary statistics and television contracts are misleading by their failure to indicate the financial prosperity, or lack thereof, of the NCAA membership. [23] For example, of the 351 Division I institutions, [24] only 24 reported positive net generated revenues in 2015. [25] The median net generated revenues for Division I as a whole hovered around negative $ 12 million during that same year. [26] The so-called "revenue generating sports" of men's basketball and football were only profitable at a rate of fifty-five and fifty percent, respectively, during that same period. [27]

Today, in 2018, the NCAA maintains that collegiate sports are not as profitable as many are led to believe: "Women's basketball, in particular, almost everywhere generates less revenue than its costs, while men's basketball **[*280]** and football are nearly as likely to generate less revenue than costs, even in Division I-FBS." [28] The majority of the NCAA membership cannot cover the costs of their athletic programs. [29] As one President of a major university puts it, "I'm amazed that intelligent people really believe that athletics makes a lot of money for the university." [30] How then, are student-athletes to be paid? If they are to be paid, which ones? Will men receive more than women?

The reality of the situation is that collegiate athletics is an expensive endeavor that can lead to a large tab to be picked up by the school, and in many cases by the unknowing general student body. [31] In 2014, Rutgers athletics operated at a deficit of $ 28 million. [32] The school subsidized $ 18.5 million of the deficit while the student-body subsidized the remaining $ 9.5 million by way of student fees. [33] A reported ninety percent of Division I schools similarly rely on school subsidies. [34] Paying student-athletes will result in the costs of collegiate athletics to be exacerbated, leading to larger bills to be footed by the general student body in increased tuition fees. [35] Moreover, budget constraints have forced some schools to drop athletic teams altogether. In 2013, Temple University

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[6] See B. David Ridpath, The College Football Playoff and Other NCAA Revenues Are an Expose of Selfish Interest, Forbes, Jan. 17, 2017, https://www.forbes.com/sites/bdavidridpath/2017/01/17/college-football-playoff-and-other-ncaa-revenues-is-an-expose-of-selfish-interest/#27f01704e1af. This rule is not without its exceptions, however. Several universities are more well known for sports other than men's basketball or FBS football. See, e.g., Jeff Kolpack, All Individual Sports at NDSU, UND Lose Money, Bismarck Trib., Apr. 7, 2017,http://bismarcktribune.com/news/state-and-regional/all-individual-sports-at-ndsu-und-lose-money/article_a9ea7b3f-6826-5348-8cb5-d0eadb369df0.html (referring to the University of North Dakota's hockey program as the crown jewel of collegiate athletics in North Dakota); see also Zach Helfand, The Road to Cal State Fullerton Baseball Greatness is Littered with Parking Tickets, L.A. Times, May 29, 2017, http://www.latimes.com/sports/la-sp-fullerton-baseball-20170529-story.html (describing Cal State Fullerton as a "one-sport wonder" while revisiting the storied success of its baseball team).

[7] Daniel L. Fulks, Nat'l Collegiate Athletic Assoc., NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report: Fiscal Years 2004 Through 2015, at 36, 62, 88 (2016), http://www.ncaapublications.com/productdownloads/D1REVEXP2015.pdf (providing a sport-by-sport breakdown of generated revenues where basketball and football far exceed all other sports in revenues generated with the limited exception of ice hockey). At least for football, this has been true for almost a century. Howard J. Savage et al., Carnegie Found. for the Advancement of Teaching, American College Athletics 83, 87 (1929) [hereinafter Carnegie Report].

[8] Marc Tracy, N.C.A.A. Extends Basketball Deal with CBS Sports and Turner Through 2032, N.Y. Times, Apr. 12, 2016, https://www.nytimes.com/2016/04/13/sports/ncaabasketball/ncaa-extends-basketball-deal-with-cbs-sports-and-turner-through-2032.html. The television agreement, beginning in 2010, is worth $ 10.8 billion through 2024 and an additional $ 8.8 billion between 2024 and 2032.

[9] Roman Stubbs, Big Ten Formally Announces Six-Year Media Rights Deal with ESPN, FOX, and CBS, Wash. Post, July 24, 2017, https://www.washingtonpost.com/news/terrapins-insider/wp/2017/07/24/big-ten-formally-announces-six-year-media-rights-deal-with-espn-fox-and-cbs/?utm_term=.0defb2381a9f.

announced it would drop seven teams to save money. [36] More recently, the University of New Mexico announced a reduction in their athletics budget and specifically included the line item "reduction in sports" in the plan. [37] **[*281]** University of New Mexico's reduction is being made to, in part, repay the $ 4.7 million that was borrowed from the main campus. [38] One of the teams expected to be cut is men's soccer, which has played in two Final Fours, a national championship, and has been a conference champion seven times since 2001. [39] The University of California at Berkeley Athletic Department finished the 2017 fiscal year with a $ 16 million deficit and speculation that the University may need a century to pay off their $ 440 million in debt despite the main campus agreeing to assume more than half of that debt - $ 9.5 million in annual debt service payments. [40] Temple University and University of New Mexico are two examples, of many, where schools that are already under tight budgetary constraints have stopped providing opportunities to deserving student-athletes to limit costs. [41] UC Berkeley may be the next to join that group.

The funds generated from the revenue generating sports of men's basketball and FBS football are partially used to subsidize all other sports. [42] And, because the non-revenue generating sports are reliant on football and basketball revenues, it is typically those non-revenue generating sports that get cut when football and basketball are not as lucrative. [43] Increased costs, such as those resulting from student-athlete compensation, will inevitably lead to more of **[*282]** these cuts. [44] The current president of the NCAA, Mark Emmert, recently noted this very sentiment:

If you were going to move into a model where you were just paying football and basketball athletes … the way athletic departments are going to do that is they are going to eliminate other sports. There is really no other way for them to do it. If you just look at the revenue from football you might be able to figure out how to pay football players but you would eliminate all the other sports that are out there in order to do that and take away opportunities from men and women. [45]

Critics argue that the NCAA leads a cartel of colleges and universities that collectively underpays its primary labor force in revenue generating sports. [46] As this Comment will argue, it is somewhat misleading to call the NCAA a

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[10] Kristi Dosh, College TV Rights Deals Undergo Makeovers, ESPN (May 13, 2012), http://www.espn.com/blog/playbook/dollars/post/_/id/705/ (summarizing the multi-billion-dollar deals of the major NCAA conferences).

[11] History at a Glance - Carrier Dome, Carrier Dome: Syracuse U., http://carrierdome.com/history/default.aspx (last visited Dec. 13, 2018).

[12] Robert Sandy, The Economics of US Intercollegiate Sports and the NCAA, in Handbook on the Economics of Sport 389, 389 (Edward Elgar 2006).

[13] Michigan Stadium, U. Mich., http://www.mgoblue.com/sports/2017/6/16/facilities-michigan-stadium-html.aspx (last visited Dec. 13, 2018). Like the Rose Bowl,the University of Michigan's stadium is quite old, but has been renovated and greatly expanded at a significant cost. Id.

[14] AT&T Stadium, HKS Architects, http://www.hksinc.com/places/cowboys-stadium-2/ (last visited Dec. 13, 2018).

[15] This is strictly speaking, of course. It is true that student-athlete's financial aid beyond the costs associated with attending a university have never grown; they have always been zero. However, if one were to consider the increased costs associated with attending a university - arguably one way of valuing a full scholarship - as a form of increased compensation for student-athletes, a different conclusion would be had altogether. For example, in 1949, UCLA estimated a maximum annual in-state resident cost of attendance of $ 1,243. University of California, General Catalogue, U.C. Bulletin (Aug. 10, 1949), http://www.registrar.ucla.edu/Portals/50/Documents/catalog-archive/1900-1949/49-50catalog.pdf. For the 2017-18 academic year, UCLA estimates an annual in-state resident cost of attendance to be $ 33,604. Financial Aid and Scholarships - Cost of Attendance, UCLA Financial Aid and Scholarships, http://www.financialaid.ucla.edu/Undergraduate/Cost-of-Attendance#495791584-residence-halls (last visited Dec. 13, 2018). Viewed from this perspective, the student-athlete today enjoys an inflation-adjusted compensation increase of 167.57%.

"cartel." [47] Team sports leagues of any kind must introduce restraints if they are to operate effectively. [48] For example, participants must agree to be bound by rules and submit themselves to disciplinary procedures; teams must agree to a system for scheduling games and determining a champion; and, in some cases, **[*283]** agreements must be made to restrain unbridled competition because it can lead to an environment that lacks competitive balance - where a few teams dominate all others - which is bad for business of sport. [49] The NCAA's compensation restrictions are one example of a restraint that is made to mitigate the possibility of monopolies. Compensation restraints in sport have been around since before the NCAA came into existence. Indeed, Major League Baseball began instituting a compensation restraint - known as the reserve clause - in 1879. [50] The Supreme Court has refused to overturn the reserve clause. [51]

Nonetheless, critics - including some student-athletes themselves - are bringing their claims to be heard in a court of law. Broadly speaking, the claims allege that various NCAA rules constitute an unreasonable restraint on trade, which violates federal antitrust law. Recently, in O'Bannon v. National Collegiate Athletic Ass'n, several current and former men's basketball and football student-athletes (the "Plaintiffs") made this very claim. [52] Specifically, the Plaintiffs alleged that NCAA rules barring student-athletes from being paid for their names, images, and likenesses ("NILs") constitute as a violation of Section 1 of the Sherman Act. [53] Initially, the Plaintiffs were successful. The district court applied antitrust analysis [54] and concluded that the NCAA was indeed in violation of federal antitrust law and, while the NCAA could cap the amount of compensation men's basketball and football student-athletes receive, **[*284]** it could not set the cap below the cost of attendance. [55] Significantly, the court also held that the NCAA membership must permit cash payments - not to be capped at less than $ 5,000 - into a trust for each year that the men's basketball and football student-athlete remained academically eligible, which was to be payable when the student-athlete left the school or their eligibility expired. [56] Under this holding, for the first time the student-athletes were entitled to compensation specifically related to the added revenues they bring to their institution.

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[16] Cost of attendance scholarships were recently introduced by the NCAA in 2015. NCAA, 2017-18 NCAA Division I Manual art. 15, 15.1, at 198 (Aug. 1, 2017) (allowing cost of attendance scholarships) [hereinafter NCAA Division I Manual]. Prior to 2015, the NCAA restricted scholarships to Grant-in-Aid. NCAA, 2014-15 NCAA Division I Manual art. 15, 15.1, at 190 (Aug. 1, 2014) (capping scholarship value at grant-in-aid). See Cost of Attendance Q&A, NCAA (Sept. 3, 2015), http://www.ncaa.com/news/ncaa/article/2015-09-03/cost-attendance-qa (announcing cost of attendance scholarship being permitted in the NCAA).

[17] Estimates vary. One study finds a men's basketball scholarship to be worth $ 120 thousand per year. See Jay Weiner & Steve Berkowitz, USA Today Analysis Finds $ 120k Value in Men's Basketball Scholarship, USA Today, Mar. 30, 2011, https://usatoday30.usatoday.com/sports/college/mensbasketball/2011-03-29-scholarship-worth-final-four_N.htm; see also Jeffrey Dorfman, Pay College Athletes? They're Already Paid Up To $ 125,000 Per Year, Forbes, Aug. 29, 2013, https://www.forbes.com/sites/jeffreydorfman/2013/08/29/pay-college-athletes-theyre-already-paid-up-to-125000year/#358d980e2b82 (valuing a college athletic scholarship at $ 125 thousand per year); Patrick Rishe, Value of College Football Scholarship Exceeds $ 2 Million for College Football's Top 25, Forbes, Aug. 21, 2011, https://www.forbes.com/sites/prishe/2011/08/21/value-of-college-football-scholarship-exceeds-2-million-for-college-footballs-top-25/#78edbf9619ef (estimating the total value of a top college football scholarship to exceed $ 2.2 million). But see Estimated Value of a Full 2014-2015 Indiana University Athletic Scholarship, Ind. Univ. Athletics (Sept. 15, 2014),http://iuhoosiers.com/documents/2015/5/21/genrel_2014 _15_misc_non_event__Sept2014CostScholarship.pdf (valuing a four-year Indiana University scholarship at $ 135,766 for in-state students and $ 240,274 for out-of-state students).

[18] See Travis Waldron, A Trip to the Men's Room Turned Jeff Kessler Into the NCAA's Worst Nightmare, Huffington Post (Aug. 7, 2017), https://www.huffingtonpost.com/entry/jeffrey-kessler-ncaa-lawsuit_us_59723f33e4b00e4363df3f59 (discussing Jeffrey Kessler, the plaintiffs' attorney in the current NCAA antitrust litigation, and his belief that college athletes should be better compensated); Rick Maese, Jay Bilas vs. NCAA: How a Former Player with a Law Degree Became an Agent of Change, Wash. Post, Nov. 12, 2014, https://www.washingtonpost.com/sports/colleges/jay-bilas-vs-ncaa-how-a-former-player-with-a-law-degree-became-an-agent-of-change/2014/11/12/7f4254ee-6a7d-11e4-bafd-6598192a448d_story.html?utm_term=.9c6845a0db7e

With respect to the Plaintiffs' compensation claim, their success was short-lived. On appeal, the Ninth Circuit reversed, in part, the holding of the lower court. [57] The appellate court agreed that the NCAA was in violation of federal antitrust law and that schools should be permitted to provide aid up to the full cost of attendance. [58] The court disagreed with the lower court's decision to allow compensation to be placed into a trust and distributed to student-athletes upon graduation or expiration of eligibility. [59] The court held that allowing pure cash compensation fails to preserve amateurism, which is founded on the idea that student-athletes compete as an avocation rather than as professionals. [60] Thus, compensation unrelated to educational expenses, such as a trust fund drawn from licensing agreements, is not an available remedy.

The Supreme Court denied certiorari [61] and the Plaintiffs ultimately walked away with the opportunity to receive financial aid up to the cost of attendance, but nothing more. I believe this was the right outcome. The courts have a long history of recognizing amateurism as a justification for NCAA rules that restrict compensation. [62] Consequently, the Ninth Circuit did what the district court **[*285]** should have done by recognizing the consistency of the courts' jurisprudence and holding that "cash sums untethered to educational expenses … is a quantum leap" from the NCAA's current amateurism preserving policy. [63]

Moreover, an argument originally made by the National Football League (NFL) in Sullivan v. NFL would serve to justify the compensation restraints equally as well if borrowed by the NCAA. [64] In Sullivan, the NFL was sued for antitrust violations due to a policy that restricted owners from offering to sell public stock in an NFL team (the "Public Ownership Policy"). [65] In response, the NFL claimed that its Public Ownership Policy "enhanced [its] ability to effectively produce and present a popular entertainment product unimpaired by the conflicting interests that public ownership would cause." [66] Allowing publicly owned teams, the NFL argued, would conflict with the long-term interests of the league as a whole due to short-term dividend expectations of public shareholders. [67] The NFL argued that this justification should be considered in the court's antitrust analysis. [68]

(discussing former Duke men's basketball player, Jay Bilas, as the "grand marshal" of the movement to "do away with the notion of amateurism [and] pay college athletes.").

[19] Jay Bilas, College Athletes Should Be Compensated, N.Y. Times, Mar. 14, 2012, *https://www.nytimes.com/roomfordebate/2012/03/13/ncaa-and-the-interests-of-student-athletes/college-athletes-should-be-compensated*. See Derek Van Rheenen, Exploitation in College Sports: Race, Revenue, and Educational Reward, 48 Int'l Rev. Soc. Sport 550, 2 (2012) (noting that critics believe collegiate sport is a "form of systematic exploitation, perpetuated by the … (NCAA) and its member institutions against college athletes.").

[20] Also known as the "Autonomous Five," the "Power Five," or the "Big Five," the five major collegiate conferences are the Pacific Coast Conference (PAC-12); Big 12 Conference; Big Ten Conference; Southeastern Conference (SEC); and the Atlantic Coast Conference (ACC). See Kent Babb, NCAA Board of Directors Approves Autonomy for "Big Five' Conference Schools, Wash. Post, Aug. 7, 2014, *https://www.washingtonpost.com/sports/colleges/ncaa-board-of-directors-approves-autonomy-for-big-5-conference-schools/2014/08/07/807882b4-1e58-11e4-ab7b-696c295ddfd1_story.html?utm_term=.e7eafbd71834* ; see also NCAA Division I Manual, supra note 16, art. 5, 5.3.2.1.1, at 33 (granting the Power Five conferences the authority to adopt or amend legislation autonomously).

[21] ESPN.com News Services, Michigan Wolverines Coach Jim Harbaugh's Salary Tops List of College Football Coaches, ESPN (Oct. 26, 2016), *http://www.espn.com/college-football/story/_/id/17892134/michigan-wolverines-coach-jim-harbaugh-salary-tops-list-college-football-coaches*. The lowest was the ACC at a median salary of $ 2,562,485. Id. The SEC, Big 12, Pac-12, and the Big Ten had median football coach salaries of $ 4,172,500; $ 3,540,788; $ 3,102,960; and $ 2,753,100, respectively. Id.

[22] Erik Brady et al., Major College ADs Averaging More Than $ 500,000 in Pay, USA Today, Mar. 6, 2013, *https://www.usatoday.com/story/sports/college/2013/03/06/college-athletics-directors-salaries-increase/1964239/*.

[23] In a 2015 investigation of the system of college athletics, The Chronicle of Higher Education stated, "All those big television contracts might make you believe that college sports pour money back into campus, or are at least self-sufficient [but] nothing could be further from the truth" and went on to note that public universities had spent more than $ 10.3 billion in subsidizing their sport programs. Wolverton et al., supra note 5. See Lesley Ryder, Don't Pay College Athletes, Huffington Post (Sept. 18, 2011),

The NFL's argument was significant because traditional antitrust inquiries involve restrictions, and the justifications for those restrictions, that reside in the same relevant market. Here, the NFL argued that restrictions in the relevant market of public ownership could be justified by the ancillary benefits to the closely related market of "NFL football in competition with other forms of entertainment." [69] The district court refused to recognize the NFL's justification, stating "a jury cannot be asked to compare what are essentially apples and oranges." [70] On appeal, the First Circuit disagreed, noting that antitrust analysis "seems to contemplate the balancing of a wide variety of factors and considerations, many of which are not necessarily comparable or correlative" [71] and concluded that it is appropriate to consider those ancillary benefits in one **[*286]** market as a justification for restraints in another market so long those markets are closely related. [72]

The Sullivan holding presents the NCAA with an opportunity to make the colorable argument that its compensation restrictions in the plaintiffs' markets of men's basketball and FBS football can be justified by the ancillary benefits that these restrictions provide in the closely related markets of non-revenue generating sports. Specifically, that benefit is maintaining equality of educational access and opportunity so that student-athletes may enjoy the benefits of a worthy higher education. [73]

Part II of this Comment discusses the history of the NCAA and provides the framework for analysis of antitrust claims under the Sherman Act. Part III examines past NCAA antitrust cases, the recent O'Bannon decision, and the currently pending [74] NCAA antitrust case. [75] Part IV argues that the courts prior decisions necessarily require a finding that amateurism justifies the NCAA's compensation restrictions. Part V contends that, even if the courts are unpersuaded by the weight of their prior decisions, the NCAA can point to the ancillary benefits of its compensation restrictions as justification. Finally, Part VI applies the ancillary benefits argument to the NCAA's current antitrust litigation, Alston. [76]

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https://www.huffingtonpost.com/lesley-ryder/pay-college-athletes-_b_968479.html ("The numbers from ESPN can be deceiving. It's true that big time sports like football and basketball can rake in millions of dollars in revenue, but for most universities that money still isn't enough to cover department costs.").

[24] Composition and Sport Sponsorship of the NCAA Membership, NCAA (Sept. 2018), http://www.ncaa.org/about/who-we-are/membership/composition-and-sport-sponsorship-ncaa-membership.

[25] Fulks, supra note 7, at 12.

[26] Id. at 19 (emphasis added).

[27] Id. at 12.

[28] Defendants' Opening Statement at 20, In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig. (Alston), No. 4:14-md-02541-CW, 2017 BL 437266 (N.D. Cal. Aug. 27, 2018).

[29] See Nathan Boninger, Antitrust and the NCAA: Sexual Equality in Collegiate Athletics as a Procompetitive Justification for NCAA Compensation Restrictions, 65 UCLA L. Rev. 754, 802 (2018) ("Altough football and men's basketball may be profitable, additional funds from the university are still generally needed to support athletic departments.").

[30] Knight Commission on Intercollegiate Athletics, supra note 2, at 48.

[31] For example, a 2010 survey revealed that 54% of students at Ohio University were unaware that they were each paying several hundred dollars in general fees to support the athletic department. Matt Krupnick, Would Your Tuition Bills Go Up if College Athletes Got Paid?, Time: Money, Nov. 28, 2014, http://time.com/money/3605591/college-athletes-sports-costs-

[*287]

II. History

A. Pre-NCAA Collegiate Sport

The first recorded intercollegiate athletic event occurred in 1852 when Harvard and Yale organized a regatta. [77] The event was commercially sponsored and, to gain an edge over the Yale Bulldog competition, Harvard enlisted the services of a non-student coxswain. [78] Like so many of today's collegiate contests, the first intercollegiate athletic event "was characterized by commercialization, crowds of spectators, prize money, and an eligibility question." [79] Robert Evans, reflecting on the history of the intercollegiate sports, states: "The problem of misrepresentation, illegal recruiting, and payment of athletes isn't a new one for big-time college athletics … . Gymnasium walls have echoed with similar cries ever since the humble beginnings of college sports." [80]

By 1870, collegiate athletics had taken their place in American college life. [81] It was during this year that the first intercollegiate football game occurred. [82] Baseball was played in all of the prominent eastern colleges. [83] Rowing, too, maintained its popularity after the Harvard-Yale regatta of 1852. [84] The increased prevalence of intercollegiate competition came with an increased desire to form associations that would allow teams to meet each other in athletic competition on a uniform and accepted basis. [85] To that end, the Intercollegiate Football Association, Rowing Association of American Colleges, and Intercollegiate Association of Amateur Athletes of America were all founded **[*288]** during the 1870s. [86] None of the associations were successful however, as partisanship, rivalry, and inconsistency would prove to be their undoing. [87]

The 1880s saw collegiate athletic competition more fully assume the commercial nature that continues to be present today, due in large part to the influences of university alumni and the acquiescence of university faculty. [88] Colleges began charging for admission to contests and soliciting financial support from alumni. [89] The increased funding allowed for coaches that were more technical and were paid salaries. [90] Salaried coaches led to intensified

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students/. See Boninger, supra note 29, at 802 ("Athletic departments often receive funds from the school, such as student fees allocated to athletics and direct transfers from the general fund of the institution.").

[32] Steve Berkowitz et al., Most NCAA Division I Athletic Departments Take Subsidies, USA Today, July 1, 2013, https://www.usatoday.com/story/sports/college/2013/05/07/ncaa-finances-subsidies/2142443/.

[33] Id.

[34] Phil Mushnick, Colleges Cutting Sports for "Revenue' Doesn't Add Up At All, N.Y. Post, Dec. 28, 2013, http://nypost.com/2013/12/28/colleges-cutting-sports-for-revenue-doesnt-add-up-at-all/.

[35] Dorfman, supra note 17 ("Given that the colleges that lose money on athletics [] subsidize their programs with money from regular student tuition, increasing pay to student athletes could mean tuition increases at many colleges.").

[36] Id.

[37] Geoff Grammer, UNM Regents Approve Athletics Budget Calling for "Reduction in Sports', Albuquerque J., Apr. 17, 2018, https://www.abqjournal.com/1160076/unm-board-of-regents-approve-athletics-budget-plan-calling-for-reduction-in-sports.html?utm_source=amp&utm_medium=more %20link&utm_campaign=amp.

[38] Id.

[39] Id.

[40] Justice Delos Santos, UC Berkeley to Pay $ 238M of Cal Athletics Debt from Stadium Renovations, Daily Californian (Jan. 18, 2018), http://www.dailycal.org/2018/01/17/central-campus-take-chunk-cal-athletics-debt/.

[41] Liz Clarke, Maryland Athletics' Financial Woes Reveal a Broken College Sports Revenue Model, Wash. Post, June 28, 2012, https://www.washingtonpost.com/sports/colleges/maryland-athletics-financial-woes-reveal-a-broken-college-sports-revenue-

and elaborated training for student-athletes. [91] The reputation of a college came to be predicated upon its victory count. [92] Notions of loyalty, power, and social prominenceled to the continued generous contributions by alumni to college athletic programs. [93]

The increasingly blatant commercialization of collegiate athletics did not go unchallenged. Harvard President Eliot's annual report from 1892-93, which set forth the benefits and disadvantages of college athletics, provided the groundwork for a bitter attack on the then-status of college athletics. [94] The annual report led to a broad controversy, with critics claiming that college athletics is filled with dishonesty; betting and gambling; recruiting and subsidizing; employment and payment of the wrong kind of men as coaches; extravagant expenditures of money; and the general corruption of youth. [95] Defenders of collegiate athletics (many being college graduates and former players) were quick to point to the vigor and mental alertness of athletes; their "manly character;" their loyalty; and the qualities of leadership that participation in athletics had engendered. [96] Defenders scoffed at the notion that any college athlete could be paid. [97]

Disagreement regarding the merit, or lack thereof, in collegiate athletics would continue. Agreement did exist, however, regarding the need for centralized agencies that could handle the relationships between colleges and **[*289]** universities. [98] Three organizations were founded during the last decade of the nineteenth century in an effort to meet this need. [99] Namely, these were the Southern Intercollegiate Athletic Conference, the Intercollegiate Conference (known today as the "Big Ten"), and the Maine Intercollegiate Track and Field Association. [100] These organizations paved the way for the first nationwide attempt to unite in one body all the reputable colleges and universities supporting intercollegiate competition - the NCAA. [101]

B. The NCAA

In 1905, alarmed by eighteen deaths and over one hundred injuries in intercollegiate football, President Theodore Roosevelt invited officials from major football programs to participate in a White House conference. [102] The

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model/2012/06/28/gJQAmEvx9V_story.html?utm_term=.8a4c154c5d2d (noting that 205 NCAA Division I teams have been dropped over a five-year period due to athletic department budgetary constraints).

[42] Wladimir Andreff, Sport and Financing, in Handbook on the Economics of Sport 271, 281 (Edward Elgar 2006). It has been this way for a while. In 1994, former athletics director at the University of Mississippi, Warner Alford, commented on the issue: "It's tough to get new women's sports fully funded when only football and men's basketball bring in revenue." NCAA, Former AD: Funding the Biggest Stressor, NCAA, Sep. 19, 1994, at 1, available at *https://ia801400.us.archive.org/31/items/NCAA-News-19940919/NCAA-News-19940919.pdf*).

[43] See Ken Belson, With Revenue Down, Colleges Cut Teams Along with Budgets, N.Y. Times, May 3, 2009, *http://www.nytimes.com/2009/05/04/sports/04colleges.html* (likening football and basketball to "sacred cows" and implying they will not be cut because of their ability to generate revenue, among other things); see also Wolverton et al., supra note 5 (mentioning that subsidies make thousands of athletic scholarships possible, without which would cause "many nonrevenue sports like track and field and swimming [to be] cut.").

[44] Indeed, nearly half of all FBS Presidents have expressed concern that the current status of intercollegiate athletics will affect the number of varsity sports their institution can retain in the future. See Knight Commission on Intercollegiate Athletics, supra note 2, at 24; see also Bob Wuornos, The Future of "Other' College Sports, Nat'l Rev., Jan. 17, 2015, *http://www.nationalreview.com/article/411740/future-other-college-sports-bob-wuornos* (explaining that "anyone who understands the systemic dynamics of [Division I] sports knows that [student-athlete compensation] will inevitably create a competitive crisis… . Athletic directors will be pressed to make up the difference by cutting the teams that big-money sports once subsidized."); Dorfman, supra note 17 ("Adding direct pay will put financial pressure on schools to drop non-revenue sports."); Jon Solomon, If Football, Men's Basketball Players Get Paid, What About Women?, CBS Sports (June 5, 2014), *https://www.cbssports.com/college-football/news/if-football-mens-basketball-players-get-paid-what-about-women/* (noting NCAA conference commissioners, university presidents, and athletic directors whom have suggested that paying players could result in women's sports and non-revenue men's sports being cut).

conference was intended to reduce the unsavory violence and mayhem that characterized collegiate football contests. [103] Additionally, President Roosevelt was concerned with the preservation of amateurism. [104] The meeting ultimately led to the formation of the Intercollegiate Athletic Association of the United States, which was officially renamed the National Collegiate Athletic Association (NCAA) in 1910. [105] The Association had sixty-two original members and was organized specifically to eliminate that "unsavory violence" and to "preserve amateurism." [106]

The NCAA spent its first several years organizing and promoting championship events, [107] leaving the actual governance and running of **[*290]** intercollegiate athletics in the hands of the students as it had always been. [108] In 1929, the NCAA was forced to reconsider this structure due to a damning three-year study by the Carnegie Foundation for the Advancement of Education (the "Carnegie Report"):

[A] change of values is needed in a field that is sodden with the commercial and the material and the vested interests that these forces have created. Commercialism in college athletics must be diminished and college sport must rise to a point where it is esteemed primarily and sincerely for the opportunities it affords to mature youth … to exercise at once the body and the mind and to foster habits [of] both bodily health and … high qualities of character … . [109]

In response, the NCAA restructured recruiting rules, and coaches and administrators began to take a major role in operating and recruiting at each athletic program. [110]

Scandals would continue to occur however, [111] prompting the NCAA to enact the Sanity Code in 1948, which was created to "alleviate the proliferation of exploitive practices in the recruitment of student-athletes." [112] The Sanity Code was short-lived, [113] being replaced in 1951 with the Committee on Infractions, an enforcement body with the authority to penalize members involved in rules violations.

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[45] NCAA (@NCAA), Twitter (Mar. 31, 2018, 9:48 AM), https://twitter.com/NCAA/status/980124563353886720 (statement by NCAA President, Mark Emmert).

[46] See Karl W. Einolf, The Economics of Collegiate Athletics, in Handbook on the Economics of Sport 379 (Edward Elgar 2006); see also Sandy, supra note 12, at 390 ("The NCAA has been described as a surplus-maximising cartel run primarily for the financial benefit of a small coterie of senior NCAA employees, former employees, and prominent athletic directors and coaches.").

[47] Andrew Zimbalist, Unpaid Professionals: Commercialism and Conflict in Big-Time College Sports 6 (1999) ("Big-time college sports is organized as a cartel … through the NCAA"); Andres Rodriguez Brauer, The NCAA Cartel, Econ. Rev. at NYU (Apr. 19, 2017), https://theeconreview.com/2017/04/19/the-ncaa-cartel/ (describing the NCAA as an "exploitive cartel").

[48] Stefan Szymanski, The Sporting Exception and the Legality of Restraints in the US, in Handbook on the Economics of Sport 730, 730 (Edward Elgar 2006) (discussing the sports leagues as a joint venture, which may in all likelihood require the agreement of restraints among the members). See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101 (1984) (noting that some restraints "must be agreed upon" if competition is to continue to effectively exist amongst the NCAA's member institutions).

[49] Szymanski, supra note 48.

[50] Id. at 731. The reserve clause tied a player to the one specific team that held that player's contract the previous season. Lawrence Hadley, The Reserve Clause in Major League Baseball, in Handbook on the Economics of Sport 619 (Edward Elgar 2006). If a player wanted to play Major League Baseball, he could only play for the one team that held his contract, unless he was traded at the owner's discretion. Id. Although it is not facially a compensation restriction, the reserve clause has the same effect by reducing player wages due to an elimination of competition on the owners' side of the labor market. Id.

[51] The reserve clause was tested in 1922 and again in 1972. In the first case, the Supreme Court decided that antitrust laws do not apply to baseball because it does not involve interstate trade. Federal Baseball Club v. Nat'l League, 259 U.S. 200 (1922). In the second case, the reserve clause was again left untouched; instead leaving the rule to Congress to overturn. Flood v.

[*291] Under the leadership of newly appointed Executive Director, Walter Byers, the NCAA marked a new beginning. [114] The power of the new Committee on Infractions was complemented by a new enforcement division coupled with a newfound financial power due to the successful negotiations of the first collegiate football television contract, valued at over one million dollars. [115] The NCAA began to play a dominant role in the governance of intercollegiate athletics for the first time. [116] This dominance, however, came with competing criticisms that persist today. One set of criticisms asserted that intercollegiate athletics had been commercialized to the point that it was little more than a big business masquerading as an educational enterprise. [117] On the other hand, the NCAA was criticized for having enforcement efforts that were too harsh on some schools and not harsh enough on others. [118] The NCAA attempted to abate the criticisms with another round of major reform efforts to no avail. [119]

Legislators, too, were critical. The NCAA was thesubject of a congressional investigation into the alleged unfairness of its enforcement procedures and processes in 1978. [120] In response, the NCAA again amended its procedures. [121] Criticisms continued to grow and reached a fever pitch when an investigation into the drug-related death of a student-athlete revealed a lack of academic integrity at the University of Maryland. [122] The revelation led to calls for organized protests over abuses in athletic programs and demands that major sports powers cut their athletic budgets. [123]

Determined to change course, the university presidents called a special convention in June 1985. [124] Like the NCAA, the university presidents **[*292]** themselves had been feeling competing pressures. On one hand, the university faculty demanded that the presidents recognize their academic mission by de-emphasizing major, "winning" athletic programs that were commercial in both appearance and function. [125] On the other hand, the university alumni, boosters, board of trustee members, and state legislators pressured the presidents to produce winning athletic programs. [126] The presidents recognized that if reform was to occur successfully, it needed to be on a national level, as a collective unit. [127] Competitive pressures of major athletics programs made it impossible to implement major reform on individual campuses, where powerful alumni, boosters, legislators and trustees used their positions to coerce presidents to maintain a competitive edge as paramount, regardless of ethics. [128] At the

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Kuhn, 107 U.S. 258 (1972). The clause was eventually overturned by a private arbitrator. David Greenberg, Why Does Baseball Have An Antitrust Exemption?, Slate (July 19, 2002), *https://slate.com/news-and-politics/2002/07/why-does-baseball-have-an-antitrust-exemption.html*. But see*Smith v. Pro Football, Inc., 593 F.2d 1173, 1175 (D.C. Cir. 1978)* (affirming the finding that the NFL Draft serves as a compensation restriction and is thus a violation of Sherman antitrust law); *Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 890-91 (S.D.N.Y. 1975)* (noting that many NBA compensation-related rules appear to be per se violative of the Sherman Act).

52 *7 F. Supp. 3d 955 (N.D. Cal. 2014).*

53 *Id. at 963.* As will be addressed later in this Comment, Plaintiffs also alleged that limiting scholarships to Grant-in-Aid, as opposed to the full cost of attendance, is violative of federal antitrust law. *Id. at 982-93.*

54 The analysis applied, known as the Rule of Reason, will be thoroughly discussed later in this Comment.

55 *Id. at 1008-09.*

56 *Id. at 1009.*

57 *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).*

58 *Id. at 1072, 1075-6.*

59 Or, if the student-athlete never graduates, it is upon expiration of the student-athletes' eligibility. *Id. at 1079.*

60 *Id. at 1078.*

61 *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015),* cert. denied, ***137 S. Ct. 277 (2016).***

June 1985 special convention, the university presidents, through the Presidents Commission, shifted control over intercollegiate athletics by adopting key enforcement legislation in an effort to enhance academic integrity in their athletic programs. [129] The legislation effectively placed the Presidents and Chancellors in control of the NCAA, replacing a regime of individual accountability:

[The Presidents] are deeply concerned that there be sufficient institutional control of athletics programs, [with] apparent lack of such control in many instances leading to problems for academic values in higher education. Presidents are heartsick **[*293]** about the serious violation of rules which are occurring by coaches, alumni and other boosters and are determined to stop them … . We can make it very clear by our actions here today … that the nation's presidents and chancellors are going to determine the direction and the major policies of college athletics, and that we are not going to condone any failure to comply with those policies. [130]

This paradigm shift was timely. A few years prior to the special convention, one coach told an NCAA representative, "While you're out making new rules, we the coaches are meeting at a hotel up the street trying to figure how to get around them." [131]

Once the legislation was adopted, the NCAA became a vehicle driven by the universities as a collective unit. The fear that unilaterally adopting legislation would result in a diminished capacity to compete was made less of an issue because legislation would be adopted universally among the NCAA member institutions.

Today, the corporate structure of the NCAA mirrors those significant changes made by the President's Commission in 1985. The highest governance body in the NCAA, the Board of Governors, consists of twenty members, sixteen of whom are Presidents or Chancellors of various large and small colleges throughout the country. [132] Those sixteen individuals are the only members on the board who are entitled to vote on NCAA legislation, with the exception that the President of the NCAA, currently Mark Emmert, may vote in the case of a tie. [133] Thus, the NCAA is simply a conduit by which the universities regulate themselves - a central location where the university presidents and chancellors can meet to discuss, and agree on, binding legislation. [134]

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62 See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 117 (1984)* ("It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams") (emphasis added); *Id. at 102* ("In order to preserve the character and quality of the [college sports], athletes must not be paid, must be required to attend class, and the like."); see also *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 344-45 (7th Cir. 2012)* ("The NCAA's limitation on athlete compensation … directly advances the goal of maintaining "a clear line of demarcation between intercollegiate athletics and professional sports,' and thus is … aimed at preserving the existence of amateurism and the student-athlete") (citations omitted) (quoting *Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1089 (7th Cir. 1992)); McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1344-45 (5th Cir. 1988)* (noting that amateur eligibility centered around amateurism allows the NCAA product to remain distinct from its professional counterpart and reasonably furthers the NCAA goal of integrating athletics with academics).

63 *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1078 (9th Cir. 2015).*

64 *Sullivan v. Nat'l Football League, 34 F.3d 1091 (1st Cir. 1994).*

65 *Id. at 1096.*

66 *Id. at 1113.*

67 *Id. at 1102.*

68 Id.

69 *Id. at 1112.*

70 *Id. at 1111.*

[*294]

C. Amateurism

As mentioned in the prior section of this Comment, the NCAA was founded in large part upon the idea of preserving amateurism. The Harvard-Yale regatta of 1852 was significant not only in the fact that it institutionalized a tradition of intercollegiate competition in this country - a tradition of utmost importance to this very day - but also because it put on display the result when both commercialization and competition are mixed: a win at all costs environment. [135] President Roosevelt expressly acknowledged the issue of amateurism preservation when he called the White House meetings that led to the formation of the NCAA. The lack of a commonly held understanding of what it means to be a student-athlete plagued intercollegiate competition in the years leading up to the formation of the NCAA and continued to be problematic for decades later. [136] The need to establish boundaries around who could participate in intercollegiate sport, and what their goals ought to be, had to be determined if fair competition was ever to be achieved. It is through the concept of amateurism that the NCAA seeks to set these boundaries. And, when one considers the reports that a standard basketball player in the late 1970's and 80's received $ 10,000 - or that a top football player might receive $ 25,000 - the need for those boundaries of amateurism become critical. [137] This section seeks to review the NCAA's approach toward amateurism and how that concept has been received by critics.

Article VI of the NCAA's original constitution was written to, in part, prevent the participation by non-amateurs. [138] A well-conceived definition of amateurism remained elusive however, prompting the NCAA to establish a committee to affirmatively define what an amateur is. [139] The NCAA did just **[*295]** that, becoming the first - domestically or abroad [140] - to affirmatively define what it means to be an amateur in 1909:

An amateur in athletics is one who enters and takes part in athletic contests purely in obedience to the play impulses or for the satisfaction of purely play motives and for the exercise, training, and social pleasure derived. The natural or primary attitude of mind in play determines amateurism. [141]

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[71] *Id. at 1112* (referring to Justice Brandeis' famous formulation of the rule of reason (citing *Bd. of Trade v. U.S., 246 U.S. 231, 238 (1918)).*

[72] Id. at 1113. Notably, the court in Sullivan cites to the seminal Bd. of Regents decision as "one of the more extensive examples … where the Court considered the value of certain procompetitive effects that existed outside of the relevant market in which the restraint operated." Id. at 1111. See *L.A. Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1397* (directing the finder of fact to "balance the gain to interbrand competition against the loss of intrabrand competition," where the two types of competition operated in different markets).

[73] *U.S. v. Brown Univ., 5 F.3d 658, 678 (3d Cir. 1993)* ("It is most desirable that schools achieve equality of educational access and opportunity in order that more people enjoy the benefits of a worthy higher education.").

[74] The decision is pending at the time of this writing. It is expected that the decision will be made by the time this Comment is published. See Michael McCann, Alston v. NCAA: Analyzing College Sports' Grant-in-Aid Trial, Sports Illustrated, Sept. 4, 2018, *https://www.si.com/college-football/2018/09/04/alston-v-ncaa-trial-news-updates-ncaa-cost-attendance* (nothing that a ruling on the current NCAA antitrust litigation is likely to be made sometime in November 2018).

[75] In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig. (Alston), No. 4:14-md-02541-CW (N.D. Cal. argued Sept. 25, 2018). For simplicity, the case's colloquial name, Alston, will be used throughout this Comment.

[76] Id.

[77] Rodney K. Smith, The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others, *62 Ind. L.J. 985, 988-90 (1987).*

Importantly, the NCAA also defined what it means to be a professional athlete, distinguishing the concepts of amateurism and professionalism:

A professional in athletics is one who enters or takes part in any athletic contest from any other motive than the satisfaction of pure play impulses, or for the exercise, training, or social pleasures derived, or one who desires and secures from his skill or who accepts of spectators, partisans, or other interests, any material or economic advantage or reward. [142]

It is significant that the NCAA not only defines amateurism, but also professionalism in athletics, with the primary distinction being the acceptance of pecuniary gain. [143] Taken together, the two definitions produce an important takeaway: Amateurs don't get paid. [144]

In 1916, the NCAA, along with various other organizations, [145] established a national standard of what it means to be an amateur: "An amateur athlete is defined as one who participates in competitive physical sport only for the pleasure, and the physical, mental, moral, and social benefits derived therefrom." [146]

Today, the NCAA maintains a definition of similar thrust, although worded differently:
[*296]

Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises. [147]

The concept of amateurism has thus been present since the NCAA's inception in 1906. The sincerity with which the NCAA actually observes and enforces amateurism is subject to open debate. Critics claim that amateurism is simply the veil behind which the NCAA hides as it profits off the backs of student-athletes with unequal bargaining

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78 *Id. at 989.* Harvard won. Carnegie Report, supra note 7, at 18. See Sandy, supra note 12, at 396 ("At the beginning of intercollegiate athletics some colleges recruited athletes who had no connection with the college, they simply wore the school's jersey for pay.").

79 *Smith, supra* note 77, at 989 (quoting George Mason Univ. & Am. Council on Educ., Admin. Univ. Programs: Internal Control & Excellence 18 (1986)). These types of eligibility questions would persist. In the latter part of the nineteenth century, a successful student-athlete at Yale was provided with a suite of rooms in the dorm, free meals, a scholarship, the ability to sell programs for profit, was made an agent of the American Tabaco Company, where he received a commission, and a ten-day paid vacation in Cuba. Id. at 989 n.23.

80 Robert J. Evans, Blowing the Whistle on Intercollegiate Sports 7 (1974).

81 Carnegie Report, supra note 7, at 18.

82 The game was between Rutgers and Princeton, which was spurred by the loss of Rutgers to Princeton in a baseball game. Id. at 19. Rutgers won. Id.

83 Id. at 20.

84 Id. at 19.

85 Id. at 21.

86 Id. at 20.

87 Id. at 21.

88 Id. at 23.

89 Id.

90 Id. at 22.

power. [148] In some instances these critiques seem warranted. For example, the NCAA allows student-athletes to be paid by their respective countries for participation in the Olympics. [149] In 2016, a gold, silver, or bronze metal resulted in a payout of twenty-five thousand, fifteen thousand, or ten thousand dollars, respectively. [150] And, where the student-athletes earns multiple Olympic metals, those figures add up. [151] **[*297]** Additionally, the NCAA allows tennis student-athletes the opportunity to accept up to $ 10,000 per calendar year in prize money prior to their full-time collegiate enrollment. [152] A cursory review of these allowances make the hypocrisy of amateurism seem clear and the criticisms warranted. Here, the NCAA allows select student-athletes to be paid, an act directly contrary to the values it contends are paramount. Without more inquisition, it is not entirely unreasonable to conclude that amateurism is indeed a myth, used only to advance the ends of the decisionmakers in the NCAA, rather than the student-athletes.

But, in some cases, like those of the Olympic and tennis student-athletes discussed above, an explanation does exist. In collegiate tennis, it has long been accepted that the sport is dominated by international students. [153] These international students come from a different culture, one where "nobody plays for free" and very few understand what amateurism is. [154] Moreover, most lose money despite having received prize checks due to travel and training costs. [155] The NCAA specified the losses being absorbed by prospective student-athletes and their families when the legislation allowing tennis student-athletes to earn limited cash amounts was adopted. [156] These foreign players are considered to **[*298]** have upgraded the level of the college game [157] and their presence within the NCAA hasgrown substantially over the past decade. [158] The facts suggest that the NCAA is increasing opportunities for student-athletes. This seems even more likely when it is taken into consideration that the NCAA generally loses money through its facilitation of collegiate tennis. [159]

With regard to allowing payment for Olympic student-athletes, the motives were similarly to help defray those significant costs that come with training for competition on the world stage. [160] Critics point to instances where NCAA student-athletes received large payouts for their Olympic performances, with one payout nearing one million dollars. [161] But, like the coaches with million-dollar annual salaries, these payouts are the exception rather than the

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[91] Id.

[92] Id. at 24.

[93] Id. at 23.

[94] Id. at 24.

[95] Id. at 25.

[96] Id.

[97] Id.

[98] Id. at 26.

[99] Id.

[100] Id. at 27.

[101] Id.

[102] *Smith, supra* note 77, at 990. Violence in football was not uncommon. In the 1880's, then-Harvard President, Charles William Eliot, described football at "brutal" and formally abolished football for two years in 1884. Carnegie Report, supra note 7, at 21-22. See Wray Vamplew, The Development of Team Sports Before 1914, in Handbook on the Economics of Sport 435, 438 (Edward Elgar 2006) ("[American Football] was a brutal but popular game with many injuries and deaths and in 1905, following a season in which 18 college players had died, [the NCAA] was formed to overhaul the rules.").

[103] James V. Koch, The Economic Realities of Amateur Sports Organization, *61 Ind. L.J. 9, 12 (1985).*

[104] Id.

rule. The costs associated with training to be a world-class Olympic athlete, worthy of medal recognition, are exorbitant - not to mention the equipment and entrance costs. [162] Most NCAA collegiate athletes participating in the Olympics do not make money. [163]

However, there are some inconsistencies in the NCAA's enforcement of amateurism that are troublesome. The NCAA's profits from the sale of **[*299]** star-players' jerseys [164] and its failure to appropriately sanction high-revenue generating schools [165] are two of the most recent inconsistencies. In these cases, proponents of the NCAA are hard-pressed to reconcile amateurism and the practices of the NCAA. Harder questions arise: Should amateurism be abandoned entirely? Or, alternatively, is it okay that amateurism has not been distilled to its most perfect form? The courts, by way of the Sherman Antitrust Act, have been forced to grapple with these questions. For decades, numerous opinions on this issue have been drafted; and yet, a solution remains elusive. The next section of this Comment outlines the courts' current antitrust framework - the mechanism by which the concept of amateurism has historically been challenged. The rest of this Comment seeks to detail the most relevant cases on this issue and, finally, considers a possible solution.

D. Antitrust Framework

The Sherman Antitrust Act is the primary authority under which claims are brought against the NCAA for restricting student-athlete pay. Specifically, Section 1 of the Sherman Antitrust Act makes it illegal to form any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." [166] In order to prevail on a claim under this Section, a plaintiff must show: (1) a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade; and (3) that the restraint affected interstate commerce. [167] When it comes to claims against the NCAA, steps one and three of the analysis are low thresholds, which plaintiffs routinely overcome. [168] This is largely because the rules forbidding student-athletes from receiving compensation are codified in the NCAA Manual, an embodiment of the agreed upon rules, which satisfies part one of the analysis. As for step three, the NCAA is a nationally operating enterprise, with member institutions **[*300]**

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105 *Smith, supra* note 77, at 991. In order to avoid confusion, the NCAA will be referred to as the NCAA even when discussing the Association during the years of 1905 to 1910. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014)* ("The NCAA was founded in 1905 by the presidents of sixty-two colleges and universities in order to create a uniform set of rules to regulate intercollegiate football.").

106 *Smith, supra* note 77, at 991; Carnegie Report, supra note 7, at 27.

107 *Smith, supra* note 77, at 991.

108 It was status quo for intercollegiate athletics to be governed and ran by the students. It had been that way since the 1850s:

The rowing clubs had set a precedent for student-run organizations in the early days of intercollegiate athletics, raising their own funds, purchasing equipment, and constructing facilities. In the 1850s the boating organizations were initiated, coached, administered, and financed by students. The captain was indispensable. He assured the continuance of the organization, served as its coach and administrator, organized fund raisers, and promoted his club; he was the sole arbiter of the athletic program, although the team managers controlled the scheduling of contests and the purse strings.

Smith, supra note 77, at 989 n.21. See Carnegie Report, supra note 7, at 21 (noting how management of American college athletics appears to have been entirely in the hands of the students until the late nineteenth century).

109 *Smith, supra* note 77, at 991 (alteration in original).

110 Id. at 992.

111 For instance, college athletics faced a major gambling scandal in 1945 when a team was caught shaving points to keep the spread margin down. Ironically, the worst gambling scandal occurred after the Sanity Code was introduced in 1948, when thirty players and seven schools were found to have conspired to fix games in 1951. *Smith, supra* note 77, at 989 n.39.

112 Id. at 992.

operating in every state. [169] Interstate commerce is clearly affected. Thus, claims brought on this issue overwhelmingly turn on step two of a Sherman Antitrust analysis: Did the agreement unreasonably restrain trade?

There are three available means with which the courts answer this question: (1) the Rule of Reason; (2) the Per Se rule of illegality; or (3) the more recently developed Quick Look analysis. Each are briefly discussed below.

1. Rule of Reason

Courts use the Rule of Reason to analyze antitrust claims brought against the NCAA. [170] Under the rule of reason analysis, an agreement unreasonably restrains trade where "the relevant agreement likely harms competition by increasing the ability or incentive profitability to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement." [171] The courts utilize a three-step process of burden shifting between the defendant-NCAA and the plaintiff to determine if an agreement constitutes an unreasonable restraint of trade. [172]

The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market. [173] A relevant market consists of both a product and geographic market. [174] The product market includes the pool of goods or services that have reasonable interchangeability **[*301]** of use and cross-elasticity of demand. [175] The geographic market extends to the area of effective competition where buyers can turn for alternate sources of supply. [176] Once the relevant market is determined, significant anticompetitive effects in the relevant market must be established by the plaintiff. Significant anticompetitive effects may be indirectly established by proving that the defendant possessed the requisite market power within the relevant market. [177] Alternatively, the anticompetitive effect may be established directly by showing actual anticompetitive effects, such as control over output or price. [178]

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[113] The Sanity Code was ineffective because its only recourse was to expel members from the NCAA in the event that a violation was uncovered. Id. at 993.

[114] Id.

[115] Id.

[116] One of the major governance changes by the NCAA was establishing divisions within college athletics in an effort to group institutions of similar sizes for the purpose of maintaining a similar level of competitiveness. Id.

[117] Id. at 994.

[118] Criticism of the NCAA grew in force when, in 1976, the NCAA's rule enforcement powers expanded, allowing for schools to be directly penalized and administrators, coaches and student-athletes to be indirectly penalized as well. Id.

[119] In 1973, the NCAA formed a special committee to study the criticized enforcement process and ultimately decided to separate the investigative and prosecutorial roles in the Committee on Infractions. Id.

[120] Id.

[121] Id.

[122] Id.

[123] Id. at 995 (noting demands that were made by the Carnegie Foundation for the Advancement of Teaching.

[124] *Smith, supra* note 77, at 996. See Paul Hardin, Commission Unified on Proposals, NCAA News, June 19, 1985, at 2 *https://ia902303.us.archive.org/30/items/NCAA-News-19850619/NCAA-News-19850619.pdf*. (comment by Drew University President Paul Hardin) ("Never before has the NCAA convened … at the request of its presidents and never to deal with an agenda proposed by the presidents.").

[125] *Smith, supra* note 77, at 996.

If the plaintiff can satisfy this burden, the defendant must then come forward with evidence of the restraint's legitimate procompetitive justifications. [179] Essentially, the defendant must show that, although they have imposed restraints, those restraints are justified by some procompetitive effect, typically in the same market.

If the defendant can demonstrate such a justification, the burden will shift back to plaintiff to demonstrate that the defendant's justification can be achieved by substantially less restrictive means. [180] The less restrictive means must be "virtually as effective" and must come "without significantly increased cost." [181] If, at any point, a party is unable to meet their burden, they will lose.

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2. Per Se

The Per Se analysis is appropriate where an entity is engaging in practices that can be conclusively presumed illegal without any inquiry into competitive purpose or market effect. [182] Such practices exist where there is clearly a pernicious effect on competition and the practice lacks any redeeming virtue. [183] Courts have typically presumed practices such as price fixing, [184] output limitations, [185] division of markets, [186] and group boycotts [187] as illegal, applying the per se analysis accordingly. While some may find it appropriate that the NCAA be subject to such an analysis, the Supreme Court has disagreed; recognizing that the NCAA must make and enforce a myriad of rules defining and sometimes restraining the manner in which institutions compete, if the NCAA is to exist at all. [188] Thus the per se analysis has yet to be applied to antitrust claims against the NCAA.

3. Quick Look

Similar to the Per Se analysis, quick look is not typically applied to antitrust claims against the NCAA. [189] The quick look analysis is worth mentioning because it has recently been argued that it is the appropriate lens with which the court should view NCAA antitrust claims. [190] The quick look analysis is a truncated form of the rule of

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[126] Id. at 995. The alumni, boosters, board of trustee members, and state legislators were often "power-brokers" that could provide important funds for the university, which could be used to build a science building, for example. Walter Byers, Executive Director Assesses Status of Intercollegiate Athletics, NCAA News, Sept. 22, 1986, at 4, https://ia801402.us.archive.org/1/items/NCAA-News-19860922/NCAA-News-19860922.pdf. University presidents were placed in the difficult position of having to direct these influential individuals not to have a hand in the operations of the athletic program while also asking for large donations. Id. Unprincipled head coaches would seek bypass the university president and deal directly with the influential individual, creating pressure on the university president to comply. Id.

[127] *Smith, supra* note 77, at 994.

[128] Id. at 996-97 (describing the "association syndrome" and its ability to be used to promote values as a collective unit, which could not be promoted in individually due to pressures of power university actors). In support of major reform, then NCAA President Walter Byers described those pressures facing university presidents:

It is difficult sometimes for a [president] who longs for funds to build a new science building to offend one of those power-brokers by directing him not to have a hand in the operations of the athletics program. And it is because of this leverage situation that the popular, unprincipled head coach gets what he wants by dealing directly with the big-time supporter, bypassing the university and athletics administration.

Byers, supra note 126.

[129] *Smith, supra* note 77, at 997-98.

[130] Convention Success Spurs Future Commission Actions, NCAA News, July 3, 1985, at 1, 10, https://ia601400.us.archive.org/22/items/NCAA-News-19850703/NCAA-News-19850703.pdf (statement by NCAA Presidents Commission Chair John W. Ryan). See*Smith, supra* note 77, at 997 ("there is no doubt who is running the show in college sports. It's the college presidents.") (quoting Associated Press sportswriter, Doug Tucker).

reason analysis and presumes the defendant's restraint is unlawful. [191] Therefore, the burden does not start with the plaintiff to demonstrate significant anticompetitive effects within a relevant market. **[*303]** Rather, it skips the initial rule of reason burden entirely, going straight the defendant to justify the restraint. Like the rule of reason, if the restraint can be justified, the burden will shift back to the plaintiff to demonstrate that the plaintiff's justification can be achieved by less restrictive means.

The quick look analysis is appropriate where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." [192] If any plausible justification for the restraint may exist, the quick look form of analysis is inappropriate. [193] The Supreme Court has found that the NCAA's general restrictions on student-athlete compensation could conceivably enhance competition. [194] Thus, like the per se analysis, the quick look analysis is inappropriate in most antitrust cases challenging the NCAA's amateurism rules.

III. Antitrust Claims and the NCAA

A. History

More than three decades ago, in 1984, the Supreme Court decided National Collegiate Athletic Ass'n v. Board of Regents, a landmark decision that dominates the NCAA's now storied relationship with antitrust law. [195] Proponents of NCAA amateurism rules argue that the fundamental premise of the case is that student-athletes should not be paid. [196] Unsurprisingly, it is this case that the NCAA has relied on the most in defending its amateurism rules.

In Board of Regents, the University of Oklahoma and the University of Georgia challenged an NCAA-mandated television plan that limited the amount **[*304]** of times a member institution could appear on television. [197] Restrictive television plans had become routine for the NCAA. [198] The NCAA adopted the first one in 1951 after a year-long study revealed that television has "an adverse effect on college football attendance and unless brought

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131 J. Wade Gilley et al., Administration of University Athletic Programs: Internal Control & Excellence 25 (1986).

132 NCAA, Board of Governors, *http://web1.ncaa.org/committees/committees_roster.jsp* ?CommitteeName=EXEC (last visited Dec. 13, 2018).

133 Id.

134 Indeed, it has been accepted that the NCAA can be viewed as a body that "reflects the interests of its member institutions, the colleges, and is directly controlled by college presidents." Sandy, supra note 12, at 390. The opposing view is that the NCAA is a "surplus-maximising cartel run primarily for the financial benefit of a small coterie of senior NCAA employees, former employees, and prominent athletic directors and coaches." Id.

135 Gilley et al., supra note 131, at 17. Indeed, it has been acknowledged that commercialism in collegiate athletics has led to widespread rule-breaking:

It is too much to expect that human nature should not seek to evade detailed regulations, especially when these regulations appear in certain cases to place a premium upon their evasion. With the rise of commercialism in college athletics, its temptations became in many instances too strong to be resisted. The result has been a great increase in the number of ways by which, sometimes even under the guise of philanthropy, the amateur convention is set at naught.

Carnegie Report, supra note 7, at 50.

136 Carnegie Report, supra note 7.

137 Gilley et al., supra note 131, at 32.

138 Carnegie Report, supra note 7, at 42.

139 Id.

140 Id. at 42, 50 (noting that the NCAA was the first to affirmatively define amateurism in the United States and that the conception of the amateur in international sport owes its definition to amateurism in the United States).

under some control threatens to seriously harm the nation's overall athletic andphysical system." [199] Several member institutions, seeking to increase revenues, desired a more liberal number of television appearances and, in 1979, sought to negotiate a television agreement of their own. [200] The NCAA publicly announced that it would take disciplinary action against any member that entered into a separate television agreement, effectively killing any chances of a separate agreement coming to fruition. [201] The Universities of Oklahoma and Georgia brought this antitrust action in response. [202]

As discussed, the NCAA is subject to the Rule of Reason analysis for antitrust claims. The plaintiffs met their initial burden of demonstrating significant anticompetitive effects exist in a relevant market: The NCAA television plan restricted each institution's ability to sell television rights in the relevant market of college football broadcasts. [203] Consequently, the price for those respective television rights were higher and the output was lower than they might be in a less restrictive market. [204] Thus, the anticompetitive effects were "apparent." [205]

The burden then shifted to the NCAA to justify the restraints imposed through the television plan. The NCAA proffered three justifications, [206] only **[*305]** one of which the court deemed to have salience: competitive balance amongst amateur teams. [207] The NCAA argued that its interest in maintaining competitive balance amongst amateur teams is a legitimate procompetitive justification. [208] Significantly, the Supreme Court agreed:

It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. [209]

The NCAA next argued that its legitimate interest in maintaining that competitive balance amongst amateur teams justified its restrictive television plan. [210] On this point, the Court disagreed. And, in the end, the Court affirmatively acknowledged that the NCAA needs "ample latitude" in playing the "critical role [of] the maintenance of a revered tradition of amateurism in college sports." [211] But, a restrictive television plan is not a means of preserving

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[141] Id. at 42 ("[The NCAA definitions] make up, so far as can be ascertained, the first attempt affirmatively to define an amateur.").

[142] Id. (emphasis added).

[143] This distinction exists today. NCAA Division I Manual, supra note 16, art. 12, 12.01.2, at 61 ("The student-athlete is considered an integral part of the student body, thus maintaining a clear line of demarcation between college athletics and professional sports.").

[144] The Ninth Circuit relied on this concept expressly in the most recent antitrust litigation regarding student-athlete pay. See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015).*

[145] Namely the Amateur Athletic Union (AAU) and the Intercollegiate Association of Amateur Athletes of America (IAAAA). Carnegie report, supra note 7, at 44.

[146] Id.

[147] NCAA Division I Manual, supra note 16, art. 2, 2.9, at 4. The distinction of amateurism and professionalism can be compared to that of the distinction between love and money. Marjorie Garber, Academic Instincts 5 (2001). Indeed, the word amateur is derived from the Latin word Amator, or lover. Amateur, Dictionary, *http://www.dictionary.com/browse/amateur* (last visited Dec 13, 2018). The amateur competes for the love of the sport alone, while the professional athlete competes for money. Garber, supra.

[148] Jason Whitlock, Greedy NCAA Still Exploiting Athletes, Fox Sports, Mar. 29, 2011, *https://www.foxsports.com/college-basketball/story/ncaa-amateur-concept-is-a-sham-that-exploits-players-032911*; Jay Bilas, Until the NCAA Solves the Money Problem and Pays Athletes Its Problems Will Continue, ESPN (Sep. 28, 2017),*http://www.espn.com/mens-college-basketball/story/_/id/20841877/until-ncaa-solves-money-problem-pays-athletes-problems-continue*; Patrick Hruby, Why America's Newest Tennis Sweetheart Should Sue the NCAA, Vice Sports (Aug. 28, 2014), *https://sports.vice.com/en_us/article/nzpmjx/why-americas-newest-tennis-sweetheart-should-sue-the-ncaa* ("Everyone knows

amateurism. [212] The television plan does not "fit into the same mold" as those rules that preserve amateurism. [213] Thus, preserving amateurism is a legitimate justification for which some restrictions will withstand antitrust scrutiny because they enhance public interest in intercollegiate athletics. The Supreme Court found that the television plan did not serve that legitimate purpose. [214] The restrictive television plan was a violation of antitrust law. [215]

The Board of Regents decision is important because it makes clear what the critical role of the NCAA is: to preserve and maintain the revered tradition of amateurism in college sports, which widens consumer choice [216] and enhances the public interest. [217] And, "there can be no question but that it needs ample **[*306]** latitude to play that role." [218] The Supreme Court is clear: "The role of the NCAA must be to preserve a tradition that might otherwise die." [219] Therefore, Board of Regents should be read to mean the NCAA has ample latitude in protecting amateurism, which may be done by imposing some restrictions, but not all. The question then becomes: Is restricting student-athlete compensation justified by protecting amateurism? Or, like the television plan, does restricting student-athlete compensation not "fit into the same mold" as those rules that preserve amateurism? Fortunately, the Supreme Court answers this question: "In order to preserve the character and quality of [college sports], athletes must not be paid, must be required to attend class, and the like." [220] Arguably, Board of Regents forecloses the question of whether the NCAA may restrict student-athlete pay and the NCAA has been sure to argue as much. [221]

Several subsequent court decisions have doubled down on the Supreme Court's Board of Regents decision. In McCormack v. Nat'l Collegiate Athletic Ass'n, several football players brought suit claiming the NCAA's compensation restrictions are a violation of antitrust law. [222] The football players argued that amateurism rules are not equally applied to all student-athletes, and thus the rules stifle competition rather than encourage it. [223] Relying almost exclusively on the Board of Regents decision, the court found that the compensation restrictions were reasonable and not in violation of federal antitrust law. [224] The court emphasized the Supreme Court's Board of Regents language stating, "athletes must not be paid." [225] Acknowledging the football players' claims that

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that amateurism exploits the money-making young men on the field, the football players risking brain damage and men's basketball players … ."); Gerald S. Gurney & B. David Ridpath, Why the NCAA Continues to Work Against Athletes' Best Interests, Chron. Higher. Ed. (Feb. 29, 2016), https://www.chronicle.com/article/Why-the-NCAA-Continues-to-Work/235522 ("The [NCAA] is made up of those presidents, athletic directors, and conference representatives who approach college sports as a trade association to forward the best interests of athletic administrators and coaches; the athletes are mere tools of athletic capital to achieve those ends.").

[149] NCAA Division I Manual, supra note 16, art. 12, 12.1.2.1.3.1.2 & 12.1.2.1.4.1.3, at 64-65 (Operation Gold Grant & Incentive Programs for International Athletes).

[150] Steve Berkowitz, Olympics Offer Rare Chance for NCAA Athletes to be Paid, USA Today, Aug. 2, 2016, https://www.usatoday.com/story/sports/olympics/rio-2016/2016/08/02/paying-ncaa-college-athletes-at-rio-olympics-kyle-snyder-katie-ledecky/87709714/. In at least one case, a student-athlete competing for his home country received about $ 740,000 for winning gold at the Olympics. Patrick Hruby, The NCAA Lets College Olympians Collect Cash for Gold, Because Amateurism Is a Self-Serving Lie, Vice Sports (Aug. 18, 2016), https://sports.vice.com/en_us/article/8qyxmg/the-ncaa-lets-college-olympians-collect-cash-for-gold-because-amateurism-is-a-self-serving-lie.

[151] Katie Ledecky, Stanford University swimmer, took home $ 115,000 after earning six Olympic medals in the 2016 Rio Olympics. Jackie Bamberger, Rio Mystery Solved: Can NCAA Athletes Keep Their Olympic Medal Bonuses?, Yahoo! Sports (Aug. 12, 2016), https://sports.yahoo.com/news/rio-mystery-solved-can-ncaa-athletes-keep-their-olympic-medal-bonuses-032912550.html. Kyle Snyder, Ohio State wrestler, retained his NCAA eligibility while taking home $ 250,000 in the 2016 Rio de Janeiro Olympics. See Adam Kilgore, College Athletes Can't Be Paid for Their Performances - Unless They're Olympians, Chi. Trib., Sep. 5, 2016,http://www.chicagotribune.com/sports/college/ct-college-athletes-olympics-paid-20160905-story.html.

[152] NCAA Division I Manual, supra note 16, art. 12, 12.1.2.4.2 & 12.1.2.4.1, at 66 (Exception for Prize Money Based on Performance - Sports Other than Tennis & Exception for Prize Money - Tennis).

amateurism rules are not equally applied, the court said, "that the NCAA has **[*307]** not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable." [226]

In Gaines v. Nat'l Collegiate Athletic Ass'n, a football player challenged NCAA amateurism rules that declared him ineligible after an unsuccessful bid in the NFL Draft. [227] Albeit in the context of a Section 2 Sherman antitrust claim, [228] the court once again cited the Board of Regents decision, finding the NCAA's restrictions as valid: "Athletes must not be paid" and "controls of the NCAA … are justifiable means of fostering competition among amateur teams and therefore procompetitive because they enhance public interest in intercollegiate athletics." [229] Speaking specifically to the enhancement of the public interest, the court added its own language: "The public interest is promoted by preserving amateurism and protecting the educational objectives of intercollegiate athletics." [230]

Altogether, Board of Regents, McCormack, and Gaines can be understood to stand for the proposition that, although amateurism has not been perfected, it remains a legitimate justification for some restrictions, so long as those restrictions further amateurism and educational objectives. In the decades since, courts have nodded approvingly at the concept of amateurism and the pursuit of educational objectives:

We should not permit the entry of professional athletes and their agents into NCAA sports because the cold commercial nature of professional sports would not only destroy the amateur status of college athletics but more importantly would interfere with the athletes proper focus on their educational **[*308]** pursuits and direct their attention to the quick buck in pro sports. [231]

As recently as 2012, the Seventh Circuit applied the Supreme Court's Board of Regents decision directly to the question of whether student-athletes may be compensated:

The NCAA's limitation on athlete compensation beyond educational expenses … directly advances the goal of maintaining "a clear line of demarcation between intercollegiate athletics and professional sports,' and thus is best categorized as an eligibility rule aimed at preserving the existence of amateurism and the student-athlete. [232]

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[153] In 2016, 41 nationalities were represented in 128 slots of the NCAA Division I tennis championships. Chuck Culpepper, Why There's No Time for Xenophobia in U.S. College Tennis: They Need Internationals to Win, Wash. Post, May 30, 2017, https://www.washingtonpost.com/news/sports/wp/2017/05/30/why -xenophobia-has-been-beaten-out-of-u-s-college-tennis-they-need-internationals-to-win/?utm_term=.f6ab62b54a9d. Ten years ago, there were thirty-eight nationalities represented. Id. And, ten years before that, in 1998, forty-eight of the sixty-four male qualifiers were international students. Id.

[154] Hruby, supra note 148.

[155] Id.; see also Joe Drape, Foreign Pros in College Tennis: On Top and Under Scrutiny, N.Y. Times, Apr. 11, 2006, http://www.nytimes.com/2006/04/11/sports/tennis/foreign-pros-in-college-tennis-on-top-and-under-scrutiny.html ("Nobody makes a living at playing tennis in satellites and tournaments all over the world.") (quoting Virginia Commonwealth University Head Coach Paul Kostin).

[156] Amateurism -- Exceptions to Amateurism Rule -- Prize Money Prior to Full-Time Collegiate Enrollment -- Tennis -- $ 10,000 Per Year, NCAA Division I Amateurism Cabinet, https://web3.ncaa.org/lsdbi/reports/pdf/searchPdfView?id=2941&businessCode=PROPOSAL_SEARCH_VIEW&division (last visited Dec. 13, 2018).

Prospective student-athletes and their families spend exorbitant amounts of money for travel and other expenses related to competing in tennis events … . Research by the United States Tennis Association Player Development staff place the top junior and senior prospective student-athletes as having made significantly less than $ 10,000 per year in prize money as prospective student athletes, and combined with the financial costs to their families, most are not earning prize money in excess of their expenses.

Id.

[157] As one coach puts it, "you cannot win a championship now … with all American players." Culpepper, supra note 153.

It seems that a colorable argument could be made that student-athlete compensation restrictions are valid under the Sherman antitrust law. However, the validity of amateurism, and therefore the legality of student-athlete compensation restrictions, remains an open question - possibly more so than ever before. This is because most court decisions that defend the concept of amateurism and pursuing educational objectives as legitimate justifications for various restraints have done so on the basis of the language stated in the Supreme Court's Board of Regents decision. Therefore, if the Board of Regents language is challenged, so, too, is every other case upon which the NCAA may rely to uphold its amateurism based restrictions. In 2014, the Northern District Court of California did exactly this in its O'Bannon v. National Collegiate Athletic Ass'n decision, finding the Supreme Court's compelling amateurism language as dicta. [233] The next Section discusses the controversial O'Bannon decision, and its partial reversal, in detail.

B. The Landmark Decision: O'Bannon

In O'Bannon, the lead plaintiff was Ed O'Bannon, a former collegiate basketball player at the University of California, Los Angeles (UCLA). [234] After recognizing himself in a video game that he was not compensated for, O'Bannon brought a class action antitrust suit against the NCAA for forbidding **[*309]** student-athletes from being compensated for the use of their names, images, and likenesses (NILs) in broadcasts and videogames. [235] More specifically, O'Bannon alleged that the NCAA fixes the amount paid to student-athletes for their NILs at zero and forecloses student-athletes from accessing the market for their NILs. [236] O'Bannon sought to prohibit the NCAA from enforcing compensation restriction rules "that preclude FBS football players and Division I men's basketball players from receiving any compensation, beyond the value of their athletics scholarships, for the use of their names, images, and likeness in videogames, live game telecasts, re-broadcasts, and archival game footage." [237] An O'Bannon win would have resulted in a major change to collegiate athletics. In addition to current student-athletes being compensated, it was expected that universities would be allowed to make financial offers to high school recruits as a way to lure them to a given institution. [238]

Relying on Board of Regents, the NCAA moved to dismiss the claims made by O'Bannon, arguing that the claims made are "nothing more than a challenge to the NCAA's rule on amateurism and therefore must be dismissed

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[158] International student-athlete applicants to the NCAA multiplied twelve-fold between 2007 and 2017. Pat Rooney, International Athletes Commuting in Droves to NCAA Athletics, BuffZone (Oct. 28, 2017), http://www.buffzone.com/mensbasketball/ci_31410506/international-athletes-commuting-droves-ncaa-athletics.

[159] In 2016, Men's tennis teams had median losses of $ 683,000 and women's tennis teams had median losses of $ 726,000 at FBS institutions. Daniel L. Fulks, Nat'l Collegiate Athletic Assoc., NCAA Revenues and Expenses of Division I Intercollegiate Athletics Programs Report: Fiscal Years 2004 Through 2016, at 44 (2017), http://www.ncaa.org/sites/default/files/2017RES_D1-RevExp_Entire_2017_Final_20180123.pdf.

[160] "Such funds, even though based on place finish, generally are used to defer a significant amount of expenses incurred by individuals who train to participate in such events." Amateurism--Operation Gold Grants, NCAA Division I Board of Directors, https://web3.ncaa.org/lsdbi/reports/pdf/searchPdfView?id=505 &businessCode=PROPOSAL_SEARCH_VIEW&division=1 (last visited Dec. 13, 2018).

[161] The most commonly cited cases are those of student-athletes Katie Ledecky, Joseph Schooling, and Kyle Snyder earning prize monies of $ 115,000, $ 740,000, and $ 250,000, respectively. Kilgore, supra note 151.

[162] Natalie Finn, How Olympic Athletes Make Money If They're Not Michael Phelps, Simone Biles or Usain Bolt, ENews (Aug. 5, 2016), http://www.eonline.com/news/785451/how-olympic-athletes-make-money-if-they-re-not-michael-phelps-simone-biles-or-usain-bolt.

[163] Id.

[164] See Laken Litman & Steve Berkowitz, NCAA Apparel Sales Site Used Athletes' Names in Search, USA Today Sports, Aug. 7, 2013, https://www.usatoday.com/story/sports/ncaaf/2013/08/06/ncaa-shop-search-football-jerseys-johnny-manziel/2625119/ (describing the NCAA's practice of selling star players' jerseys online with the name of player removed).

under NCAA v. Board of Regents." [239] The court disagreed, refusing to accept the proposition that the Board of Regents decision permits claims challenging **[*310]** amateurism to be dismissed at the pleading stage. [240] This claim would be decided on the merits. [241]

The first and third steps of antitrust analysis require the plaintiff to show an agreement was made that affects commerce among the several states. As mentioned, this burden is routinely met by plaintiffs in antitrust suits against the NCAA. The O'Bannon case is no different. [242] Therefore, the subsequent discussion - and most NCAA antitrust case law - focuses on the second step of the antitrust analysis: the extent to which the agreement unreasonably restrains trade.

1. Summary Judgment

Both parties moved for summary judgment. The NCAA's motion was denied in full and O'Bannon's granted in part. [243] The court applied the rule of reason and plaintiffs met their initial burden by submitting factual evidence that **[*311]** allowed for the plausible inference that the NCAA student-athlete compensation restriction undermines free competition. [244]

The burden then shifted to the NCAA to identify any procompetitive justifications for its restrictions on student-athlete compensation. The NCAA proffered five such justifications: (1) preservation of amateurism in college sports; (2) promoting competitive balance among Division I teams; (3) integration of education and athletics; (4) increased support for women's sports and less prominent men's sports; and (5) greater output in Division I football and basketball. [245] With the exception of the fourth justification - increased support for women's sports and less prominent men's sports - the NCAA met its burden to survive summary judgment. [246]

The court found against the NCAA on the fourth justification for three reasons. First, the court noted that restrictions in one market may not be justified by benefits in another. [247] Thus, restrictions in the college education market for football and basketball recruits cannot be justified by benefits received in the markets of women's sports or less

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[165] Marc Tracy, N.C.A.A.: North Carolina Will Not Be Punished for Academic Scandal, N.Y. Times, Oct. 13, 2017, https://www.nytimes.com/2017/10/13/sports/unc-north-carolina-ncaa.html (discussing the NCAA's failure to punish the University of North Carolina for its academic fraud scheme).

[166] Sherman Antitrust Act, ***15 U.S.C. § 1*** (2018).

[167] *Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991).*

[168] Indeed, the most prominent and contemporary case on the matter, O'Bannon, makes no discussion of steps one and three of the antitrust analysis, preferring to discuss only the most contested piece of the analysis, step two. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014);* see also *In re NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126 (N.D. Cal. 2014)* (making no discussion of parts one and two of the Sherman Antitrust analysis).

[169] The nationwide operations of the NCAA generated one billion dollars in revenue last year. See Deloitte & Touche LLP, National Collegiate Athletic Association and Subsidiaries 26 (2017). An argument that the NCAA does not affect interstate commerce would be futile.

[170] In 1984, the Supreme Court determined that the NCAA should be subject to the rule of reason analysis because it is a joint venture, which requires some self-imposed restraints if it is to exist at all. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101 (1984).* The recent O'Bannon decision - at both the district court and appellate court levels - cited this very case in its justification for applying the rule of reason analysis. See *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1063 (9th Cir. 2015);* see also *Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010)* (mandating the use of the rule of reason in cases of joint ventures); Thomas A. Piraino, Jr., Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis, 64. S. Cal. L. Rev. 685, 697 (1991) ("[Justice Stevens applied rule of reason analysis] because amateur collegiate athletics require certain horizontal restrictions on competitions (such as requirements for academic credentials and the number of players on each team) in order for the product to be available at all.")

prominent men's sports. [248] Second, the court stated that social welfare benefits cannot justify anticompetitive restrictions; it is irrelevant that supporting women's sports and less prominent men's sports serves a broader social purpose. [249] Finally, the court concluded that the NCAA can support these other sports through less restrictive means, such as mandating a greater portion of revenues be directed to those less prominent sports. [250] The court concluded the compensation restraint was not justified by increasing support to other sports and, accordingly, the NCAA was prohibited from relying on the justification at trial. [251]

2. Trial Verdict

At trial, the plaintiffs again met their initial burden in the rule of reason analysis - establishing that the NCAA created significant anticompetitive effects in the college education market. [252] Therefore, the NCAA was tasked **[*312]** with justifying the compensation restrictions. The NCAA relied on the four procompetitive justifications that survived summary judgement to meet its burden. [253]

First, and most importantly, the NCAA argued that its compensation restrictions promote consumer demand by preserving its tradition of amateurism and the identity of college sports. [254] The NCAA again relied on the Board of Regents holding to support this justification. [255] The court was not swayed. The court found that the Board of Regents language stating that student-athletes "must not be paid," [256] did not serve to resolve any disputed issues of law in the 1984 case and was not based on any factual findings. [257] Additionally, the court found the Board of Regents decision less persuasive because it was decided so long ago. [258] The court concluded that the Supreme Court's language was an "incidental phrase" [259] that does not establish compensation restrictions as procompetitive. [260] Accordingly, the NCAA's reliance on the Board of Regents language was unavailing. [261]

The NCAA also supported its amateurism justification by reasoning that college sports' amateur tradition and identity makes it distinguishable from professional sports and other forms of entertainment, enhancing its popularity with consumers. [262] The court was not so convinced, questioning whether amateurism is a tradition at all. [263] The court pointed out that the NCAA has revised its rules governing student-athlete compensation numerous times over

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171 FTC & DOJ, Antitrust Guidelines for Collaborations Among Competitors 4 (2000). Note, that the quoted language is accurate if somewhat awkward.

172 *In re NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1136 (N.D. Cal. 2014)*

173 Id.

174 *Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988).* Failure to identify a relevant market is a proper ground for dismissing a Sherman Act claim. See *Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1105 (9th Cir. 1999).*

175 *Oltz, 861 F.2d at 1446.* For example, in Law, the product market was defined as college basketball. *Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1018 (10th Cir. 1998).*

176 *Oltz, 861 F.2d at 1446.*

177 *Law, 134 F.3d at 1019.*

178 Id.

179 *In re Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1136 (N.D. Cal. 2014).*

180 Id. Alternatively, if the defendant cannot meet its own obligation under the rule of reason burden-shifting procedure, the court does not need to address the availability of less restrictive alternatives for achieving a purported procompetitive goal. Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law: Analysis of Antitrust Principles and Their Application (3d ed. 2006).

181 *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1074 (9th Cir. 2015)* (citing *Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001)).* However, the test for less restrictive means varies significantly depending on the court:

[*313] the years, sometimes in contradictory ways. [264] Noting that current rules allow only tennis players to receive compensation before starting college, the court concluded that amateurism has been "malleable" since its founding and that failure to adhere to a single definition is not indicative of core principles. [265] The NCAA also introduced a consumer survey to demonstrate that amateurism does, in fact, increase consumer interest, and is therefore procompetitive. [266] The court was unpersuaded by the survey's finding that respondents across the United States "generally oppose[] the idea of paying college football and basketball players." [267] According to the court, the survey did not appropriately address "how consumers would actually behave if NCAA's restrictions on student-athlete compensation were lifted." [268] Per the plaintiff's argument, the court found that compensation restrictions have limited bearing on a sport's popularity. [269] To support this point, the court noted Major League Baseball's elevated popularity and increased revenues after it removed restrictions on its players' compensation levels in the face of overwhelming public opposition. [270] Ultimately, the court determined that amateurism is "not the driving force behind consumer interest" after considering lay witness testimony suggesting that interest is derived from other sources, such as loyalty. [271] Unlike the Board of Regents, McCormack, and Gaines decisions, the court here would not observe that "ample latitude" [272] previously afforded to the NCAA. Rather, the court determined that Board of Regents and its progeny are only applicable where the **[*314]** challenged restraint "actually plays a substantial role in maximizing consumer demand for the NCAA's products." [273] Thus, because amateurism is "not the driving force behind consumer demand," [274] it "might justify certain limited restraints" [275] but does "not justify the [compensation restrictions]." [276]

Second, the NCAA asserted that its compensation restrictions are procompetitive because they maintain the current level of competitive balance among football and basketball teams, which is needed to sustain consumer demand. [277] The court found that the NCAA simply did not have enough evidence to support that proposition. [278] In fact, the court found there was "academic consensus" to the opposite - NCAA amateurism rules "have no discernable effect on the level of competitive balance." [279] The court was also troubled by NCAA policies that seem to hinder competitive balance. Specifically, the court was troubled by the universities' ability to spend freely on football

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There is no uniformity in the application or even statement of the [less restrictive alternative] test, either across or within the federal circuits. Instead, confusion and inconsistency permeate the decisions. The two most significant variables in the test are the level of requisite "restrictiveness" and the burden of persuasion. With respect to the burden of persuasion, the majority of the circuits place the burden on the plaintiff to prove the existence of a less restrictive alternative. The U.S. Courts of Appeals for the District of Columbia and the Seventh Circuit, however, place the burden on the defendant to prove the absence of less restrictive alternatives, while the U.S. Courts of Appeals for the Eleventh and Second Circuits have been inconsistent, placing the burden on the defendant in one case and the plaintiff in another. The level of restrictiveness varies from "least restrictive" to "reasonable necessary."

Gabriel A. Feldman, The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis, *58 Am. U. L. Rev. 561, 583 (2009)* (citations omitted).

182 Piraino, Jr., supra note 170, at 691. The per se analysis is applied where "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979).*

183 Piraino, Jr., supra note 170, at 691. See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 103-04 (1984)* ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.").

184 *U.S. v. McKesson & Robbins, Inc., 351 U.S. 305, 309-10 (1956).*

185 *U.S. v. Topco Assocs., Inc., 405 U.S. 596, 608-09 (1972).*

186 *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50 (1990).*

187 *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-14 (1959).*

coaching salaries and the NCAA's redistributing of revenues to schools that perform well in the Division I men's basketball tournament. [280] The court reasoned that these policies cancel out the leveling effect that student-athlete compensation restrictions might have on competitive balance and generally benefit the highest revenue generating schools more than others. [281]

Third, the NCAA contended that its compensation restrictions promote the integration of academics and athletics by ensuring that student-athletes obtain all available educational benefits while participating in their schools' academic communities. [282] The court found that NCAA rules unrelated to student-athlete compensation - like those prohibiting athlete-only dorms and limits on practice time - are better suited to achieve the integration of academics and athletics. [283] The court acknowledged testimony of university administrators asserting that **[*315]** student-athletes could make more money than their professors, or be inclined to separate themselves from the broader campus community, if they are to be paid large sums of money. [284] But, ultimately the court concluded that, even though "certain limited restrictions on student-athlete compensation may help" to integrate academics and athletics, the NCAA may not use this goal to justify a sweeping prohibition on any student-athlete compensation. [285]

Finally, the NCAA argued that its compensation restrictions attract schools with a "philosophical commitment to amateurism" to compete at the Division I level while also enabling schools that otherwise could not afford to compete in Division I to do so. [286] Overall, these rules allow for more schools and student-athletes to participate in Division I, which increases the overall output of its product, the NCAA argued. [287] However, testimony of several university and collegiate sport officials revealed a belief that most schools would remain in Division I athletics even if compensation restrictions were removed. [288] And, in any event, the plaintiffs sought an injunction that allowed schools to compensate their student-athletes, not one that required student-athlete compensation. [289] The court reasoned that schools would not be driven to financial ruin or leave Division I because they could simply opt not to pay their student-athletes. [290] Therefore, the court concluded that the compensation restrictions do not increase the output of Division I basketball and FBS football. [291] Thus, the justification was not procompetitive. [292]

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188 *Bd. of Regents, 468 U.S. at 100-02.*

189 Interestingly enough, the quick look analysis was developed and applied in the seminal Supreme Court case involving the NCAA. See *id. at 109* (noting that a relevant market analysis is not required by the plaintiff where a naked restraint on price and output exists); see also *Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1020 (10th Cir. 1998)* (applying the quick look analysis).

190 *In re Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1136 (N.D. Cal. 2014).*

191 Id.

192 *Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).*

193 *Id. at 771.*

194 *In re NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126, 1137 (N.D. Cal. 2014)* (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 101-02 (1984)).*

195 *468 U.S. 85 (1984).* See *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 339 (7th Cir. 2012)* (referring to the Board of Regents decision as the "seminal case on the interaction between the NCAA and the Sherman Act."). Prior to the Board of Regents decision, very few antitrust claims had been asserted against the NCAA. See Daniel E. Lazaroff, The NCAA in Its Second Century: Defender of Amateurism or Antitrust Recidivist?, *86 Or. L. Rev. 329, 337 (2007);* see also Ben Strauss, 30-Year-Old Decision Could Serve as Template for N.C.A.A. Antitrust Case, N.Y. Times, June 30, 2014, *https://www.nytimes.com/2014/06/14/sports/ncaabasketball/30-year-old-decision-could-serve-as-template-for-ncaa-antitrust-case.html* ("[The case] sets the rules of the game for the N.C.A.A. and how it should be examined as a cartel.").

196 Strauss, supra note 195 ("The fundamental premise of that case, as has been cited a number of times, is that student-athletes should not be paid.") (quoting NCAA Chief Legal Officer, Donald Remy). See *Nat'l Collegiate Athletic Ass'n v. Bd. of*

Ultimately, the NCAA found its footing, albeit shakily, on two of its four procompetitive justifications: amateurism and the integration of academics and athletics. [293] For amateurism, the court found that preventing student-athletes from receiving large sums of money may increase consumer demand. [294] For integration of academics and athletics, the court found that restrictions on pay may serve to integrate student-athletes into their communities, improving the **[*316]** quality of education services a school offers. [295] Therefore, the burden shifted back to the plaintiffs to show that amateurism and the integration can be achieved through less restrictive alternatives. [296]

Plaintiffs identified two legitimate less restrictive alternatives [297] : (1) permit schools to allow scholarships to cover the full cost of attendance at any given Division I school; and (2) permit schools to hold limited and equal shares of licensing revenues in a trust to be distributed to student-athletes after their eligibility expires. [298] Because this Comment focuses on cash compensation above the costs of receiving an education, the subsequent discussion focuses on the plaintiff's second alternative. [299]

The court agreed that allowing schools to pay football and men's basketball student-athletes a limited amount of cash is a less restrictive means of preserving consumer demand than are amateurism and academic integration. [300] The court determined that, if the NCAA so chooses, it may cap these student-athlete's annual compensation at no less than five thousand dollars. [301] The determination of five-thousand dollars was based exclusively on two findings. First, NCAA witnesses had stated that their concerns regarding student-athlete pay would decrease if the student-athletes were paid smaller sums. [302] Second, five thousand dollars is comparable to the amount that a qualifying student-athlete would receive in federal grant monies. [303] On these two facts alone, the five-thousand-dollar value was determined. If the NCAA **[*317]** did not set a cap, the cash payments would be entirely up to the discretion of each school. [304]

The court further found that the effects of student-athlete pay on consumer demand would be minimized if held in trust until after the student-athlete leaves school. [305] Amateurism and academic integration were too restrictive as means of maintaining consumer demand. [306] Permissive - but not required - cash payments of up to five thousand

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Regents, 468 U.S. 85, 102 (1984) ("In order to preserve the character and quality of [college football], athletes must not be paid, must be required to attend class, and the like.").

197 The agreement, negotiated by the NCAA, granted telecasting rights for all NCAA college football games to the American Broadcasting Company (ABC) and the Columbia Broadcasting System (CBS) over a four-year period. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 92-93 (1984).* Under the agreement, no single institution could appear on television more than a total of six times and not more than four times nationally. *Id. at 94.* Additionally, the agreement set an absolute maximum on the number of games that could be broadcast. Id.

198 The NFL had a similarly restrictive television plan, which allowed for the League to market television rights collectively. Szymanski, supra note 48. The NFL's restrictive television plan was overturned by antitrust legislation in 1953. *U.S. v. NFL, 116 F. Supp. 319 (E.D. Pa. 1953).* Congress allowed the television plan to survive however, by granting an antitrust exemption known as the Sports Broadcasting Act of 1961. Szymanski, supra note 48.

199 *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 89 (1984)* (citing the NCAA Television Committee Report).

200 *Id. at 94-95.*

201 *Id. at 95.*

202 Id.

203 *Id. at 105-07, 112-13* (1984).

204 *Id. at 106-07.*

205 *Id. at 106.*

dollars were found to be a less restrictive means of maintaining consumer demand. [307] Accordingly, the NCAA was enjoined from prohibiting such payments. [308]

With that, the court delivered a "resounding rebuke" [309] to the amateurism foundation of the NCAA, becoming the first of any federal court to find any aspect of the NCAA's amateurism rules as violative of antitrust law. [310] FBS football players and Division I men's basketball players could now collectively earn an estimated $ 300 million over a four-year period. [311] Schools could engage in bidding wars for the best high school football and basketball student-athletes. [312] And those not discussed in the O'Bannon decision - female and other non-football or basketball student-athletes - would be left to wonder if they, too, would be compensated or, worse yet, if they would have a team to play on at all. [313] A timely appeal by the NCAA gave the Ninth Circuit Court of Appeals an opportunity to speak on the matter. [314]

[*318]

3. Ninth Circuit Decision

On appeal, the NCAA again relied on the Supreme Court's seminal Board of Regents decision. [315] The NCAA argued that the Board of Regents decision established that amateurism restrictions are presumptively procompetitive. [316] The court noted that, if the NCAA's argument were to be accepted, then any restriction related to amateurism would be automatically valid. [317] The NCAA would effectively have an exemption from antitrust scrutiny for any restrictions made to preserve amateurism. [318] The court would not be so generous. The court reasoned that the Board of Regents decision only mentioned amateurism rules in such a positive light to justify its application of the rule of reason analysis where others might apply the per se analysis. [319] The language is not a part of the final holding. Thus, the court concluded that the Supreme Court language regarding amateurism is dicta that will be given appropriate deference "where applicable." [320]

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206 The NCAA's three justifications for the television plan were: (1) it enables the NCAA to better compete against other forms of television entertainment by offering an attractive package sale; (2) it is necessary to protect live attendance at college football games; and (3) it helps maintain competitive balance among amateur athletics teams. *Id. at 113, 116-17.*

207 The first two justifications were given a cursory review before being invalidated. *Id. at 115-17* (discussing the merits of the first two justifications for a few paragraphs before summarily dismissing them).

208 *Id. at 117.*

209 Id. See also *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 595 (7th Cir. 1984)* ("The essence of successful league competition is maintaining a balance of power among the competitors - a goal antithetic to the goals of competition in a conventional economic market.").

210 *Bd. of Regents, 468 U.S. at 117.*

211 *Id. at 120.*

212 *Id. at 117-18.*

213 *Id. at 117.*

214 *Id. at 119-20.*

215 *Id. at 120.*

216 *Id. at 102.*

The court also found that the Supreme Court's Board of Regents decision did not compel a decision in favor of the NCAA. [321] The NCAA read Board of Regents as standing for the proposition that its amateurism restrictions are presumptively procompetitive. [322] However, under the rule of reason analysis, an anticompetitive restriction violates antitrust law if a substantially less restrictive alternative exists. [323] Therefore, a court may still find that the NCAA restrictions, even if justified, violate antitrust law where a substantially less restrictive alternative exists. Thus, Board of Regents does not mean amateurism restrictions are automatically valid under Sherman antitrust law. [324]

With preliminary legal arguments dealt with, the court turned to the merits of the appeal under a "clear error" standard of review. [325] The NCAA focused **[*319]** its appeal entirely on amateurism, arguing that the district court did not give amateurism enough credit as a procompetitive justification. [326] The NCAA argued that its amateurism restrictions are procompetitive because they increase opportunities for student-athletes by giving them the only opportunity to obtain an education while competing as students. [327] The court agreed that broadening choices available to student-athletes can make a restraint procompetitive. [328] However, the court was unable to see the link between compensation restrictions and increased opportunities to student-athletes. [329] Thus, the argument that amateurism rules increase opportunities for student-athletes was rejected on appeal. [330]

Ultimately, with regard to the NCAA's procompetitive justifications, the circuit court agreed with the district court's holdings. [331] The compensation restrictions play a limited role in: (1) integrating academics with athletics; and (2) preserving consumer demand by promoting amateurism. [332] As discussed, anticompetitive restrictions, even if supported by procompetitive justifications, are still in violation of antitrust law if less restrictive alternatives exist. Accordingly, the court turned to evaluate the legitimacy of the less restrictive alternatives. [333]

The Ninth Circuit relied heavily on the Supreme Court's Board of Regents decision to evaluate the less restrictive alternatives - "We must generally afford the NCAA "ample latitude' to superintend college athletics." [334] To afford the NCAA that deference, the Circuit Court makes clear that only a "strong **[*320]** evidentiary showing" [335] that

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[217] The Supreme Court notes that the NCAA widens the educational opportunities available to student-athletes, which is procompetitive. *Id. at 120.* Case law demonstrates that increasing access to a higher education is in the public interest and; thus, should be considered as a legitimate procompetitive justification. *U.S. v. Brown Univ., 5 F.3d 658, 678 (3d Cir. 1993).*

[218] *Bd. of Regents, 468 U.S. at 120.*

[219] Id.

[220] *Id. at 102* (emphasis added).

[221] See *In re NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F. Supp. 2d 996, 1001 (N.D. Cal. 2013)* (restating the NCAA's contention that an antitrust claim brought against it challenging the amateurism rules must be dismissed under the Board of Regents decision).

[222] *845 F.2d 1338, 1342 (5th Cir. 1988).*

[223] The football players supported their claim with two allegations: (1) "the NCAA permits some compensation through scholarships"; and (2) the NCAA "allows a student to be a professional in one sport and an amateur in another." *McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1345 (5th Cir. 1988).*

[224] *McCormack, 845 F.2d at 1344-45.*

[225] *Id. at 1344* (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 102 (1984)).* See *Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1089 (7th Cir. 1992)* (emphasizing the Supreme Court's language that student-athletes must not be paid) (citing *Bd. of Regents, 468 U.S. at 102 (1984)).*

[226] Id. at 1345.

the proposed alternative is "virtually as effective" [336] at achieving the legitimate procompetitive justification will be sufficient to meet the plaintiff's burden.

On the first alternative to the compensation restriction - allowing schools to offer full cost of attendance scholarships - the plaintiffs met their burden. [337] Under NCAA standards, student-athletes remain amateurs as long as their compensation is for legitimate educational expenses. [338] Allowing student-athletes to receive cost of attendance scholarships therefore has no impact on amateurism. [339] The court affirmed the district court's finding that restricting scholarships to only grant-in-aid is a violation of antitrust law. [340]

As for the second alternative - paying student-athletes small amounts of deferred cash compensation - the court was clear: "We cannot agree that a rule permitting schools to pay students pure cash compensation and a rule forbidding them from paying NIL compensation are both equally effective in promoting amateurism and preserving consumer demand." [341] Indeed, "not paying student-athletes is precisely what makes them amateurs" [342] and "the difference between offering student-athletes education-related compensation and offering them cash sums untethered to education expenses is not minor; it is a quantum leap." [343] The circuit court found the lower court's decision to be based on "threadbare evidence." [344] Additionally, the court was concerned with the possibility of a slippery slope where lawsuits would be brought until the five-thousand-dollar limit no longer existed, destroying amateurism in its **[*321]** entirety. [345] Once again referring to the "ample latitude" [346] that the NCAA must be afforded, the court vacated the district court's allowance of cash payments: "The Rule of Reason requires that the NCAA permit its schools to provide up to the cost of attendance to their student athletes. It does not require more." [347]

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[227] *746 F. Supp. 738, 740 (M.D. Tenn. 1990).* Commonly known as the "no-draft" rule, the NCAA makes a player ineligible for participation in a particular intercollegiate sport when he or she asks to be placed on the draft list or supplemental draft list of a professional league in that sport. *Id. at 741.*

[228] A Section 2 Sherman antitrust claim, distinct from the Section 1 claims thus far discussed, alleges that an illegal monopoly has been formed or attempted. "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." *Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 738, n.4 (M.D. Tenn. 1990)* (citing ***15 U.S.C. § 2).***

[229] *Id. at 747.* The court actually has two holdings. First, and most interestingly, the court holds that some eligibility rules are not subject to antitrust review whatsoever. *Id. at 745.* Second, as discussed, the court finds that, even if these rules are subject to antitrust review, the rules are "overwhelmingly procompetitive" because they serve to "preserve the distinct "product' of major college football as an amateur sport." *Id. at 746* (emphasis added).

[230] *Id. at 747.* "Moreover, [the no-draft rule] by the NCAA in fact makes a better "product' available by maintaining the educational underpinnings of college football and preserving the stability and integrity of college football programs." *Id. at 746.*

[231] *Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1091 (7th Cir. 1992).*

With that, the Ninth Circuit had spoken, affirming in part and vacating in part the decision of the lower court. The district court and the circuit court agreed on several issues, chief among them being: (1) the Board of Regents decision does not give the NCAA carte blanche authority to enforce restrictions under the guise of amateurism; and (2) student-athletes should receive compensation equal to the cost of attending their respective institution. As for disagreement, the circuit court can be seen to have overturned the lower court's allowance of cash compensation for two reasons. First, the district court simply did not have the evidence to support a finding that amateurism can be achieved by delayed payments of cash. Second, student-athletes cannot receive compensation above the costs of their educational expenses because to do so would violate their status as amateurs.

The Ninth Circuit's decision is current law. [348] Today's Division I student-athlete enjoys the opportunity to receive a full cost of attendance scholarship and all of the benefits of competing at the highest level in collegiate sport. [349] Cash compensation remains restricted. It is unclear how long compensation restrictions will last, however. The next section of this Comment discusses Alston, [350] a student-athlete compensation case that is currently being argued in the same district court that permitted student-athlete compensation before being overruled.

C. Current NCAA Litigation: Alston

Several former student-athletes [351] have stepped into the shoes once occupied by Ed O'Bannon to challenge those same compensation restrictions **[*322]** that the NCAA enforces to protect amateurism. Represented by the prominent sports labor lawyer, Jeffrey Kessler, the plaintiffs seek to undo all NCAA restrictions against compensating student-athletes, creating a free market where conferences may choose to offer compensation packages to prized recruits. [352] Like in O'Bannon, the plaintiffs allege that the NCAA violates federal antitrust law by restricting the compensation a student-athlete may receive. [353] Accordingly, the plaintiffs seek an injunction against the NCAA's rules limiting compensation for student-athletes. [354]

Recognizing that the allegations made in Alston are essentially identical to those in O'Bannon, the NCAA moved to dismiss the claims under the doctrine of stare decisis. [355] Judge Claudia Wilken, the same judge that presided over

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[232] *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328 (7th Cir. 2012).* The court found that NCAA bylaws eliminating the eligibility of players who receive cash payments beyond the costs of attending a university "clearly protect[] amateurism." *Id. at 343.*

[233] *In re NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F. Supp. 2d 996, 1001 (N.D. Cal. 2013).* See *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1000-01 (N.D. Cal. 2014).*

[234] Steve Eder & Ben Strauss, Understanding Ed O'Bannon's Suit Against the N.C.A.A., N.Y. Times, June 9, 2014, *https://www.nytimes.com/2014/06/10/sports/ncaabasketball/understanding-ed-obannons-suit-against-the-ncaa.html*.

[235] Id.

[236] Third Consolidated Amended Class Action Complaint, In re NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-01967 CW, 2013 WL 3810438, at 14, (N.D. Cal. July 19, 2013).

[237] *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014).* See Eder & Strauss, supra note 234.

[238] Eder & Strauss, supra note 234.

[239] *In re NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F. Supp. 2d 996, 1001 (N.D. Cal. 2013)* (internal quotations and citations omitted).

[240] The court gives several reasons for refusing to grant the motion to dismiss the complaint. Chief amongthem are: (1) the alleged harms to a competition and the justifications for those harms are intrinsically factual, making them inappropriate to dismiss at the pleading stage; (2) the Bd. of Regents decision focused on the restrictive television plan as opposed to restrictive eligibility rules and did not complete a factual inquiry as to whether the compensation ban actually has a procompetitive effect; and (3) subsequent cases have been able to state valid antitrust claims against the NCAA, similar to that of O'Bannon's claim, and have not been barred from doing so by the Bd. of Regents decision. *Id. at 996, 1002, 1003, 1005* (citing *Brennan v.*

the first O'Bannon decision that allowed for cash payments of five thousand dollars, denied the motion. [356] She reasoned that the O'Bannon decision makes clear that student-athletes cannot receive cash compensation untethered to educational expenses. [357] Although it is not written in her short opinion, Judge Wilken is clearly suggesting that other benefits may be made available for student-athletes in lieu of cash compensation. Indeed, plaintiffs' attorney Jeffrey Kessler argued **[*323]** this very notion during oral arguments. [358] Specifically, Kessler argued that the NCAA could provide tuition for graduate school; improved health care for student-athletes; and funds for athletes' families to attend on recruiting trips, among other benefits. [359]

Both parties moved for summary judgment. [360] Like O'Bannon, the summary judgment determination revolved around the veracity of amateurism. The plaintiffs sought to convince the court that amateurism is a myth that does not justify restricting compensation exclusively to academic scholarships. [361] The NCAA sought to affirm amateurism as fundamental to the appeal of collegiate sport and to have the court reaffirm that the NCAA must be afforded ample latitude to protect amateurism. [362]

Unsurprisingly, Judge Wilken did not grant the NCAA's motion for summary judgment. [363]

The plaintiffs' summary judgment motion was premised on the idea that the NCAA takes an inconsistent approach to restricting financial aid, generally limiting aid to cost of attendance in most cases but also allowing aid to exceed cost of attendance in certain specific instances. [364] Thus, as the plaintiffs would have it, the compensation restrictions are unprincipled restraints that cause unjustified anticompetitive effects. [365] The NCAA was unable create a factual dispute on this point and the court found that the compensation restraints do **[*324]** produce significant anticompetitive effects in the relevant market [366] as a matter of law. [367]

The burden shifted to the NCAA to provide procompetitive justifications for the compensation restrictions. The NCAA proffered the two surviving procompetitive justifications from O'Bannon: integrating academics with athletics and preserving the popularity of the NCAA's product by promoting its current understanding of amateurism. [368] The court found that a factual dispute existed and that these two justifications must be proved at trial once again. [369]

Concord EFS, Inc., 369 F. Supp. 2d 1127, 1133 (N.D. Cal. 2005); Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145, 1156 (9th Cir. 2003); Board of Regents, 468 U.S. 85, 101 (9th Cir. 1984); Rock v. Nat'l Collegiate Athletic Ass'n, 2013 WL 4479815, at 14 (S.D. Ind. 2013); White v. Nat'l Collegiate Athletic Ass'n, Case No. 06-999, Docket No. 72, slip op. at 3 (C.D. Cal. 2006); *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 347 (7th Cir. 2012)); In re NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005)* ("The NCAA is not exempt from the scrutiny under the Sherman Act."). See also *Law v. Nat'l Collegiate Athletic Ass'n, 902 F. Supp. 1394, 1404 (D. Kan. 1995)* ("The Court does not believe that the Supreme Court intended to give the NCAA carte blanche in imposing restraints of trade on its member institutions or other parties because of its role in the marketplace."), aff'd, *134 F.3d 1010 (10th Cir. 1998).*

241 Prior case law suggests that a complaint may be dismissed under the Board of Regents holding only when the restraint is obviously reasonable. *Metropolitan Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n, 339 F. Supp. 2d 545, 548 (S.D.N.Y. 2004)* ("The challenged rules and expansions are not so obviously reasonable as to fall into the group of restrictions sanctioned by Board of Regents.").

242 *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014)* ("The NCAA does not dispute that these [challenged compensation restrictions] were enacted and are enforced pursuant to an agreement among its Division I member schools and conferences. Nor does it dispute that these rules affect interstate commerce. Accordingly, the only remaining question here is whether the challenged rules restrain trade unreasonably.").

243 *In re NCAA Student-Athlete Name & Likeness Licensing Litig., 37 F. Supp. 3d 1126 (N.D. Cal. 2014).*

244 *Id. at 1137.* Recall that, under the rule of reason analysis, the plaintiff bears the initial burden of showing that the challenged restraint produces significant anticompetitive effects within a relevant market.

245 *Id. at 1146.*

246 *Id. at 1155.*

The NCAA offered seven additional procompetitive justifications. [370] The court found that six of them had no evidentiary support and dismissed them. [371] The NCAA's seventh procompetitive justification called for the court to consider the expanded opportunities that the NCAA is able to provide as a result of the compensation restrictions:

The challenged rules serve the procompetitive goals of expanding output in the college education market and improving the quality of the collegiate experience for student-athletes, other students, and alumni by maintaining the unique heritage and traditions of college athletics and preserving amateurism as a foundation principle, thereby distinguishing amateur college athletics from professional sports, allowing the former to exist as a distinct form of athletic **[*325]** rivalry and as an essential component of a comprehensive college education. [372]

This final procompetitive justification is reminiscent of the "increased output" justification proffered by the NCAA in O'Bannon. [373] The court correctly notes that this justification is distinct because it implicates all student-athletes, students, and alumni, where the "increased output" justification in O'Bannon was cabined to increased output for just those student-athletes in football and men's basketball. [374]

Here, the court was asked to consider those "other players" in college sports other than men's basketball and football. And the NCAA provides evidentiary support to validate this procompetitive justification. Dr. Elzinga, an expert for the NCAA, concluded that the relevant market is notsimply a one-sided market where the schools are either a seller of an education and athletic opportunities or buyers of athletic services. [375] Rather, Dr. Elzinga concluded that the relevant market is a "multi-sided market for college education in the United States" and that restrictions must be enforced to provide an optimal balance for all participants. [376] The NCAA also provided testimony from the plaintiffs' expert, Dr. Lazear, stating that demand in the college education market may include alumni, viewers, and other students. [377] The testimony of these experts suggests that the relevant market is larger than the current view adopted by the court, where procompetitive justifications are cabined to those existing within specific sports. Under this procompetitive justification, which implicates a broader relevant market, the court would have to consider all players involved in collegiate athletics. The court dismissed this procompetitive justification, too. [378]

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[247] *Id. at 1151* (citing *Sullivan v. Nat'l Football League, 34 F.3d 1091, 1112 (1st Cir. 1994)).*

[248] Id.

[249] *Id. at 1150-51* (citing *FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990)).*

[250] Id. at 1151-52.

[251] Id. at 1155.

[252] Recall that the Plaintiffs survived summary judgment by establishing an inference that the NCAA restrained competition in the college education and group licensing markets. Id. at 1138. At trial, Plaintiffs were unable to show that actual injury to competition in the group licensing market had occurred due to the NCAA's compensation restriction. *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 996-98 (N.D. Cal. 2014).* Thus, the scope of the antitrust claim was narrowed to the damage caused by the NCAA's compensation restriction to the college education market. *Id. at 988, 993.*

[253] Those four are: (1) preservation of amateurism; (2) competitive balance; (3) integration of academics and athletics; and (4) increased output. *Id. at 999.*

[254] Id.

[255] Id.

[256] Id. (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 102 (1984)).*

[257] Id.

[258] Id.

The court reasoned that, even if all reasonable inferences were drawn in favor of the NCAA, the evidence did not support the proffered justification **[*326]** because Dr. Elzinga was not expressly referring to the "increased output" justification when making his comments. [379] Thus, his comments were mischaracterized and insufficient to raise a genuine issue of material fact. [380] The court makes no attempt to disqualify Dr. Lazear's testimony, which the NCAA also relied on as evidence for the justification. [381]

The seven additional procompetitive justifications were dismissed. [382] With the NCAA's two surviving procompetitive justifications, the burden shifted to back to the plaintiffs to provide a less restrictive alternative for meeting those surviving justifications.

Plaintiffs provided two less restrictive alternatives: allow Division I conferences to set the rules regulating education and athletic participation expenses that the member institutions may provide; or remove all rules prohibiting payments of any kind that are related to educational expenses and any payments that are incidental to athletic participation. [383]

The plaintiffs did not seek summary judgment on the less restrictive alternatives, preferring to prove their validity at trial. [384] The NCAA did seek summary judgment on these less restrictive alternatives, however, arguing they were foreclosed by O'Bannon. [385] The NCAA was unsuccessful. [386] The court found that O'Bannon does not foreclose the plaintiffs' less restrictive alternatives. [387]

With that, the court had once again spoken on the issue of student-athlete pay. The court made clear that O'Bannon stands for the idea that student-athletes may not receive cash untethered to educational expenses. But nothing more. The NCAA has two procompetitive justifications that have some salience in the eyes of the court: integrating athletics and academics; and preserving the popularity of college sports through the preservation of

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[259] Id. at 1000. Calling the Supreme Court's language an "incidental phrase" may have been a strategic decision by the district court. The court could have deemed the language to be dicta. However, even Supreme Court dicta requires some deference. See *United States v. Augustine, 712 F.3d 1290, 1295 (9th Cir. 2013)* ("We do not treat considered dicta from the Supreme Court lightly"). Here, the court avoids that problem.

[260] *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1000 (N.D. Cal. 2014).*

[261] *Id. at 999.*

[262] Id.

[263] *Id. at 1000* ("The historical record that the NCAA cites as evidence of its longstanding commitment to amateurism is unpersuasive.").

[264] Id. Specifically, the court noted that the original rules banned the awarding of scholarships to individuals based on athletic ability. *Id. at 973-75.* The court went on to note the general introduction of athletic scholarships in 1956; the allowance for tennis recruits to earn up to ten thousand dollars in prize money before they enroll in college; and permitting student-athletes to receive federal need-based monies beyond the NCAA's stated maximum allowed. *Id. at 974-75* ("This conception of amateurism stands in stark contrast to the definitions set forth in the NCAA's early bylaws.").

[265] *Id. at 1000.*

[266] *Id. at 975.*

[267] Id.

[268] Id. The survey does ask consumers if they were more or less likely to observe a college football or basketball game based on certain specified levels of pay to the student-athletes. Id. The results demonstrated that as the pay per student-athlete increased, the respondents were less likely to observe the sporting event. Id. (emphasis added). This result, coupled with the finding that consumers across the country generally oppose paying football and basketball student-athletes, arguably allows for the reasonable inference that consumers find collegiate sport appealing because of its amateur character.

amateurism. The plaintiffs have the upper hand. The relevant market is apparently cabined to restrictions and justifications that exist in a narrow market, exclusive to men's and women's basketball and FBS football **[*327]** student-athletes. And, for now, two less restrictive alternatives exist that will change the face of the NCAA as we know it if they are not defeated.

Oral Argument commences on September 4, 2018 and concludes on September 25, 2018. [388] Judge Wilken's decision is expected in late 2018. [389]

The concept of amateurism has been obfuscated by a barrage of antitrust claims and misleading rhetoric. Over a century ago, amateurism was introduced as a means of ensuring a safe and equitable playing field for a large swath of student-athletes. Today, claims are largely brought for the exclusive benefit of the revenue generating sports of men's basketball and football. [390] The value of a free education goes unmentioned as claim after claim alleges that student-athletes receive no compensation for their efforts. And, the consequences of a regime where some student-athletes are paid, while others are not, goes largely undiscussed in any meaningful way by the courts. Here, the court has the opportunity to redirect the conversation toward the value of amateurism in a meaningful way. The remainder of this Comment argues that the court should do exactly that.

IV. The Ninth Circuit Got it Right in O'Bannon

Judge Wilken and the Northern District Court of California (and all other courts for that matter) should recognize that the Ninth Circuit's decision in O'Bannon was correct. [391] To come to this conclusion, one must first consider the general reason that these antitrust cases are brought against the NCAA: to remedy the perceived exploitation of former, current, and future student-athletes. Payments of five thousand dollars do not remedy that perceived exploitation. [392] Indeed, the Ninth Circuit opinion reflects the Court's concern that allowing limited and delayed payments of five-thousand dollars was only considered a "first step" towards realizing an outcome where student-athletes received more compensation. It is likely that the "next step" would have been another antitrust lawsuit

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269 Id.

270 Id.

271 *Id. at 977-78* (emphasis added). Namely, loyalty to the school, which is shared by both alumni and people who live in the region or the conference. Id.

272 *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 121 (1984).* Notably however, the court makes no distinction between a rule change allowing already-pro MLB players to be paid more, and one allowing amateur student-athletes to be compensated for the first time ever - arguably two very different concepts.

273 *O'Bannon, 7 F. Supp. 3d at 1000* (emphasis added).

274 *Id. at 977-78.*

275 The court gives insight as to what those "certain limited restraints" might be: "They might justify a restriction on large payments to student-athletes while in school." *Id. at 978, 1001.*

276 *Id. at 978.*

277 Id.

278 *Id. at 979* ("Given the lack of such evidence in the record, the Court finds that the NCAA's challenged rules are not needed to achieve a level of competitive balance necessary, or even likely, to maintain current levels of consumer demand for FBS football and Division I Basketball.").

279 *Id. at 978* (quoting testimony from Dr. Noll; a study done by economist Jim Peach; and another finding by Dr. Rascher).

280 *Id. at 978-79.*

raising the limit from five-thousand **[*328]** dollars to twenty-thousand dollars, and so on. The Ninth Circuit expressly acknowledged this very issue: "We have little doubt that plaintiffs will continue to challenge the arbitrary limit imposed by the district court until they have captured the full value of their NIL." [393]

During the O'Bannon trial, several individuals testified that their concern regarding student-athlete pay would be heightened if those payments were large. [394] The district court acknowledged these concerns and concluded that small payments would be a better alternative for preserving amateurism than restricting payments altogether would be. [395] Small payments are not a valid alternative when the legal action is brought to remedy the perceived exploitation of student-athletes that generate millions of dollars of revenue (not profits) for their university. This concern was also acknowledged by the Ninth Circuit: "The district court cannot plausibly conclude that being a poorly-paid professional collegiate athlete is "virtually as effective' for that market as being [an] amateur." [396]

For example, consider lead plaintiff Ed O'Bannon. O'Bannon led the University of California, Los Angeles (UCLA) Bruins to a college basketball championship after a twenty-year drought. He averaged 20.4 points and 8.3 rebounds and was named the most outstanding basketball player in all of college basketball. [397] UCLA likely generated hundreds of thousands of dollars, if not millions, in revenues (again, not profits) as a result of Mr. O'Bannon's efforts. Annual payments of five-thousand dollars, which O'Bannon could not have collected until he was done playing, do not eliminate the perceived exploitation. Indeed, the ultimate payment O'Bannon would have received would pale in comparison to the revenues he likely generated for UCLA. The district court's decision does not remedy the perceived exploitation. It only serves to undermine amateurism.

Furthermore, the district court was unduly skeptical of the NCAA's historic commitment to amateurism, [398] leading to a conclusion that amateurism is only **[*329]** somewhat procompetitive. [399] As discussed in this Comment, the NCAA was founded partially on the premise that amateurism must be preserved within collegiate athletics. [400] The district court concluded that the NCAA is not truly committed to amateurism because it has adjusted its definition numerous times in its century-old existence. [401] However, an ideal with an evolving definition does not necessarily

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281 Id.

282 *Id. at 979, 1002.*

283 *Id. at 980.*

284 Id.

285 Id. (emphasis added).

286 *Id. at 1003-04.*

287 Id.

288 *Id. at 982* (citing testimony of University of South Carolina President, Dr. Harris Pastides; Conference USA Commissioner, Britton Banowsky; University of Texas Associate Athletics Director, Christine Plonsky; and Sports Management Expert, Dr. Daniel Rascher).

289 *Id. at 1004.*

290 Id.

291 *Id. at 982.*

292 *Id. at 982, 1004.*

293 *Id. at 1004.*

mean that an organization is less committed to that ideal. As discussed, the NCAA is the first organization in the world to affirmatively define amateurism. It should not be forced to stand by an antiquated definition as the world around it continues to develop. Rather, it should be afforded the opportunity to develop the definition, allowing for the most equitable and all-encompassing result possible.

For example, the district court pointed to the fact that the NCAA allows Division I tennis recruits to preserve their amateur status despite having "accepted ten thousand dollars in prize money the year before he enrolls in college" while a track and field athlete is not afforded the same opportunity. [402] The district court concluded that this was demonstrative of the NCAA's malleable and contradictory approach to amateurism. [403] However, as discussed in this Comment, the decision to allow tennis recruits to receive prize money was done in an effort to allow tennis players, mostly foreign, the ability to recoup the major costs associated with training, traveling, and entrance into competitions. The NCAA similarly allows prospective student-athletes in all other sports in the United States to have their training, traveling, and entrance costs covered by corporate sponsors prior to their enrollment in the college. [404] The NCAA is shifting the burdensome costs of preparing for college athletics **[*330]** to corporate sponsors, which will be borne by member institutions of the NCAA once the prospective student-athlete enrolls at a member school. An evolving definition of amateurism is not a sign of contradiction, it is one of growth.

Even if the NCAA has some rules that are contradictory, that does not mean that amateurism as a whole must be abandoned. Like any century-old organization, the NCAA has missteps. Missteps do not justify complete abandonment of the ideals upon which the Association was founded, primarily amateurism. The Fifth Circuit has recognized as much: "That the NCAA has not distilled amateurism to its purest form does not mean its attempts to maintain a mixture containing some amateur elements are unreasonable." [405]

The district court also challenged the extent to which amateurism generates consumer interest. [406] The Supreme Court has attempted to settle this issue as a matter of law. [407] But even if this were a question of fact, polls indicate that it is an open question. In 2014, a Washington Post poll revealed that the public generally opposes paying student-athletes at a rate almost double that of those who support it. [408] What is more, a large portion of those

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294 Id.

295 Id.

296 Id.

297 Plaintiffs proposed a third less restrictive alternative: allowing student-athletes to receive money for endorsements. *Id. at 984.* In the findings of fact, the court concluded this was not a legitimate less restrictive alternative because it "would undermine the efforts of both the NCAA and its member schools to protect against the "commercial exploitation' of student-athletes." Id.

298 *Id. at 1005.*

299 The first alternative - increasing scholarships to the full cost of attendance - was granted by the district court, affirmed by the Ninth Circuit appellate court, and concurrently adopted by the NCAA. *Id. at 982-83, 1006; O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F. 3d 1049, 1075-76 (9th Cir. 2015);* NCAA, 2015-16 NCAA Division I Manual art. 15, 15.1, at 190 (Oct. 2014). The change has not been without consequence, though. See Blair Kerkhoff & Tod Palmer, They're Not Paychecks, But Major College Athletes Got Extra Scholarship Stipends for First Time This School Year, Kan. City Star, June 30, 2016, *http://www.kansascity.com/sports/college/article86062792.html* (discussing the inequities that cost of attendance scholarships have created between schools, sports, and genders).

300 *O'Bannon, 7 F. Supp. 3d at 983.*

301 *Id. at 1008.*

302 *Id. at 983, 1008.*

303 *Id. at 1008.*

individuals whom oppose paying student-athletes are strongly opposed to the idea. [409] The Washington Post poll revealed figures consistent with those presented by the NCAA in trial. [410] While these figures are not demonstrative of how the consumer would actually act if student-athletes are paid, they are insightful as to the preferences of the consumer. A product, such as collegiate athletics, is arguably procompetitive if it seeks to maximize the preferences of the consumer. [411] The Ninth Circuit succeeded where the district failed by recognizing this fact: "Having found that amateurism is integral to the NCAA's **[*331]** market, the district court cannot plausibly conclude that [paying student-athletes] is "virtually as effective' … as being amateur." [412]

Ultimately, the Ninth Circuit's holding in O'Bannon is correct because it properly affords the NCAA "ample latitude" in superintending collegiate athletics, as required by the United States Supreme Court. [413] More than thirty years ago, the Supreme Court recognized higher education benefits in quality and diversity through preservation of the student-athlete. [414] These goals are entirely consistent with the Sherman Act and for this reason, the Ninth Circuit's O'Bannon decision was correct. [415]

V. NCAA Compensation Restrictions are Procompetitive Because They Create Ancillary Benefits in Closely Related Markets

Even if O'Bannon is viewed so narrowly as to only stand for prohibiting one type of compensation - cash benefits untethered to education expenses [416] - there is still good reason for permitting the NCAA to restrict compensation to cost of attendance scholarships, and it starts with the analysis of the relevant markets. As discussed, the rule of reason analysis is typically limited to those restraints in a product market and the procompetitive benefits derived from those restraints in the same product market. The O'Bannon decision limited the rule of reason analysis to the anticompetitive effects in the markets of Division I men's basketball and FBS football. [417] Alston similarly considers those two revenue generating sports, and also nominally includes Division I women's basketball. [418] In either case it is inappropriate to primarily consider certain specified sports when the antitrust claims implicate all sports and student-athletes under the NCAA's purview. [419] A regime change where student-athletes can be compensated with

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[304] Ben Strauss & Marc Tracy, N.C.A.A. Must Allow College to Pay Athletes, Judge Rules, N.Y. Times, Aug. 8, 2014, https://www.nytimes.com/2014/08/09/sports/federal-judge-rules-against-ncaa-in-obannon-case.html ("The amounts in the trust funds would be up to the discretion of institutions.").

[305] *O'Bannon, 7 F. Supp. 3d at 983-84.*

[306] *Id. at 1007.*

[307] *Id. at 1007-08.*

[308] Id. The court also held that the NCAA may prohibit schools from funding these stipends or trusts with anything other than revenue derived from the use of players' NILs. *Id. at 1005.*

[309] Strauss & Tracy, supra note 304.

[310] *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1053 (9th Cir. 2015)* ("As far as we are aware, the district court's decision is the first by any federal court to hold that any aspect of the NCAA's amateurism rules violate the antitrust laws, let alone to mandate by injunction that the NCAA change its practices.").

[311] Strauss & Tracy, supra note 304.

[312] Id.

[313] Solomon, supra note 44. See Boninger, supra note 29, at 801-05 (discussing the NCAA's inability to provide equal athletic opportunities to men and women without restrictions).

[314] *O'Bannon, 802 F.3d 1049.*

cash, or in-kind benefits, will put financial pressures on athletic departments across the country as they try to keep **[*332]** up with other institutions by offering competitive compensation packages to prospective Division I men's and women's basketball, and FBS football student-athletes. The ensuing financial pressures will result in non-revenue generating sports being cut altogether. [420] Indeed, financial pressures have resulted in this very outcome in the past as a result of the financial pressures accompanied by Title IX:

The NCAA observed that some college presidents had to close academic departments, fire tenured faculty, and reduce the number of sports offered to students due to the economic restraints [of increasing support for women's athletic programs]. At the same time, many institutions felt pressure to "keep up with the Joneses' by increasing spending on recruiting talented players and coaches and on other aspects of their programs in order to remain competitive with rival schools. [421]

Additionally, tuition costs for the general student body may increase as a result of enlarged financial burdens on the athletic department. [422] Because of the pernicious effects of such a regime change, the courts should consider the procompetitive benefits that the compensation restrictions provide in the closely related markets of the non-revenue generating collegiate sports.

In Sullivan v. NFL, [423] the court expressly considered those "ancillary benefits" in a closely related market. The owner of the New England Patriots brought antitrust action against the NFL for prohibiting him from offering for sale public stock in the Patriots. [424] The district court determined that the relevant market was the market for public stock in NFL teams and a jury trial resulted in a finding against the NFL for antitrust violations. [425] On appeal, the NFL argued that all procompetitive effects of its policy, even those in a market different from that in which the alleged restraint operated, should have been **[*333]** considered by the district court. [426] Specifically, the NFL argued that its public ownership restrictions ensure that NFL stakeholders are focused on the long-term interests of the league as a whole, rather than short-term dividend interests. [427] The NFL reasoned that these aligned interests allow the NFL to better compete in the entertainment market. [428] The NFL further reasoned that the entertainment market is closely related to the market identified by the district court - the market for public ownership in NFL teams. [429] Thus, the NFL argued that the anticompetitive harms in the market for public ownership in NFL teams can be

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315 On appeal, the NCAA made two additional arguments based on legal formalities that will not be discussed in this Comment: (1) that the NCAA's compensation restrictions are not covered by the Sherman Act because they do not regulate commercial activity; and (2) that the plaintiffs do not have standing under the Sherman Act because they have not suffered antitrust injury. *Id. at 1061.* The court was not persuaded by either argument. Id.

316 *Id. at 1061-62.*

317 *Id. at 1063.*

318 Id.

319 Id. (citing *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 103 (1984)).*

320 Id.

321 Id.

322 Id. at 1063-64.

323 Id. at 1064 ("[A] restraint that serves a procompetitive purpose can still be invalid under the Rule of Reason if a substantially less restrictive rule would further the same objectives equally well.").

324 Id.

325 Id. at 1061 ("We review the district court's findings of fact after the bench trial for clear error.").

326 Id. at 1072 ("[The NCAA] argues to us that the district court gave the amateurism justification short shrift"). Accordingly, the court accepted the district court's conclusions regarding the NCAA's other procompetitive justifications because the NCAA did not offer any meaningful argument. Id.

compared with the resulting procompetitive benefits in the market for entertainment. [430] Significantly, the First Circuit court agreed and remanded the case for those benefits in the entertainment market to be considered [431] :

We can draw at least one general conclusion from the case law at this point: courts should generally give a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices. [432]

Like the First Circuit, the district court should consider the benefits being realized in the closely related markets of non-revenue generating sports as a result of the men's basketball and FBS football compensation restrictions. In Sullivan, the stated market was public ownership in NFL teams and the closely related market was entertainment. [433] Here, the stated markets are the revenue generating sports of Division I men's basketball and FBS football. The closely related market is non-revenue generating collegiate sport. In Sullivan, the First Circuit required the district court to consider the benefits being realized in the entertainment market as a result of those public ownership restrictions. [434] The district court here should similarly consider the benefits being realized by the student-athletes participating in non-revenue generating sport as a result of compensation restrictions in Division I men's basketball and FBS football. The **[*334]** major benefit being realized is the increased opportunity for student-athletes to compete in amateur sport while earning a quality education. [435]

This is not a radical proposition. The Fifth Circuit has previously considered, and upheld, NCAA restrictions because the non-revenue generating sports benefit from those restrictions. In Hennessey v. National Collegiate Athletic Ass'n, coaches brought an antitrust action against the NCAA because the Association had introduced a new bylaw that limited the number of assistant coaches a school could employ. [436] The court recounted that the bylaw had been introduced to preserve the long-term interests of the entire association:

Colleges with more successful programs, both competitively and economically, were seen as taking advantage of their success by expanding their programs, to the ultimate detriment of the whole system of intercollegiate athletics.

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[327] Id. The NCAA also argued that the District Court was inappropriately skeptical of the Association's historical commitment to amateurism. Id. at 1073. The Ninth Circuit agreed, but found it was ultimately irrelevant because a proven commitment to amateurism does not equate to a finding that amateurism has procompetitive effects. Id.

[328] Id. at 1072.

[329] Id. In a footnote, the court noted that the link may be that the compensation restriction reduces the schools' costs, allowing them to fund more scholarships and thereby increase the number of opportunities that recruits have to play college sports. Id. at 1073 n.16. The court found this argument to be tantamount to the NCAA's increased output argument, which had been rejected by the district court. Id. The NCAA had not directly challenged that holding on appeal and, on that basis, the court affirmed the lower court's holding. Id. at 1072-73 n.16.

[330] Id. at 1073.

[331] Id. ("We therefore conclude that the NCAA's compensation rules serve the two procompetitive purposes identified by the district court.").

[332] Id. at 1072-73.

[333] Id. at 1074.

[334] Id. (citing *Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 120 (1984)).*

[335] Id.

[336] Id. at 1076.

[337] Id. at 1075-76.

[338] Id. at 1075 ("By the NCAA's own standards, student-athletes remain amateurs as long as any money paid to them goes to cover legitimate educational expenses.").

[339] Id.

Financial pressures upon many members, not merely to "catch up", but to "keep up", were beginning to threaten both the competitive, and the amateur, nature of the programs, leading quite possibly to the abandonment by many. "Minor" and "minority" sports were viewed as imperiled by concentration upon the "money makers", such as varsity football and basketball. [437]

The court upheld the restriction, noting that the fundamental objective of the rule was to reorient schools into maintaining "their traditional role as amateur sports operating as part of the educational processes." [438] In Alston, the court has the opportunity to similarly reorient the focus of Division I men's basketball and FBS football from their purely commercial objectives back to their academic pursuits while competing as amateur student-athletes. The longevity of collegiate athletics stands to benefit from such a reorientation of the otherwise commercialistic objectives held by revenue generating sports. As mentioned, the major benefit will be the continued viability of non-revenue generating sports that risk succumbing to financial pressures.

The benefit that stands to be gained - increased opportunities to earn a quality education while competing in amateur sport - should, at the very least, **[*335]** be considered by courts in both an economic and a social welfare sense. In an economic sense, the restriction results in increased consumer choice by making NCAA member institutions more accessible to a greater number of prospective student-athletes. [439] Similarly, it maintains access for the general student body by keeping "general fees" from being arbitrarily increased due to increased costs within the athletic department. In a social welfare sense, the restrictions promote the social ideal of equality of educational access and opportunity for all student-athletes, not just those belonging to the lucrative sports of men's basketball and FBS football. Indeed, the Third Circuit has found that these exact benefits are worth consideration in the antitrust context.

In U.S. v. Brown, MIT was sued by the United States Department of Justice for establishing a program where certain Ivy League schools [440] would collectively agree to a single financial aid package that would be offered to each prospective student. [441] The program was designed to help economically disadvantaged students, so financial aid packages were determined exclusively on the basis of demonstrated need. [442] MIT argued that the

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[340] Id. at 1075-76. Grant-in-aid scholarships cover most of the costs associated with attending a university, whereas cost-of-attendance scholarships cover all of the costs associated with attending a university. See Michelle Brutlag Hosick, Autonomy Schools Adopt Cost of Attendance Scholarships: College Athletes' Viewpoints Dominate Business Session Discussion, NCAA (Jan. 18, 2015), http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships ("In addition to tuition, fees, books and room and board, the scholarship will also include expenses such as academic-related supplies, transportation and other similar items. The value of those benefits can differ from campus to campus.").

[341] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1076 (9th Cir. 2015).

[342] Id. (emphasis in original).

[343] Id. at 1078 ("The district court cannot plausibly conclude that being a poorly-paid professional collegiate athlete is "virtually as effective' for the market as being [an] amateur.").

[344] Id. at 1077 ("The court relied on threadbare evidence in finding that small payments of cash compensation will preserve amateurism as well [as] the NCAA's rule forbidding such payments.").

[345] Id. at 1079.

[346] Id. (citing Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 120 (1984)).

[347] Id.

[348] The Supreme Court denied review of the appellate court decision. ***O'Bannon v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 277 (2016)*** (denying certiorari).

program increased consumer choice by making Ivy League educations more accessible to a greater number of students, particularly those that lack financial resources. [443] Moreover, MIT argued that the program was also justified on social welfare grounds by promoting the ideal of equality of educational access and opportunity. [444] The district court found the program to be in violation of antitrust law. [445] On appeal, the circuit court reasoned that "it is most desirable that schools achieve equality of educational access and opportunity in order that more people enjoy the benefits of a worthy higher education" and "there is no doubt, too, that enhancing the quality of our educational system redounds to the general good." [446] Accordingly, the circuit court held that the district court was **[*336]** obliged to consider the economic and social welfare justifications offered by MIT. [447]

In short, removing financial obstacles for the greatest number of talented but needy students increases educational access, thereby widening consumer choice. Enhancement of consumer choice is a traditional objective of the antitrust laws and has also been acknowledged as a procompetitive benefit. [448]

The district court in Alston should feel equally as obliged to consider these procompetitive justifications. Specifically, the court should consider the justification that payment restrictions allow the NCAA to provide a greater number of educational and athletic opportunities to many student-athletes that would not exist if such payment restrictions were lifted.

VI. Application: Alston

The Northern District Court of California has demonstrated an unwillingness to grant the NCAA that "ample latitude" that the Supreme Court [449] and *Ninth* Circuit [450] have afforded the NCAA. The recent District Court summary judgment decision is only the most recent example of that. Based on the outcome of the summary judgment motion, it is unlikely that the District Court will change course in issuing its verdict at the close of the Alston trial. [451] Thus, the application of this Comment may be more applicable to the subsequent appeal made by the NCAA after an unfavorable outcome.

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[349] Benefits such as meal plans; money for books and miscellaneous expenses; academic counseling and tutoring; life skill training; nutritional advice; professional coaching; strength and fitness training; and support from athletic trainers and physical therapists. Dorfman, supra note 17.

[350] In re NCAA Athletic Grant-In-Aid Cap Antitrust Litig. (Alston), No. 4:14-md-02541-CW, 2017 BL 437266 (N.D. Cal. 2017).

[351] Namely: Shawne Alston, Martin Jenkins, Johnathan Moore, Kevin Perry, William Tyndall, Alex Lauricella, Sharriff Floyd, Kyle Theret, Duane Bennett, Chris Stone, John Bohannon, Ashley Holliday, Chris Davenport, Nicholas Kindler, Kendall Gregory-McGhee, India Chaney, Michel'le Thomas, Don "DJ" Banks, Kendall Timmons, Dax Dellenbach, Nigel Hayes, Anfornee Stewart, Kenyata Johnson, Barry Brunetti, Dalenta Jameral "D.J." Stephens, Justine Hartman, Afure Jemerigbe, and Alec James. Parties for In Re: National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation, 4:14-md-02541, Ct. Listener, *https://www.courtlistener.com/docket/4495063/parties/in-re-national-collegiate-athletic-association-athletic-grant-in-aid-cap/* [*https://perma.cc/6QBX-WXK7*] (last visited Dec. 13, 2018).

[352] See Will Hobson, After NCAA Settlement, Sports Lawyer Jeffrey Kessler Continues Fight to Upend Amateurism, Wash. Post, Feb. 7, 2017, *https://www.washingtonpost.com/news/sports/wp/2017/02/07/ncaa-settlement-on-past-cost-of-attendance-stipends-is-not-nearly-enough-sports-lawyer-jeffrey-kessler/?utm_term=.ea57e6c63f16*; see also Travis Waldron, A Trip To the Men's Room Turned Jeff Kessler Into the NCAA's Worst Nightmare, Huffington Post (Aug. 7, 2017), *https://www.huffingtonpost.com/entry/jeffrey-kessler-ncaa-lawsuit_us_59723f33e4b00e4363df3f59*.

[353] Order Denying Motion for Judgment on the Pleadings, No. 14-md-2541- *CW, 2016 WL 4154855 (N.D. Cal. 2016).*

[354] Id. The plaintiffs do not seek damages. Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., No. 14-md-02541- CW, 2018 WL 1524005, at 3 (N.D. Cal. 2018).

Regardless of the procedural posture, level of the court, or circuit in which an antitrust claim is being brought against the NCAA, the points made in this Comment should be taken into consideration. Below, I will illustrate how the principles described above should be applied in Alston.

[*337] The relevant market, per the summary judgment decision, is the market for a college education combined with athletics, or alternatively the market for the student-athletes' services. Crucially, the student-athletes described belong to the sports of FBS football and Division I men's and women's basketball - no other sports are considered. [452] Thus, the sought remedy only benefits those stated sports and no others. As discussed, an injunction that allows prized recruits to be paid in cash or in kind will result in increased financial burdens on any given school. Also discussed, increased financial burdens often lead to the removal of woman's sports and other non-revenue generating sports. [453] Therefore, the issues and proposed solutions mentioned in this Comment are directly applicable.

The compensation restrictions were found to be anticompetitive as a matter of law. Therefore, the burden will primarily be on the NCAA at trial to prove the validity of its stated procompetitive justifications for the restrictions. As mentioned, those procompetitive justifications are: (1) integration of academics and athletics; and (2) preservation of amateurism in college sport, which preserves its popularity by distinguishing it from professional sport.

The NCAA should argue that the benefits being derived in the revenue and non-revenue generating sports justify the compensation restrictions. Because the procompetitive justifications have been limited to those two stated above, the NCAA will have to argue that non-revenue generating sports are enjoying those benefits. More specifically, student-athletes in the non-revenue generating sports are enjoying the benefits of having an integrated experience and that, as amateurs, their athletic competition is preserved as a distinct form of athletic participation as compared to professional sports. The NCAA must further argue that neither of these benefits will materialize for non-revenue generating sports whatsoever, if the compensation restrictions are lifted. This is because many non-revenue generating sports will cease to exist in their entirety due to the increased financial burden on many

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355 Defendants' Motion for Judgment on the Pleadings and Memorandum of Points and Authorities in Support Thereof, In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., No. 14 MD02541, 2016 WL 4943915 (N.D. Cal. 2016).

Under the doctrine of stare decisis, the Jenkins and consolidated action plaintiffs are not entitled to relitigate the question of whether defendants' rules prohibiting member schools from paying student-athletes more than their cost of attendance violate the Sherman Act, and they are not entitled to an injunction against the enforcement of those rules.

Id.

356 Order Denying Motion for Judgment on the Pleadings, supra note 353, at 2.

357 Id. ("The Ninth Circuit's decision in O'Bannon simply forecloses one type of relief Plaintiffs previously sought: cash compensation untethered to educational expenses.").

358 Steve Berkowitz, Judge Rejects NCAA's Request for Dismissal of "Kessler,' Alston Suits, USA Today, Aug. 5, 2016, *https://www.usatoday.com/story/sports/college/other/2016/08/05/ncaa-suit-shawne-alston-martin-jenkins-kessler-berman-nigel-hayes-claudia-wilken/88313408/*.

359 Id.

360 Plaintiffs' Notice of Motion and Motion for Summary Judgement; Memorandum of Points and Authorities in Support Thereof, No. 4:14-md-02541- CW, 2017 WL 3525667 (N.D. Cal. 2017); Defendants' Notice of Motion and Motion for Summary Judgment and for Exclusion of Expert Testimony, and Opposition to Plaintiffs' Motion for Summary Judgment, In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig. (Alston), No. 4:14-md-02541- CW, 2017 WL 4348498 (N.D. Cal. 2017).

361 "Defendants' price-fixing justification based on their ever-elusive concept of "amateurism' is simply their version of a three-card Monte game in which the line defining amateurism never stays in the same place." Plaintiffs' Notice of Motion and Motion for Summary Judgement; Memorandum of Points and Authorities in Support Thereof, supra note 360, at 1.

362 Defendants' Notice of Motion and Motion for Summary Judgment and for Exclusion of Expert Testimony, and Opposition to Plaintiff's Motion for Summary Judgment, supra note 360 (discussing the century-old principle of amateurism and the courts' continued recognition that the NCAA must have ample latitude to enforce rules to protect amateurism).

schools. The NCAA should rely on the Sullivan decision for this argument, where procompetitive benefits recognized in a closely related market were allowed to be considered as justifications for restrictions in a separate market. [454] Here, the restrictions in the college education market for football and men's basketball result in benefits being realized in the closely related markets of non-revenue generating sports. **[*338]** Those benefits are having an integrated experience between academics and athletics and a distinction between amateur and professional sports.

The NCAA may be unable to persuade the district court with this argument, however. And it would not be surprising if they lost at trial. The NCAA relied on these very same procompetitive justifications before this very same court only a few years prior. [455] The NCAA lost.

The NCAA's best bet will be on appeal when they can restate the procompetitive justifications that were dismissed at summary judgment. Specifically, the NCAA should argue that the district court erroneously refused to consider a compelling procompetitive justification - that of expanding opportunities to all student-athletes:

The challenged rules serve the procompetitive goals of expanding output in the college education market and improving the quality of the collegiate experience for student-athletes, other students, and alumni by maintaining the unique heritage and traditions of college athletics and preserving amateurism as a foundation principle, thereby distinguishing amateur college athletics from professional sports, allowing the former to exist as a distinct form of athletic rivalry and as an essential component of a comprehensive college education. [456]

Indeed, this is exactly what Defendant-MIT did in Brown when the district court refused to consider their compelling procompetitive justification. [457]

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[363] Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, supra note 354, at 15.

[364] Id. at 9 ("Plaintiffs contend that because Defendants permit student-athletes to be paid money that does not go "to cover legitimate education expenses,' they are not amateurs.").

[365] Id. at 7 ("Plaintiffs contend that … Defendants cannot meet their burden to prove that the restraints have procompetitive benefits.").

[366] The relevant market was the same as in O'Bannon: "the market for a college education combined with athletics or alternatively the market for the student-athletes' athletic services." Id. at 8.

[367] The NCAA once again relied on O'Bannon precedent, arguing that stare decisis barred an allegation that the compensation restrictions cause anticompetitive effects. Id. at 8. The court was once again unpersuaded.

[368] Id.

[369] Id. ("The validity of the specific rules challenged in this cased "must be proved, not presumed."") (citing *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1064 (9th Cir. 2015)).*

[370] The seven additional justifications were:

(1) expanding output in the college education market … ; (2) widening opportunities for student-athletes to attend college through athletics scholarships … ; (3) promoting support for college and universities … ; (4) creating a more diverse student body; (5) providing a broader scope of athletic program offerings … ; (6) promoting competitive balance … ; and (7) promoting competitive fairness and improving the quality of college education …

First, the NCAA should argue that it was erroneous to dismiss the proffered expanding opportunities procompetitive justification at summary judgment. Expert testimony from both parties supported the notion that the NCAA should be considered as a whole - a multi-side market that includes many participants rather than a one-sided market that is constricted to only a few specific sports. At the very least, an issue of fact on the matter exists. The procompetitive justification should have survived summary judgment, becoming an issue for the trier of fact of determine.

Second, the NCAA should rely on Sullivan to argue that benefits generated in a closely related market are worthy of consideration. As discussed, Sullivan demonstrates that courts must consider procompetitive impacts in closely related markets. This argument is crucial. The relevant market remains the **[*339]** college education market for FBS football and Division I men's and women's basketball. Thus, the NCAA must argue that benefits outside of this market can be considered, specifically those benefits in a closely related market. The closely related market would be student-athletes participating in non-revenue generating sports. Sullivan allows such an argument. And, what's more, the Sullivan court relied on Ninth Circuit precedent - L.A. Memorial Coliseum Commission v. NFL [458] - to permit the consideration of procompetitive benefits being generated in closely related markets. [459] L.A. Memorial

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Defendants' Notice of Motion and Motion for Summary Judgment and for Exclusion of Expert Testimony, and Opposition to Plaintiffs' Motion for Summary Judgment, supra note 360.

[371] Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, supra note 354, at 10 (stating that "Defendants have not attempted to meet [their] burden at all" and that "the Court will grant summary judgment on these six procompetitive justifications" against the NCAA).

[372] Id. at 10.

[373] Recall the fourth procompetitive justification proffered by the NCAA in O'Bannon: "The NCAA asserts that its challenged rules are reasonable and procompetitive because they enable it to increase the number of opportunities available to schools and student-athletes to participate in FBS football and Division I basketball, which ultimately increases the number of games that can be played." *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 983 (N.D. Cal. 2014).*

[374] Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, supra note 354, at 11.

Coliseum Commission is binding precedent on the Ninth Circuit. Thus, the NCAA should argue that the Court not only should consider those procompetitive benefits in the closely related market, per Sullivan, but that it must consider them, per L.A. Memorial Coliseum Commission.

Finally, with the expanded opportunity justification and non-revenue generating sports being considered, the NCAA should return to Brown for support. As mentioned, Brownstands for the proposition that equality of educational access and opportunity is a procompetitive justification. Thus, the NCAA's compensation restrictions being made in an attempt to achieve expanded access and opportunity to a quality higher education for all student-athletes are procompetitive.

With these arguments, the NCAA invalidates the plaintiffs' alleged less restrictive alternatives. Recall that those were: (1) to allow conferences to determine compensation packages; or (2) remove compensation restrictions altogether. As discussed, the resulting compensation packages for student-athletes would cause burdensome financial pressure for most schools. Also discussed, many schools would respond by cutting non-revenue generating sports. Because the removal of sports would be the outcome, thereby reducing opportunities for student-athletes, the proposed "alternatives" do not serve the same end of expanding opportunities for student-athletes as the compensation restrictions do.

VII. Conclusion

The first recorded intercollegiate sporting event, between Harvard and Yale, occurred over 150 years ago. There is arguably no other institution in the country - including the NCAA itself - with the inextricable links to collegiate athletics that both Harvard and Yale have; they were there from the beginning. Today, both universities compete at the Division I level in all sports, but they **[*340]** do not offer athletic scholarships. Neither school has extravagant athletic facilities, nor do they have coaches that are paid millions of dollars. Rather, these schools rely primarily on their academic values in appealing to prospective Division I caliber student-athletes. These prospective student-athletes need look no further than the Supreme Court Justices; [460] United States Presidents; [461] Congressmen and Congresswomen; [462] and business executives [463] produced by Harvard and Yale to see the opportunities that

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375 Order on Motions to Exclude Proposed Expert Testimony, In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig. (Alston), No. 14-md-02541-CW, at 5 (N.D. Cal. 2018) (comparing Dr. Elzinga's determination of the relevant market to the single-sided market definition adopted by the court).

376 Id. at 5.

377 Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, supra note 354, at 11.

378 Id.

379 Id.

380 Id.

381 Id.

382 Id. at 10-11.

383 Id. at 12-13. Plaintiffs' Opening Argument at 41-42, In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig. (Alston), No. 4:14-md-02541-CW, 2017 BL 437266 (N.D. Cal. Aug. 27, 2018).

384 Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, supra note 354, at 11.

385 Id.

386 Id. at 11-12.

387 Id.

388 Minute Order, In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig. (Alston), No. 4:14-md-02541-CW, 2017 BL 437266 (N.D. Cal. May 22, 2018).

389 Id. at 15.

await them. Indeed, amateurism in its most pure form can be found at these two institutions, and their graduates are compensated handsomely.

A dollar figure cannot be put on the value of a decent education. Courts should take the opportunity to realize that paying student-athletes in cash, or in kind, comes at a greater cost. Sports will be cut and access to higher education will be restricted for many. Moreover, academic values will be subordinated to short term financial gain. Student-athlete gain in being compensated does not outweigh the resulting losses in educational values. "Basically, my position is that coaches and administrators and the NCAA and everybody else needs to do a better job in educating youngsters about the value of a degree, the value of an education." [464] Indeed.

In defending athletics I would not for one moment be understood as excusing that perversion of athletics which would make it the end of life instead of merely a means in life. It is first-class, healthful play, and is useful as such. But play is not business, and it is a very poor business indeed for a college man to learn nothing but sport.
[*341]

Play while you play and work while you work, and though play is a mighty good thing, remember that you had better never play at all than to get into a condition of mind where you regard play as the serious business of life, or where you permit it to hamper and interfere with your doing your full duty in the real work of the world. [465]

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[390] Arguably, women's basketball was included in litigation for the exclusive purpose of satisfying federal Title IX regulations. In the NCAA's opening statement, the NCAA correctly points out women's basketball is never mentioned in the Plaintiffs' Opening Statement. Defendants' Opening Statement at 21, In re Nat' Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig. (Alston), No. 4:14-md-02541-CW, 2017 BL 437266 (N.D. Cal. Aug. 27, 2018) ("[Plaintiffs'] never say a word about women's basketball in particular.").

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

[392] See *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 1008 (N.D. Cal. 2014)* (allowing for student-athletes to receive up to five-thousand dollars in a trust per year while eligible).

[393] *O'Bannon, 802 F.3d at 1079.*

[394] *O'Bannon, 7 F. Supp. 3d at 983.*

[395] Id.

- President Theodore Roosevelt

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396 *O'Bannon, 802 F.3d at 1076.*

397 SPORTS PEOPLE: COLLEGE BASKETBALL; O'Bannon Receives the Wooden Award, N.Y. Times, Apr. 8, 1995, *http://www.nytimes.com/1995/04/08/sports/sports-people-college-basketball-o-bannon-receives-the-wooden-award.html*.

398 The Ninth Circuit acknowledged this skepticism and suggested it may disagree with the district court's conclusion: "[The NCAA] faults the district court for being inappropriately skeptical of the NCAA's historical commitment to amateurism … . we might have credited the depth of the NCAA's devotion to amateurism differently." *O'Bannon, 802 F.3d at 1072.*

399 *O'Bannon, 7 F. Supp. 3d at 1001* ("[Amateurism] restrictions on student-athlete compensation play a limited role in driving consumer demand.") (emphasis added).

400 See *Jones v. Nat'l Collegiate Athletic Ass'n, 392 F. Supp. 295, 304 (D. Mass. 1975).*

The N.C.A.A. was originally established to promote amateurism in college sports and to integrate intercollegiate athletics into the educational programs of its member institutions. The N.C.A.A. eligibility rules were … designed to … implement the N.C.A.A. basic principles of amateurism, principles which have been at the heart of the Association since its founding.

Id.

401 *O'Bannon, 7 F. Supp. 3d at 1000.*

402 Id.

403 Id.

404 The NCAA permits the actual and necessary expenses associated with competition to be reimbursed by permissible sources such as event sponsors and club teams. See NCAA, 2017-18 NCAA Division I Manual art. 12, 12.02.6, at 62 (Aug. 1, 2017); see also Adam Himmelsbach, Club Team, Nike Reap Benefits of Sponsorship, Courier J., Oct. 17, 2014, *https://www.courier-journal.com/story/sports/college/basketball/2014/10/17/club-team-nike-reap-benefits-sponsorship/17458415/* ("Generally speaking, it is permissible for basketball teams to be sponsored by companies and to provide prospective student-athletes with necessary expenses like travel, food, etc.").

405 *McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1345 (5th Cir. 1988).*

406 *O'Bannon, 7 F. Supp. 3d at 975-76.*

407 In Board of Regents the Supreme Court makes clear that "athletes must not be paid" because it preserves the character of college sports as compared to professional sports, which is in the consumers' interest because it widens the choices available to sports fans. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 102, 117 (1984).*

408 Alex Prewitt, Large Majority Opposes Paying NCAA Athletes, Washington Post-ABC News Poll Finds, Wash. Post, Mar. 23, 2014, *https://www.washingtonpost.com/sports/colleges/large-majority-opposes-paying-ncaa-athletes-washington-post-abc-news-poll-finds/2014/03/22/c411a32e-b130-11e3-95e8-39bef8e9a48b_story.html?utm_term=.a0ab74eea1a5* .

409 Id. Forty-seven percent were found to be strongly against the idea of paying student-athletes. Id.

410 The NCAA survey revealed sixty-nine percent of respondents were opposed to paying student-athletes while only twenty-eight percent were in favor of paying them. *O'Bannon, 7 F. Supp. 3d at 975.* The Washington Post poll revealed that sixty-four percent were opposed and thirty three percent were in favor. Prewitt, supra note 408.

411 See *Bd. of Regents, 468 U.S. at 102* ("[NCAA] actions widen consumer choice … and hence can be viewed as procompetitive.").

412 *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1076 (9th Cir. 2015).*

413 *Id. at 1079* (citing *Bd. of Regents, 468 U.S. at 120).*

414 *Bd. of Regents, 468 U.S. at 120.*

415 Id.

416 Order Denying Motion for Judgment on the Pleadings, supra note 353.

417 *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 986-87 (N.D. Cal. 2014); O'Bannon, 802 F.3d at 1070-72.*

418 See Defendants' Opening Statement, supra note 390 (noting Plaintiffs' failure to mention women's basketball in their opening statement, and suggesting that women's basketball may have been included to avoid Title IX obligations).

419 In the NCAA's Opening Statement, the NCAA expressly states its disagreement with the district court's definition of the relevant market at issue, and reserves the right to challenge the finding. Defendants' Opening Statement at 6 n.11, In re Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig. (Alston), No. 4:14-md-02541-CW, 2017 BL 437266 (N.D. Cal. Aug. 27, 2018).

420 It will also lead to cuts within the revenue generating sports themselves. Jon Solomon, NCAA, Conferences: Scholarships Would Be Cut If Players Are Paid, CBS Sports (May 1, 2015), *https://www.cbssports.com/college-football/news/ncaa-conferences-scholarships-would-be-cut-if-players-are-paid/* ("If college athletes are allowed to be paid, the development would "likely lead many - if not most - Division I institutions' to reduce the number of scholarships for less-renowned football and men's and women's basketball players.").

421 *Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1012 (10th Cir. 1998).*

422 See Krupnick, supra note 31 ("The most likely outcome … would be for at least some … universities to drop out of the big-time sports by eliminating athletics scholarships or otherwise scaling back sports programs rather than risking protests by paying athletes and charging students more.").

423 *34 F.3d 1091 (1st Cir. 1994).*

424 *Sullivan v. Nat'l Football League, 34 F.3d 1091, 1096 (1st Cir. 1994).*

425 Id.

426 *Id. at 1111.*

427 *Id. at 1102.*

428 *Id. at 1112-13.*

429 *Id. at 1112.*

430 Id.

431 The Fifth Circuit Court of Appeals actually gave the district court a choice. On remand, the district court could allow the jury to consider the benefits to competition in the closely related market or the court could have the jury make a final determination without considering a relevant market whatsoever. *Id. at 1113.*

432 *Id. at 1112.*

433 Id.

434 *Id. at 1113* ("These procompetitive justifications should have been considered by the jury.").

435 In O'Bannon, the district court considered, and refuted, the NCAA's argument that compensation restrictions are procompetitive because they increase opportunities to compete in FBS Football and men's Division I basketball. *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 981-82 (N.D. Cal. 2014).* This Comment argues that the increased opportunities to all student athletes should be considered and that those opportunities include increased access to a quality

education. See Boninger, supra note 29, at 805 (concluding that "the NCAA's prohibitions on compensation are necessary for schools to continue to provide equality of collegiate athletic opportunities for men and women.").

436 *564 F.2d 1136, 1141 (5th Cir. 1977).*

437 *Id. at 1153.*

438 Id.

439 Here, the student-athletes would be the "consumers" for the purposes of antitrust review. The Ninth Circuit and Northern District Court of California accepted the view of student-athletes as consumers in a market where schools are selling educational and athletic opportunities. *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1057-58 (9th Cir. 2015); O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955, 991 (N.D. Cal. 2014).*

440 Those Ivy League schools were: *MIT, Brown, Columbia, Cornell, Dartmouth, Harvard, Princeton, the University of Pennsylvania, and Yale. U.S. v. Brown Univ., 5 F.3d 658, 662 n.1 (3d Cir. 1993).*

441 *Id. at 661-63.*

442 *Id. at 662.*

443 *Id. at 674-75* ("By increasing the financial aid available to needy students, [the Program] provided some students who otherwise would have been able to afford an [Ivy League] education the opportunity to have one.").

444 *Id. at 675.*

445 *Id. at 664.*

446 *Id. at 678.*

447 *Id. at 661* ("We hold that the district court erred by failing to adequately consider the procompetitive and social welfare justifications proffered by MIT.").

448 *Id. at 675.*

449 Recall the Supreme Court's language in the seminal Board of Regents decision:

There can be no question but that [the NCAA] needs ample latitude to play [the critical role of maintaining the revered tradition of amateurism in college sports], or that preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.

Nat'l Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 120 (1984).

450 *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1074 (9th Cir. 2015)* ("We must generally afford the NCAA "ample latitude' to superintend college athletics.").

451 "Judge Wilken has shown less deference to the NCAA than most judges, but this case and the fate of the NCAA's economic model will likely ultimately rest in the hands of the Ninth Circuit and the Supreme Court." Ralph D. Russo, NCAA Goes Back to Court, Defending Its Amateurism Rules, Associated Press (Sept. 3, 2018), *https://www.apnews.com/db8398e20f8d4f959591b622160e408c* (quoting Director of Tulane University's Sports Law Program Gabe Feldman).

452 Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, supra note 354, at 8.

453 Id. The increased financial burdens also increase costs for the average collegiate student. See supra notes 30-34 and accompanying text.

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454 Recall that in Sullivan, the anticompetitive restrictions occurred in the market for public ownership in NFL teams, yet the appellate court remanded the case for the district court to consider the benefits that exist in the entertainment market as a result of the restrictions.

455 See generally *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 7 F. Supp. 3d 955 (N.D. Cal. 2014).*

456 Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, supra note 354, at 8.

457 See *U.S. v. Brown Univ., 5 F.3d 658, 675 (3rd Cir. 1993)* ("[MIT claims] the district court erroneously refused to consider compelling social welfare justifications.").

458 *726 F.2d 1381 (9th Cir. 1994).*

459 *Sullivan v. Nat'l Football League, 34 F.3d 1091, 1111 (1st Cir. 1994)* (citing *L.A. Memorial Coliseum Comm'n v. NFL, 726 F.2d 1381, 1392, 1397, 1399 (9th Cir. 1994)).*

460 Each of the current Supreme Court Justices attended either Harvard or Yale, although Justice Ginsburg ultimately graduated from Columbia after transferring from Harvard. Aaron Steckelberg, The Current Supreme Court Justices Are All Ivy Leaguers, Wash. Post., Jan. 26, 2017, *https://www.washingtonpost.com/graphics/politics/scotus-education/*.

461 Harvard and Yale are first and second, respectively, in the ranking of colleges that have graduated the most United States Presidents. Top Colleges for Presidential Graduates, Best Colleges, *https://www.bestcolleges.com/features/most-us-presidents/* (last visited Dec. 13, 2018).

462 Harvard and Yale are first and third, respectively, in the ranking of colleges that have produced the most members of Congress. Colleges That Produced the Most Members of Congress, Huffington Post (Dec. 6, 2017), *https://www.huffingtonpost.com/2014/02/19/colleges-members-of-congress-alumni_n_4818357.html*.

463 Harvard and Yale are third and thirteen, respectively, in the ranking of colleges that have produced the most Fortune 500 CEOs. Colleges with the Most Fortune 500 CEO Graduates, Best Colleges, *https://www.bestcolleges.com/features/colleges-with-highest-number-fortune-500-ceo-graduates/* (last visited Dec. 13, 2018).

464 Ronald D. Mott, Student-Athlete Voices Join Pay-for-Play Debate, NCAA News, Sept. 19, 1994, at 19, *https://ia801400.us.archive.org/31/items/NCAA-News-19940919/NCAA-News-19940919.pdf* (statement from former Baylor University Athletics Director and Head Coach Grant Teaff).

465 President Theodore Roosevelt, supra note 1. Recall that this statement is made in the period immediately after President Roosevelt initiated the changes that led to creation of the NCAA in his attempt to preserve amateurism and reduce the unsavory violence in collegiate sport. Id.

Comments: Equity and Amateurism: How the NCAA Self-Employment Guidelines are Justified and Do Not Violate Antitrust Law

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* J.D. Candidate, The Pennsylvania State University, Penn State Law, 2019. First, I would like to thank my parents for their unwavering love and support as I have journeyed through law school and life. I would also like to thank Professors Geoffrey Scott and Steve Ross for their mentorship and guidance throughout my time at Penn State Law, and Professor Jeffrey Erickson for believing in me as a writer and supporting my inquisitive nature.

Highlight

Abstract

The ***NCAA***'s longstanding tradition of ***amateurism*** is a pillar of the ***NCAA*** that has been regularly challenged by student-athletes and the public. The ***NCAA*** has set forth numerous ***guidelines*** to safeguard this tradition, including the ***Self-Employment Guidelines***, which provide that a student-athlete may not use his or her name, image, likeness, or reputation as an ***NCAA*** athlete in the promotion of his or her business. The ***Self-Employment Guidelines*** have become particularly relevant and controversial recently, as the ***NCAA*** has found student-athletes to be ineligible based on these ***Guidelines***, and has warned future student-athletes against these practices in order to remain in compliance. In August 2017, Donald De La Haye, the kicker for the University of Central Florida, was deemed ineligible for a violation of the ***Self-Employment Guidelines*** after receiving advertising revenues on his YouTube channel. Additionally, the ***NCAA*** has expressed concern over highly anticipated sixteen-year-old basketball star LaMelo Ball's participation in his family's business, Big Baller Brand.

Antitrust claims are a common vehicle for student-athletes to challenge ***NCAA*** regulations. Thus, this Comment will engage in a rule of reason analysis of the ***NCAA***'s ***Self-Employment Guidelines*** to determine if the maintenance of the tradition of ***amateurism***, along with the desire for parity amongst universities and amongst student-athletes, sufficiently ***justifies*** any anticompetitive effects that the student-athletes might feel from the ***Self-Employment Guidelines***. Ultimately, this Comment will conclude that the procompetitive justifications outweigh the anticompetitive effects of the ***Guidelines***.

Text

[*249]

I. Introduction

Student-athletes at times feel stifled by National Collegiate Athletic Association ("***NCAA***") regulations, as they have bigger dreams beyond their intercollegiate athletics careers. [1] Whether their aspirations are to play a sport professionally, open their own business, or work for a large corporation, the ultimate goal is to make a living doing it. [2] Those student-athletes with an entrepreneurial spirit are often inspired to use the resources available to them to their advantage. [3] Many times, the most valuable resources are their own name, image, likeness, and reputation.

In the 2017-2018 ***NCAA*** Division I Manual ("***NCAA*** Manual"), [4] the ***NCAA*** set forth a number of regulations to protect their product, which relies heavily on the maintenance of the tradition of ***amateurism***. [5] ***Amateurism*** [6] has been a pillar of the ***NCAA*** since its inception, and is characterized primarily by a lack of direct or indirect compensation for athletes. [7] Article 12 of the ***NCAA*** Manual provides a comprehensive list of eligibility rules to protect the tradition of ***amateurism***. [8] While student-athletes have attempted to challenge a number of these eligibility rules in the past, courts have yet to make a determination on the legality of the ***NCAA***'s ***Self-Employment Guidelines***, which restrict student-athletes' ability to use their name, image, likeness, or status as an ***NCAA*** athlete in order to promote his or her product or business. [9]

This Comment will examine the ***NCAA***'s dedication to the tradition of ***amateurism*** through the ***Self-Employment Guidelines*** and whether that **[*250]** commitment has led to a violation of the Sherman Antitrust Act. [10] First, Part II of this Comment will provide a brief history of the ***NCAA*** and the ***NCAA*** Manual, followed by a description of the elements required to assert a claim under the Sherman Antitrust Act. [11] Next, Part III will engage in a "rule of reason" analysis to determine if the ***Self-Employment Guidelines*** are sufficiently procompetitive to ***justify*** their alleged anticompetitive effects. [12] Part III will then analyze the ***self-employment*** of LaMelo Ball and Donald De La Haye to examine ***how*** the indirect compensation they received for their athletic ability potentially damaged the ***NCAA***'s product. [13] This Comment will ultimately recommend that the Supreme Court grant certiorari to a case

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[1] For example, Donald De La Haye has felt stifled by the ***NCAA***'s regulations, as the regulations have forced him to choose between his YouTube channel and his intercollegiate athletics career. See Iliana Limon Romero, UCF YouTube kicker seeks donations, unsure about legal options, Orlando Sentinel (Aug. 1, 2017, 9:30 PM), *http://www.orlandosentinel.com/sports/ucf-knights/os-sp-ucf-kicker-**ncaa**-reaction-0802-story.html*.

[2] See generally id (discussing De La Haye's financial struggles, and ***how*** he uses his YouTube channel to earn a living).

[3] See, e.g., Donald De La Haye (@Deestroying), YouTube (Apr. 1, 2017), *https://www.youtube.com/watch?v=HA9ln1wmxgc* (showing De La Haye practicing his sprints for football); see also Donald De La Haye (@Deestroying), YouTube (Mar. 13, 2017), *https://www.youtube.com/watch?v=d8PG8BJdzfY* (showing De La Haye working out with teammates and practicing his kicking).

[4] Nat'l Collegiate Athletic Ass'n, 2017-2018 ***NCAA*** Division I Manual (2017), *http://www.ncaapublications.com/productdownloads/D118.pdf* [hereinafter ***NCAA***, Division I Manual].

[5] See id., art. 2.9, at 4.

[6] See Amateur, Oxford Dictionary, *https://en.oxforddictionaries.com/definition/amateur* (last visited Aug. 14, 2018) (defining an amateur as one who "who engages in a pursuit, especially a sport, on an unpaid basis").

[7] See infra Section II.A.1 (discussing the history and definition of ***amateurism***).

[8] See ***NCAA***, Division I Manual, supra note 4, art. 12, at 61-91.

[9] See id., art. 12.4.4, at 72.

[10] Sherman Antitrust Act, ch. 647, ***26 Stat. 209 (1890)*** (codified as amended at ***15 U.S.C.§§1***-7 (2012 & Supp. 2017)).

[11] See infra Part II.

challenging the ***NCAA***'s rules against indirect compensation for athletic ability, and hold that the ***Self-Employment Guidelines*** do not violate the Sherman Antitrust Act. [14]

II. Background

The ***NCAA*** has a long and telling history that gives courts insight as to the ***NCAA***'s motives and objectives in its governance of intercollegiate athletics. [15] These motives and objectives in turn influence the courts' interpretations of the ***NCAA***'s ***guidelines***. Student-athletes have regularly used antitrust law to challenge the ***NCAA***'s ***guidelines***, but student-athletes are often unsuccessful, as courts tend to be persuaded by arguments for the maintenance of the tradition of ***amateurism***.

A. History of the ***NCAA***

In the early twentieth century, scandals, cheating, and serious injuries were common amongst intercollegiate athletic programs, leading President Theodore Roosevelt to call for the formation of a governing body to help curtail these issues. [16] Originally called the Intercollegiate **[*251]** Athletic Association of the United States ("IAAUS"), the ***NCAA*** was formed in 1906 by 62 member institutions. [17]

The ***NCAA*** began as a rule-making body and discussion group, but over time developed into a much larger and more complex organization. [18] With the creation of national championship games and increased regulations in areas like recruiting and financial aid, the ***NCAA*** grew quickly. [19] This surge in growth created a demand for full-time professional leadership, leading to the appointment of Walter Byrnes as the ***NCAA***'s first Executive Director in 1951. [20] With new leadership, the ***NCAA*** continued to expand their influence. [21] The ***NCAA*** not only grew to dictate rule-making for more sports, but it also expanded its sanctioning authority with the creation of the Committee on Infractions. [22] The Committee on Infractions was created in the 1950s as a more powerful force in ensuring that member institutions were complying with ***NCAA*** rules. [23]

The ***NCAA*** continued to grow rapidly throughout the late twentieth century, [24] thus leading to the creation of Divisions I, II, and III in 1973. [25] These divisions were created for both competitive and legislative purposes, and to

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[12] See infra Part III.

[13] See infra Section III.C.

[14] See infra Part IV.

[15] See generally History, Nat'l Collegiate Athletic Ass'n, *https://web.archive.org/web/20110807060521/http://www.**ncaa**.org:80/wps/wcm/connect/public/**ncaa**/about+the+**ncaa**/who+we+are/about+the+**ncaa**+history* (last updated Nov. 8, 2010) [hereinafter ***NCAA***, History] (providing details as to the ***NCAA***'s formation and growth as a governing body).

[16] See id.

[17] See id. (stating that the IAAUS was renamed the National Collegiate Athletic Association in 1910).

[18] See id.

[19] See id. (stating the ***NCAA*** hosted its first national championship in 1921 for Track and Field, and that the "Sanity Code" was the ***NCAA***'s attempt to regulate recruitment and financial aid).

[20] See id.

[21] See id.

[22] See id.

[23] See id.

[24] See id.

[25] See ***NCAA***, History, supra note 15

account for the increased membership and varying levels of emphasis on athletics at each member institution. [26] In the 1980s, **[*252]** the ***NCAA*** greatly expanded again; this time to include women's sports. [27] Today, the ***NCAA*** consists of 1,123 member institutions with nearly half of a million college athletes under its influence and direction. [28]

1. ***Amateurism*** and the ***NCAA***

Amateurism in sports is the idea that athletes have not played their sport professionally, meaning that they have not entered into contracts with a professional teams or agents, or profited from their athletic ability above the cost of their expenses. [29] An amateur is often defined as "a person who engages in a pursuit, especially a sport, on an unpaid basis." [30] ***Amateurism*** has been the ***NCAA***'s eligibility standard since its inception in 1906. [31] The IAAUS, and eventually the ***NCAA***, adopted bylaws that outlined the principles of ***amateurism*** and ways to avoid violating those principles. [32] In 1916, the ***NCAA*** provided more detailed guidance for member institutions by formally defining an amateur as "one who participated in competitive physical sports only for the pleasure and the physical, mental, moral and social benefits directly derived therefrom." [33] The ***NCAA*** operated using this definition of "amateur" for many years; however, the ***amateurism guidelines*** were not strictly enforced until the 1950s with the creation of the Committee on **[*253]** Infractions. [34] The Committee on Infractions had great sanctioning authority, which allowed them to fully enforce the ***amateurism*** rules. [35]

Presently, the ***NCAA*** and the courts clearly continue to place enormous value on the principles of ***amateurism***. [36] In the ***NCAA*** Manual, the ***NCAA*** unambiguously identifies its basic purpose as "maintaining intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by doing so, retaining a clear line of demarcation between intercollegiate athletics and professional sports." [37] This separation between professional and intercollegiate athletics is created and maintained by the ***NCAA*** ***amateurism***

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[26] See id.; see also Divisional Differences and the History of Multidivisional Classification, Nat'l Collegiate Athletic Ass'n, http://www.**ncaa**.org/about/who-we-are/membership/divisional-differences-and-history-multidivision-classification (last visited Aug. 14, 2018) [hereinafter ***NCAA***, Divisional Differences]. Division I requires institutions to sponsor at least seven sports for men and seven sports for women, or six sports for men and eight for women. Id. Division I also has strict contest minimums, participation minimums, and scheduling criteria for each sport. Id. Member institutions in Division I must also meet the requisite minimum for financial aid awards for their athletic programs, and may not exceed the maximum financial aid awards for each individual sport. Id. Division II and Division III both require their member institutions to sponsor at least five sports for men and five sports for women, or four sports for men and six for women. Id. However, they differ in that Division II has strict scheduling criteria, especially for football and basketball teams, while Division III institutions do not. Id. Notably, Division III member institutions may not distribute financial aid based on a student-athlete's athletic ability, whereas, like Division I institutions, Division II institutions may, so long as they do not exceed the maximum financial aid awards for each sport. Id.

[27] See ***NCAA***, History, supra note 15.

[28] See What is the ***NCAA***?, Nat'l Collegiate Athletic Ass'n, http://www.**ncaa**.org/about/resources/media-center/**ncaa**-101/what-**ncaa** (last visited Aug. 14, 2018).

[29] ***Amateurism***, Nat'l Collegiate Athletic Ass'n, http://www.**ncaa**.org/***amateurism*** (last visited Jan. 19, 2018, 1:00 PM).

[30] Amateur, Oxford Dictionary, https://en.oxforddictionaries.com/definition/amateur (last visited Aug. 14, 2018).

[31] See Gregory Sconzo, They're Not Yours, They Are My Own: ***How NCAA Employment*** Restrictions Violate Antitrust Law, 67 U. Miami L. Rev. 737, 742-43 (2013) (citing Mathew J. Mitten et al., Sports Law and Regulation: Cases, Materials, and Problems 100 (2d ed. 2009)).

requirement. [38] The ***NCAA*** further emphasizes the importance of ***amateurism*** by providing explicit examples of ***how*** student-athletes can lose their amateur status later in the ***NCAA*** Manual. [39]

Moreover, the courts have continuously protected the ***NCAA***'s tradition of ***amateurism***. [40] The Supreme Court of the United States and the federal circuit courts have consistently chosen to defend the ***NCAA***'s tradition of ***amateurism*** when presented with opportunities to uproot that tradition. [41] For example, as recently as October 2016, the Supreme Court **[*254]** denied certiorari to O'Bannon v. ***NCAA***, [42] a case in which Ed O'Bannon [43] submitted a writ of certiorari challenging the ***NCAA***'s tradition of ***amateurism*** on antitrust grounds. [44] In O'Bannon, the Ninth Circuit Court of Appeals safeguarded the tradition of ***amateurism*** by denying the student-athletes' demands for compensation beyond the cost of attendance at their respective schools. [45] This case is just one example of student-athletes challenging ***NCAA*** policies on antitrust grounds, and provides interesting discussion as to what the court feels it means to be an amateur athlete.

B. Antitrust Law Generally

In 1890, Congress passed the first antitrust law, which is known as the Sherman Antitrust Act. [46] Originally, the Sherman Antitrust Act was simply a "comprehensive charter designed to preserve free and unfettered competition as a rule of trade." [47] Now, the Sherman Antitrust Act is intended to promote competition amongst businesses to prevent the creation of monopolies. [48] To be a violation of the Sherman Antitrust Act, a claim must contain: (1) an existing contract, combination, or conspiracy; (2) an unreasonable restraint on trade in a relevant market resulting from the contract, combination, or conspiracy; and (3) an injury resulting from the unreasonable restraint on trade. [49] A per se analysis or a "rule of reason" analysis is applied to determine if the allegations arise to an unreasonable restraint on trade, and therefore, a violation of the Sherman Antitrust Act. [50] **[*255]**

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[32] See W. Burlette Carter, The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931, *8 Vand. J. Ent. & Tech. L. 211, 222 (2006)* (discussing the IAAUS 1906 bylaws, which decreed that "no student shall represent a College or University in any intercollegiate game or contest who at any time received either directly or indirectly, money or other consideration, to play on any team, or for his athletic services," and further explaining the IAAUS student-athlete eligibility rules). Additionally, student-athletes were required to sign an "Eligibility Card" to verify their eligibility based on compliance with the ***amateurism*** principles. See *id. at 223-224.*

[33] Sconzo, supra note 31, at 743 (citing Kay Hawes, Debate on ***Amateurism*** Has Evolved over Time, ***NCAA*** News (Jan. 3, 2000), *http://fs.**ncaa**.org/Docs/NCAANewsArchive/2000/associationwide/debate%2Bon%C2Bamateurism%C2Bhas%C2Bevolved%C2Bover%C2Btime%2B-%2B1-3-00.html*).

[34] See id.

[35] See ***NCAA***, History, supra note 15.

[36] See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 120 (1984)* (stating that the "role of the ***NCAA*** must be to preserve [the] tradition [of ***amateurism***] that might otherwise die" and "there can be no question but that it needs ample latitude to play that role").

[37] ***NCAA***, Division I Manual, supra note 4, art. 1.3.1, at 1 (emphasis added).

[38] See id., art. 12, at 61-91.

[39] See id., art. 12.1.2, at 63 (stating that student-athletes will lose their amateur status, and therefore be deemed ineligible by the ***NCAA***, if they do any of the following activities). Article 12.1.2 prohibits a student-athlete from:

(a) Using his or her athletics skill (directly or indirectly) for pay in any form in that sport; (b) Accepting a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation; (c) Signing a contract or commitment of any kind to play professional athletics, regardless of its legal enforceability or any consideration received, except as permitted in Bylaw 12.2.5.1; (d) Receiving, directly or indirectly, a salary, reimbursement of expenses or any other form of financial

1. Elements of a Sherman Antitrust Act Violation

Section One of the Sherman Antitrust Act states that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal," [51] and has consistently been interpreted to require plaintiffs to prove three elements to demonstrate a violation of the Sherman Antitrust Act. [52]

The three elements are: (1) an existing contract, combination, or conspiracy, (2) an unreasonable restraint on trade in a relevant market resulting from the contract, combination, or conspiracy, and (3) an injury resulting from the unreasonable restraint on trade. [53] The Supreme Court has specified that Section One only bars those restraints on trade that are considered unreasonable. [54] The requirement of unreasonableness is particularly important because nearly every contract requiring parties to behave in a certain way constitutes some type of restraint of trade. [55]

2. Two Analyses to Determine if a Practice is an Unreasonable Restraint on Trade

Once a claim is determined to arise under the Sherman Antitrust Act, the court will apply one of two analyses to determine the reasonableness of the challenged restraint. [56] A per se analysis and a rule of reason analysis are the two accepted ways of evaluating whether a **[*256]** practice constitutes an unreasonable restraint on trade. [57] A court will look to the surrounding circumstances of a case when determining which analysis to apply. [58]

a. Per Se Analysis

A per se violation of the Sherman Antitrust Act is reserved for those practices or regulations that are blatantly unreasonable restraints on trade. [59] A regulation is a blatantly unreasonable restraint on trade, and therefore illegal per se, [60] "when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." [61] Therefore, once a regulation is deemed illegal per se,

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assistance from a professional sports organization based on athletics skill or participation, except as permitted by ***NCAA*** rules and regulations; (e) Competing on any professional athletics team per Bylaw 12.02.11, even if no pay or remuneration for expenses was received, except as permitted in Bylaw 12.2.3.2.1; (f) After initial full-time collegiate enrollment, entering into a professional draft (see Bylaw 12.2.4); or (g) Entering into an agreement with an agent.

Id.

[40] See infra Part III.

[41] See, e.g., *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015),* cert. denied, ***137 S. Ct. 277 (2016)*** (finding the maintenance of the tradition of ***amateurism*** to be persuasive in making its decision, and the Supreme Court ultimately denying certiorari to the case despite both parties requesting review).

[42] *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015),* cert. denied, ***137 S. Ct. 277 (2016).***

[43] Ed O'Bannon is a former amateur basketball player at University of California, Los Angeles and professional basketball player in the National Basketball Association. See Tom Hoffarth, Hoffarth on the Media: Q&A with Ed O'Bannon, Orange County Reg. (Mar. 10, 2018, 8:00 AM) *https://www.ocregister.com/2018/03/10/hoffarth-on-the-media-qa-with-ed-obannon/*.

[44] See ***Petition for Writ of Certiorari at 13-34, O'Bannon v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 277 (2016) (No. 15-1167), 2016 WL 1085599.***

[45] See *O'Bannon, 802 F.3d at 1076-79.*

[46] See Sherman Antitrust Act, Encyc. Britannica, *https://www.britannica.com/event/Sherman-Antitrust-Act* (last visited June 16, 2018).

the court is not required to make any further inquiry into the procompetitive justifications for the regulation, and may deem the regulation a violation of the Sherman Antitrust Act. [62]

A per se analysis of a Sherman Antitrust Act claim is only applied to those practices "that "are entirely void of redeeming competitive rationales.'" [63] The Supreme Court, in ***NCAA*** v. Board of Regents of University of Oklahoma, [64] explained that a practice that is void of competitive rationales is one that "facially appears to be one that would always or almost always tend to restrict competition and decrease output." [65] The Supreme Court has also continuously emphasized that a per se analysis "is a "demanding' standard that should be applied only in clear cut cases." [66]

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b. Rule of Reason Analysis

A rule of reason analysis is appropriate whenever further inquiry into the procompetitive justifications for a regulation is warranted. [67] Therefore, if the court does not deem the regulation to be illegal per se, a rule of reason analysis is appropriate. [68]

A rule of reason analysis consists of four steps with shifting burdens of proof. [69] Step one places the burden of proof on the plaintiff to show that the regulations have anticompetitive effects. [70] If the plaintiff meets that burden, step two then shifts the burden to the defendant to provide procompetitive justifications for the regulations. [71] If the defendant meets that burden, step three subsequently shifts the burden back to the plaintiff to show that the regulations are "not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner." [72] Finally, step four requires the judge to weigh the alleged procompetitive effects against the alleged anticompetitive effects to determine if the regulation at issue constitutes an unreasonable restraint on trade. [73]

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[47] A. Douglas Melamed, Antitrust at the Turn of the Century, U.S. Dep't of Justice (Dec. 7, 1999), https://www.justice.gov/atr/speech/antitrust-turn-century.

[48] See ***15 U.S.C. § 1*** (2012 & Supp. 2017).

[49] See Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 335 (7th Cir. 2012) (citing Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993)); see also infra Section II.D.1.

[50] See infra Section II.D.2.

[51] See ***15 U.S.C. § 1.***

[52] See Agnew, 683 F.3d at 335 (citing Denny's Marina, 8 F.3d at 1220); see also Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016 (10th Cir. 1998).

[53] Id. (citing Denny's Marina, 8 F.3d at 1220).

[54] See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 120 (1984) (finding that a horizontal price fixing agreement that places a restraint on output is an unreasonable restraint on trade); see also Arizona v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 342-43 (1982); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687-88 (1978) (stating that the "petitioner's ban on competitive bidding prevented all customers from making price comparisons in the initial selection of an engineer," and after an application of the rule of reason analysis, this constituted an unreasonable restraint on trade); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918); Law, 134 F.3d at 1016 (finding that the limit placed on coaches' compensation was an unreasonable restraint on trade, after a thorough rule of reason analysis). In a rule of reason analysis, a regulation is deemed to be unreasonable if the anticompetitive effects of the regulation outweigh the procompetitive effects. Bd. of Regents, 468 U.S. at 103-05.

Notably, some regulations that were seemingly illegal per se have been deemed by the Supreme Court to instead warrant a rule of reason analysis. [74] In Board of Regents, the Supreme Court decided that a rule of reason analysis should be applied despite the agreement at issue **[*258]** constituting a horizontal price fixing [75] plan in blatant violation of the Sherman Antitrust Act. [76] The Court rationalized that the rule of reason analysis was appropriate because the industry of intercollegiate athletics required some degree of horizontal restraints in order to ensure that the product remained available. [77]

C. History of the ***NCAA*** and Antitrust

As the ***NCAA*** continued to expand its influence, student-athletes, coaches, and athletic associations began to challenge the extensive ***NCAA*** regulations on antitrust grounds. [78] In 1981, the Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association filed a class action suit in the Western District of Oklahoma. [79] This class action suit alleged that the ***NCAA***'s agreement with a network regarding the televising of college football games was an unreasonable restraint on trade and constituted an attempt to monopolize the market. [80] After decisions in the district court and the court of appeals, the Supreme Court of the United States granted certiorari. [81] In Board of Regents, the Supreme Court performed a thorough antitrust analysis using the rule of reason test to assess the legality of the ***NCAA***'s price fixing plan for televised college football games. [82] Notably, the Supreme Court recognized that the ***NCAA*** is subject to antitrust laws, and that the **[*259]** price fixing plan at issue constituted an unreasonable restraint on trade in violation of the Sherman Antitrust Act. [83]

In the decades following the Supreme Court's decision in Board of Regents, federal circuit courts across the country have used this decision to hold the ***NCAA*** accountable for those regulations placing an unreasonable restraint on trade, while also allowing the ***NCAA*** to argue that the procompetitive effects ***justify*** their regulations. [84] The Tenth Circuit, in Law v. ***NCAA***, [85] applied the same rule of reason analysis as the Supreme Court in Board of Regents. [86] In Law, the court found that an ***NCAA*** rule that placed a limit on the annual compensation for college basketball coaches constituted an unreasonable restraint on trade that could not be ***justified*** by the alleged procompetitive effects, and was therefore a violation of the Sherman Antitrust Act. [87]

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[55] See *Bd. of Regents, 468 U.S. at 98* (stating that the challenged ***NCAA*** practices are undoubtedly a restraint on trade, as they limit the member institution's ability to freely negotiate their own television contracts, but the Supreme Court has consistently recognized that the Sherman Antitrust Act only bars unreasonable restraints); *Law, 134 F.3d at 1016.*

[56] See *Bd. of Regents, 468 U.S. at 100-04.*

[57] See id.

[58] See *id. at 101, 103-04* (considering that "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all," and therefore, the rule of reason analysis is appropriate in order to fully consider the anticompetitive effects and procompetitive justifications).

[59] See id.

[60] See Illegal per se, Black's Law Dictionary (10th ed. 2014) (defining "illegal per se" as something "unlawful in and of itself").

[61] *Bd. of Regents, 468 U.S. at 103-04.*

[62] See *Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016 (10th Cir. 1998)*

[63] Id. (citing *SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 963 (10th Cir. 1994)).*

[64] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984).*

[65] *Bd. of Regents, 468 U.S. at 100* (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979))* (internal quotation marks omitted).

Similarly, the Seventh Circuit in Agnew v. ***NCAA*** [88] also applied the rule of reason analysis in considering the viability of the claim at issue. [89] In Agnew, student-athletes alleged that the ***NCAA*** regulations that put a cap on the number of scholarships available per team had anticompetitive effects on the market for student-athletes, and was therefore a violation of the Sherman Antitrust Act. [90] The Seventh Circuit affirmed the lower court's decision to dismiss the claim on grounds that the Sherman Antitrust Act was inapplicable because the plaintiffs failed to show a labor market for student-athletes. [91]

Overall, the decisions in Board of Regents, Law, and Agnew showcase the widespread acceptance of the rule of reason analysis, and ***how*** courts hold both parties, student-athletes, and the ***NCAA*** to a high **[*260]** standard for proving that the regulations at issue are either procompetitive or anticompetitive.

D. ***NCAA Guidelines*** for Student-Athletes

The ***NCAA*** Manual provides specific ***guidelines*** for member institutions, athletics personnel, and student-athletes to follow. [92] These ***guidelines*** cover a vast assortment of areas, from information on ***how*** to become a member of the ***NCAA***, to championship procedures, to athlete eligibility. [93] Specifically, Article 12 of the ***NCAA*** Manual describes the relationship between ***amateurism*** and the athletic eligibility process. [94] Article 12 emphasizes the importance of ***amateurism*** in determining a student-athlete's eligibility by providing specific details as to ***how*** student-athletes can maintain their amateur status and eligibility, and ***how*** that status and eligibility can be lost. [95]

1. Student-Athlete ***Employment Guidelines*** Generally

Article 12.4 of the ***NCAA*** Manual lays out specific ***guidelines*** for student-athletes seeking ***employment*** while simultaneously playing a sport for their school. [96] Article 12.4.1 states that "compensation may be paid to a student athlete: (a) only for work actually performed; and (b) at a rate commensurate with the going rate in the locality for similar services." [97] This article clearly seeks to ensure that student-athletes are not given special treatment, in the form of additional compensation, in the course of their ***employment***. [98] Article 12.4.1.1 specifies that "such

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[66] *Law, 134 F.3d at 1019* (citing *Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977))* (recognizing that a rule of reason analysis is appropriate, even in cases of horizontal price fixing, when the industry involved is one that requires some horizontal restraints for the product to be available). Horizontal price fixing is defined as "price-fixing among competitors on the same level, such as retailers throughout an industry." Price-fixing, Black's Law Dictionary (10th ed. 2014). Horizontal price fixing is typically deemed to be a per se violation of the Sherman Antitrust Act. See *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 235 (1948)* (finding that the agreement amongst sugar refiners to purchase sugar-beets at a previously agreed upon price likely constituted a per se violation of the Sherman Antitrust Act); see also *Nat'l Macaroni Mfrs. Ass'n v. Fed. Trade Comm'n, 345 F.2d 421, 426-27 (7th Cir. 1965)* (finding that the agreement amongst macaroni producers to limit the amount of premium wheat purchased and substitute a specifically agreed upon percentage of inferior wheat into the finished macaroni was a per se violation of the Sherman Antitrust Act because this agreement had the effect of artificially reducing the price of premium wheat).

[67] See *Bd. of Regents, 468 U.S. at 100-04;* see also *Law, 134 F.3d at 1016-19.*

[68] See *Bd. of Regents, 468 U.S. at 100-04;* see also *Law, 134 F.3d at 1016-19.*

[69] See *Law, 134 F.3d at 1019;* see also *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 335 (7th Cir. 2012).*

[70] See *Law, 134 F.3d at 1019* (stating the plaintiff's burden of proving anticompetitive effects, and further explaining that "[a] plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price" (citing *Orson Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (10th Cir. 1998))); see also Agnew, 683 F.3d at 335.*

[71] See *Law, 134 F.3d at 1019, 1021* (stating the defendant's burden of proving procompetitive effects, and further explaining that procompetitive "justifications offered under the rule of reason may be considered only to the extent that they tend to show

compensation may not include any remuneration for value or utility that the student-athlete may have for the employer because of the publicity, reputation or personal following that he or she has obtained because of athletics ability." [99] In other words, Article 12 places emphasis on the ***NCAA***'s dedication to ***amateurism*** by attempting to ensure that student-athletes do not become professionals through receipt of compensation due to their athletic ability, either directly or indirectly. [100]

Moreover, ***NCAA*** Manual Articles 12.4.2.3 and 12.5 provide guidance for those student-athletes seeking to be employed to sell or **[*261]** promote sporting equipment. [101] Article 12.4.2.3 states, "[a] student-athlete may not be employed to sell equipment related to the student-athlete's sport if his or her name, picture or athletics reputation is used to advertise the product, the job or the employer." [102] This is similar to the ***guideline*** set forth in Article 12.5, which outlines non-permissible promotional activities and exceptions to those rules. [103]

Once a student-athlete becomes an ***NCAA*** student-athlete, they are prohibited from advertising and promotional activities unless the activity falls into one of the exceptions delineated in Article 12.5.2.1.1. [104] An important exception to this general rule is the exception which allows for the "continuation of modeling and other nonathletically related promotional activities after enrollment." [105] This exception allows a student-athlete to continue to receive compensation for promotional activities that use his or her name or picture to promote the sale of a product or service, as long as a number of conditions are met. [106] These conditions are:

(a) The individual's involvement in this type of activity was initiated prior to his or her enrollment in a member institution; (b) The individual became involved in such activities for reasons independent of athletics ability; (c) No reference is made in these activities to the individual's name or involvement in intercollegiate athletics; (d) The individual's remuneration under such circumstances is at a rate commensurate with the individual's skills and experience as a model or performer and is not based in any way upon the individual's athletics ability or reputation. [107]

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that, on balance, "the challenged restraint enhances competition"' (quoting *Bd. of Regents, 468 U.S. at 1004));* see also *Agnew, 683 F.3d at 335-36.*

[72] *Law, 134 F.3d at 1019;* see also *Agnew, 683 F.3d at 336.*

[73] See *Law, 134 F.3d at 1019.*

[74] See *Bd. of Regents, 468 U.S. at 100.*

[75] See supra note 66 (describing horizontal price fixing).

[76] See *Bd. of Regents, 468 U.S. at 100-01, 103* (reasoning that "despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the ***NCAA***'s justifications for the restraints").

[77] See *id. at 101.*

[78] See, e.g., *id. at 88, 94-99.*

[79] See *id. at 95.*

[80] See *Complaint at 31-39, Bd. of Regents of Univ. of Oklahoma v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. 1276 (W.D. Okla. 1982) (No. CIV-81-1209-E), 1981 WL 760127.*

[81] See *Bd. of Regents, 468 U.S. at 95-98* (describing the decisions of the district court and the court of appeals). The District Court found that control exhibited by the ***NCAA*** over the televising of college football games constituted a violation of the

These conditions help to ensure that student-athletes maintain their amateur status, despite their ***employment***.

2. Student-Athlete ***Self-Employment*** ***Guidelines***

NCAA Manual Article 12.4.4 specifically addresses those student-athletes seeking to start their own business. [108] Article 12.4.4 states, "[a] student-athlete may establish his or her own business, provided the student-athlete's name, photograph, appearance or athletics reputation are not used to promote the business." [109] These ***guidelines*** are similar to **[*262]** those set forth earlier in Article 12.4 for general ***employment***, as the ***NCAA*** is consistent in barring student-athletes from using their name, image, likeness, and reputation as an ***NCAA*** athlete for financial gain. [110]

3. The Student-Athlete Statement

Each year, all ***NCAA*** student-athletes are required to sign the Student-Athlete Statement to assist the ***NCAA*** in certifying their eligibility. [111] The 2018-2019 Student-Athlete Statement contains six sections, which include: "I. A statement concerning eligibility; II. A Buckley Amendment consent; [112] III. An affirmation of status as an amateur athlete; IV. Results of drug tests; V. Previous involvement in ***NCAA*** rules violation(s); and VI. An affirmation of valid and accurate information provided to the ***NCAA*** Eligibility Center." [113] Student-athletes are required to sign each section in order to certify the information they provided to the ***NCAA***, and to certify that they read and understand the ***NCAA*** rules as delineated in the ***NCAA*** Manual. [114]

The completion of the Student-Athlete Statement is required by ***NCAA*** Manual Articles 3.2.4.6 [115] and 12.7.2. [116] Article 3.2.4.6 generally requires that each student-athlete sign a statement, [117] whereas Article 12.7.2.1 provides that the statement should contain information about the student-athlete's "eligibility, recruitment, financial aid, amateur status, previous positive-drug tests administered by any other athletics organization[,] and involvement in organized gambling activities related to intercollegiate or professional athletics competition." [118] A student-athlete that fails to sign such a statement would be deemed to be ineligible to participate in intercollegiate athletics. [119]

Sherman Antitrust Act. *Id. at 95.* The Court of Appeals similarly found that the ***NCAA*** television plan at issue was a per se violation of the Sherman Antitrust Act, and even if a rule of reason analysis were to be applied, the anticompetitive effects would outweigh any procompetitive justifications set forth by the ***NCAA***. *Id. at 97-98.*

[82] See *id. at 105-12.* A rule of reason analysis consists of four steps. Id. First, the plaintiff must show that the regulation at issue has anticompetitive effects. Id. Next, the defendant is tasked with providing procompetitive justifications for the regulation. Id. Then the burden shifts back to the plaintiff to show that the defendant's goals can be achieved in a substantially less restrictive manner. Id. Finally, the judge is required to weigh the alleged procompetitive and anticompetitive effects to determine if the regulation constitutes an unreasonable restraint on trade. Id.

[83] See *id. at 105-12;* see also ***15 U.S.C. § 1*** (2012 & Supp. 2017) (delineating the Sherman Antitrust Act, which is designed to protect competition and prevent agreements and regulations that are unreasonable restraints on trade).

[84] See infra Section III.A.2.b.

[85] *Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010 (10th Cir. 1998).*

[86] See id.

[87] See *id. at 1016-24.*

[88] *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328 (7th Cir. 2012).*

[89] See id.

[90] See *id. at 333.*

[91] See *id. at 347.* The Seventh Circuit made it clear that the identification of a relevant market was necessary in order to show ***how*** the regulation at issue had an anticompetitive effect on that particular market. *Id at 345-47.* Here, the plaintiffs alleged that

[*263] The signing of the Student-Athlete Statement by hundreds of thousands of student-athletes every year demonstrates the vast power of the ***NCAA*** to control the behaviors of student-athletes. Nevertheless, increasing discontent with that power has led to more than a few challenges to ***NCAA*** regulations on antitrust grounds. [120] These challenges will likely continue to grow in number until the Supreme Court decides to grant certiorari to one of these cases to ultimately decide ***how*** far the ***NCAA*** can go in the regulation of student-athletes.

III. Analysis

Initially, Section III.A of this Comment will discuss why student-athletes have standing against the ***NCAA*** and why the ***NCAA*** is subject to the Sherman Antitrust Act. [121] Section III.B will then engage in a rule of reason analysis to determine whether the procompetitive effects of the ***NCAA Self-Employment Guidelines*** outweigh the anticompetitive effects of the ***Guidelines***. [122]

Student-athletes may choose to rely on the harsh limits that the ***Self-Employment Guidelines*** place on the student-athletes' ability to market their own businesses to show that the ***Self-Employment Guidelines*** are anticompetitive, whereas the ***NCAA*** would likely have a persuasive argument that maintenance of ***amateurism*** coupled with ***equity*** amongst member institutions and student-athletes are valid procompetitive justifications for the ***Self-Employment Guidelines***. Finally, Section III.C of this Comment will address two athletes who have been, and could be, sanctioned based on the ***Self-Employment Guidelines***. [123] Ultimately, this Comment will conclude with a recommendation that the Supreme Court grant certiorari to a case challenging indirect compensation of student-athletes based on athletic ability, and hold that the ***Self-Employment Guidelines*** do not violate the Sherman Antitrust Act. [124]

A. Antitrust Analysis of the ***NCAA*** Student-Athlete ***Self-Employment Guidelines***

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the relevant markets were the market for bachelor's degrees and the market for student-athlete labor. Id. The court was not persuaded by the argument that the market for bachelor's degrees was a relevant market because the argument was vague and the market would have encompassed far more people than just those student-athletes receiving scholarships. Id. The court notes that the market for student-athlete labor could be a relevant market, however, the plaintiffs did not sufficiently identify this market in their complaint. Id. Thus, the court chose to dismiss the claim. Id.

92 See generally ***NCAA***, Division I Manual, supra note 4.

93 See id., Table of Contents, at iii-v.

94 See id., art. 12, at 61-91.

95 See id.

96 See id., art. 12.4, at 72.

97 Id., art. 12.4.1, at 72.

98 See id.

99 Id., art. 12.4.1.1, at 72.

100 See id.

101 See id., art. 12.4.2.3, at 72; see also id., art. 12.5, at 73-77.

102 See ***NCAA***, Division I Manual, art. 12.4.2.3, at 72.

103 See ***NCAA***, Division I Manual, art. 12.5, at 73-77.

104 See id., art. 12.5.2.1.1, at 75-76.

105 Id., art. 12.5.1.3, at 74.

106 See id.

If student-athletes were to bring suit challenging the ***Self-Employment Guidelines*** on antitrust grounds, courts would be tasked with deciding issues like standing, whether the Sherman Antitrust Act is **[*264]** applicable, and the type of antitrust analysis to apply. Notably, the Supreme Court has consistently found that the ***NCAA*** is subject to the Sherman Antitrust Act, as the ***NCAA*** often falls squarely within the confines of Section One. [125] Additionally, lower courts have regularly recognized student-athletes' standing to bring suit against the ***NCAA***. [126] In a challenge to the ***Self-Employment Guidelines***, courts would likely find a rule of reason analysis to be appropriate, rather than a per se analysis. [127]

1. Student-Athletes Have Standing

While standing is not a highly litigated issue and standing requirements differ amongst state and federal courts, courts have widely accepted that student-athletes do have standing to sue the ***NCAA*** for a variety of claims, including antitrust claims. [128] Generally, federal courts require plaintiffs to show that they have standing by proving three factors: (a) an "injury in fact," (b) "a causal connection between the injury and the conduct complained of," and (c) a probability that the injury will be remedied by a favorable decision. [129] Whether the student-athletes argued their standing in court or in their pleadings, numerous federal cases in which the student-athletes brought suit against the ***NCAA*** under the Sherman Antitrust Act have proceeded with little or no contention on the issue. [130]

Similarly, state courts have found that student-athletes have standing to sue the ***NCAA***. [131] For example, in Bloom v. ***NCAA***, [132] the Colorado Court of Appeals found the plaintiff had standing because he was a third-party beneficiary to the contractual relationship between the ***NCAA*** and the member institution that he attended. [133]

Overall, student-athletes are generally found to have standing to sue the ***NCAA*** in both federal and state courts.

[*265]

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[107] Id.

[108] See id., art. 12.4.4, at 72.

[109] Id.

[110] See id.; see also id., art. 12.4.1, at 72.

[111] See Form 18-1a: Student-Athlete Statement, Nat'l Collegiate Athletic Ass'n (2018), http://www.ncaa.org/sites/default/files/201819_DIForm _18_1a_Student_Athlete_Statement_20180608.pdf [hereinafter ***NCAA***, Form 18-1a]. ***NCAA*** Division I compliance forms are updated on an annual basis and published online at Division I Compliance, Nat'l Collegiate Athletic Ass'n, http://www.ncaa.org/compliance?division=d1 (last visited Aug. 19, 2018).

[112] See ***NCAA***, Form 18-1a, supra note 111, at 3-4 (requiring student-athletes to consent to the disclosure of their academic records, drug test records, and other related information, to authorized representatives of their institution, the ***NCAA***, and their athletics conference).

[113] Id. at 1.

[114] See id.

[115] See ***NCAA***, Division I Manual, supra note 4, art. 3.2.4.6, at 10.

[116] See id., art. 12.7.2, at 78.

[117] See id., art. 3.2.4.6, at 10.

[118] Id., art. 12.7.2.1, at 78.

[119] See id.

[120] See generally Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984); see also O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015), cert. denied, ***137 S. Ct. 277 (2016);*** Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328 (7th Cir. 2012).

2. The ***NCAA*** is Subject to the Sherman Antitrust Act

The Supreme Court has made it clear that the ***NCAA*** is required to abide by the limitations set forth in the Sherman Antitrust Act. [134] The most prominent Supreme Court case addressing this subject is Board of Regents. [135] In Board of Regents, as previously mentioned, the University of Oklahoma and the University of Georgia Athletic Association sued the ***NCAA*** on antitrust grounds arguing that the ***NCAA***'s agreement with a television network to limit the number of college football games televised each year, and preventing member institutions from individually contracting with broadcasters, violated the Sherman Antitrust Act. [136]

Ultimately, the Supreme Court found that the ***NCAA*** had engaged in horizontal price fixing, which was a per se violation of the Sherman Antitrust Act. [137] However, the Court decided to engage in a rule of reason analysis, reasoning that some horizontal restraints were necessary in order for college football games to be available on television at all, and therefore, that the justifications for such regulations should be explored. [138] Board of Regents notably demonstrates that the ***NCAA*** can be held responsible for unreasonable restraints on trade under the Sherman Antitrust Act. [139]

Clearly, the ***NCAA*** falls within the purview of the Sherman Antitrust Act, allowing student-athletes to challenge restrictions and ***guidelines*** that they feel are a violation thereunder. [140] Similar to most ***NCAA*** rules and procedures, the ***Self-Employment Guidelines*** are contained within the ***NCAA*** Manual, [141] which the student-athletes agree to abide by when signing the Student-Athlete Statement at the outset of each season. [142] The signing of the Student-Athlete Statement constitutes an agreement between the parties that would fall within the

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121 See infra Sections III.A.1-.2.

122 See infra Section III.B.

123 See infra Section III.C.

124 See infra Part IV.

125 See infra Section III.A.2.

126 See infra Section III.A.1.

127 See infra Section III.A.3.

128 See, e.g., *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1066-69 (9th Cir. 2015),* cert. denied, ***137 S. Ct. 277 (2016).***

129 *Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).*

130 See *O'Bannon, 802 F.3d at 1066-70;* see also *Agnew, 683 F.3d at 335.*

131 See, e.g., *Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621, 623-25 (Colo. App. 2004).*

132 *Bloom v. Nat'l Collegiate Athletic Ass'n, 93 P.3d 621 (Colo. App. 2004).*

133 See *id. at 624* (finding a collegiate skier had standing to sue the ***NCAA*** and seek injunctive relief-although unsuccessfully-for not allowing him to keep endorsement money).

134 See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 88 (1984).*

135 See id.

136 See Complaint, Bd. Of Regents, supra note 80, at 31-39.

137 See *Bd. of Regents, 468 U.S. at 100-01.*

138 See *id. at 100-03.*

scope of the Sherman Antitrust Act, and consequently, courts would then be tasked with deciding whether a per se analysis or rule of reason analysis is appropriate.

[*266]

3. Rule of Reason Analysis is Appropriate

If a court were to analyze the ***NCAA*** ***Self-Employment*** ***Guidelines***, a rule of reason analysis would be appropriate. The Court has made it clear that a per se analysis is a demanding standard that is only appropriate when the practice at issue is so void of competitive rationales that further inquiry into the possible justifications for the practice is not warranted. [143] The ***Self-Employment*** ***Guidelines*** clearly possess a number of procompetitive rationales that would need to be explored by the courts. [144]

Additionally, the Supreme Court and the circuit courts have recognized the existence of a procompetitive presumption for those practices of the ***NCAA*** that serve to protect the tradition of ***amateurism***. [145] In Board of Regents, the Supreme Court explained that "the ***NCAA*** plays a critical role in the maintenance of a revered tradition of ***amateurism*** in college sports [and] there can be no question but that it needs ample latitude to play that role." [146] The Court went on to recognize that "a fair evaluation of [the restraint's] competitive character required consideration of the ***NCAA***'s justifications for the restraints." [147]

The ***Self-Employment*** ***Guidelines*** are clearly in place to protect the tradition of ***amateurism*** in college sports by preventing student-athletes from becoming professionals through compensation for their athletic ability or status as an ***NCAA*** student-athlete. [148] Therefore, the ***NCAA*** would be deserving of a procompetitive presumption in this case, and a rule of reason analysis would be appropriate.

B. Rule of Reason Analysis

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[139] See *id. at 120* (finding that the network agreements at issue did constitute an unreasonable restraint on trade under the Sherman Antitrust Act).

[140] See generally id.; *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049 (9th Cir. 2015),* cert. denied, ***137 S. Ct. 277 (2016);*** *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328 (7th Cir. 2012).*

[141] ***NCAA***, Division I Manual, supra note 4, art. 12.4.4, at 72.

[142] See ***NCAA***, Form 18-1a, supra note 111, at 1.

[143] See *Bd. of Regents, 468 U.S. at 100-04;* see also *Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1016-19 (10th Cir. 1998).*

[144] See infra Section III.B.3.b.

[145] See *Bd. of Regents, 468 U.S. at 100-03, 120* (finding that the ***NCAA*** plays an important role in preserving the character of college football and making the product available to the public, which can be viewed as procompetitive); see also *Agnew, 683 F.3d at 342-43* (stating that when a restraint is clearly in place to protect the tradition of ***amateurism***, the court should presume that restraint to be procompetitive).

[146] *Bd. of Regents, 468 U.S. at 120.*

[147] *Id. at 103.*

[148] See supra Sections II.C.1-.2.

When engaging in a rule of reason analysis to determine the reasonableness of the ***NCAA*** ***Self-Employment Guidelines***, the anticompetitive and procompetitive effects of the ***NCAA***'s ***Self-Employment Guidelines*** must be reviewed. [149]

[*267]

1. Anticompetitive Effects of ***Self-Employment Guidelines***

Student-athletes would likely argue that the ***NCAA***'s ***Self-Employment Guidelines*** have one primary anticompetitive effect: the ***Self-Employment Guidelines*** place a harsh limit on student-athletes' abilities to market their products or businesses, which, therefore, restricts the student-athletes' earning capacities within their permissible ***employment***. Additionally, student-athletes would likely argue that, by preventing them from using all of the resources at their disposal to start and promote their business, the ***NCAA*** is unreasonably restricting their earning capacity.

The ***Self-Employment Guidelines***, outlined in ***NCAA*** Manual Article 12.4.4, prevent student-athletes from using their name, image, likeness, or reputation as an ***NCAA*** student-athlete in the promotion of their businesses. [150] A student-athlete's name, image, likeness, and reputation are extremely valuable to a business owner for many reasons, including advertising and endorsements. [151] Non-student-athlete business owners would easily be able to use these resources in the promotion of their businesses. Therefore, the ***Self-Employment Guidelines*** clearly limit the student-athlete business owner's ability to promote his or her product or business. By not allowing the student-athletes to utilize these viable resources in their businesses, student-athletes will argue that they are crippled in such a way that sets them apart from other business owners, thereby severely restricting the financial success of their businesses.

2. Procompetitive Effects of ***Self-Employment Guidelines***

The ***NCAA***, on the other hand, would be able to point to many procompetitive effects to ***justify*** their ***Self-Employment Guidelines***. Some of the most persuasive of these procompetitive effects include: (a) the preservation of one of the ***NCAA***'s characteristic features, the tradition of ***amateurism***; (b) the preservation of ***equity*** between member institutions; and (c) the preservation of ***equity*** between student-athletes. [152] Each of these effects has a clear positive effect on competition.

[*268]

a. Preservation of ***Amateurism***

As previously mentioned, courts have found the protection of the tradition of ***amateurism*** to be a persuasive procompetitive justification for ***NCAA*** regulations. [153] This phenomenon is often referred to as a procompetitive presumption. [154] Despite finding the television agreement at issue to be an unreasonable restraint on trade, the Supreme Court in Board of Regents recognized that the ***NCAA*** plays a vital role in "preserv[ing the] tradition [of

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[149] See infra Sections III.B.1-.3.

[150] ***NCAA***, Division I Manual, supra note 4, art. 12.4.4, at 72.

[151] See Laura Lee Stapleton & Matt McMurphy, The Professional Athlete's Right of Publicity, *10 Marq. Sports L.J. 23, 23 (1999).*

[152] See infra Sections III.B.2.a-.c.

[153] See supra Section III.A.3.

[154] See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 100-03, 120 (1984);* see also *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 342-43 (7th Cir. 2012).*

amateurism] that might otherwise die," and that the ***NCAA*** needs "ample latitude to play that role." [155] Lower courts have interpreted this language to mean that when an ***NCAA*** regulation is clearly designed to help maintain the tradition of ***amateurism***, that regulation will be presumed to be procompetitive. [156]

Moreover, the ***NCAA*** is explicit in its goal of maintaining a "clear line of demarcation between intercollegiate athletics and professional sports," [157] and achieves that goal through its ***amateurism*** and eligibility rules delineated in Article 12 of the ***NCAA*** Manual. [158] A primary characteristic of professional athletes, which is forbidden amongst amateur athletes, is receiving financial benefit from the use of the athlete's name, image, likeness, and reputation. [159] Therefore, because the ***NCAA***'s ***Self-Employment Guidelines***, which prohibit the use of student-athletes' name, image, likeness, and reputation in the course of their businesses, are in place to maintain the tradition of ***amateurism*** amongst student-athletes, the ***NCAA*** is accordingly deserving of the procompetitive presumption.

Although the Supreme Court has not yet granted certiorari to a case that addresses the issue of ***employment*** compensation directly, the Court's recent denial of certiorari to both parties in O'Bannon is telling. [160] As previously discussed, the Supreme Court's denial of certiorari allowed the Ninth Circuit's decision, which denied the student- **[*269]** athletes' demands for compensation above the cost of attendance at their respective schools, to stand. [161] This decision effectively safeguarded the tradition of ***amateurism***. [162] While defending the tradition of ***amateurism***, the court noted that "not paying student-athletes is precisely what makes them amateurs." [163]

Similar to the court's argument in O'Bannon, the ***NCAA*** could argue that not allowing student-athletes to exploit their name, image, and likeness for financial gain is also precisely what makes them amateurs. The use of one's name, image, and likeness to promote a business or product, whether your own or that of a third party, is arguably a practice reserved for professionals. [164] A student-athlete who owns his own business would be treating himself as a professional if he were to use the value in his photographs or reputation to financially benefit in such a way that a non-***NCAA***-athlete would not be able to. The celebrity that often comes with being an ***NCAA*** student-athlete is valuable; however, using that status to benefit the student-athlete's personal business ventures crosses the line between amateur and professional.

b. ***Equity*** Between Member Institutions

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[155] *Bd. of Regents, 468 U.S. at 120.*

[156] See *Agnew, 683 F.3d at 342-43.*

[157] ***NCAA***, Division I Manual, supra note 4, art. 1.3.1, at 1.

[158] See id., art. 12, at 61-91.

[159] See id.; see also Stapleton & McMurphy, supra note 151, at 23 (finding that "our infatuation with our favorite sports heroes is so strong that many advertisers pay professional athletes millions of dollars in order to entice more people to buy their products.").

[160] See ***O'Bannon v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 277*** (mem.) (2016) (denying certiorari to petitioner O'Bannon); ***Nat'l Collegiate Athletic Ass'n v. O'Bannon, 137 S. Ct. 277*** (mem.) (2016) (denying certiorari to petitioner ***NCAA***).

[161] See *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1079 (9th Cir. 2015),* cert. denied, ***137 S. Ct. 277 (2016).***

[162] See *id. at 1076.*

[163] Id.

[164] See id. (noting that not paying student-athletes is what makes them amateurs). Arguably, a student-athlete's use of his or her name, image, likeness, or reputation as an ***NCAA*** student-athlete in marketing for his or her business would be an indirect form of payment for being a student-athlete.

Equity amongst member institutions is undoubtedly procompetitive. [165] Institutions with similar resources and levels of prestige have greater competition in recruiting and on the playing field, which leads to more entertaining games and greater popularity for the sport, the teams, and intercollegiate athletics in general. The ***NCAA*** could successfully argue that the ***Self-Employment Guidelines*** preventing student-athletes from using their names, images, likenesses, and reputations to benefit their personal businesses work to maintain ***equity*** between member institutions.

When athletes are deciding where to attend college, they consider a number of factors. For example, student-athletes consider financial aid, educational opportunities, and the reputation of the team and the university. Allowing student-athletes to create businesses that directly benefit from their status as an ***NCAA*** athlete could lead student-athletes **[*270]** to consider many other factors, like potential market size, when deciding which institution to attend. Thus, allowing student-athletes to create businesses that directly benefit from their status would likely lead to a slippery slope of schools in larger cities and larger markets becoming more desirable because of seemingly greater opportunities for commercial success there.

Presently, the ***NCAA*** and the courts have recognized strict limits that prevent student-athletes from receiving financial aid above the cost of attendance at their school. [166] Removing the ***Self-Employment Guidelines*** would likely lead to athletes taking into consideration the possibility of additional compensation, through the creation of their own business, on top of the financial aid that they receive from their institution. The ***NCAA*** would likely argue that this in turn would lead to athletes choosing schools based off of where they could make the most money, thus creating a situation in which larger schools, or schools in larger cities, would be significantly more attractive than smaller schools because of the larger markets and the greater opportunity to make money at those larger schools. Therefore, the ***NCAA***'s ***Self-Employment Guidelines*** are necessary to maintain the ***equity***, and thus, the competition, between member institutions.

c. ***Equity*** Amongst Student-Athletes

The ***NCAA*** could additionally claim that the ***Self-Employment Guidelines*** are procompetitive because they help to maintain ***equity*** amongst student-athletes. Similar to ***equity*** between member institutions, ***equity*** between student-athletes helps to enhance competition by keeping all of the student-athletes on an equal playing field. Naturally, some student-athletes gain more name-recognition and popularity than others, [167] and significant differences in popularity likely affords some student-athletes greater economic opportunity than others. To remove these ***Self-Employment Guidelines*** and allow popular student-athletes to financially benefit, directly or indirectly, from their athletic ability would create a harshly unequal playing field.

Further, the ***NCAA*** would likely argue that these popular student-athletes would receive an unfair advantage based on the additional compensation they receive from their business. This advantage could come in the form of better living conditions, food, or medical care. The ***NCAA*** would also note that without this additional compensation from **[*271]** their businesses, student-athletes would be equal in each of these areas, as they would all rely solely upon their schools for these products and services. [168] Therefore, the ***Self-Employment Guidelines*** are arguably

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[165] But see Daniel E. Lazaroff, The ***NCAA*** in Its Second Century: Defender of ***Amateurism*** or Antitrust Recidivist?, *86 Or. L. Rev. 329, 358-361 (2007).*

[166] See ***NCAA***, Division I Manual, supra note 4, art. 15, at 195-220.

[167] For example, far more people throughout the country could name or recognize Penn State Football's Saquon Barkley before they could name or recognize any player on Penn State's women's basketball team.

[168] Student-athletes would rely on their schools to provide these products and services either directly or indirectly. Schools could directly provide these products and services in the form of team sponsored meals or medical care from the university's athletic trainers. Schools could provide these products and services indirectly by providing student-athletes with financial aid up to the cost of attendance, thus financially sponsoring student-athlete choices in food and housing. See generally Megan

procompetitive in that they are necessary to maintain fairness and equality, and subsequently, viable competition, between student-athletes.

3. Are the ***Self-Employment Guidelines*** Necessary to Achieve a Legitimate Objective or Can the Objective be Achieved in a Substantially Less Restrictive Manner?

The ***NCAA***'s named objective is to maintain a "clear line of demarcation between intercollegiate athletics and professional sports." [169] As previously discussed, this line is maintained through the tradition of ***amateurism*** and the ***guidelines*** set forth in Article 12 of the ***NCAA*** Manual. [170] This goal is clearly legitimate, as the tradition of ***amateurism*** has been a pillar of the ***NCAA*** since its inception, [171] and courts have recognized the importance of ***amateurism*** to intercollegiate athletics and have consistently protected it. [172]

The ***NCAA*** would likely argue that the ***Self-Employment Guidelines*** are necessary to achieve the legitimate goal of differentiating intercollegiate athletics from professional sports, and to financially benefit from one's athletic ability, directly or indirectly, is to be a professional athlete. It would be virtually impossible to create a less restrictive rule that would also prevent a student-athlete from improperly financially benefiting from his or her athletic ability. The ***NCAA*** would continue to argue that while it would be difficult in some cases to prove or quantify the amount that student-athletes' uses of their names, images, likenesses, or statuses as ***NCAA*** athletes helped them earn, it is likely that any of these elements, together or separately, could have a positive effect on the student-athlete's business. While a student-athlete's **[*272]** entrepreneurial spirit is admirable, the ***Self-Employment Guidelines*** are necessary to achieve the ***NCAA***'s goal of differentiating intercollegiate athletics from professional sports through ***amateurism***.

In response to the ***NCAA***'s arguments, student-athletes may argue that a less restrictive way of accomplishing the ***NCAA***'s goal would be to measure each ***self***-employed student-athlete's popularity and influence to determine if his or her name, image, likeness, or status as an ***NCAA*** athlete would have a noticeable effect on the success of his or her business. This could be accomplished by considering the student-athlete's social media following and the number of times the student-athlete is mentioned and discussed in the media by third parties. Student-athletes may also suggest that, on a case-by-case basis, a series of focus groups could be conducted, in which the product or service is presented without the student-athlete's name, image, likeness, and status, and then the product or service is presented with those elements, to determine if the business is impacted by those elements. A court, however, would likely find that this suggestion is not a less restrictive means of accomplishing the ***NCAA***'s goal because it places an enormous burden on the ***NCAA*** to thoroughly investigate each individual student-athlete, which is extremely unrealistic.

Additionally, student-athletes may also argue that a less restrictive way to accomplish the ***NCAA***'s goal of differentiating intercollegiate athletics from professional sports would be to allow student-athletes to use their name, image, likeness, and status in the promotion of their business, but require a percentage of those sales to be paid to the ***NCAA*** and the student-athlete's institution. This practice of splitting sales would arguably allow the student-athletes to have and promote their businesses as they see fit, but not allow them to be unfairly compensated based on their status as an ***NCAA*** student-athlete. However, this argument would likely be unsuccessful because it ignores the tradition of ***amateurism*** and its importance as the primary division separating intercollegiate athletics from professional sports.

Fleming, Perks of Being a Student Athlete at Penn State, Onward State, (Oct. 31, 2014, 4:14 AM), https://onwardstate.com/2014/10/31/perks-of-being-a-student-athlete-at-penn-state/.

169 ***NCAA***, Division I Manual, supra note 4, art. 1.3.1, at 1.

170 See id., art. 12, at 61-91; see also supra Section III.B.2.a.

171 See supra Section II.A.

172 See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 120 (1984);* see also *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 342-43 (7th Cir. 2012);* supra Section III.B.2.a.

Ultimately, the ***NCAA***'s argument that the ***Self-Employment Guidelines*** are the least restrictive way of accomplishing its goal is significantly more persuasive. Thus, a court should find that the ***Self-Employment Guidelines*** are sufficiently competitive and ***justified***, as they would satisfy the requirements of a rule of reason analysis.

C. LaMelo Ball and Donald De La Haye

LaMelo Ball, now sixteen years old, was only thirteen when he committed to play basketball at the University of California in Los **[*273]** Angeles ("UCLA"). [173] He has been a highly anticipated recruit, and his talent, along with his famous family, [174] has already made him into "a public figure and a highly marketable athlete." [175] Ball recognized the value of his popularity, and chose to capitalize with the creation of the Big Baller Brand with his family. [176] Recently, the Big Baller Brand came out with a new sneaker inspired by LaMelo, called the "Melo Ball 1." [177] LaMelo can regularly be seen advertising and promoting these sneakers on social media, including multiple Instagram posts on both his personal profile and the Big Baller Brand's profile. [178] In these photographs and videos, LaMelo is seen both wearing the sneakers and talking about them while playing basketball. [179] The ***NCAA*** has been upfront in expressing that these practices could make him ineligible to participate in intercollegiate athletics because he would be in direct violation of ***NCAA*** Manual Article 12. [180]

[*274] LaMelo Ball is precisely the type of athlete that the ***NCAA Self-Employment Guidelines*** were designed to curtail. To allow him to use his celebrity, which is derived directly from his athletic ability, to make large amounts of money selling $ 395 "signature" sneakers and still continue to receive the benefits of being considered an amateur, would be clearly inequitable. To allow this kind of indirect compensation for athletic ability would be to place those student-athletes on a different playing field than those without that opportunity. It would be naive to think that upon

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[173] Although LaMelo Ball has recently decided to forego his potential ***NCAA*** career to begin a professional career in Europe, his athletic ability, stardom, and successful business are still relevant to the debate on the ***NCAA Self-Employment Guidelines***. In December 2017, LaMelo Ball, and his brother, LiAngelo Ball, decided to sign one-year contracts to play professional basketball for Prienu Vytautas, a small team in Lithuania. See Scott Davis, LiAngelo and LaMelo Ball were lured to their Lithuanian basketball team when a team employee DMed their agent on Twitter, Business Insider (Dec. 23, 2017, 6:39 PM), *http://www.businessinsider.com/liangelo-lamelo-ball-lithuanian-team-twitter-2017-12*.

[174] LaMelo Ball is the son of former professional basketball player LaVar Ball, and is the younger brother of Los Angeles Lakers player Lonzo Ball. See Michael McCann, Who Needs the Other More: High School Phenom LaMelo Ball or the ***NCAA***?, Sports Illustrated (Sept. 7, 2017), *https://www.si.com/nba/2017/09/07/lamelo-ball-big-baller-brand-ucla-**ncaa**-nba-lavar-ball-lonzo-ball*.

[175] Id.

[176] See id. Big Baller Brand is a privately held company founded by Chief Executive Officer LaVar Ball. Id. Due to the private nature of the company, it is unclear exactly who has an ownership interest in the company. For purposes of this Comment, it will be assumed that LaMelo Ball is a part owner in Big Baller Brand.

[177] See Tyler Lauletta, LaMelo Ball now has his own $ 400 Big Baller Brand shoes raising concerns about college eligibility, Business Insider (Aug. 31, 2017, 5:20 PM), *http://www.businessinsider.com/lamelo-ball-signature-shoe-big-baller-brand-2017-8*.

[178] See Big Baller Brand (@bigballerbrand), Instagram (Aug. 31, 2017, 4:54 PM), *https://www.instagram.com/p/BYdzKAwhVLP/?hl=en&taken-by=bigballerbrand*; see also Big Baller Brand (@bigballerbrand), Instagram (Aug. 31, 2017, 5:07 PM), *https://www.instagram.com/p/BYd0pjhB2y9/?hl=en&taken-by=bigballerbrand*; see also LaMelo Ball (@melo), Instagram (Aug. 31, 2017), *https://www.instagram.com/p/BYdzkAaHipq/?hl=en&taken-by=melo*; LaMelo Ball (@melo), Instagram (Dec. 7, 2017), *https://www.instagram.com/p/BcbPhjHF9Mq/?hl=en&taken-by=melo*.

his arrival at UCLA, LaMelo would not be at a significant competitive advantage compared to his fellow student-athletes. [181]

Removing the ***Self-Employment Guidelines*** would allow LaMelo to financially benefit off of his athletic ability, while simultaneously reaping the benefits and exposure related to his amateur status. The ***NCAA*** relies on ***amateurism*** to maintain the equitable entertaining competition of their product. To destroy that principle in order to allow some student-athletes, like LaMelo, to line their pockets with money based off of ***self***-promotion of their own businesses just a couple of years earlier would be unfair to other student-athletes, the member institutions, and the ***NCAA***. [182]

Donald De La Haye, on the other hand, was a kicker for the University of Central Florida ("UCF") football team, and was recently deemed ineligible by the ***NCAA*** under the ***Self-Employment Guidelines***. [183] While a student-athlete at UCF, De La Haye developed a popular YouTube channel called "Deestroying," which contained videos depicting his life as a college football player. [184] In the videos, De La Haye is often seen playing football, practicing for football, and hanging out with teammates in the locker room and other team areas. [185] In August **[*275]** 2017, the ***NCAA*** deemed De La Haye ineligible because he was receiving advertising revenue from his YouTube channel, and he refused to take down the videos when offered a deal to remain ***NCAA*** eligible. [186]

While De La Haye's business was on a much smaller scale than LaMelo Ball's, the ***NCAA***'s motivation of protecting ***amateurism*** and the procompetitive justifications for the ***Self-Employment Guidelines*** remains the same. It would be inequitable to other student-athletes and member institutions, and detrimental to the ***NCAA***'s product, to do away with the tradition of ***amateurism*** by allowing student-athletes to indirectly profit off of their athletic ability. The ***Self-Employment Guidelines*** only govern student-athletes for a few years, and if a student-athlete feels that his or her business requires the use of his or her name, image, likeness, or reputation to be successful, then the student-athlete always has the option to no longer compete in intercollegiate athletics. By not accepting the ***NCAA***'s offer of

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[179] See Big Baller Brand (@bigballerbrand), Instagram (Aug. 31, 2017, 5:07 PM), https://www.instagram.com/p/BYd0pjhB2y9/?hl=en&taken-by=bigballerbrand (showing LaMelo Ball playing basketball while advertising the Melo Ball 1's).

[180] See McCann, supra note 174 (discussing Article 12 of the ***NCAA*** Manual, and the options that LaMelo Ball has to defend himself if the ***NCAA*** tries to deem him ineligible); see also ***NCAA***, Division I Manual, supra note 4, art. 12.4.4, at 72 (stating that student-athletes may open their own business, but they may not use "the student-athlete's name, photograph, appearance or athletics reputation" in the promotion of the business).

[181] While it may be true that certain athletes in widely popular sports like football or men's basketball may be viewed differently amongst the general student population, this does not put them on an unequal playing field to other student-athletes, as they are each treated equally under the ***NCAA*** Manual.

[182] The rule clearly allows for student-athletes to have businesses and make money with them, and only limits the way the products and services can be promoted. See ***NCAA***, Division I Manual, supra note 4, art. 12.4.4, at 72.

[183] See Henry Fernandez, ***NCAA*** rules UCF kicker Donald De La Haye ineligible over YouTube profits, Fox Business (Aug. 7, 2017), http://www.foxbusiness.com/features/2017/08/02/**ncaa**-rules-ucf-kicker-donald-de-la-haye-ineligible-over-youtube-profits.html.

[184] See Donald De La Haye (@Deestroying), YouTube (joined June 5, 2015), https://www.youtube.com/channel/UC4mLlRa_dezwvytudo9s1sw/featured.

[185] See Donald De La Haye (@Deestroying), YouTube (Apr. 1, 2017), https://www.youtube.com/watch?v=HA9ln1wmxgc (showing De La Haye practicing his sprints for football); see also Donald De La Haye (@Deestroying), YouTube (Mar. 13, 2017), https://www.youtube.com/watch?v=d8PG8BJdzfY (showing De La Haye working out with teammates and practicing his kicking).

[186] See Romero, supra note 1. The ***NCAA*** offered to allow De La Haye to remain eligible if he stopped taking revenue for his YouTube videos or if he stopped featuring aspects of his life as a UCF football player in his YouTube videos. See id.

terms to keep his eligibility, De La Haye chose his business over his intercollegiate athletics career, and that was entirely his decision. However, it would be unfair to the ***NCAA***, its member institutions, and his fellow student-athletes for De La Haye to indirectly promote the destruction of the longstanding tradition of ***amateurism*** simply for De La Haye to profit.

IV. Conclusion

The ***NCAA***'s ***Self-Employment Guidelines*** clearly do not violate the Sherman Antitrust Act. The procompetitive justifications for the ***Guidelines*** undoubtedly outweigh the anticompetitive effects, and the ***Guidelines*** are the least restrictive way of accomplishing the ***NCAA***'s legitimate goal of a "clear line of demarcation" between college and professional sports. [187]

While the ***Guidelines*** may have some anticompetitive effects that limit student-athletes' abilities to promote their businesses, thus restricting their business' earning capacity, these anticompetitive effects are plainly outweighed by the plethora of procompetitive justifications. [188] The tradition of ***amateurism*** is a touchstone of the ***NCAA*** that cannot be discounted. [189] The Supreme Court has made it clear that any ***NCAA*** **[*276]** regulation that is in place to protect ***amateurism*** is presumed to be procompetitive. [190] While this procompetitive presumption alone may not overcome the anticompetitive effects, the other procompetitive justifications of maintaining ***equity*** amongst student-athletes and member institutions help to tip the scale in the ***NCAA***'s favor.

While the student-athletes may find these ***Self-Employment Guidelines*** inequitable, they are forgetting that being an amateur is precisely what makes them an ***NCAA*** athlete, and a collection of amateur athletes is precisely what the ***NCAA***'s product is. [191] If the ***Self-Employment Guidelines***, and principles of ***amateurism*** generally, were eliminated from the ***NCAA*** Manual, student-athletes would be able to receive compensation, directly and indirectly, for their athletic ability, thus making them professionals. [192] The elimination of ***NCAA*** regulations set in place to safeguard ***amateurism*** would essentially create a new minor league for each of the respective sports. To create a new minor league and to receive direct or indirect compensation would be to forget the value of the education that student-athletes receive and to completely disregard a core characteristic of the ***NCAA***'s product.

Ultimately, the Supreme Court should finally grant certiorari to a case in which a student-athlete challenges an ***NCAA*** regulation that prevents the indirect receipt of compensation for his or her athletic ability, such as the ***Self-Employment Guidelines***. Perhaps Donald De La Haye will challenge his ineligibly on antitrust grounds, giving the courts a chance to weigh-in on this complex issue. When such a challenge does come before the Supreme Court, the Supreme Court should find that the ***Self-Employment Guidelines***, and other similar ***guidelines***, do not violate the Sherman Antitrust Act, as the procompetitive justifications clearly outweigh any potential anticompetitive effects. The maintenance of the tradition of ***amateurism***, and the preservation of ***equity*** amongst institutions and student-athletes, are important concepts for courts to consider in order to best protect and preserve the competition of intercollegiate athletics, both on and off the field.

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[187] See ***NCAA***, Division I Manual, supra note 4, art. 1.3.1, at 1.

[188] See supra Section III.B.2.

[189] See *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 120 (1984).*

[190] See *id. at 120;* see also *Agnew v. Nat'l Collegiate Athletic Ass'n, 683 F.3d 328, 342-43 (7th Cir. 2012).*

[191] See *O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1076 (9th Cir. 2015),* cert. denied, ***137 S. Ct. 277 (2016).***

[192] See Amateur, Oxford Dictionary, *https://en.oxforddictionaries.com/definition/amateur* (last visited Aug. 19, 2018) (defining an amateur as one "who engages in a pursuit, especially a sport, on an unpaid basis").

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NCAA Can't Cap Student Athletes' Education-Related Pay

By Dorothy Atkins

Law360 (March 8, 2019, 11:52 PM EST) -- A California federal judge on Friday barred the NCAA from restricting student athletes' education-related compensation, finding that some of its decades-old rules violate antitrust laws, while also holding the organization can continue to restrict pay unrelated to education.

In a 104-page order, U.S. District Judge Claudia Wilken rejected the NCAA's arguments that all its compensation rules promote the demand for college sports and justify its antitrust violations. The judge issued an injunction prohibiting the association from enforcing rules that she deems "overly and unnecessarily restrictive."

"The court finds and concludes that the defendants agreed to and did restrain trade in the relevant market, and that the challenged limits on student-athlete compensation produced significant anticompetitive effects," the order says.

But Judge Wilken said eliminating pay caps altogether could open the door for some conferences to offer unlimited cash payments untied to education, like teams do in professional sports, and that could impact demand for college sports.

"The NCAA can … continue to limit compensation and benefits, paid in addition to the cost of attendance, that are unrelated to education," Judge Wilken wrote.

In explaining her decision to bar restrictions on education-related expenses, the judge wrote that currently, the NCAA can restrict athletes' benefits "in any way, at any time they wish," without impacting its market power, since the NCAA has no competitors. But the compensation athletes receive is not commensurate with the "extraordinary" revenues that they generate for the NCAA, which makes approximately $1 billion annually, the judge said.

Judge Wilken rejected the NCAA's defense that its pay caps are justified because fans value amateurism. She said the NCAA never defined the term "amateurism" during trial, and she agreed with athletes' experts that the NCAA's "principle of amateurism" definition in its rulebook is circular, because it includes the word "amateur." She added that the NCAA's own pay rules don't follow any coherent definition of "amateurism."

“The only common thread underlying all forms and amounts of currently permissible compensation is that the NCAA has decided to allow it,” the judge wrote.

Judge Wilken also rejected the NCAA’s argument that its rules help athletes integrate with non-athletes on college campuses, noting that wealth disparities already exist on campuses and athletic scholarships vary under the current rules. She said the current rules actually might be segregating athletes from the rest of the campus, because they allow schools to spend money on “unregulated frills” at athletes-only facilities.

The judge pointed out contradictions in the NCAA’s current pay rules. For example, she said the NCAA allows some Olympic athletes to receive thousands of dollars in unlimited payments from outside organizations for their athletic performance. Also, athletes can currently receive athletic performance awards, which are typically in the form of gift cards, and can add up to thousands of dollars for winning teams.

The judge said the NCAA allows such “cash-equivalent” awards, even though they seem to violate NCAA rules that prohibit cash compensation untied to education.

“Nevertheless, these awards do not constitute a prohibited form of payment or compensation, only because the NCAA has chosen to permit them,” the order says.

Judge Wilken said that while the NCAA makes exceptions for those awards, it sets other restrictions on education-related benefits “arbitrarily.” For example, it bars athletes from obtaining financial aid for graduate school at other institutions, she said.

The judge prohibited the NCAA from enforcing rules that limit payments for education-related expenses, like computers, science equipment, musical instruments, tutoring and expenses related to studying abroad and internships. She also barred caps on undergraduate and postgraduate degree scholarships at any university or vocational school.

“Defendants have offered no cogent explanation for why limits or prohibitions on these education-related benefits are necessary to preserve demand,” the judge wrote.

Judge Wilken said that if conferences ultimately realign due to her order, there’s no

evidence such a realignment would harm competition, because the conferences have changed “frequently” in the past few decades and demand for college sports has increased. She also noted that such demand wasn’t impacted by the NCAA’s 2015 increase in scholarship amounts.

The judge observed that lifting the rules on education-related benefits could free up resources that the NCAA spends on enforcing compliance, and said any additional costs the NCAA incurs would not be significant.

Judge Wilken added that the only education-related benefit that the NCAA can limit are cash academic awards, graduation awards and similar incentives. She said the limits on those awards cannot be less than the caps on athletic participation awards.

Friday's ruling wraps a landmark 10-day bench trial that kicked off in Oakland, California, on Sept. 4 over allegations by Division I college football and basketball players that the NCAA's rules illegally restrict what they can receive to play. Currently, the rules limit athlete benefits to cost-of-attendance scholarships; Student Assistance Funds, which cover certain school-related expenses; some need-based grants, like Pell Grants; and bowl participation awards, which are typically capped around $450.

During the trial, sports economists, former athletes, university officials and NCAA administrators took turns testifying on the impacts of the NCAA's compensation rules. Three former athletes, who didn't play professionally after college, recalled how they struggled as students to pay for meals, clothes and trips home, while they spent between 40 to 60 hours a week on their sports, which left little time for academics.

Meanwhile, university officials and NCAA administrators testified that lifting the compensation restrictions would create million-dollar bidding wars between schools over top athletes that would turn off fans and foster resentment among college team players.

But on Friday, Judge Wilken sided in part with the athletes.

The athletes’ attorney, Steve Berman of Hagens Berman Sobol Shapiro LLP, said Friday that the ruling will change college sports, because athletes will be able to receive some additional benefits for their services.

“Although the court did not allow a complete ban on any rules limiting cash compensation, this ruling should result in conferences competing for athletes by offering educational scholarships and incentive awards,” Berman said.

NCAA chief legal officer Donald Remy said the decision recognizes that college sports should be played by student-athletes, not by paid professionals. However, Remy said the judge’s decision to lift current limits on some education expenses is inconsistent with the Ninth Circuit’s ruling in the O’Bannon case.

The NCAA plans to “explore our next steps as appropriate,” Remy added.

The student-athletes are represented by Jeffrey L. Kessler, David Greenspan, David Feher, Joseph A. Litman, Sean D. Meenan and Jeanifer E. Parsigian of Winston & Strawn LLP, Jeff D. Friedman, Steve W. Berman, Craig R. Spiegel and Emilee N. Sisco of Hagens Berman Sobol Shapiro LLP, Bruce L. Simon and Benjamin E. Shiftan of Pearson Simon & Warshaw LLP, and Elizabeth C. Pritzker, Bethany L. Caracuzzo and Shiho Yamamoto of Pritzker Levine LLP.

The NCAA is represented by Beth Wilkinson, Sean Eskovitz, Brant W. Bishop and James Rosenthal of Wilkinson Walsh Eskovitz. The Pac-12 Conference is represented by Bart Harper Williams, Scott P. Cooper, Kyle A. Casazza, Jennifer L. Jones, Shawn S. Ledingham Jr. and Jacquelyn N. Crawley of Proskauer Rose LLP. The NCAA and the Western Athletic Conference are represented by Patrick Hammon, Jeffrey A. Mishkin and Karen Hoffman Lent of Skadden Arps Slate Meagher & Flom LLP. The Big Ten Conference Inc. is represented by Andrew S. Rosenman, Britt M. Miller and Richard J. Favretto of Mayer Brown LLP. The Big Twelve Conference and Conference USA Inc. are represented by Leane K. Capps, Caitlin J. Morgan, Amy D. Fitts, Mit Winter and Wesley D. Hurst of Polsinelli PC. The Southeastern Conference is represented by Robert W. Fuller III, Nathan C. Chase Jr., Lawrence C. Moore III, Pearlynn G. Houck and Amanda R. Pickens of Robinson Bradshaw & Hinson and Mark J. Seifert of Seifert Law Firm. The Atlantic Coast Conference is represented by D. Erik Albright, Gregory G. Holland and Jonathan P. Heyl of Fox Rothschild LLP, and Charles LaGrange Coleman III of Holland & Knight LLP. The American Athletic Conference is represented by Benjamin C. Block and Rebecca A. Jacobs of Covington & Burling LLP. The Mid-American Conference is represented by R. Todd Hunt and Benjamin G.

Chojnacki of Walter Haverfield LLP. The Sun Belt Conference is represented by Mark A. Cunningham of Jones Walker LLP. The Mountain West Conference is represented by Meryl Macklin, Richard Young and Brent Rychener of Bryan Cave LLP.

The case is In re: National Collegiate Athletic Association Athletic Grant-in-Aid Cap Antitrust Litigation, case number 4:14-md-02541, in the U.S. District Court for the Northern District of California.

--Editing by Kat Laskowski and Michael Watanabe.

NCAA's Antitrust Violation 'Pretty Clear,' Judge Says

By Dorothy Atkins

Law360, Oakland, Calif. (December 18, 2018, 8:45 PM EST) -- A California federal judge told parties at the close of a landmark antitrust bench trial over athlete pay limits Tuesday that it seems "pretty clear" that the NCAA committed an antitrust violation, but she questioned how it could be quantified and appeared wary of million-dollar bidding wars over college athletes.

During a hearing, U.S. District Judge Claudia Wilken suggested that the parties had agreed that the NCAA's athlete pay rules violated antitrust laws. But the NCAA's counsel, Beth Wilkinson of Wilkinson Walsh Eskovitz, said they wouldn't concede the point, which appeared to frustrate the judge.

"Do you want to tell me there is no agreement to restrain trade in a way that affected interstate commerce?" the judge asked.

Wilkinson replied that she wasn't prepared to make the argument at the moment, but that she would not concede that the NCAA's rules violated antitrust laws. The judge told her to "move on" to a different topic then. The exchange came during a hearing on closing arguments, which served as a final act to a 10-day landmark bench trial that kicked off in Oakland, California, on Sept. 4.

The trial is over allegations brought by Division I college football and basketball players who are aiming to change the system to give college athletic conferences more freedom to allow their member schools to provide heftier aid packages to attract top recruits and alleviate students' financial stress.

At the start of the hearing Tuesday, Judge Wilken said she had a list of questions for the parties on a number of issues that came up during trial. She began by asking both sides how they think she should quantify and balance any potential "procompetitive effect" the rules have on the demand for college sports.

Jeffrey Kessler of Winston & Strawn LLP, counsel for the athletes, argued that the NCAA has not shown a single procompetitive effect of its rules. But if there is such a showing, it's "very small" and minor, he said.

Meanwhile, Wilkinson said there's no way to determine the procompetitive effect of the NCAA's rules on demand for sports without a quantitative analysis, which she argued the athletes' experts didn't provide. Wilkinson added that any "balancing" without such an analysis would be a subjective personal opinion. But Judge Wilken appeared unconvinced.

"That's kind of what judges have to do," she said.

Judge Wilken then said she was "dismayed" that the NCAA stated in its brief that the court "forced" the parties to stipulate to a recounting of the NCAA's history. The judge said she didn't force the parties to do anything and if there is something factually inaccurate in the stipulation the NCAA must file a brief addressing it.

Judge Wilken then asked the parties whether giving athletes a "little bit of money" would impact student-athletes, their integration on campus and their success in academics. Counsel for the conferences, Bart H. Williams of Proskauer Rose LLP, argued that even a small amount of money would disrupt the players' studies and create envy among athletes. His response raised more questions from the judge.

"So people will be mean to athletes and the athletes will feel bad?" the judge asked.

Williams replied that it's more than just "being mean," because paying certain athletes more would increase the resentment among teams and degrade the quality of education over time.

However, Judge Wilken noted that under the current regime, athletes are already getting paid different amounts. She added that it's a "little odd" that some athletes can receive need-based Pell Grants on top of their full cost-of-attendance scholarships. She said it seems as though athletes who are getting both are getting paid twice for tuition, room and board. The judge added that the athletes "probably need" the extra funds and it's "probably a social good," but it's still cash that the students are receiving that is more than the alleged cost to go to school, which the NCAA's rule purportedly caps.

Judge Wilken also asked the parties to explain their takes on proposed less-restrictive alternatives to the NCAA's current compensation rules. Judge Wilken emphasized that it's "more likely than not" that paying athletes large sums — like a million or more — could create a bidding war among schools.

Kessler argued that economic principles will prevent NCAA conferences from allowing bidding wars to occur, while Wilkinson said nothing would stop schools from offering athletes millions and it would take years for conferences to create and implement their own rules restricting pay.

Judge Wilken wrapped her line of question asking both sides how long they think conferences would need to implement their own compensation rules. The athletes had proposed a 90-day deadline, but Kessler said it could be extended to accommodate the conferences if they show why they need more time. Wilkinson said that if the judge sided with the athletes, the NCAA would ask her to stay the injunction pending appeal.

After four hours of argument, Judge Wilken said she had more questions that she wasn't able to ask due to time constraints. She then thanked both sides and said she'll issue a ruling in short order.

The student-athletes are represented by Jeffrey L. Kessler, David Greenspan, David Feher, Joseph A. Litman, Sean D. Meenan and Jeanifer E. Parsigian of Winston & Strawn LLP, Jeff D. Friedman, Steve W. Berman, Craig R. Spiegel and Emilee N. Sisco of Hagens Berman Sobol Shapiro LLP, Bruce L. Simon and Benjamin E. Shiftan of Pearson Simon & Warshaw LLP, and Elizabeth C. Pritzker, Bethany L. Caracuzzo and Shiho Yamamoto of Pritzker Levine LLP.

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--Editing by Jay Jackson Jr.

Correction: An earlier version of this story misstated the conference that Polsinelli PC represents. The error has been corrected.