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## THE LAW MAY CAVE, BUT ECONOMICS WILL NOT: THE ROAD TO PAYING STUDENT ATHLETES IS LONGER THAN WE THINK

*Nicholas Kitko\**

### I. INTRODUCTION

Early in the 2015 NFL football season, New England Patriots quarterback Tom Brady whizzed his 400th career touchdown to receiver Danny Amendola in the second quarter of a Sunday afternoon game.<sup>1</sup> Upon catching the touchdown, Amendola gave the ball to a Patriots fan sitting behind the end zone.<sup>2</sup> The ball carried significant value and Brady sought to get it back. Brady and the fan eventually exchanged the touchdown ball for various autographs and another NFL ball used in that game.<sup>3</sup> The value of the 400th touchdown ball is a mystery since it never reached the open market, so one can only speculate its value. To give a contextual reference, though, one may consider an ordinary, game-used NFL ball signed by Hall of Fame wide receiver Jerry Rice being sold for \$4,500.<sup>4</sup>

Compare Brady's quid pro quo exchange to that of Terrelle Pryor, a former Ohio State University quarterback. In 2011, Pryor sold some autographed memorabilia and his conference championship ring to a Columbus tattoo artist in exchange for *discounted* tattoos.<sup>5</sup> As punishment, the NCAA determined that Pryor had to miss the first five games of the 2011 season and repay \$2,500, representing the value of

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\* Associate Member, 2015-2016 *University of Cincinnati Law Review*. Specials thanks to Professor Timothy Armstrong at University of Cincinnati College of Law for giving me direction to select this topic.

1. Connor Orr, *Brady Gets 400th TD Ball Back for Meeting, Autographs*, AROUND THE NFL (Oct. 1, 2015), <http://www.nfl.com/news/story/0ap3000000546599/article/brady-gets-400th-td-ball-back-for-meeting-autographs>.

2. *Id.*

3. *Id.*

4. *Shopping Suggestions for Jerry Rice Signed Football*, SPORTS MEMORABILIA, <http://www.sportsmemorabilia.com/sports-products/1998-49ers-jerry-rice-game-used-signed-touchdown-football-vs-falcons.html> (last visited Nov. 3, 2015). As of November 3, 2015 the ball is still available for sale on this site. *Id.*

5. Zach Dirlam, *Scandal at Ohio State (Part 1 of 5): The Tattooed Five and Tressel's Cover Up*, BLEACHER REPORT (Dec. 2, 2015), <http://bleacherreport.com/articles/719411-scandal-at-ohio-state-part-1-of-5-the-tattooed-five-tressels-cover-up>. To be sure, the memorabilia he sold was more than old jock straps or smelly practice uniforms. "Pryor sold his 2008 Big Ten championship ring, Fiesta Bowl Sportsmanship Award and his 2008 gold pants, which are given to all Ohio State Football players when they beat the University of Michigan," *id.*, which is perhaps this biggest rivalry in intercollegiate athletics.

the goods he exchanged.<sup>6</sup> The tattoo artist sold Pryor's ring on eBay for \$18,000 in 2013.<sup>7</sup>

The difference between Brady and Pryor is amateurism. Brady is a professional who plays in the NFL, which generated about \$11 billion in revenue in 2014;<sup>8</sup> Pryor is an amateur who plays in the National Collegiate Athletic Association—more commonly known as the NCAA—which generated about \$3.5 billion in football-related revenue in 2013.<sup>9</sup> To be fair, NCAA football only accounts for about twenty-five percent of that revenue, but the punishment would be identical if any NCAA athlete did the same.<sup>10</sup> As *Around the NFL* writer Connor Orr put it, “for once, we leave a Tom Brady/football story right where it is. No need to get any lawyers involved.”<sup>11</sup> Unfortunately, that was not the case for Pryor.

NCAA athletes continue to fight to earn a share of the revenues the NCAA generates from use of its athletes' names and likenesses, in addition to those driven from the lucrative television and marketing deals held by the NCAA. This article explores the various legal hurdles NCAA athletes have faced over the past ten years, ultimately bringing them to the 2015 *O'Bannon v. National Collegiate Athletic Ass'n*<sup>12</sup> lawsuit where the NCAA and its former athletes fought a brutal antitrust dispute. Antitrust litigation is the most recent, though certainly not the final, chapter of a novel filled with athletes suing the NCAA for the appropriation of their names and likenesses.<sup>13</sup>

Part II begins with a discussion of the history of the NCAA and its amateurism policies that lead to a revenue gap between the NCAA and its student athletes. Part III will put these issues in context with examples of legal challenges student athletes have battled, including the focus of this article: the *O'Bannon* case. Part IV delves deeper into antitrust law and the central legal dispute in *O'Bannon*, thereafter

6. *Id.*

7. Levi Damien, *Terrelle Pryor Ohio State "Tattoo Scandal" Championship Ring Sells on eBay*, SB NATION (June 9, 2013), <http://www.silverandblackpride.com/2013/6/9/4412528/terrelle-pryor-ohio-state-tattoo-scandal-championship-ring-sells-on-ebay>.

8. Daniel Kaplan, *NFL Projecting Revenue Increase of \$1B Over 2014*, SPORTS BUS. J. (Mar. 9, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/03/09/Leagues-and-Governing-Bodies/NFL-revenue.aspx>.

9. *The Equity in Athletics Data Analysis Cutting Tool*, U.S. DEPT. OF EDUC. OFF. OF POSTSECONDARY EDUC., <http://ope.ed.gov/athletics/> (follow “download custom data” then select “Criteria” and “NCAA Division I-A,” “Continue with all found,” select boxes for “2013” and “Revenues,” finally select “Football” in the Sport Code and Download the data. Column “AD” lists the Total Revenue generated per institution, which totals roughly \$3.5 billion) (last visited Nov. 21, 2016).

10. *Id.*

11. Orr, *supra* note 1.

12. *O'Bannon v. National Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).

13. *See, e.g., Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013).

discussing how the court applied antitrust law. Part V introduces additional challenges, both legal and nonlegal, related to compensating student athletes that the court does not discuss in *O'Bannon*.

## II. HISTORY OF THE NCAA AND AMATEURISM

### A. History of the NCAA

President Theodore Roosevelt directed the inception of the NCAA when he and leaders in college athletics discussed reforming their current methods of college athletic governance.<sup>14</sup> Prior to this reform, student groups loosely oversaw the various sports, and teams would often hire nonstudents to play for their teams to increase their chances of winning.<sup>15</sup> The influx of nonstudents competing resulted in a bounty of “injuries and deaths and prompted many colleges and universities to discontinue football.”<sup>16</sup> Thus, the NCAA was formed “to protect young people from the dangerous and exploitive athletics practice of the time.”<sup>17</sup>

The NCAA began as a forum for various leaders to congregate and discuss the challenges they faced in their respective programs and sports. As it expanded, so did its mission.<sup>18</sup> In 1921, the NCAA conducted its first national championship in track-and-field.<sup>19</sup> Additional rules committees began to form in other sports, following in track-and-field’s footsteps, leading to the first basketball national championship in 1939.<sup>20</sup> Although championships provided additional structure for the NCAA, the competitive imbalance remained on the field as teams abused recruiting and financial aid to put the best team possible on the field.<sup>21</sup>

Following World War II, the NCAA faced new challenges as television became a prevalent medium for consumers to engage in collegiate athletics.<sup>22</sup> With television came media contracts, heightened interest in athletics, and the expansion of the NCAA.<sup>23</sup> As a result of

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14. *History of the National Collegiate Athletic Association*, NCAA, <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).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *History of the National Collegiate Athletic Association*, *supra* note 14.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

this growth and imbalance in competition, the NCAA divided into three separate, hierarchical divisions: Divisions I, II, and III.<sup>24</sup> These different divisions held their own legislative powers within the scope of the NCAA, but more importantly, balanced the size and competition of the NCAA member schools.<sup>25</sup>

Women's athletics expanded across all divisions, and ten championships were formed in Divisions II and III in the 1980s.<sup>26</sup> Around the same time, tensions began to rise as academic standards for participation were inconsistent and the NCAA lost dominion over its television contract based on *NCAA v. Board of Regents of Oklahoma*, a 1984 Supreme Court antitrust case.<sup>27</sup> At the time, the NCAA held its first contract with CBS broadcasting—a three-year agreement earning the NCAA \$49 million.<sup>28</sup> The Supreme Court determined that the NCAA's television contract was a violation of the Clayton and Sherman antitrust acts.<sup>29</sup> According to the Court, the antitrust laws are supposed to prohibit group restraint on trade, which the NCAA violated by controlling which teams would be televised.<sup>30</sup> In response, the major colleges began to form their own television contracts to keep their teams televised.<sup>31</sup> The NCAA countered by threatening to revoke schools' memberships in the NCAA.<sup>32</sup> The Supreme Court ruled this to be an unfair restraint on trade and required the NCAA to grant contractual freedom to major colleges seeking individual television deals.<sup>33</sup>

### B. Amateurism

As mentioned in the Brady-Pryor dichotomy, amateurism rules prohibit Pryor from engaging in his tattoo exchange while leaving Brady free to act as he may. In order to participate in NCAA competition, athletes must hold amateur status.<sup>34</sup> The NCAA contends that “[a]mateur competition is a bedrock principle of college athletics and

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24. *History of the National Collegiate Athletic Association*, *supra* note 14.

25. *Id.*

26. *Id.*

27. *Id.* See *NCAA v. Board of Regents of Oklahoma*, 468 U.S. 85 (1984).

28. *Revenue of the National Collegiate Athletic Association*, NCAA, <http://www.ncaa.org/about/resources/finances/revenue> (last visited Dec. 2, 2015).

29. See *Board of Regents of Oklahoma*, 468 U.S. 85.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Amateurism in the National Collegiate Athletic Association*, NCAA, <http://www.ncaa.org/amateurism> (last visited Dec. 2, 2015).

the NCAA.”<sup>35</sup> In order to maintain amateur status, one must refrain from (1) contracting with professional teams; (2) earning a salary for participating in athletics; (3) earning prize money above actual and necessary expenses; (4) playing with professionals; (5) participating in tryouts, practice or competition with a professional team; (6) receiving benefits from an agent or prospective agent; (7) entering an agreement to be represented by an agent; and (8) seeking delayed initial full-time collegiate enrollment to participate in organized sports competition.<sup>36</sup>

Perhaps the prohibitions of amateurism seem less than daunting, but the NCAA’s interpretation and enforcement of those prohibitions tell a different story. Consider the story of Silas Nacita, a walk-on football player at Baylor University who had previously been homeless.<sup>37</sup> Nacita accepted food and shelter from an acquaintance while he attended class and played football at Baylor.<sup>38</sup> Upon learning about his aid, the NCAA and Baylor determined that Nacita was permanently ineligible from participating in NCAA athletics.<sup>39</sup> While a stringent interpretation of amateurism rules may help to maintain the NCAA’s posture, this decision “turns Maslow’s hierarchy of needs on its head.”<sup>40</sup>

The NCAA claims that its primary purpose for demanding amateur status is to “ensure the students’ priority remains on obtaining a quality educational experience and that all of the student athletes are competing equitably.”<sup>41</sup> While this may be true, maintaining this amateur-student status precludes athletes from asserting other rights like collective bargaining and publicity rights.<sup>42</sup> For example, in *Northwestern University & College Athletes Players Ass’n (CAPA)*,<sup>43</sup> the National Labor Relations Board (NLRB) determined that a group of student athletes could be employees, which may permit them to unionize and collectively bargain, but failed to effectuate such a decision and instead

35. *Id.*

36. *Id.*

37. Chip Patterson, *Ex-Baylor RB Silas Nacita Permanently Ineligible, Looking into NAIA*, CBS SPORTS (Apr. 8, 2015), <http://www.cbssports.com/collegefootball/eye-on-college-football/25140867/ex-baylor-rb-silas-nacita-permanent-ineligible-looking-into-naia-options>.

38. *Id.*

39. *Id.*

40. Marc Edelman, *Don’t Feed (or Shelter) the Athletes: The Absurdity of NCAA Amateurism in 2015*, FORBES (Feb. 28, 2015), <http://www.forbes.com/sites/marcedelman/2015/02/28/dont-feed-or-shelter-the-athletes-the-absurdity-of-ncaa-amateurism-in-2015/>; Saul McLeod, *Maslow’s Hierarchy of Needs*, SIMPLY PSYCHOLOGY, <http://www.simplypsychology.org/maslow.html> (last updated 2016).

41. *Amateurism in the National Collegiate Athletic Association*, *supra* note 34.

42. *See* Nw. Univ. & Coll. Athletes Players Ass’n (CAPA), 362 N.L.R.B. No. 167 slip op. (Aug. 17, 2015); *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013).

43. *See* Office of Pub. Affairs, *NLRB Director Region 13 Issues Decisions in Northwestern University Athletes Case*, NLRB (Mar. 26, 2014), <https://www.nlr.gov/news-outreach/news-story/nlr-director-region-13-issues-decision-northwestern-university-athletes>.

denied jurisdiction.<sup>44</sup> The NLRB suggested that asserting jurisdiction over the claim would not promote labor stability given the nature and structure of the NCAA.<sup>45</sup> NCAA athletes with collective bargaining power could lobby for better nutrition services, improved medical services, increased scholarships, and increased stipends for players.<sup>46</sup>

### C. NCAA and the Student Athlete Revenue Gap

At the end of the 2011–2012 season, the NCAA generated \$871.6 million in revenue.<sup>47</sup> Eighty-one percent of this revenue came from television and marketing rights fees, which is about \$706 million.<sup>48</sup> According to an audited statement provided by *USA Today*, the NCAA generated \$989 million in revenue in 2014, which would equate to \$801 million generated from television- and marketing-rights fees if the eighty-one percent figure from 2011–2012 remained the same.<sup>49</sup> But, these revenues do not correlate to the amount of NCAA athletes' scholarship dollars or grants-in-aid, which are arguably the only direct benefits that the athletes receive. The resulting equity gap between student athletes and the NCAA continues to expand alongside the NCAA's growth.

In 1982, CBS Broadcasting and the NCAA began their partnership by signing a three-year \$49.9 million television-broadcasting contract with a primary interest in airing the storied March Madness basketball tournament. That relationship has grown substantially since, with the most recent agreement, signed in 2010, lasting for fourteen years and valued at \$10.8 billion.<sup>50</sup> The majority of this money went to the member schools and accounted for about twenty-four percent of the revenue generated by the member schools' athletics programs.<sup>51</sup> In turn, only fifteen percent of that total revenue made it to athletes in the form

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44. *Nw. Univ. & Coll. Athletes Players Ass'n*, slip op.

45. Office of Pub. Affairs, *Board Unanimously Decides to Decline Jurisdiction in Northwestern Case*, NLRB (Aug. 17, 2015), <https://www.nlr.gov/news-outreach/news-story/board-unanimously-decides-decline-jurisdiction-northwestern-case>.

46. Tom Farrey, *Northwestern Players Denied Request to Form First Union for Athletes*, ESPN (Aug. 17, 2015), [http://espn.go.com/college-football/story/\\_/id/13455477/nlr-says-northwestern-players-cannot-unionize](http://espn.go.com/college-football/story/_/id/13455477/nlr-says-northwestern-players-cannot-unionize).

47. *Revenue of the National Collegiate Athletic Association*, *supra* note 28.

48. *Id.*

49. Steve Berkowitz, *NCAA Nearly Topped \$1 Billion in Revenue in 2014*, USA TODAY SPORTS (Mar. 11, 2015), <http://www.usatoday.com/story/sports/college/2015/03/11/ncaa-financial-statement-2014-1-billion-revenue/70161386/>.

50. *Revenue of the National Collegiate Athletic Association*, *supra* note 28.

51. Daniel L. Fulks, *NCAA Division I Intercollegiate Athletics Programs Revenues & Expenses Report 2004–2014* 41, NCAA (Sept. 2015), <http://www.ncaa.org/sites/default/files/2015%20Division%20I%20RE%20report.pdf>.

of scholarships and grants.<sup>52</sup> Although the money does trickle down to the student athletes, the NCAA governs the quantity of scholarships and the amount of money member schools may assign in scholarships in order to level competition.<sup>53</sup> These limits are rarely changed and therefore eliminate any proportional gains NCAA athletes may receive relative to the NCAA's success.<sup>54</sup> Until recently, these scholarships fell far below the mark by providing student athletes an insufficient amount of financial support.<sup>55</sup> Scholarships were intended to cover the "cost of attendance" for a student athlete; the NCAA's definition was quite narrow, but is now expanding.<sup>56</sup> The "cost of attendance" has always included tuition, fees, books, and room and board. As of August 1, 2015, it will also now include "expenses such as academic-related supplies, transportation and other similar items."<sup>57</sup>

The NCAA does not share its revenues and successes with the student athletes that comprise its product. This void leaves student athletes removed from the overall picture of success and creates a deficit that leaves student athletes searching for other revenue streams. The NCAA uses athletes' on-field talents to profit while simultaneously prohibiting athletes from doing the same. Student athletes became increasingly aware of the imbalance and began taking action in an effort to take their share.

### III. THE ROAD TO *O'BANNON*: HISTORY OF NAME AND LIKENESS APPROPRIATION IN THE NCAA

NCAA athletes have fought many battles against the NCAA and various entities that, according to the athletes, appropriate their name, image, and likeness (NIL). These issues over athletes' NILs have touched on many other areas of law prior to *O'Bannon*'s antitrust dispute.<sup>58</sup> In order to better understand the context of *O'Bannon*, one

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52. *Id.* at 42.

53. Patrick O'Rourke, *College Athletic Scholarship Limits*, SCHOLARSHIPSTATS, <http://www.scholarshipstats.com/ncaalimits.html> (last visited Mar. 14, 2016).

54. *Id.*

55. Michelle Brutlag Hosick, *Autonomy Schools Adopt Cost of Attendance Scholarships*, NCAA MEDIA CENTER (Jan. 18, 2015), <http://www.ncaa.org/about/resources/media-center/autonomy-schools-adopt-cost-attendance-scholarships>.

56. *Id.*

57. *Id.*

58. To be sure, many other antitrust battles have taken place between the NCAA and its institutions and/or NCAA athletes. *See, e.g.*, Board of Regents of Oklahoma, 468 U.S. 85, 87 (1984) (holding that the NCAA television contract was not a per se violation of the Sherman Antitrust Act, but that the "anticompetitive limitation on price and output was not offset by any procompetitive justifications sufficient to save the plan even when the totality of the circumstances was examined"); Summary Jury Trial Data Collection Form, *White v. NCAA*, No. CV 06-0999-RGK, 2008 Jury Verdicts



must understand the backdrop of important cases involving the NCAA and its athletes that precede *O'Bannon*.<sup>59</sup> The two most contentious areas of law are copyright and collective bargaining, each discussed below.

### A. Copyright

The core of the *O'Bannon* dispute is the appropriation of student athletes' NILs—generally known as the right of publicity—which is a subset of copyright law in the broader context of intellectual property rights.<sup>60</sup> Conveniently, antitrust law and intellectual property law have many similarities, the strongest being that both areas of law seek to protect property rights, albeit in their own ways.<sup>61</sup>

In *Hart v. Electronic Arts, Inc.*,<sup>62</sup> the appellant, an ex-NCAA quarterback, sued Electronic Arts (EA), a video-game developer, alleging a violation of his right of publicity under New Jersey law.<sup>63</sup> EA raised a transformative use defense.<sup>64</sup> The primary inquiry of this defense is “whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative.’”<sup>65</sup> The New Jersey district court granted summary judgment in favor of EA; however, the Third Circuit reversed and remanded the district court’s decision.<sup>66</sup> The Third Circuit held,

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LEXIS 34462 (C.D. Cal. Mar. 3, 2008) (where parties settled following discussion of scholarship money not being enough to support true value of academic expenses, settlement provided that “plaintiffs will be able to make claims for reimbursement of educational expenses up \$2,500 a year incurred over the next three years. The funds can be used toward a degree or professional certificate at any accredited institution.”).

59. The list of cases discussed below is merely a snapshot of the various legal arenas in which these battles have been fought, this is not meant to be an exhaustive list.

60. See Lynne M. J. Boisineau, *Intellectual Property Law: The Right of Publicity and the Social Media Revolution*, GPSOLO (2013), [http://www.americanbar.org/publications/gp\\_solo/2013/may\\_june/intellectual\\_property\\_law\\_right\\_publicity\\_and\\_social\\_media\\_revolution.html](http://www.americanbar.org/publications/gp_solo/2013/may_june/intellectual_property_law_right_publicity_and_social_media_revolution.html).

61. See *infra* Section IV.a for a discussion of Antitrust Law and its methods for protecting property rights.

62. *Hart v. Electronic Arts, Inc.*, 717 F.3d 141 (3rd Cir. 2013).

63. See *id.* at 145 (“Specifically, Appellant’s claims stemmed from Appellee’s alleged use of his likeness and biographical information in its *NCAA Football* series of videogames.”).

64. See *id.* at 158.

65. *Id.* at 159 (quoting *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001)) (citations omitted). Electronic Arts bolstered their transformative use defense by further suggesting that the video game falls within the freedom of expression, asking the Court to determine whether the interest in safeguarding the right of publicity overpowers the interest in safeguarding free expression. *Hart*, 717 F.3d at 149.

66. *Hart*, 717 F.3d at 170.

*inter alia*, that EA’s videogames “do not sufficiently transform Appellant’s identity to escape the right of publicity claim.”<sup>67</sup>

On remand, the California district court consolidated *Hart* (on remand and mentioned above) with *O’Bannon* and *Keller* and additionally granted class certification for NCAA football and NCAA basketball players.<sup>68</sup> Around the same time, the certified class reached a settlement with EA and the Collegiate Licensing Company (CLC), but not with the NCAA.<sup>69</sup> The settlement provided a total of \$40 million payable to “student athletes whose names, jersey numbers and/or likenesses were used in EA video games.”<sup>70</sup> In order to accommodate the individual athletes’ circumstances, payment depended on “claims asserted by the student, the number of appearances, and extent of their appearance” with an opportunity to receive up to \$1000 per appearance.<sup>71</sup> This was a major win for the student athletes—perhaps the only win. The claims against the NCAA remain in dispute and are addressed in Part IV with the full analysis of *O’Bannon*.

### B. Collective Bargaining

In 2013, Kain Colter, a former Northwestern University quarterback, organized a movement to unite college athletes.<sup>72</sup> Colter hoped to “reset the balance of power between players, their universities, and the NCAA.”<sup>73</sup> Ultimately, this movement resulted in a push to unionize Northwestern University football players for collective bargaining purposes under the National Labor Relations Act (Act).<sup>74</sup>

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67. *Id.* However, the Court circled back to the First Amendment discussion by stating that EA’s “apparent use of Appellant’s likeness in *NCAA Football 2009* is protected by the First Amendment.” *Id.*

68. *O’Bannon v. NCAA*, 802 F.3d 2049, 1055 (9th Cir. 2015). See *infra* note 100 for class certification details.

69. Summary Jury Trial Data Collection Form, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 4:09-cv-01967-CW, 2013 Jury Verdicts LEXIS 10132 (N.D. Cal. Sept. 28, 2013). Settlement with the NCAA was impracticable because the antitrust claims had not yet been argued. *O’Bannon*, 802 F.3d 1049.

70. *In Re NCAA Student-Athlete Name & Likeness Licensing Litigation*, *supra* note 69.

71. *Id.*

72. *Northwestern Football Union Timeline*, ESPN (Aug. 17, 2015), [http://espn.go.com/college-football/story/\\_/id/13456482/northwestern-football-union-line](http://espn.go.com/college-football/story/_/id/13456482/northwestern-football-union-line). Colter, his teammates, and players from Georgia and Georgia Tech all wore armbands with the hashtag “#APU”, which stands for “All Players United.”

73. Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players’ Union Bid*, N.Y. TIMES (Aug. 17, 2015), [http://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrbsays-northwestern-football-players-cannot-unionize.html?\\_r=0](http://www.nytimes.com/2015/08/18/sports/ncaafootball/nlrbsays-northwestern-football-players-cannot-unionize.html?_r=0) (“He argued that with all the time demands on players and the ever-increasing money flowing through college sports, players deserved a greater say in issues like safety and long-term health care.”).

74. See *Nw. Univ. & Coll. Athletes Players Ass’n (CAPA)*, 362 N.L.R.B. No. 167 slip op. (Aug. 17, 2015).

Before any bargaining could take place, the NLRB's Regional Director had to determine whether the players were "employees" within the meaning of the Act.<sup>75</sup> On review, the Regional Director of the NLRB found that "players receiving scholarships from [Northwestern University] are employees under Section 2(3) of the Act."<sup>76</sup> This allowed the players to elect a representative for collective bargaining.<sup>77</sup> Northwestern University requested a review of the Regional Director's decision before the election took place, which the Board approved and took under review.<sup>78</sup>

In an appeal decision that effectively reversed the Regional Director, the Board denied jurisdiction over the issue and dismissed the petition filed to elect a representative.<sup>79</sup> The Board did not decide whether athletes were employees, even though that inquiry was central to the Regional Director's opinion.<sup>80</sup> Instead, the Board stated that asserting jurisdiction "would not promote stability in labor relations," which is one of the primary purposes of the Act, and therefore denied jurisdiction.<sup>81</sup>

If a silver lining exists in this decision, it lies in the Board's snub to the employee matter.<sup>82</sup> Since the Board avoided discussion of whether grant-in-aid scholarship athletes were employees, these athletes still enjoy the benefit of the Regional Director's affirmative decision on the matter, and students may use that opinion to bolster future arguments if student athletes can prove that the NLRB's involvement would promote labor stability.<sup>83</sup>

#### IV. ANTITRUST LAW AND APPLICATION TO *O'BANNON*

After setting the backdrop by introducing the various NCAA and student athletes' suits, it is now appropriate to shift to *O'Bannon* and antitrust law. In order to understand properly *O'Bannon* and its effects, one must first understand the basics of antitrust law since it is central to the dispute.

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75. Nw. Univ. & Coll. Athletes Players Ass'n (CAPA), 2014 NLRB LEXIS 221, at \*1 (N.L.R.B. Mar. 26, 2014). The University—effectively the employer—sought review after players were initially permitted to seek union representation. *Id.*

76. *Id.* (internal quotations omitted).

77. *Id.*

78. *See Nw. Univ. & Coll. Athletes Players Ass'n*, slip op. at 1. Ballots were held in secret until the decision from the Board was finalized. *Id.* at 1 n. 1.

79. *Id.* at 1.

80. *Id.* at 3.

81. *Id.* at 3.

82. *Id.*

83. *Nw. Univ. & Coll. Athletes Players Ass'n*, slip op. at 1.

#### A. A Snapshot of Sherman Antitrust Law<sup>84</sup>

From early on, the Sherman Antitrust Act<sup>85</sup> sought to “protect, not destroy, rights of property.”<sup>86</sup> Toward that end, in the first section, the Sherman Act outlaws “[e]very 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.”<sup>87</sup> The second section expands this restraint to prohibit “[e]very 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.”<sup>88</sup>

While Sherman seeks to promote competition, enhance trade, and protect property rights through its rigid prohibition on monopolies and conspiracies, the Supreme Court has recognized that not every restraint of trade is necessarily bad for commerce.<sup>89</sup> Instead, the Supreme Court has developed two approaches to evaluating antitrust inquiries. Under the first approach, “certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that antitrust laws do not require proof that agreement of that kind is anticompetitive in particular circumstances; agreement of such kind is unlawful, *per se*.”<sup>90</sup> Under the second approach, courts must approach “those [agreements] whose legality may be determined only upon a fact-specific inquiry into competitive effects . . . using what has become known as the ‘rule of reason.’”<sup>91</sup> Under this latter analysis, the true test of legality asks whether the restraint imposed is one aimed to regulate and promote commerce, or rather one to suppress or destroy competition.<sup>92</sup>

84. Sherman is just one area of antitrust law and was the focus of the athletes’ disputes, therefore, it will be the only area discussed in this paper.

85. “An act to protect trade and commerce against unlawful restraints and monopolies.” 51 Cong. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C §§ 1–7 (2012)).

86. *See* United States v. Terminal R.R. Ass’n, 224 U.S. 383 (1912). Many other purposes have been stated in relation to Sherman; however, property rights are most applicable to those abridged by the NCAA (i.e., NILs). For additional examples, see *TV Signal Co. v. Am. Tel. & Tel. Co.*, 462 F. 2d 1256, 1972 (S.D. Cal. 1972) (15 U.S.C. § 2 “is aimed at acquisition or retention of effective market control”) and *White & White, Inc. v. Am. Hosp. Supply Corp.*, 540 F. Supp. 951 (W.D. Mich. 1982) (“protecting competition . . . is the central purpose of” 15 U.S.C. § 2.).

87. 15 U.S.C. § 1 (2012).

88. 15 U.S.C. § 2 (2012).

89. *See, e.g.*, *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899) (overturning a lower court’s decision to wholly enjoin defendants from maintain combination in the contracts for cast-iron pipes).

90. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1998).

91. Timothy K. Armstrong, *Dueling Monologues on the Public Domain: What Digital Copyright Can Learn from Antitrust*, 1 U. CIN. INTEL. PROP. & COMPUTER L.J. 1 (2016), <http://scholarship.law.uc.edu/ipclj/vol1/iss1/1>.

92. *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

Application of the “rule of reason” in the Ninth Circuit—where the parties are litigating *O’Bannon*—follows a three-step framework outlined in *Tanaka v. University of Southern California*:

[1] The plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market. [2] If the plaintiff meets this burden, the defendant must come forward with evidence of the restraint’s procompetitive effects. [3] The plaintiff must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.<sup>93</sup>

The court concluded that *O’Bannon*’s claim was not egregious enough to be analyzed under the *per se* approach, so the court evaluated the claim under the “rule of reason.”<sup>94</sup>

#### *B. O’Bannon’s Suit*

In 2009, Ed O’Bannon, a former college basketball player, sued the NCAA and the CLC<sup>95</sup> when he noticed an avatar of himself on a video game at a friend’s house.<sup>96</sup> O’Bannon claimed that the NCAA’s amateurism rules—which prevented compensating athletes for the use of their NILs—were an illegal restraint on trade prohibited by Section 1 of the Sherman Antitrust Act.<sup>97</sup>

Concurrently, Sam Keller, a former NCAA quarterback, sued the NCAA, CLC, and EA Sports. Keller made the same allegations as O’Bannon; however, Keller brought his claims under Indiana’s and California’s right of publicity statutes.<sup>98</sup> Given the similarity of their claims, the court consolidated the cases during the pretrial proceedings and also consolidated *Hart* when it was remanded.<sup>99</sup> The court then

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93. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). The Court went on to explain the meaning of the term “relevant market” “encompasses notions of geography as well as product use, quality, and description. The geographic market extends to the area of effective competition . . . where buyers can turn for alternative sources of supply. The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.” *Id.* (quoting *Oltz v. St. Peter’s Comty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988)) (internal quotations omitted).

94. *O’Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015).

95. The Collegiate Licensing Company is “the entity which licenses the trademarks of the NCAA and a number of its member schools for commercial use.” *Id.* at 1055.

96. *Id.*

97. *Id.* 15 U.S.C. §§ 1–7 (2012).

98. *O’Bannon*, 802 F.3d at 1055.

99. *Id.* In addition to *Keller* and *O’Bannon*, the Third Circuit’s *Hart* case was consolidated into this action against EA and the CLC. *Id.*

granted class certification to NCAA student athletes in football and basketball.<sup>100</sup> As a class, the plaintiffs settled their claims with EA and the CLC—which the Court approved—and the cases were deconsolidated to pursue their separate claims.<sup>101</sup> O’Bannon and the NCAA went to a bench trial in 2014 to handle the antitrust claims.<sup>102</sup>

### 1. Application of Antitrust Law to O’Bannon’s Case

The primary components of the suit included proof of relevant markets that are affected by the NCAA’s amateurism rules and application of the “rule of reason” to the restraints imposed by those rules. The next three sections will discuss the district and circuit court’s grounds for deciding both issues. Although the focus of this article is the “rule of reason” analysis, it will first explore the relevant markets in order to understand the NCAA’s specific revenue streams from which student athletes are excluded.

#### *a. Relevant Markets*

In order to prove the NCAA’s alleged antitrust violations, O’Bannon had to prove an unfair restraint on trade in markets related to him and other NCAA athletes. The district court and circuit court agreed with O’Bannon that the NCAA’s rules unfairly restrained trade in both the college education market and the group licensing market.<sup>103</sup> The court admitted that the markets share many of the same participants, but “each market ultimately involves a different set of buyers, sellers, and products.”<sup>104</sup>

The student athletes specifically challenged NCAA rules that “prohibit student athletes from receiving any compensation from their schools or outside sources for the use of their [NILs] in live game telecasts, videogames, game rebroadcasts, advertisements, and other archival footage.”<sup>105</sup> Additionally, NCAA rules prohibit student athletes

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100. *Id.* at 1055–56 (The class consisted of “[a]ll current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I (formerly known as ‘University Division’ before 1973) college or university men’s basketball team or on an NCAA Football Bowl Subdivision (formerly known as Division I-A until 2006) men’s football team and whose images, likenesses and/or names may be, or have been, included or could have been included (by virtue of their appearance in a team roster) in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees.”).

101. *Id.* at 1056. To recall the settlement discussed in the *Hart* case, see *supra* Part II and note 70.

102. *O’Bannon*, 802 F.3d at 1056.

103. See *O’Bannon v. NCAA*, 7 F.Supp.3d 955, 965–69 (N.D. Cal. 2014).

104. *Id.* at 965.

105. *Id.* at 971.

from receiving any “financial aid based on athletics ability that exceeds the value of a full ‘grant in aid.’”<sup>106</sup> This grant-in-aid amount varies from school to school and covers the direct expenses associated with attending college, but not the ancillary expenses such as money for food or entertainment.<sup>107</sup> If a student acquires any additional aid, his scholarship will be revoked and amateur eligibility forfeited.<sup>108</sup> A payment from EA would qualify as financial aid that exceeds the value of a full grant-in-aid, and student athletes who accepted such payment would forfeit their eligibility.

### i. College Education Market

For the purposes of this discussion, Division I athletics and Division I education go hand in hand. Division I basketball and FBS<sup>109</sup> football competition are distinct from the other options available to aspiring athletes.<sup>110</sup> Although the other options do exist, studies have shown that “elite football and basketball recruits rarely forego opportunities to play FBS football or Division I basketball” in order to play in the alternative leagues.<sup>111</sup> These divisions attract the most competitive athletes and provide “unique bundles of goods and services.”<sup>112</sup> In return, the athletes provide their services both on the field and off, which include indirectly offering the schools the right to use their NILs.<sup>113</sup> Because there is no viable substitute for these leagues, the market is relevant and the restraint imposed by the NCAA is potentially unfair. In other words, there is only one competitive market for these sports. Similarly, there is

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106. *Id.*

107. *Id.* “The bylaws define a full grant-in-aid as financial aid that consists of tuition and fees, room and board, and required course-related books. This amount varies from school to school and from year to year.” *Id.* (internal quotations omitted).

108. *O’Bannon*, 7 F.Supp.3d at 972 (“Any student-athlete who receives financial aid in excess of this amount forfeits his athletic eligibility.”). The court also explained that students are free to earn any amount of money through on-campus or off-campus employment, so long as that employment is unrelated to their athletic ability. *Id.*

109. Football Bowl Subdivision; formerly known as Division 1-A, which is the top level of competition in college athletics.

110. *O’Bannon*, 7 F.Supp.3d at 965. “The only potential substitutes that the NCAA has identified are the opportunities offered by schools in other divisions, collegiate athletics associations, or minor and foreign professional sports leagues.” *Id.* at 966.

111. *Id.* at 967.

112. *Id.* at 965. “The bundles include scholarships to cover the cost of tuition, fees, room and board, books, certain school supplies, tutoring, and academic support services. . . . [T]hey also include access to high-quality coaching, medical treatment, state-of-the-art athletic facilities, and opportunities to compete at the highest level of college sports, often in front of large crowds and television audiences.”

113. *Id.* at 966 (“They also implicitly agree to pay any costs of attending college and participating in intercollegiate athletics that are not covered by their scholarships.”).

only one competitive market for a Division I education, and if students refuse to forego Division I athletics, then they impliedly refuse to forego a Division I education, which is arguably more important. Therefore, the courts reviewed the legality under antitrust law because the NCAA Division I athletic and academic opportunity is in a market of its own, which is restricted by NCAA policies.<sup>114</sup>

## ii. Group Licensing Market

The student athletes successfully argued and proved that a market exists in which, collectively, they could sell “group licenses for the use of their [NILs].”<sup>115</sup> This broad group licensing market breaks down into three subcategories that the student athletes presented: (1) live game telecasts; (2) sports video games; and (3) game rebroadcasts, advertisements, and other archival footage.<sup>116</sup> According to the courts, each subcategory has a proven demand,<sup>117</sup> and, “but for the NCAA’s compensation rules, college football and basketball athletes would be able to sell group licenses for the use of their NILs.”<sup>118</sup> As in the college education market, this is potentially an unfair restraint on trade and is subject to scrutiny under Sherman antitrust law.

### *b. Rule of Reason Analysis on Market Restraints*

As previously mentioned, the NCAA’s restraints on the college education market and group licensing market were not egregious enough to constitute *per se* violations, so the courts reviewed the claims under

114. *Id.* at 984.

115. *O’Bannon*, 7 F.Supp.3d at 968 (“Specifically, they contend that members of certain FBS football and Division I basketball teams would be able to join together to offer group licenses, which they would then be able to sell to their respective schools, third-party licensing companies, or media companies seeking to use student-athletes’ names, images, and likenesses.”).

116. *O’Bannon v. NCAA*, 802 F.3d 1049, 1057 (9th Cir. 2015). “(1) a submarket for group licenses to use student-athletes’ names, images, and likenesses in live football and basketball game telecasts; (2) a submarket for group licenses to use student-athletes’ names, images, and likenesses in videogames; and (3) a submarket for group licenses to use student-athletes’ names, images, and likenesses in game re-broadcasts, advertisements, and other archival footage.” *O’Bannon*, 7 F.Supp.3d at 968.

117. “With respect to live game telecasts, the [district] court noted that the TV networks that broadcast live college football and basketball games ‘often seek to acquire the rights to use’ the players’ NILs, which the court concluded ‘demonstrate[s] that there is a demand for these rights’ on the networks’ part. . . . With respect to video games, the court found that the use of NILs increased the attractiveness of college sports video games to consumers, creating a demand for players’ NILs . . . . And with respect to archival footage, the court noted that the NCAA had licensed footage of student-athletes—including current athletes—to a third-party licensing company, T3Media, proving that there is demand for such footage.” *O’Bannon*, 802 F.3d at 1057 (quoting *O’Bannon*, 7 F.Supp.3d at 968–71).

118. *Id.* (quoting *O’Bannon*, 7 F.Supp.3d at 968).



the “rule of reason.”

Under the “rule of reason,” plaintiffs carry the initial burden of proving anticompetitive effects of the alleged restraint in a relevant market.<sup>119</sup> If plaintiffs meet that burden, then the burden shifts to the defendants to provide procompetitive justifications for such restraint (i.e., the restraint still promotes competition rather than inhibit it).<sup>120</sup> Finally, the plaintiffs may rebut the justifications by proving that less restrictive alternatives exist to obtain virtually the same effect as the restraint otherwise would.<sup>121</sup>

At the district court trial, plaintiff’s expert spoke to the restraints that these compensation limits impose on student athletes.<sup>122</sup> He stated that the cap on student compensation through scholarships impeded the schools’ ability to compete with one another to compensate students.<sup>123</sup> But for the NCAA’s prohibition on unlimited compensation to athletes, member schools could pay students amounts exceeding the direct, aforementioned costs and thus acquire the best talent possible.<sup>124</sup> The court adopted this reasoning and came to a similar conclusion regarding the use of students’ NILs.<sup>125</sup>

To combat the plaintiffs’ initial burden, the NCAA gave five procompetitive justifications for the restraint imposed.<sup>126</sup> The NCAA needed the court to validate just one procompetitive justification in order to continue their practice of prohibiting student compensation.<sup>127</sup> The district court accepted the first and third justifications while rejecting the others.<sup>128</sup> The first justification was the NCAA’s need to preserve amateurism since it is a driver of consumer demand—though not the primary driver of demand.<sup>129</sup> The third was the integration of academics

119. *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001).

120. *Id.*

121. *Id.*

122. *O’Bannon*, 7 F.Supp.3d at 972.

123. *Id.*

124. *Id.*

125. *Id.* at 973 (“The recruit provides his athletic performance and the use of his name, image, and likeness. However, the schools agree to value the latter at zero by agreeing not to compete with each other to credit any other value to the recruit in the exchange. This is an anticompetitive effect. Thus, the Court finds that the NCAA has the power—and exercises that power—to fix prices and restrain competition in the college education market that Plaintiffs have identified.”).

126. *Id.* (“The NCAA asserts that the challenged restrictions on student-athlete compensation are reasonable because they are necessary to preserve its tradition of amateurism, maintain competitive balance among FBS football and Division I basketball teams, promote the integration of academics and athletics, and increase the total output of its product.”).

127. *See generally O’Bannon*, 7 F.Supp.3d 955.

128. *See id.* at 973–81.

129. *See id.* at 973–78. “The district court was not persuaded that amateurism is the *primary* driver of consumer demand for college sports—but it did find that amateurism serves some procompetitive purposes. The court first concluded that consumers are primarily attracted to college

and athletics; however, the court stated that the restraints on compensation are not the cause for the benefits derived from this integration.<sup>130</sup>

The final step of the “rule of reason” analysis requires the court to determine if less restrictive alternatives exist to serve the NCAA’s procompetitive justifications.<sup>131</sup> The district court found two substantially less restrictive alternatives that would be virtually as effective as the NCAA’s current amateur-status rule.<sup>132</sup> The suggested alternatives were: (1) allowing NCAA member schools to give student athletes grants-in-aid that cover the full cost of attendance; and (2) allowing member schools to pay student athletes small amounts of deferred cash compensation for use of their NILs.<sup>133</sup> The district court found that \$5,000 was the appropriate figure to allocate to student athletes in deferred cash payments held in trust and made available after student athletes left school.<sup>134</sup> The Court reached this figure through the cross-examination of Neal Pilson, a television sports consultant, formerly employed by CBS.<sup>135</sup> Pilson conceded his uncertainty when pressed to provide a fair amount to pay student athletes, but later stated, “I tell you that a million dollars would trouble me and \$5,000 wouldn’t.”<sup>136</sup>

On appeal, the Ninth Circuit found no error in the first alternative, but did find clear error in the second, suggesting that students would use the deferred cash payments intended to bridge the gap between expenses and scholarship dollars as a means to eventually reap the full benefits of their NILs.<sup>137</sup> Additionally, the Ninth Circuit struck down the district court’s basis for proposing the \$5,000 figure.<sup>138</sup> The Ninth Circuit said Pilson’s lack of concern for a potential payment of \$5,000 “is simply not enough to support the district court’s far-reaching conclusion that

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sports for reasons unrelated to amateurism, such as loyalty to their alma mater or affinity for the school in their region of the country.” *O’Bannon*, 802 F.3d at 1059.

130. See *O’Bannon*, 7 F.Supp.3d at 979–81. “The district court allowed that this was a viable procompetitive justification for the NCAA’s regulating the college education market, but it concluded that most of the benefits of academic and athletic ‘integration’ are not the result of the NCAA’s rules restricting compensation. Rather, these benefits are achieved by other NCAA rules—such as those requiring student-athletes to attend class, prohibiting athletes-only dorms, and forbidding student-athletes to practice more than a certain number of hours per week.” *O’Bannon*, 802 F.3d at 1059–60.

131. *Id.* at 1072.

132. *Id.* at 1074.

133. *Id.* at 1076–78.

134. *Id.*

135. *O’Bannon*, 802 F.3d at 1076–78.

136. *Id.*

137. *Id.* at 1078 (“Once that line is crossed, we see no basis for returning to a rule of amateurism and no defined stopping point; 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.”).

138. *Id.*

paying students \$5,000 per year will be as effective in preserving amateurism as the NCAA's current policy."<sup>139</sup>

*O'Bannon* is the NCAA and student athletes' most recent and relevant legal battle. Although it seems like a win for the student athletes, its holding is far from balancing the scales between the NCAA and its athletes. *O'Bannon* is peculiar because its claims are based in antitrust law. Under the antitrust "rule of reason" analysis, broad policy justifications permit otherwise illegal restraints to remain valid. In *O'Bannon*, while the court recognized the illegal restraint, the NCAA overcame its illegality by using justifications such as preserving amateurism and integrating academics and athletics. While the court accepted these justifications to continue permitting the restraints on student athletes, there are likely other justifications that student athletes will have to overcome in future battles with the NCAA.

#### V. CONSIDERATIONS NOT INCLUDED IN ANTITRUST ANALYSIS<sup>140</sup>

Antitrust law provides a unique safety net for parties caught in its web. While the law prohibits certain trade restraints on a *per se* basis, other restraints are deemed legal so long as adequate justification exists and the restraint is sufficiently narrow. The "rule of reason" analysis allows parties to argue the anticompetitive and procompetitive effects of the challenged restraint. The plaintiff can invalidate an agreement that imposes a restraint if he can prove that the restraint carries heavier anticompetitive effects than it does procompetitive effects, or that the restraint is overly restrictive. In contrast, the defendant can maintain his agreement if he can prove that the restraint furthers legitimate, procompetitive goals.<sup>141</sup> This three-part inquiry misses a consideration that may have a more stifling effect than anti-competitiveness: impracticability. The next section of this article focuses on various considerations that an antitrust analysis overlooks. Prior to that discussion, this section outlines some of the changes the NCAA has already made to accommodate the challenges that athletes have brought in their various complaints. The next sections discuss the economic and structural impracticalities of a pay-to-play scheme in the NCAA.

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139. *Id.*

140. There are many more considerations not considered in this analysis. Some of those considerations that should be brought to light are: fair compensation for past players who created demand for universities and conferences, the revolving door of NCAA athletics non-contract based performance, additional areas of compensation that athletes do not realize, and more.

141. Stephen F. Ross & Wayne S. DeSarbo, *A Rapid Reaction to O'Bannon: The Need for Analytics in Applying the Sherman to Overly Restrictive Joint Venture Schemes*, 119 PENN ST. L. REV. PENN STATIM 43, 45 (2015), [http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1130&context=fac\\_works](http://elibrary.law.psu.edu/cgi/viewcontent.cgi?article=1130&context=fac_works).

### A. NCAA Changes in the Wake of Student Athlete Challenges

In 2014, the NCAA Division I Board of Directors “restructured how schools and conferences will govern themselves” by allowing more student-athlete input in key issues at all levels.<sup>142</sup> After all, who would know what student athletes need better than a student athlete?

Under this new model, the Division I Board of Directors includes student athletes, faculty representatives, athletics directors, and a female administrator.<sup>143</sup> Additionally, the top five conferences streamlined the legislative process to put issues immediately before the Board and now have three student-athlete representatives from each conference to vote on conference rule changes.<sup>144</sup> Another benefit that student athletes will indirectly receive from these changes comes from the autonomy granted to the five major conferences (SEC, ACC, Big 10, Big 12, and Pac 12). Now, these conferences will be able to govern areas related to student-athlete wellbeing such as: (1) health and wellness; (2) meals and nutrition; (3) financial aid; (4) expenses and benefits in student-athlete support and pre-enrollment support; (5) insurance and career translation; (6) career pursuits; (7) time demands; (8) transfer eligibility; (9) academic support; (10) recruiting; and (11) personnel.<sup>145</sup> The NCAA selected these conferences based on their commitment to student-athlete wellbeing and their preparedness to face “public comment and criticism . . . from advocates for pay-for-play or a professional athletics system for colleges and universities.”<sup>146</sup> These pressures will, perhaps, help student athletes in their quest for compensation.

While these changes will not necessarily earn players the paychecks they were hoping for, they seem markedly appropriate given the comments of the NLRB in the *Northwestern* decision. There, the Board denied jurisdiction because collective bargaining through unionization would not promote labor stability.<sup>147</sup> The effective result of both the NCAA’s changes and the NLRB’s decision is to put the NCAA and its athletes on the same side of the table, tackling issues together.

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142. Hosick, *supra* note 55.

143. *Id.*

144. *Id.*

145. *Division I Steering Committee on Governance: Recommended Governance Model* 29-30, NCAA, <http://www.ncaa.org/sites/default/files/DI%20Steering%20Committee%20on%20Gov%20Proposed%20Model%2007%2018%2014%204.pdf>. The financial aid permissions will include, but not be limited to, autonomy in eligibility, period of award, reduction or cancellation and renewals or non-renewals. *Id.*

146. *Id.* at 28.

147. Nw. Univ. & Coll. Athletes Players Ass’n (CAPA), 362 N.L.R.B. No. 167 slip op. (Aug. 17, 2015).

*B. Economic Barriers*

The extralegal challenges in compensating student athletes are overwhelming and impracticable. For starters, the district court's decision in *O'Bannon* contained a void that went overlooked by the Ninth Circuit. In order to make an antitrust claim, the challenging party must prove that an unfair restraint is imposed on a legally-recognized right of theirs. In the past, student athletes had never held a property right in their NILs because the NCAA has traditionally valued each NIL at zero. Now, however, the NCAA suggests that a student athlete's value is equal to \$5,000. Yet the footing for that conclusion is unstable, as the district court rested on an expert's loosely stated range stretching from \$5,000 to \$1,000,000—a range that the Ninth Circuit later invalidated. Therefore, the student athletes' argument is premised on a property right that has never been legally recognized, while this newfound property right is grounded on shaky footing. Perhaps the reason for both the district court and Ninth Circuit decisions is that the NCAA and the courts have simultaneously realized student athletes' NILs have value, but assigning a monetary value is nearly impossible.

Recall that antitrust law seeks to protect property rights by granting the owners of those rights the freedom to dispose of them at their own behest. But, a property right must first exist in order for it to be protected. In order for the right to exist and be recognized, certain economic conditions must be met; otherwise, the right does not exist, will not be recognized, and cannot be protected by antitrust law.

Consider the following conditions in terms of student athletes. First, the financial incentive must encourage the athletes to compete.<sup>148</sup> Second, the student athletes' economic value must be capable of being misappropriated.<sup>149</sup> Third, but for being paid, athletes would not play.<sup>150</sup> Fourth, granting student athletes a property right and compensating them is the best way to advance the public interest.<sup>151</sup> Combining the first and third principles of this inquiry with the district court's "valuation" in *O'Bannon* illustrates the conundrum of assigning student athletes value.

Under the first and third principles, the student athletes must show that more athletes would compete if the NCAA paid its student athletes. However, an article released in 2014 suggests that the NCAA's

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148. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 22 (2003).

149. *Id.* at 23.

150. *Id.*

151. Brief for Law and Economics and Antitrust Scholars as *Amici Curiae* in Support of Appellant at 9, *O'Bannon v. NCAA*, 802 F.3d 1049 (9th Cir. 2015) (Nos.14-16601, 14-17068) (citing *Zacchini v. Scripps-Howard Broad Co.*, 433 U.S. 562, 563 (1977)).

participation levels continue to climb, even though athletes are not paid. The NCAA reported that the 2013–2014 season reached all-time highs with 472,625 players on 19,086 teams across twenty-three different sports.<sup>152</sup>

Now consider the potential challenges to assigning a fair value to each of the 472,625 student athletes. While the district court deemed \$5,000 fair, one would be hard-pressed to think each of those 472,625 players represent the same value. Perhaps the NCAA already demonstrated that by drawing the immediate distinction between Division I athletics and the other divisions. Would that same distinction not exist in the smaller sampling of student athletes that comprise Division I?

Consider the conjoint analysis<sup>153</sup> discussed in *A Rapid Reaction to O'Bannon: The Need for Analytics in Applying the Sherman Act to Overly Restrictive Joint Venture Schemes*.<sup>154</sup> In this analysis, the author considered the limits to student-athlete compensation in order to maintain consumer demand for college football and basketball.<sup>155</sup> The results indicated that not paying athletes created the most positive effect on consumer demand, while paying the athlete between \$5,000 and \$50,000 showed incrementally worse effects.<sup>156</sup> Therefore, if student athletes are paid based on their value and their value is based on their demand, but consumer demand is inversely related to compensation, then paying athletes will decrease their value. More stifling than this is the fact that the analysis began with assigning three different ticket values to three different games, where the price of the ticket also inversely affected demand. Therefore, a vicious cycle begins: when student athletes are compensated, ticket prices increase to offset costs, which in turn also decreases consumer demand, subsequently decreasing the value of the student athlete, and so on.

These two analyses represent basic economics principles that cannot be avoided with the compensation of student athletes.

### C. Practicability

While the economic barriers previously discussed heighten the

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152. Greg Johnson, *Athletics Participation Rates Continue to Rise: More Than 19,000 Teams Competed in NCAA Sports in 2013–2014*, NCAA (Oct. 15, 2014), <http://www.ncaa.org/about/resources/media-center/news/athletics-participation-rates-continue-rise>.

153. “Conjoint analysis is a set of market research techniques that measures the value or utility a specific market places on each feature or attribute of a designated brand of product/service and predicts the value of any combination of features.” Ross & DeSarbo, *supra* note 141, at 53.

154. *See id.*

155. *Id.* at 53.

156. *Id.*

hurdles for student-athlete compensation, another major hurdle still exists: practicability.<sup>157</sup> The conjoint analysis depicted the circular effect compensation would have on demand and value of student athletes from a broad perspective. Yet, what the analysis did not consider was varying demands across different conferences, teams, and players.<sup>158</sup> Since demand varies at all three levels and the cause for the demand is indeterminate, there is no fair solution to student-athlete compensation.

### 1. Conference Level

Starting at the conference level, analytics show that consumer demand varies from one conference to the next, even including within the top five conferences discussed in the NCAA's recent policy changes.<sup>159</sup> Each season, *Sports Media Watch* compiles data on television ratings for Division I football games. This data is then broken down to show the various ratings by conference and team.<sup>160</sup> Based on the 2013 study, the SEC had the most viewers and the highest television ratings, followed by the Big Ten, ACC, Pac 12, Big 12, MWC, AAC, MAC, C-USA, and Sun Belt, respectively.<sup>161</sup> In 2013, the SEC had an average of 3.8 million viewers per week, while the Big 10 had an average of 2.92 million, indicating a stark difference in consumer demand.<sup>162</sup> Then, in 2014, the SEC remained atop the list averaging 4.52 million viewers per week, while the Big 10 averaged 2.69 million.<sup>163</sup> Certainly, players graduated and left the various teams in the conferences and demand changed, but viewership did not dissipate. This indicates that the conference—and not solely the players—drives at least *some* demand. Student athletes' NIL value at a conference level is therefore undefined because, outside of individual consumer surveys, it is impossible to determine which viewers are watching because of the

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157. This is just the tip of the iceberg for the practicability discussion. Other considerations that should be brought to light are: student-athlete tenure and its varying effect on team demand; compensation already offered to students through intangibles, scholarships, and grants; NFL and NBA preparation and readiness not offered through other channels; and fame and reputability for future compensation.

158. See *College Football TV Ratings for Teams and Conferences: 2013 Regular Season*, SB NATION (Dec. 17, 2013), <http://www.goodbullhunting.com/2013/12/17/5216550/college-football-tv-ratings-2013-regular-season-final-sec>.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*; Phil Miller, *Analyzing 2014 College Football Television Ratings*, SPORTS ECONOMIST (Feb. 9, 2015), <http://thesportseconomist.com/2015/02/09/analyzing-2014-college-football-television-ratings/>.

163. *Analyzing 2014 College Football Television Rankings*, *supra* note 162.

players and which are watching because of the conference.

## 2. Team Level

The data from the next level, team demand, indicates that the University of Alabama—the top rated member of the SEC in 2013—had an average of 6.47 million viewers per week, while the Ohio State University—the second rated member of the Big Ten in 2014—had 5.24 million.<sup>164</sup> Then in 2014, Alabama had 6.02 million viewers per week, while Ohio State had 3.81 million.<sup>165</sup> Although demand for the Big 10 conference remained high, demand for the individual school, Ohio State, dropped. Interestingly, Ohio State won the National Championship in 2014, suggesting the program had the best players in the NCAA and therefore *should* have more viewers. This again indicates that the demand for the student athlete is indeterminate, and calculating fair compensation for that student athlete is nearly impossible if the conference, as well as the team, drive demand.

## 3. Player Level

Now consider demand at the level of the individual student athletes. Consumer demand in relation to individual student athletes varies just like team and conference demand. Recall that value is based on consumer demand; a student athlete's valuation, which would likely correspond to his payment, must therefore include demand that he drives individually. This level of demand is likely the student athletes' most practical argument for compensation.

In *O'Bannon*, the plaintiffs presented evidence at trial regarding a market for jersey sales that creates additional value for the student athletes' NILs.<sup>166</sup> As the district court properly noted, the plaintiffs abandoned this argument because it would not have bolstered the argument for group licenses; rather, it would have suggested proof of a market for individual licenses.<sup>167</sup> The NCAA could easily recognize which individual player is responsible for driving the demand for a particular jersey because the player's name is stitched on the back. Identifying the individual player responsible for driving demand based on the name on the jersey suggests that individual licenses should be granted to those players, but does not support a claim that a group license is necessary. However, the NCAA rules prohibit colleges from

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164. *Id.*

165. *Id.*

166. *O'Bannon v. NCAA*, 7 F.Supp. 3d 955, 968 n. 4 (N.D. Cal. 2014).

167. *Id.*



selling jerseys depicting players' names, yet do not prohibit them from selling jerseys with the most popular players' numbers.<sup>168</sup>

Even though the plaintiffs abandoned the argument, they failed to address how NCAA rules would additionally prohibit the schools from identifying individuals through jersey sales. Perhaps it was just a coincidence that a consumer could easily purchase a #8 jersey from Oregon and a #5 jersey from Florida State, representing Marcus Mariota and Jameis Winston—two 2014 Heisman Trophy finalists.<sup>169</sup> The NCAA eventually recognized the potential legal threat of appropriation by simply selling jerseys with the numbers of the most popular players. In response, some member schools ceased selling jerseys with popular players' numbers on them in order to avoid a battle similar to the one faced when student athletes' names were stitched on the back.<sup>170</sup> Currently, these schools are selling jerseys with generic numbers on them, consistent from year to year, and unassociated with a particular player.

Practical challenges come into play when the NCAA changes its bylaws to allow schools to pay athletes for demand driven by and attributable to each student athlete. Additionally, suppose the NCAA allowed schools to print names on the back of their jerseys, thus allowing consumers to communicate their support of a certain player. Because the NCAA must give a portion of those revenues to the player, the school, the distributor, and the manufacturer, and because all of these portions add up to an increased cost to the consumer, the vicious demand cycle is again initiated.<sup>171</sup>

Adding to this dilemma, let us again suppose the NCAA will allow schools to compensate student athletes for demand driven and attributable to each student athlete. However, suppose also that the NCAA has maintained its current policy of prohibiting jerseys from displaying players' names. Under this scenario, a consumer can purchase a jersey displaying the numbers of the most popular players on the field. Therefore, with respect to Ohio State, a person can purchase a

168. NCAA Academic and Membership Affairs Staff, *2009–10 NCAA Division I Manual*, NCAA (Aug. 1, 2009), <http://www.ncaapublications.com/productdownloads/D110.pdf>.

169. Jason Kirk, *NCAA President Faces Fact That Colleges Sell Jerseys with Real Player Numbers*, SB NATION (June 20, 2014), <http://www.sbnation.com/college-football/2014/6/20/5827802/ncaa-player-jerseys-numbers-mark-emmert-obannon>; Michael Casagrande, *Heisman Trophy 2014: Final Voting Results and Ballot Totals*, AL.COM (Dec. 13 2014), [http://www.al.com/alabamafootball/index.ssf/2014/12/heisman\\_trophy\\_2014\\_final\\_voti.html](http://www.al.com/alabamafootball/index.ssf/2014/12/heisman_trophy_2014_final_voti.html).

170. Marc Tracy, *Days of Selling Popular College Players' Jerseys Seem Numbered*, N.Y. TIMES (Aug. 5, 2015), [http://www.nytimes.com/2015/08/06/sports/ncaafootball/days-of-selling-popular-college-players-jerseys-seem-numbered.html?\\_r=0](http://www.nytimes.com/2015/08/06/sports/ncaafootball/days-of-selling-popular-college-players-jerseys-seem-numbered.html?_r=0).

171. With that said, the NFL sells individual player's jerseys and their system seems to be working just fine, so this challenge could likely be overcome with the requisite rule changes and margin cuts.

#7 jersey with a degree of confidence that the public will recognize his or her support for wide receiver Jalin Marshall. However, that is not necessarily true, because the #7 jersey has been associated with a handful of marquee Ohio State players in the past.<sup>172</sup> Yet, based on the NCAA restrictions and profit-sharing plan, Jalin Marshall will never see the revenues generated from that jersey sale. Instead, those profits go into the NCAA revenues that are distributed to its member schools based on a schedule.

The counter to this argument could be to compensate the player who wears the jersey at the time of the purchase. Perhaps the consumer purchased the #7 jersey to communicate her love for NFL standout Joey Galloway, who played for Ohio State in the '90s; or, perhaps she bought the jersey to show her support for Chris Gamble, who was a member of the 2002 Ohio State National Championship team.<sup>173</sup> After all, consumers purchase historical NFL jerseys all the time, and one may safely assume the same for NCAA football jerseys as well. For example, a consumer may purchase a Bernie Kosar jersey—#19, and a former quarterback for the Cleveland Browns—because she still supports the team now even though Kosar is no longer a part of it. Yet suppose Kosar's name was not on the back of the jersey. In that case, should the player bearing #19 now get the profits from the jersey?

There are practical challenges associated with the system towards which the NCAA is trending. The member schools have begun selling generic jerseys with the same numbers on them from year to year. To be fair, this trend began after the *O'Bannon* decision as schools realized the potential threat of the student athletes' NIL appropriation, so there is a slight circular-reference problem with this hypothetical.<sup>174</sup> Nevertheless, suppose that student athletes were compensated for individual demand. The sale of each student athlete's jersey is the easiest measure of demand at the individual level. Teams only sell generic jerseys and not any name- or number-specific options. The dilemma that exists from trying to determine what drove the demand for the jersey sale has two potential solutions, each of which is improbable. First, the NCAA amends the bylaws to require schools to sell jerseys

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172. *All Players Who Wore Jersey Number 7*, THE COLUMBUS DISPATCH: BUCKEYEXTRA, <http://buckeyextra.dispatch.com/content/pages/player-jersey-database-results.html?jersey=7> (last visited Feb 24, 2016).

173. *Id.*

174. The circular-reference problem goes as such: NCAA schools would not stop selling specifically numbered jerseys if the student athletes' NIL rights had not been recognized in *O'Bannon*. Since they were recognized, student athletes could likely enjoin the schools from selling such jerseys, or make another case to cause compensation for the sale. Likewise, since they had been recognized, the schools stopped selling the specifically numbered jerseys to mitigate the risk of an injunction or payment.

with student athletes' names on them. Second, schools compensate student athletes at a rate corresponding to the proceeds from the generic jersey sales, which again introduces the *O'Bannon* challenge of an indeterminate driver of demand. We know there is a demand for the team itself, and we know there is a higher demand for some players' jerseys compared to others. This would start the same argument all over again when the marquee players realize they are receiving the same stipend as the others. Perhaps the same argument would surface if SEC players were paid the same as the Big Ten athletes even though the SEC is more competitive in revenue and viewership.

Even if the student athletes overcome the Sherman Antitrust Law, the bigger barrier of practicability still exists. Additionally, there are several other considerations this article does not highlight that may still affect the practicability of student-athlete compensation.<sup>175</sup> These considerations are just the tip of the iceberg.

## VI. CONCLUSION

Regardless of one's personal stance on student-athlete compensation, challenges clearly exist when modeling an ideal compensation model. Any model would require a complete overhaul of the NCAA structure and its bylaws, essentially creating a league directly comparable to the NFL or NBA. As consumers, the public should be hesitant to adopt that system given the youth involved and the risks to which they would be exposed. It is important to remember that in a system where the student athletes are fighting to get the most they can for their perceived value, the NCAA will seek to squeeze that value—ultimately hurting both parties. The NCAA and the student athletes will be fighting a proxy battle through their agents, each trying to achieve the best terms for their side. This battle will unfold in place of putting the best product on the field, thereby decreasing consumer demand and hurting third-party fans.

Part I of this article introduced the idea of the NCAA and the revenue gap between it and its student athletes. Part I further provided a guideline of the article's process for reaching the antitrust claims and practicability challenges regarding student-athlete compensation. Part II discussed the NCAA's history, the role amateurism plays in the NCAA, and the gap in revenue mentioned above. Part III discussed a brief history of the cases the NCAA and its athletes have battled, ultimately leading to *O'Bannon*. Part IV continued with *O'Bannon* by introducing antitrust law—the basis for *O'Bannon*'s suit—and how it affected the outcome of the case. Following this was an analysis of the

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175. See *supra* note 157.

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considerations that antitrust, the courts, and student athletes have yet to evaluate in order to earn fair compensation. This section highlighted various challenges related to NCAA governance, basic economics, and practicability. The final verdict is this: while paying student athletes may eventually be legal in the future, it is not presently feasible, given the structural and economic hurdles that currently exist.