The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense

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This Comment examines how the evolution of the NCAA, from an organization designed to promote fair competition and integrate intercollegiate sports into higher education, to a tax-exempt entity with annual revenues of over $500 million, could affect its favored antitrust status by the courts. The Comment first discusses how the NCAA has evolved over time. The author then examines how courts struggled to evaluate the organization's antitrust liability, given its role in promoting amateurism, and how a Supreme Court loss ultimately helped shield the NCAA from antitrust liability in its dealings with student-athletes by accepting the preservation of amateurism as a pro-competitive benefit. With this framework in mind, the Comment examines a recently filed antitrust challenge brought by former student-athletes with the potential to penetrate the NCAA's defense and the merits of the lawsuit's approach. Finally, the Article discusses potential less restrictive alternatives the NCAA may choose to implement to avoid this potentially anticompetitive behavior while maintaining amateurism.

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I. INTRODUCTION

The impetus behind the formation of the National Collegiate Athletic Association (NCAA) was a directive from President Theodore Roosevelt to clean up the violent game of football.[1] Over 100 years after its formation, the NCAA has grown past its humble beginnings. Along with regulating collegiate athletics, it has evolved into a tax-exempt entity with annual revenues of over $500 million.[2] This growth reflects the two conflicting sides of the organization. On the one hand, the organization still serves its original purpose, "to govern competition in a fair, safe, equitable and sportsmanlike manner, and to integrate intercollegiate athletics into higher education so that the educational experience of the student-athlete is paramount."[3] On the other hand, the organization has entered into billion dollar television deals and receives a piece of the four-billion-dollar-a-year collegiate licensing market.[4]

Historically, courts have given deference to the NCAA's mission of maintaining amateurism in collegiate athletics.[5] As detailed in Part III, courts have generally found NCAA restrictions on student-athletes to be noncommercial and therefore not in violation of the Sherman Act, while giving closer scrutiny to commercial restrictions affecting business operations. However, as the NCAA grows and changes, the question arises whether that deference should still exist, and if so, what should the scope of that deference be? A recent class action lawsuit has called into question the continuing validity and scope of

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1. JOSEPH N. CROWLEY, IN THE ARENA: THE NCAA'S FIRST CENTURY 9-19 (2006). Roosevelt met with representatives from Harvard, Yale, and Princeton Universities in 1905, urging them to reform the game after a rash of fatalities and serious injuries. In 1906, the Intercollegiate Athletic Association of the United States was formed, and four years later, it changed its name to the National Collegiate Athletic Association. *Id.* at 10.

2. Press Release, NCAA, For the Record: NCAA Responds to *Atlanta Journal Constitution* Article Titled *Megabucks, No Taxes Make Colleges Cheer* (Mar. 31, 2007), *available at* http://www.ncaa.org (follow "Resources" hyperlink; then follow "News Releases" hyperlink; then follow "News Releases Archive" hyperlink; then follow "2007: For the Record" hyperlink).

3. *Our Mission*, NCAA, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About%20The%20NCAA/Overview/mission.html (last visited Oct. 19, 2010).

4. Richard Sandomir, *N.C.A.A. Can Opt Out of Deal with CBS After 2010*, N.Y. TIMES, Mar. 16, 2009, at B15; Tim Lemke, *NCAA Merchandise Sales Drop*, WASH. TIMES, Oct. 15, 2009, http://www.washingtontimes.com/news/2009/oct/15/sportsbiz-ncaa-merchandise-seeing-its-sales-fall-o/.

5. Jones v. Nat'l Collegiate Athletic Ass'n, 392 F. Supp. 295, 298 (D. Mass. 1975).

this deference to amateurism.[6] This class action has consolidated several complaints attacking the NCAA's use, through contracts, of the student-athlete's right to publicity.[7] This suit poses a credible and interesting threat to the NCAA for several reasons. First, former players have filed the suit on behalf of former players only.[8] This has the potential of eliminating or reducing the persuasiveness of the preservation of amateurism as a pro-competitive benefit.

Second, the lawsuit addresses many of the NCAA's actions in marketing athletes.[9] This also has the effect of shifting the discussion from the protection of amateurism to a discussion of business practices, an area where antitrust challenges to the NCAA have tended to be more successful.[10] The stakes of this suit may be the highest the NCAA has faced.[11] As discussed above, the collegiate licensing market is a multibillion dollar industry, and the Sherman Act's trebling provision heightens the impact of an adverse verdict.[12] On top of potential monetary damages in the tens or hundreds of millions of dollars, the NCAA could be forced to change fundamentally its relationship with the student-athlete.[13] The credibility of this threat is evidenced by EA Sports, a named coconspirator in the suit, which abandoned its popular NCAA video game that has existed since 1998, just one year after competitor 2K Sports discontinued its own similar game.[14]

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6. *See In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. 4:09-cv-01428-CW (N.D. Cal. Jan. 15, 2010), *available at* http://docs.justia.com/cases/federal/district-courts/california/candce/4:2009cv04128/220158/41/0.pdf.

7. *Id.* (consolidating Keller v. Nat'l Collegiate Athletic Ass'n, No. C-09-01967, 2009 WL 1270069 (N.D. Cal. May 5, 2009), and O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. C-09-03329, 2009 WL 2416720 (N.D. Cal. July 21, 2009), as well as several other complaints).

8. Complaint at 2, O'Bannon v. Nat'l Collegiate Athletic Ass'n, No. CV-09-3329, 2009 WL 2416720 (N.D. Cal. July 21, 2009) [hereinafter O'Bannon Complaint].

9. *Id.* at 37-58.

10. *Compare* Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n, 40 F. Supp. 2d 1275, 1286 (D. Kan. 1999) (dismissing claim and holding a restriction was noncommercial and designed to protect student amateurism), *with* Metro. Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n, 339 F. Supp. 2d 545, 552 (S.D.N.Y. 2004) (finding restriction could be commercial and denying summary judgment).

11. Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Anti-Trust Case*, SPORTS ILLUSTRATED, July 21, 2009, http://sportsillustrated.cnn.com/2009/writers/michael_mccann/07/21/ncaa/index.html.

12. 15 U.S.C. § 15 (2006).

13. McCann, *supra* note 11.

14. Eddie Makuch, *EA Sports To Discontinue NCAA Basketball Series*, BLAST MAG., Feb. 10, 2010, http://blastmagazine.com/the-magazine/gaming/gaming-news/2010/02/ea-sports-to-discontinue-ncaa-basketball-series/.

This Comment will address the implications of the antitrust threat posed by this suit. Part II of this Comment will briefly document the changes in the NCAA, with a focus on the increasing monetization of both the games and the athlete. Part III will detail the history and evolution of antitrust challenges against the NCAA, both before and after the United States Supreme Court's landmark decision in *National Collegiate Athletic Ass'n v. Board of Regents*.[15] Finally, Part IV will examine the strengths and weaknesses of the claims brought in this suit and potential alternative options the NCAA can adopt to preserve the spirit of amateurism while reducing antitrust risk.

II. A BRIEF OVERVIEW OF THE EVOLUTION OF THE NCAA

Decades before the NCAA held a significant enforcement role, the protection of amateurism was a hot-button issue.[16] Yet while the issue was identified, the still-growing membership could not agree whether it was the NCAA's or the individual schools' role to protect it.[17]

Changes in the organization have loosely corresponded with the growth of new media, beginning with radio in the 1920s.[18] As public attention grew, so did the NCAA. In 1921, it held the first collegiate championship for track and field.[19] Eighteen years later in March 1939, the first basketball championship followed, producing a financial loss.[20] That year also saw the first telecast of an intercollegiate sporting event, a Columbia University versus Princeton University basketball game; a year later, football followed with the broadcast of a University of Maryland versus University of Pennsylvania game.[21]

Growth in media exposure and the resulting increase in revenues led to problems and, in turn, attempted solutions. Following several

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15. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984).

16. CROWLEY, *supra* note 1, at 17-18.

17. *See id.* at 22.

18. *Id.* at 23 (noting the growth in radio sales from $60 million in 1922 to $842.5 million in 1929).

19. *The History of the NCAA*, NCAA, http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About%20The%20NCAA/Overview/history.html (last visited Oct. 19, 2010).

20. CROWLEY, *supra* note 1, at 31.

21. *Id.* at 37-38. Other sources suggest the first broadcast was a baseball game between Columbia and Brown, and the first football telecast was of Fordham and Waynesburg of Pennsylvania. Philip Hochberg & Ira Horowitz, *Broadcasting and CATV: The Beauty and the Bane of Major College Football*, 38 LAW & CONTEMP. PROBS. 112, 113 (1973).

abuses in the recruiting process, the organization adopted what became known as the "Sanity Code" (Code) as a potential solution.[22] The Code regulated recruitment of student-athletes, limited scholarships to tuition and fees only, and regulated financial contact of alumni with prospective athletes.[23] Notably, the Code was the first set of regulations including an enforcement provision, which was initially limited to termination of membership.[24] After a rash of gambling scandals, the NCAA appointed a full time executive director.[25] These were the first steps in creating a stronger, more centralized NCAA.

The NCAA also became wary of radio and television and the effect they might have on attendance at smaller schools. The organization sponsored a study in 1936 to evaluate the effects of radio on live attendance; however, the results were inconclusive.[26] The response to television was much stronger. In 1951, a partial moratorium on football broadcasts was passed in response to declining attendance.[27] This was followed by the creation of a NCAA Television Steering Committee, which limited games shown and blacked out certain games.[28] In 1952, as part of the plan, NBC signed a one-year contract for the rights to all games for $1.2 million.[29] The NCAA kept 60% of the receipts and the competing universities received 40%.[30] Schools such as the University of Notre Dame contested the plan, arguing that it cost the school as much as $1 million in 1952.[31] The plan continued in various iterations, with rights fees steadily increasing—reaching $31 million in 1982.[32]

However, as the money involved grew, so did discontent. In 1977, sixty-two major football programs joined together to form the College Football Association (CFA) to coordinate internal NCAA

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22. Craig A. Depken II & Dennis P. Wilson, *NCAA Enforcement and Competitive Balance in College Football*, 72 S. ECON. J. 826, 828 (2006).

23. *Id.*

24. *Id.* While the Code did provide for enforcement, the two-thirds vote needed to remove a member institution proved to be too difficult a threshold to meet. CROWLEY, *supra* note 1, at 31.

25. CROWLEY, *supra* note 1, at 31.

26. *Id.* at 37.

27. Hochberg & Horowitz, *supra* note 21, at 114.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Big Losses Cited*, N.Y. TIMES, Jan. 4, 1953, at S5.

32. CROWLEY, *supra* note 1, at 40.

lobbying efforts in favor of the most popular programs.[33] In 1981, the CFA was offered a four-year, $180 million contract by NBC; however, the NCAA threatened to expel institutions which agreed to the offer and thereby cut them out of the lucrative men's basketball tournament.[34] The University of Oklahoma and the University of Georgia filed an antitrust suit on behalf of the CFA members in response to this threat.[35] As discussed in more detail in Part III, the Supreme Court ruled in favor of the CFA members and nullified existing NCAA contracts worth $280 million.[36] As a result of the Court's decision, the number of games available on television skyrocketed, while rights fees decreased.[37]

CFA schools prospered, reaching a five-year, $210 million dollar deal with ABC in 1991; however, the association was dealt a blow when Notre Dame decided to sign its own four-year, $38 million deal with NBC.[38] The CFA continued to face internal pressure from member schools and conferences which found better deals outside of the CFA.[39] In 1997, the incentives for schools to negotiate outside of the CFA became too great and the organization folded.[40] Meanwhile, the NCAA climbed to new heights with its college basketball contracts, striking a ten-year, $6 billion dollar deal with CBS for the rights to broadcast its college basketball tournament.[41] Ticket revenues climbed as well, reaching over $757 million in 1999.[42] In 2003, Division I schools generated an average of $7.95 million in profit per school from football and men's basketball.[43] As of 2007, the annual operating revenue of the NCAA was approximately $550 million.[44]

Just as radio and television fueled NCAA growth, so has new media such as the Internet. Corporations pay multimillion dollar fees

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33. John J. Siegfried & Molly Gardner Burba, *The College Football Association Television Broadcast Cartel*, 49 ANTITRUST BULL. 799, 802 (2004).

34. *Id.* at 803.

35. *Id.* at 804.

36. *Id.* at 805.

37. *Id.* at 806.

38. Richard Sandomir, *Notre Dame Scored a $38 Million Touchdown on Its TV Deal*, N.Y. TIMES, Aug. 25, 1991, at S9.

39. Siegfried & Gardner Burba, *supra* note 33, at 819.

40. *Id.*

41. CROWLEY, *supra* note 1, at 175.

42. Lawrence M. Kahn, *Markets: Cartel Behavior and Amateurism in College Sports*, 21 J. ECON. PERSP. 209, 209 (2007).

43. *Id.* at 219.

44. Press Release, NCAA, *supra* note 2.

to be designated as "official NCAA corporate partners."[45] These sponsors receive special rights; for example, the sponsors allow fans to view footage and vote online for promotions such as the "Pontiac Game Changing Performance."[46] NCAA rules prohibit schools from using a student-athlete's picture and forbid athletes from promoting commercial ventures, yet athletes' exploits appear right next to slogans like "sponsored by Pontiac." The NCAA and Thought Equity Motion have a deal to, among other things, monetize sports footage "to create an additional revenue stream."[47]

The proliferation of video games has also continued to blur the line between the athlete and the product. Games have been created for baseball, basketball, and football, all of which generate significant revenue.[48] For example, EA NCAA Football '06 generated $79 million in revenue.[49] While the games do not include the players' names, virtual players' positions and numbers accurately correspond to real-life athletes'.[50] In addition, with the push of a few buttons, the user can input a player's name and have it appear on the back of the jersey and have it be called out by the game's announcers.[51]

Similarly, while schools may not use pictures of student-athletes, the schools are allowed to use uniform numbers, which serve as identifiers for the players. While sales figures are not made available publicly, it is estimated that Division I schools sell about $6 to $7 million in team apparel with about 6% coming from replica jersey sales.[52] In all, licensed collegiate merchandise generates about $4 billion a year.[53]

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45. Stuart Elliott, *The N.C.A.A. Basketball Tourney Has Graduated to the Ranks of Major Sports-Marketing Events*, N.Y. TIMES, Mar. 13, 1996, at D6.

46. Steve Wieberg & Steve Berkowitz, *NCAA, Colleges Pushing the Envelope with Sports Marketing*, USA TODAY, Apr. 2, 2009, http://www.usatoday.com/sports/college/2009-04-01-marketing-cover_N.htm.

47. *Sports Rights Holders*, THOUGHT EQUITY, http://www.thoughtequity.com/video/home/article/sports_overview.do (last visited Oct. 19, 2010).

48. *See* NCAA Basketball Game Homepage, EA SPORTS, http://ncaa-basketball.easports.com (last visited Oct. 19, 2010); NCAA Football Game Homepage, EA SPORTS, http://ncaafootball.easports.com (last visited Oct. 19, 2010); MVP 07 NCAA Baseball Game Homepage, EA SPORTS, http://games.easports.com/mvp07 (last visited Oct. 19, 2010).

49. Andrew Carter, *Colleges Profit from Video Game's Success*, ORLANDO SENTINEL, Aug. 7, 2006, at D6.

50. Andy Latack, *Quarterback Sneak*, LEGAL AFF., Jan./Feb. 2006, at 69.

51. *Id.*

52. Marcia Chambers, *Sales of College Stars' Jerseys Raise Ethics Concerns*, N.Y. TIMES, Mar. 31, 2004, at D3.

53. Lemke, *supra* note 4.

These new products continue to obfuscate the differences between NCAA athletics and professional sports. While the organization appears committed to keeping student-athletes from being paid in the name of preserving amateurism, the NCAA seems comfortable allowing commercial exploitation of the same athlete by permitting significant identifying aspects of the student-athlete to be used by its corporate partners. Although the growth in radio, television, and now new media has been financially beneficial to the organization, it could come at the far greater cost of losing judicial deference to its mission of amateurism in assessing antitrust liability.

III. ANTITRUST AND THE NCAA

Throughout its history, the dichotomy between the NCAA's role in preserving amateurism and its business aspects has complicated antitrust scrutiny of the organization's actions. Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce."[54] The Supreme Court has held that the Sherman Act does not prohibit all restraints on trade, but rather only those that are unreasonable.[55] As antitrust law developed, courts developed two categories of restraints: (1) those that are per se unreasonable—practices that facially "appear[] to be one that would always or almost always tend to restrict competition and decrease output,"[56] and (2) those that must be judged under a balancing test, weighing the pro-competitive benefits against the anticompetitive effects.[57]

The unique aspects of collegiate athletics, amateurs competing against each other, as well as the educational element inherent in collegiate sports, have traditionally made it difficult for courts to judge whether various restraints imposed by the NCAA are reasonable. Early challenges fell into two categories: those challenging NCAA rules governing players and coaches, and those affecting other organizations and businesses.

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54. 15 U.S.C. § 1 (2006).

55. Chi. Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

56. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979).

57. *See Chi. Bd. of Trade*, 246 U.S. at 238.

A. Courts Struggle To Evaluate

The first case that addressed the ability of the NCAA to discipline athletes displayed the difficulty courts would have in evaluating NCAA antitrust liability. In *Jones v. National Collegiate Athletic Ass'n*, a hockey player was declared ineligible due to compensation received from an amateur hockey team, thereby violating the NCAA principles of amateurism.[58] The athlete brought suit under section 1 of the Sherman Act claiming the ruling constituted a group boycott.[59] The court recognized that the NCAA was different from traditional businesses, stating that the Sherman Act was "'tailored for the business world,' not as a mechanism for the resolution of controversies in the liberal arts or in the learned professions."[60] The court further held that the plaintiff was a competitor and the competition he sought to protect did not originate in the marketplace, "but in the hockey rink as part of the educational program."[61] Importantly, the court cited the NCAA's educational mission as evidence that the restraint was incidental to a legitimate goal, stating, "The N.C.A.A. eligibility rules were not designed to coerce students into staying away from intercollegiate athletics, but to implement the N.C.A.A. basic principles of amateurism, principles which have been at the heart of the Association since its founding."[62]

Through these statements, *Jones* established deference to the mission of the NCAA that other courts would soon follow. In *Hennessey v. National Collegiate Athletic Ass'n*, the United States Court of Appeals for the Fifth Circuit found the reasoning in *Jones* persuasive in rejecting the claims of two Alabama coaches who saw their roles reduced to part-time following the passing of a new bylaw creating a maximum number of coaches an institution could employ.[63] After finding the NCAA was not entitled to a total exemption,[64] the Fifth Circuit evaluated the restraint under the rule of reason, despite

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58. Jones v. Nat'l Collegiate Athletic Ass'n, 392 F. Supp. 295, 296 (D. Mass. 1975).

59. *Id.* A group boycott claim alleges that the defendant's purpose is to excuse a person or group from the market or to accomplish some other anticompetitive objective. *Id.* at 304.

60. *Id.* at 303 (quoting E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 141).

61. *Jones*, 392 F. Supp. at 303.

62. *Id.* at 304.

63. Hennessey v. Nat'l Collegiate Athletic Ass'n, 564 F.2d 1136, 1141 (5th Cir. 1977).

64. *Id.* at 1148-49 (citing Goldfarb v. Va. State Bar, 421 U.S. 773, 787 (1975) (holding nonprofit entities are not exempt from the Sherman Act)).

stating the restraint was a violation typically classified as a per se violation.[65] As in *Jones*, the court pointed to the goal of the NCAA: "to retain a clear line of demarcation between college athletics and professional sports."[66]

Following these two decisions, other courts had little problem finding in favor of the NCAA when it came to rules governing competition. In *Justice v. National Collegiate Athletic Ass'n*, after a football team was sanctioned for several recruiting violations and prohibited from appearing on television, four football players sued, claiming the action denied them the opportunity for exposure and constituted a group boycott.[67] The court pointed to both *Jones* and *Hennessey* to support the proposition that NCAA regulations designed to preserve amateurism and fair competition were reasonable under the rule of reason.[68] One district court went further in denying a preliminary injunction to stop a rule requiring a transfer student to sit out for a year before participating in competition, suggesting that intercollegiate tennis is not commerce.[69]

While the above restraints all related to regulations primarily affecting the NCAA players and coaches, courts had equal difficulty determining how the NCAA should be treated in its business actions. In *College Athletic Placement Services, Inc. v. National Collegiate Athletic Ass'n*, a company that located athletic scholarships in return for a fee was initially told by the NCAA that its service would not jeopardize its clients' eligibility.[70] Shortly after, the NCAA drafted an amendment doing just that, and the company brought suit claiming the amendment amounted to a concerted refusal to deal.[71] The court found that the effect of NCAA regulations on third parties and competition was at best indirect, noting that the NCAA "is structured in such a manner as to promote amateurism in college sports as it relates to education on a national scale."[72]

The NCAA television restrictions discussed in Part II did not just affect major universities but also affected emerging cable television providers seeking content. In *Warner Amex Cable Communications, Inc. v. American Broadcasting Co.*, one such provider brought suit

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65. *Id.* at 1151-53.
66. *Id.* at 1153 (internal quotation marks omitted).
67. Justice v. Nat'l Collegiate Athletic Ass'n, 577 F. Supp. 356, 375 (D. Ariz. 1983).
68. *Id.* at 382.
69. Weiss v. E. Coll. Athletic Conference, 563 F. Supp. 192, 196 n.11 (E.D. Pa. 1983).
70. No. 74-1144, 1974 U.S. Dist. LEXIS 7050, at *3 (D.N.J. Aug. 22, 1974).
71. *Id.* at *4-5.
72. *Id.* at *8.

seeking a preliminary injunction under the Sherman Act after NCAA regulations prevented it from broadcasting Ohio State University football games.[73] The court recognized the broadcast limitations as an output restriction, the type of violation typically considered per se illegal, yet decided it should not apply in the context of "integrated commercial and educational activities."[74] The court decided without discussion that there was not a substantial likelihood of success on the merits on the section 1 claim.[75] In evaluating the section 2 monopolization claim, the court could not determine whether televised college football constituted a relevant market and therefore denied the injunction.[76]

Similarly, a court had difficulty determining whether the NCAA's actions in selling men's and women's television rights were even a commercial activity.[77] In *Ass'n for Intercollegiate Athletics for Women v. National Collegiate Athletic Ass'n*, when the NCAA introduced championships in women's sports for the first time, a rival association, the Association for Intercollegiate Athletics for Women (AIAW), brought claims that the NCAA was using its monopoly power in the men's game to facilitate entry into the women's game.[78] In finding that the NCAA's policies did not violate the Sherman Act, the court stated that the policies governed "essentially [a] noncommercial product," despite the fact that the disputed practices involved dues policies and a reimbursement formula.[79]

B. The Supreme Court Loss that Helped the NCAA Win

As the controversy over the NCAA television plan grew, two universities decided to challenge the restrictions in court.[80] The case, *National Collegiate Athletic Ass'n v. Board of Regents*, made its way to the Supreme Court as the first and only case in which the Court

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73. 499 F. Supp. 537, 539 (S.D. Ohio 1980).

74. *Id.* at 545.

75. *Id.* at 546.

76. *Id.* To succeed in a section 2 claim, a plaintiff must show possession of monopoly power in the relevant market and willful acquisition or maintenance of that power. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). The relevant market is defined by whether products are reasonably interchangeable by consumers for the same purposes. United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 394 (1956).

77. Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n, 735 F.2d 577, 579-80 (D.C. Cir. 1984).

78. *Id.*

79. *Id.* at 587.

80. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 88 (1984).

would address the antitrust liability of the NCAA.[81] As in *Warner*, the Court recognized the restraint as an output restriction similar to those typically classified as per se illegal.[82] But, like the lower courts before it, the Court found that the dual function of the NCAA made application of a per se rule inappropriate, stating that the decision was not based "on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics."[83] Rather, it was based on the simple fact that some restraints are necessary to produce intercollegiate athletics.[84]

Despite the application of the rule of reason, the Court placed the burden on the NCAA to show pro-competitive benefits of the rule: "[A] naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis."[85] After doing so, the Court found that the NCAA's proffered benefit of maintaining competitive balance was not sufficient and affirmed the United States Court of Appeals for the Ninth Circuit's decision in favor of the plaintiffs.[86]

Although the NCAA lost the case, it emerged with positive language from the Court's decision. The Court held that restrictions relating to the preservation of amateurism could be viewed as a pro-competitive benefit under the rule of reason, citing favorably to *Justice*, *Jones*, *College Athletic Placement Service Inc.*, *Hennessey*, *AIAW*, and *Warner*.[87] The Court also stated that it was 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."[88]

This decision forced lower courts not only to judge whether the restraints in question created anticompetitive effects, but also whether these anticompetitive effects were outweighed by the benefit of preserving amateurism. This essentially doomed the next round of

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81. *Id.*
82. *Id.* at 99-100.
83. *Id.* at 100-01 (footnotes omitted).
84. *Id.*
85. *Id.* at 110. This formed the basis for what became known as the "quick look" rule of reason, 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." Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999).
86. *Bd. of Regents*, 468 U.S. at 120.
87. *Id.* at 102.
88. *Id.* at 117.

student-athlete challenges of NCAA rules. First, in *McCormack v. National Collegiate Athletic Ass'n*, a group of football players challenged the enforcement of a rule restricting benefits awarded to student-athletes.[89] In part, the players argued that the NCAA allowed compensation through scholarships, thereby dampening the amateurism argument.[90] The court rejected this argument, explaining, "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."[91]

This decision steepened the burden student-athletes faced. A challenge to NCAA rules preventing a player from entering the draft or hiring an agent failed as the court pointed to the language used by the Supreme Court in deciding the restrictions were pro-competitive.[92] An appellate court addressing the same restrictions came to the conclusion that the restrictions represented a legitimate attempt "'to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives.'"[93] Similarly, challenges to various restrictions prohibiting athletes from participating in athletics continued to fail.[94]

In contrast, the NCAA faced a tougher challenge when it came to rules and restrictions that did not directly concern players. In *Law v. National Collegiate Athletic Ass'n*, coaches filed a class action suit over a rule limiting the compensation of certain coaches.[95] The court evaluated the restriction under the "quick look" rule of reason, finding the restriction amounted to a naked restraint on price.[96] Once doing so, the court rejected the NCAA's claimed pro-competitive benefits of retaining entry-level positions, cost reduction, and maintaining competitiveness, finding all of them not reasonably related to the restriction.[97] However, courts continued to look for a link to

89. 845 F.2d 1338, 1340 (5th Cir. 1988).

90. *Id.* at 1345.

91. *Id.*

92. Gaines v. Nat'l Collegiate Athletic Ass'n, 746 F. Supp. 738, 747 (M.D. Tenn. 1990).

93. Banks v. Nat'l Collegiate Athletic Ass'n, 977 F.2d 1081, 1090 (7th Cir. 1992) (quoting *Bd. of Regents*, 468 U.S. at 123).

94. Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1322 (9th Cir. 1996); *see also* Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001) (finding a player's personal choice of school does not constitute a relevant market); Smith v. Nat'l Collegiate Athletic Ass'n, 139 F.3d 180, 186-87 (3d Cir. 1998) (holding that eligibility rules are not trade or commerce under the Sherman Act).

95. 134 F.3d 1010, 1012 (10th Cir. 1998).

96. *Id.* at 1020.

97. *Id.* at 1022-24.

amateurism in evaluating restrictions. In another coaching dispute, the NCAA required universities contemplating hiring a coach who resigned from his previous position due to allegations of rule violations to undergo a show cause procedure that could limit the coach's duties for a period of time.[98] The coach sued, claiming this amounted to a group boycott.[99] The court found recruiting and academic fraud rules were noncommercial, and therefore enforcement of these rules was also noncommercial.[100]

In evaluating the effect such rules had on other businesses, courts turned to the commercial versus noncommercial distinction. A court found a restriction on the size of logos on uniforms, which barred Adidas's three-stripe design, to be noncommercial in nature and therefore did not violate the Sherman Act.[101] In contrast, a court found a restriction on the number of tournaments a basketball team could enter to be commercial activity.[102] Similarly, a court found postseason rules requiring invited schools to participate in the NCAA men's basketball championship tournament rather than in the competing Postseason National Invitational Tournament to be commercial in nature.[103] This commercial versus noncommercial dichotomy appears to depend on how connected the rule is to the preservation of amateurism or rules of the game.[104] The NCAA has been successful in linking many of these restrictions to the protection of amateurism, and has thereby benefitted from having these rules deemed noncommercial.

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98. Basset v. Nat'l Collegiate Athletic Ass'n, 528 F.3d 426, 429 (6th Cir. 2008).

99. *Id.* at 430.

100. *Id.* at 433.

101. Adidas Am., Inc. v. Nat'l Collegiate Athletic Ass'n, 40 F. Supp. 2d 1275, 1286 (D. Kan. 1999) (holding the purpose of the restriction was designed to protect student amateurism and protect student-athletes from commercial exploitation).

102. Worldwide Basketball & Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n, 388 F.3d 955, 959 (6th Cir. 2004) (reversing a district court decision based on improper application of the "quick look" rule of reason).

103. Metro. Intercollegiate Basketball Ass'n v. Nat'l Collegiate Athletic Ass'n, 339 F. Supp. 2d 545, 548 (S.D.N.Y. 2004) (finding the alleged anticompetitive effects sufficient to survive summary judgment).

104. *See* Warrior Sports, Inc. v. Nat'l Collegiate Athletic Ass'n, No. 08-14812, 2009 U.S. Dist. LEXIS 25700, at *10 (E.D. Mich. Mar. 11, 2009) (holding a rule changing the allowed dimensions of a lacrosse stick to be noncommercial and therefore did not restrict commerce); Pocono Invitational Sports Camp, Inc. v. Nat'l Collegiate Athletic Ass'n, 317 F. Supp. 2d 569, 581-83 (E.D. Pa. 2004) (holding restrictions on summer athletic camps concern eligibility rules and therefore are noncommercial).

IV. THE NEXT GENERATION OF STUDENT-ATHLETE CHALLENGES

The NCAA has enjoyed consistent protection from student-athlete antitrust attacks by citing the protection of amateurism as a pro-competitive benefit. Despite this historical success, the NCAA faces a great risk that this long-used defense may not hold up against the most recent challenge. Former University of California Los Angeles (UCLA) star Ed O'Bannon may prove to be the one to succeed where others have failed. He recently passed the first hurdle in surviving a motion to dismiss.[105] While a thorough evaluation of the merits of O'Bannon's case is beyond the scope of this Comment, the case provides a framework to evaluate the current state of NCAA antitrust liability.

A. An Overview of In re NCAA Student-Athlete Name & Likeness Licensing Litigation

O'Bannon claims that the NCAA and member schools participating in Division I basketball or in the Football Bowl Subdivision, along with coconspirator Collegiate Licensing Company, violated antitrust law through price fixing, a group boycott, and refusal to deal.[106] O'Bannon alleges that the NCAA, through its bylaws and the forms it requires athletes to sign, purports to cause student-athletes to relinquish in perpetuity their rights to obtain compensation in connection with use of their likeness by the NCAA or NCAA-designated third parties.[107] The complaint further alleges that the NCAA and codefendants conspired to depress compensation of former student-athletes for continued use of the athletes' images.[108]

The suit claims that the revenue streams, which are generated through commercial exploitation of the images of former student-athletes, are vast. The complaint specifically mentions: media rights for televising games; DVD and on-demand sales and rentals; video-clips sales to corporate advertisers and others; and photos, action-

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105. O'Bannon v. Nat'l Collegiate Athletic Ass'n, Nos. C09-1967CW, C09-3329CW, C09-4882CW, 2010 WL 445190 (N.D. Cal. Feb. 8, 2010); *see also* Pete Thamel, *N.C.A.A. Fails To Stop Licensing Lawsuit*, N.Y. TIMES, Feb. 9, 2010, at B14.

106. O'Bannon Complaint, *supra* note 8, at 2. O'Bannon's case has been consolidated with a companion case, *Keller v. National Collegiate Licensing Ass'n*, into *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. 4:09-cv-04128-CW (N.D. Cal. Jan. 15, 2010), *available at* http://docs.justia.com/cases/federal/district-courts/california/candce/4:2009cv04128/220158/41/0.pdf. Keller's suit brings only state law right of publicity claims and will not be addressed in detail in this Comment.

107. O'Bannon Complaint, *supra* note 8, at 5.

108. *Id.* at 6.

figures, trading cards, posters, video games, rebroadcasts of classic games, jerseys, T-shirts, and other apparel.[109] The suit is being brought on behalf of a class of former student-athletes competing in Division I basketball or in the Football Bowl Subdivision and seeks unspecified damages.[110]

B. Threshold Issues of Contracts and Right to Publicity

O'Bannon's suit brings an antitrust claim; however, there are two other areas of law implicated. The first is in contracts.[111] O'Bannon's claims rest on a form called the Student-Athlete Statement, which, among other things, contains a statement authorizing the NCAA, or a third party acting on behalf of the NCAA, to use the athlete's name or picture to generally promote NCAA championships or other NCAA events, activities, or programs.[112] O'Bannon claims the authorization described in the form is coerced, uninformed, and includes vague and ambiguous language.[113]

O'Bannon's contract claims rest on the doctrine of unconscionability.[114] Historically, a bargain was considered unconscionable if it was "such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other."[115] Unconscionability involves both procedural unconscionability—oppression and surprise—and substantive unconscionability—overly harsh or one-sided results.[116] The more of one that is present, the less of the other is required.[117]

The Student-Athlete Statement at issue arguably suffers from both. Procedurally, athletes usually sign this agreement without the benefit of a lawyer to explain the terms and full extent of the rights being given up.[118] Also, these forms contain boilerplate language with

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109. *Id.* at 37-58.
110. *Id.* at 2, 68-69.
111. *Id.* at 23.
112. *Id.*
113. *Id.* at 23-24.
114. *Id.*
115. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (1979) (quoting Hume v. United States, 132 U.S. 406, 411 (1889)).
116. E. ALLAN FARNSWORTH, CONTRACTS § 4.28, at 315 (3d ed. 1999).
117. *Id.*
118. *Signing Day Brings National Letter of Intent (NLI) into Focus*, SPORTS L. CONN., Jan. 14, 2010, http://ctsportslaw.com/2010/01/14/signing-day-brings-national-Letter-of-intent-nli-into-focus/; *see also* Seth Davis, *To Sign or Not To Sign*, S.I.COM (Nov. 14, 2007, 4:16 PM), http://sportsillustrated.cnn.com/2007/writers/seth_davis/11/13/national.letter/.

no opportunity to bargain.[119] In a recent case, a student-athlete was successful in challenging the NCAA's no-agent rule as it pertains to baseball players.[120] The bylaw at issue allowed players to hire a lawyer to advise them, but not to negotiate contracts with a team.[121] In ruling for the athlete, the court stated the rule was akin to a medical board not allowing a patient's doctor to meet with a surgeon because the conference could improve the patient's decision-making power.[122] While not directly analogous, the case illustrates the importance of having an attorney present to prevent oppression and surprise when making important decisions, and more importantly, the courts' recognition of this.

Substantively, a court could find the agreement overly harsh and one-sided if students are truly giving away their right to publicity in perpetuity in exchange for an athletic scholarship. If this is truly the bargain the student is making, from an economic standpoint the athlete should attend the most expensive school possible in exchange for these rights and thereby receive the maximum amount of value for these rights. Clearly this is not an efficient solution, yet depending on the amount the athlete's name or likeness is worth, the scholarship received in return may pale in comparison. The difficulty in this argument is that for a majority of athletes, the value of their name and likeness, even in perpetuity, is worth less than or equal to the value of the scholarship. At the time of contracting, neither side knows with certainty what the value of these rights will be.

Second, O'Bannon's suit implicates the right to publicity; his claims rest on establishing that the student-athlete has a right to publicity and that it has been violated.[123] The right to publicity is based on several rationales, including preventing the unjust enrichment of others seeking to appropriate the commercial value of someone's fame.[124] While protected under common law and state statutes, most right-to-publicity claims require use of a person's identity, without consent, for commercial gain.[125] Use of identity has

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119. Davis, *supra* note 118.

120. *See* Oliver v. Nat'l Collegiate Athletic Ass'n, 920 N.E.2d 203 (Ohio Com. Pl. 2009).

121. *Id.* at 213. NCAA regulations for baseball differ from basketball and football in that there is not a rule prohibiting athletes from being drafted by a professional team while still a member of a college team. *Id.*

122. *Id.* at 214.

123. O'Bannon Complaint, *supra* note 8, at 2.

124. RESTATEMENT (THIRD) UNFAIR COMPETITION § 46 cmt. c. (1995).

125. *Id.* § 46.

been interpreted broadly to include name, likeness, or other indicia of identity, as long as the person is readily identifiable.[126] For a majority of the products, establishing use of identity is a straightforward task, as the products involve actual pictures or videos.[127] Some of the more difficult products to establish use of identity include jerseys and video games; however, there is precedent that suggests even these products identify the plaintiffs.[128] Like the contract claim above, this issue may turn on whether the NCAA forms constitute consent.

The issue of a student-athlete's right to publicity was called into question when NCAA partner CBS created fantasy college sports leagues.[129] This move caused an outcry by many, including the cochairmen of the Knight Commission on Intercollegiate Athletics, William Kirwan and Gerald Turner, who wrote:

> NCAA bylaws establish that students participating in college sports "should be protected from exploitation by professional and commercial enterprises." Clearly, these fantasy contests violate that tenet.
>
> . . . .
>
> [And] if unchecked, [this] is a step toward undermining the NCAA's bedrock amateurism principles, which require colleges and their business partners to treat athletes like other students and not as commodities.[130]

Interestingly, in his response, then-NCAA president Myles Brand said, "[I]n the case of intercollegiate athletics, the right of publicity is held by the student-athletes, not the NCAA. We would find it difficult to bring suit over the abuse of a right we don't own."[131] This response supported the suggestion that when the NCAA used a student-athlete's name or likeness, it was indeed being misappropriated.[132]

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126. *Id.* § 46 cmt. d.

127. *See, e.g.*, Wieberg & Berkowitz, *supra* note 46; *Sports Rights Holders*, *supra* note 47.

128. *See* White v. Samsung Elecs. Am. Inc., 971 F.2d 1395, 1399 (9th Cir. 1992) (holding a female-shaped robot wearing a gown and blond wig standing next to a game-board identified Vanna White); Motschenbacher v. R.J. Reynolds Tobacco Co., 498 F.2d 821, 822 (9th Cir. 1974) (holding that the use of a plaintiff's racecar including a unique pinstripe and oval number identified the plaintiff); *see also* Latack, *supra* note 50 (discussing the similarities of the University of California quarterback in a video game to then-quarterback Matt Leinart).

129. William E. Kirwan & R. Gerald Turner, *Tackling College Football Fantasy Leagues*, L.A. TIMES, Aug. 30, 2008, at A31.

130. *Id.*

131. Myles Brand, *Fantasy Leagues May Be Less Than They Seem*, HUFFINGTON POST (Sept. 8, 2008, 10:06 AM), http://www.huffingtonpost.com/myles-brand/fantasy-leagues-may-be-le_b_124758.html.

132. Kirwan & Turner, *supra* note 129.

C. *Why Amateurism May No Longer Be a Pro-Competitive Benefit*

With these contract and right-to-publicity issues addressed, O'Bannon's antitrust claims can be examined. To establish an antitrust claim under the Sherman Act, a plaintiff must show "'(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce.'"[133] O'Bannon alleges the first prong is met through agreements among NCAA member schools, as well as agreements between the NCAA and its business partners such as the Collegiate Licensing Company, which amount to a contract, combination, and conspiracy.[134] O'Bannon will have little difficulty establishing that there are agreements among these entities. Similarly, O'Bannon will have little difficulty establishing that collegiate licensing is interstate commerce, as the products at issue are sold nationwide. The battleground will be establishing the second prong—that these agreements unreasonably restrain trade.

As mentioned above, O'Bannon's complaint names three violations that traditionally have fallen into the category of per se illegality—price-fixing, a group boycott, and refusal to deal.[135] While as a plaintiff it makes tactical sense to plead a violation of the strictest standard, O'Bannon's claims will likely be evaluated under the rule of reason rather than the per se rule for two reasons. First, as the Court in *Board of Regents* stated, the simple fact that some restraints are necessary to produce the product makes application of a per se rule inappropriate.[136] Second, while it is true that these restraints have traditionally fallen into the per se category, courts have generally only applied per se rules to horizontal agreements—agreements amongst competitors.[137] While NCAA member schools compete athletically, it is not clear that they compete for use of a former athlete's name or likeness, likely removing the violation from the per se category.

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133. Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1062 (9th Cir. 2001) (quoting Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1318 (9th Cir. 1996)).

134. O'Bannon Complaint, *supra* note 8, at 4.

135. *Id.* at 5-6.

136. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 102-04 (1984).

137. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007) (addressing price fixing); N.W. Wholesale Stationers v. Pac. Stationery & Printing Co., 472 U.S. 284, 298 (1985) (addressing group boycotts and concerted refusals to deal).

Similarly, applying a "quick look" rule of reason is also inappropriate. The Court has stated that an abbreviated or "quick look" rule of reason is appropriate when "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."[138] Here, the nature of the restraint is complicated by the fact that some restrictions on an athlete's income are necessary to preserve amateurism. While the debate in this case centers over former athletes, it is not clear from the outset that the rule is inherently anticompetitive. Therefore, the correct test to apply is a traditional rule of reason—whether the pro-competitive benefits outweigh the anticompetitive effects.[139]

Under this test, the initial burden is on O'Bannon to claim significant anticompetitive effects within the relevant market.[140] He has done this by claiming that former players are being excluded from the collegiate licensing market.[141] As it has done with nearly every antitrust challenge it has faced, the NCAA will likely argue that this is essentially a noncommercial restraint aimed at preserving amateurism.[142] The question remains, does this defense retain its validity in the face of increased commercialism of NCAA student-athletes?

O'Bannon's suit has many unique characteristics that make it appear to be the perfect type to succeed against the NCAA's amateurism defense. It is being brought solely on behalf of former athletes, a group for whom amateurism is no longer a concern.[143]

Also, although athletes are usually not the most sympathetic plaintiffs, there is a perceived unfairness involved.[144] The NCAA is taking this right from athletes, making millions of dollars from their images, and the student-athletes have nothing to show for it. Unlike

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138. Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 770 (1999).

139. *See* Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996).

140. *Id.*

141. O'Bannon Complaint, *supra* note 8, at 6. Sports management and marketing agency IMG states on its Web site that the Collegiate Licensing Company has an almost 80% share in the collegiate licensing market, lending credence to the claim that this relevant market exists and that the company has market power. *College Sports*, IMG WORLD, http://www.imgworld.com/sports/college_sports/default.sps (last visited Oct. 21, 2010).

142. Thamel, *supra* note 105.

143. "Whatever benefits there are in promoting the amateur mission of the NCAA for existing college players, I'm not sure that argument is as salient in the context of [retired] guys." Tim Lemke, *O'Bannon Files Suit vs. NCAA*, WASH. TIMES, July 22, 2009, at C3 (quoting University of Vermont Associate Professor Michael McCann).

144. William C. Rhoden, *A Lasting Image: Standing Up to the N.C.A.A.*, N.Y. TIMES, July 23, 2009, at B12.

merely selling tickets to games, these actions are completely separate from the actual competition. In interviews discussing his motives for bringing the lawsuit, O'Bannon mentioned a friend playing a video game with O'Bannon's likeness and commenting on the inequity of the fact that O'Bannon was not being paid for the game.[145] Coplaintiff Sam Keller expressed similar sentiments: "We signed a paper at the beginning of college saying we couldn't benefit from our name. . . . So why was the N.C.A.A. turning a blind eye to this and allowing EA Sports to take our likenesses and make big bucks off it?"[146]

These factors are helpful for O'Bannon's claims, but there are also difficulties with them. In reviewing some of the numbers stated in Part II, it is easy to assume that the NCAA and its respective schools are flush with cash made on the backs of the student-athletes. The reality is slightly different. With few exceptions, Division I men's basketball and Football Bowl Subdivision teams are the only athletic teams that generate a profit.[147] For an athletic department to be self-sufficient, these two teams need to generate enough money to support every other team, which at some schools can be as many as thirty-five other programs.[148] A 2006 report found only 19 out of 118 Football Bowl Sub-division schools turned a profit on athletics.[149] The remaining schools lost, on average, $8.9 million.[150]

Turning back to amateurism, would a court accept the preservation of amateurism across sports as a valid competitive benefit? That is, could the NCAA argue that without these restrictions, member schools would not be able to offer track and field, soccer, or lacrosse? Certainly courts have shown deference to the mission of the NCAA, but the question is whether this deference will extend to allowing arguably anticompetitive behavior in one sport in order for another sport to exist. The Supreme Court has previously recognized the benefit of restrictions, which, in turn, create a new product.[151] Could the court extend this rationale to preserving athletic

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145. Anthony Schoettle, *Lawsuit Could Bring NCAA Financials to Light*, IBJ.COM, Feb. 10, 2010, http://www.ibj.com/lawsuit-could-bring-ncaa-financials-to-light/PARAMS/article/16313.

146. Katie Thomas, *College Stars See Themselves in Video Games, and Pause To Sue*, N.Y. TIMES, July 4, 2009, at A1 (internal quotation marks omitted).

147. Ben Schorzman, *The Business of Breaking Even*, OR. DAILY EMERALD, May 27, 2009, http://www.dailyemerald.com/2.2357/the-business-of-breaking-even-1.189520.

148. *Id.*

149. Jack Carey, *NCAA Unlikely To Wage War on Fantasy Site*, USA TODAY, Oct. 28, 2008, http://www.usatoday.com/sports/college/2008-10-27-knight-commission_N.htm.

150. *Id.*

151. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 21-23 (1979).

teams? These questions cannot easily be answered, but they represent the complexities of the case.

The NCAA may also argue that payment, deferred or not, softens amateurism and removes the distinction between collegiate athletics and professional sports.[152] The argument is that the promise of a piece of the future licensing pie may distort athlete incentives. Rather than worrying about learning the game, gaining an education, and competing as a member of a team, the player could be concerned about maximizing the value of his name and likeness and thereby increasing the amount of future revenue received.[153] The NCAA will point to *McCormack*, where the court stated that simply because amateurism has not been distilled to its purest form, attempts to maintain amateur elements are not necessarily unreasonable.[154]

Yet an important question O'Bannon will have to answer is what the typical athlete's likeness is worth. The average public school costs $15,213 including room and board, and the average private school costs $35,636.[155] Does the amount of money being derived from sales of products appropriating the typical non-star-athlete's likeness exceed the amount of a four-year scholarship? If not, the NCAA can argue that the players have been adequately compensated for this use. It is likely that some likenesses will be worth more than the amount of a college scholarship. These will often come from the elite players; for example, the 1.2% of men's college basketball players who become professional.[156] These are the athletes whose names and likenesses may be worth something on their own. For the rest, the NCAA will argue that it cannot have anticompetitive effects in a market that does not exist. Moreover, from the outset, it is nearly impossible for a school to determine what an athlete's likeness will be worth over the course of his or her career. Both the school and the athlete may hope every athlete offered a scholarship will become a star; in reality, that is not the case. The NCAA may argue that at the time of signing, for the majority of athletes, the agreement represents a fair bargain. Simply because it turns out not to be so for a small group of outliers, does not

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152. McCann, *supra* note 11.

153. *Id.*

154. McCormack v. Nat'l Collegiate Athletic Ass'n, 845 F.2d 1338, 1345 (5th Cir. 1988).

155. Alison Damast, *College Tuition: Going for Broke*, BUS. WEEK, Oct. 20, 2009, http://www.businessweek.com/bschools/content/oct2009/bs20091020_667493.htm.

156. *Behind the Blue Disk: Division I Academic Reform*, NCAA, http://www.ncaa.org (follow "Resources" hyperlink; then follow "Behind the Blue Disk" hyperlink; then follow "Academic Reform" hyperlink) (last visited Oct. 21, 2010).

mean that the NCAA's actions are anticompetitive. There are various ways to interpret this argument, and it could depend on how close the valuation of an athlete's name or likeness is to the cost of providing a scholarship.

In his complaint, O'Bannon points to the extra costs athletes have, such as continuing health problems and expenses not covered by an athletic scholarship, to counter the argument that athletes are compensated through their scholarships.[157] An NCAA study estimated that athletes on full scholarships averaged $2500 a year in out-of-pocket expenses.[158] The NCAA recently settled a class action antitrust lawsuit over the limits in grants-in-aid to student-athletes.[159] The suit alleged that restricting a scholarship to the cost of tuition, books, housing, and meals was an unlawful restraint of trade due to large amounts of money the NCAA receives in broadcast and licensing deals.[160] While the NCAA denied wrong-doing, it agreed to make $218 million available to NCAA Division I member institutions for certain reimbursements and $10 million to reimburse former athletes for educational expenses.[161]

The disparity in value of the likeness of the high profile athlete versus the typical athlete also creates problems with O'Bannon's proposed remedy. O'Bannon suggests creating a trust, although he does not include specifics.[162] However, O'Bannon's suit has two main themes: the unfairness of the NCAA making money off of the athlete's image and the harsh economic reality student-athletes face. Should the trust consist of a flat distribution, the NCAA would be replacing one alleged price fix for another, thus creating the possibility for another antitrust claim. The elite athlete could claim that the value of their likeness is still being artificially depressed. A trust based on the athlete's worth would also be difficult to administer because of the difficulty in determining the exact monetary value of each athlete. Furthermore, the athletes assigned a lower value in the trust would likely be the ones who do not make it to the professional

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157. O'Bannon Complaint, *supra* note 8, 58-61.

158. Jack Carey & Andy Gardiner, *Settlement Gives Aid to Athletes, NCAA To Adjust Requirements for Fund Access*, USA TODAY, Jan. 30, 2008, http://www.usatoday.com/sports/college/2008-01-29-ncaa-settlement_N.htm.

159. *Id.*

160. *Id.*

161. Stipulation and Agreement of Settlement at 10, White v. Nat'l Collegiate Athletic Ass'n, No. CV06-0999VBF(MANx) (C.D. Cal. 2008).

162. McCann, *supra* note 11.

level and therefore will be more likely to suffer the financial hardship described in the complaint.

O'Bannon may have difficulty battling the NCAA on the grounds that the profits received from these deals exceed the costs of providing scholarships and the like. However, there is a broader argument that avoids some of these pitfalls—that the NCAA, through its actions, has forfeited the legitimate pursuit of amateurism for the revenues associated with commercialism. Going back to the origins of judicial deference to the NCAA, it was not only that the athletes were paid, but also that they were student-athletes. This academic mission differentiated the NCAA from professional sports. With the increased commercialization of the NCAA, the question is whether this educational mission has taken a back seat to commercial goals. For example, the NCAA has a multibillion dollar TV deal to broadcast its annual college basketball tournament, yet out of the four semifinalists in the 2008 tournament, only one school had a graduation rate above 50%.[163]

Rather than litigate whether a restraint is pro-competitive because it makes other sports possible, O'Bannon should focus on the simple fact that the NCAA is willing to commercialize players in the first place, regardless of where the proceeds go. Schools are more worried about running afoul of NCAA regulations than actually going over the line and commercializing the players. For example, in discussing a hat bearing the jersey numbers of three star players for the University of Connecticut, associate athletic director Tim Tolokan showed a willingness to toe the line, "You can't use names . . . . You can use the number."[164] The Web site entry for the hat made it clear that the hat is meant to recognize the player wearing that number by stating that one hat honors "the team player who wears the #3 UConn Jersey for Women's Basketball."[165] The Knight Commission on Intercollegiate Athletics, an independent watchdog group, has stated that profiting from an athlete's image veered too far from amateurism: "If that line is erased, it puts the whole enterprise on the slippery slope toward further professionalization."[166]

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163. *Gaps 'Narrowing Slightly' in Study of NCAA Teams' Graduation Rates*, ASSOCIATED PRESS, Mar. 17, 2008, http://sports.espn.go.com/ncb/ncaatourney08/news/story?id=3297989.

164. Chambers, *supra* note 52 (internal quotation marks omitted).

165. *Id.*

166. Thomas, *supra* note 146 (internal quotation marks omitted).

Former NCAA president Myles Brand recognized the dilemma, saying in 2004, "My concerns are over the potential inconsistency between our making certain requirements on student-athletes about endorsements, namely they cannot take any, and the schools themselves then using what would be endorsement material for revenue."[167] Brand further recognized that technology in video games was improving to the point where players would be physically recognizable.[168] Yet seven years later, these inconsistencies stand. Facts such as these can be used to show that the NCAA recognized it was at a cross roads between increased revenues and maintaining amateurism, and it chose the money. Therefore, it should no longer reap the benefit of amateurism as a pro-competitive benefit merely to avoid antitrust liability.

D. Examination of Potential Less Restrictive Alternatives

While not formally adopted by the Supreme Court, circuit courts have adopted an additional prong to the rule of reason—the less restrictive alternative.[169] This test is derived from *Addyston Pipe & Steel Co. v. United States*, which held that "a restraint was reasonable, and thus legal, if it was narrowly tailored, or no more restrictive than necessary to accomplish the legitimate ends of the underlying contract."[170] In that vein, there are several options the NCAA could choose to implement to preserve amateurism and lessen its antitrust liability.

First, the NCAA could proactively advise student-athletes to seek legal representation to explain the documents they are signing and what the legal consequences of these documents are. Lawyers should be provided without cost to the athlete. The benefit of this is that it would lessen legal pressure that the documents signed are unconscionable.[171] Of course, the downside for the NCAA is that increased lawyer involvement could lead to market pressure to change the terms of these contracts on an individual basis. Different treatment arguably undermines amateurism, as the different terms can be interpreted as benefits to certain athletes, such as more highly

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167. Chambers, *supra* note 52 (internal quotation marks omitted).

168. *Id.*

169. *See* Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561 (2008) (detailing how circuit courts have adopted this prong despite its confined use by the Supreme Court).

170. *Id.* at 568.

171. *See* Davis, *supra* note 118 (documenting the inequity of the National Letter of Intent).

touted recruits with more options. There is also the possibility that when athletes fully understand what rights they are giving up, elite players might explore other options, such as playing in Europe. While by no means an easy route, Brandon Jennings, an elite high school basketball player, illustrated the potential benefits of playing in Europe—forgoing college to sign a $1.2 million deal (a combination of salary and endorsement money from Under Armour) to play in Italy and then returning to play in the NBA, ultimately becoming a contender for the Rookie of the Year award.[172]

Second, the NCAA could decide that the negative impact to amateurism is not worth the commercial gains and voluntarily discontinue sales of jerseys, video games, and other products. This certainly would preserve amateurism as a pro-competitive benefit. Further, there would be no more claims that the NCAA is reducing the price of a former athlete's name and likeness, as former players would be able to license their image without competition from the NCAA and its member schools.

While it would return the NCAA to its roots, this option is not economically efficient. There is clearly a market demand for these items that would be unmet.[173] Although former athletes would be able to license their name or likeness, current student-athletes would continue to be prohibited from doing so under this option. Typically, pro-competitive benefits increase output and decrease prices.[174] Here, output would dramatically decrease. Output of merchandise featuring former athletes may increase. However, while the names and likenesses of former athletes may have value, that value is at its highest when used in conjunction with the intellectual property of the NCAA and member schools and while the athlete is still attending school. Even O'Bannon would likely agree that an Ed O'Bannon video game would not sell many copies, but an extra feature where a user could play as the 1995 UCLA Bruins likely adds value to a game. It is probable that O'Bannon and other former athletes would prefer

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172. William C. Rhoden, *A Rookie Star's Mom Is with Him All the Way*, N.Y. TIMES, Feb 14, 2010, at SP3. Interestingly, Sonny Vaccaro, a long-time sneaker executive, played a major role in Jennings' decision and also played a large role in convincing O'Bannon to file suit. Pete Thamel, *N.C.A.A. Sued over Licensing Practices*, N.Y. TIMES, July 22, 2009, at B15; Josh Peter, *The Great Unknown*, RIVALS.COM, http://rivals.yahoo.com/ncaa/basketball/news?slug=jo-jennings062409 (last updated June 24, 2010).

173. Carter, *supra* note 49.

174. Nat'l Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 114 (1984) ("If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games.").

that these products continue and the former players receive a portion of the benefits.

Finally, the NCAA could, as O'Bannon suggests, create a trust with the student-athlete's portion of the revenue. The concern with any form of payment, current or deferred, is that it lessens amateurism. While this is a valid concern, student-athletes are permitted to receive scholarships without destroying amateurism, lending credence to the idea that a benefit system and amateurism could coexist.

The key in any system is removing the link between athletes' performances on the field and any future benefits. As discussed above, creating a flat system where higher-profile athletes receive an equal share to lower-profile athletes despite the fact that the rights for higher profile athletes are more valuable creates a similar concern that the athletes are not receiving the fruits of their efforts. This tradeoff is necessary to preserve the spirit of amateurism and allow the NCAA to distinguish itself from professional leagues. By making the amount received a set share, rather than output based, the money is more in line with scholarship money than payment for performance.

Characterizing the money from licensed products as a component of the scholarship addresses many of the difficulties faced by student-athletes that are not shared by their peers. For example, students attending a university on a full academic scholarship are free to work in their free time and accept money from friends and family to help with expenses. In many cases, an athlete's athletic commitments consume the time available to work, and the NCAA forbids payments as improper benefits.[175] While the sums received may exceed an amount that can be characterized as leveling the playing field, other justifications, such as increased medical expenses, also play a role. On a more basic level, the student-athletes are creating these income streams, and as a matter of fairness, deserve to

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175. NCAA CONST. art. 16.01.1 (Awards, Benefits and Expenses for Enrolled Student-Athletes) (2009), *available at* http://www.ncaapublications.com/p-3934-2009-2010-ncaa-division-i-manual.aspx:

> A student-athlete shall not receive any extra benefit. Receipt by a student-athlete of an award, benefit or expense allowance not authorized by NCAA legislation renders the student-athlete ineligible for athletics competition in the sport for which the improper award, benefit or expense was received. If the student-athlete receives an extra benefit not authorized by NCAA legislation, the individual is ineligible in all sports.

Article 12.1.2.1.6 states that college athletes cannot receive "[p]referential 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." *Id.* art. 12.1.2.1.6 (Amateurism).

see a benefit. As stated, the goal of such a plan is to give student-athletes a share of the revenues generated through their efforts with a minimal effect on amateurism. This system would move away from pay for play, encouraging athletes to remain amateurs while removing some of the hardships of doing so.

V. CONCLUSION

The NCAA is at a crossroads. As the organization becomes more and more commercialized, the likelihood that its actions will face antitrust scrutiny continues to increase. The current lawsuit brought by O'Bannon represents the potential end of judicial acceptance of amateurism as a pro-competitive benefit. O'Bannon has already taken a giant first step in surviving a motion to dismiss and gaining access to NCAA financials through discovery. The availability of that information increases the possibility that, if not O'Bannon, the right plaintiff could come along and financially destroy the NCAA. The question is whether the NCAA will resist the allure of commercialism and make the changes necessary to preserve amateurism and keep its protection. The ball is now in the NCAA's court.