HE SHOOTS, HE SCORES: AN ANALYSIS OF *O'BANNON V. NCAA* ON APPEAL AND THE FUTURE OF INTERCOLLEGIATE ATHLETICS*

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INTRODUCTION

Intercollegiate athletics has experienced substantial financial gains over the course of the last two decades. During that time, student-athletes have demanded a larger piece of the pie, but the National Collegiate Athletic Association ("NCAA") and its member institutions have refused to adopt policies that would allow for such gains. When legislative changes wane, litigation often spurs change. Ed O'Bannon, a former star men's basketball student-athlete, filed litigation that changed the outlook for student-athletes and provided for limited financial gains.[1] This Article explores *O'Bannon v. NCAA*,[2] including potential arguments on appeal, and concludes that the *O'Bannon* opinion does not catastrophically change intercollegiate athletics and Title IX does not prohibit payments to football and men's basketball student-athletes. First, Part I of this Article introduces the NCAA and the present state of commercialization in intercollegiate athletics. Next, Part II discusses and provides a historical view of Sherman Act litigation as applied to the NCAA and amateurism. Then, Part III provides a lengthy discussion of the procedural history of *O'Bannon v. NCAA*, including Judge Claudia Wilken's opinion. Part IV analyzes pertinent aspects of *O'Bannon v. NCAA* that will be addressed by the Ninth Circuit on appeal. Finally, Part V of this Article addresses the future of

1. *See* O'Bannon v. NCAA, 7 F. Supp. 3d 955, 962–63 (N.D. Cal. 2014).
2. 7 F. Supp. 3d 955 (N.D. Cal. 2014).

intercollegiate athletics as it pertains to changes to NCAA legislation and the effects of Title IX.

I. INTRODUCTION TO THE NCAA

In 1852, the first intercollegiate athletic competition was held in the United States.[3] Yale University and Harvard University competed against one another in a rowing contest.[4] In an effort to win, Harvard sought the services of an athlete who did not attend Harvard University.[5] In the years following this first intercollegiate athletic endeavor, universities throughout the United States challenged one another in athletic competition.

The violence associated with turn-of-the-century intercollegiate football was of great concern to many Americans.[6] The use of gang tackling and mass formations caused numerous injuries and deaths.[7] By 1905, intercollegiate football was on the brink of abolishment as the public urged for substantial reform to the football playing rules.[8] President Theodore Roosevelt took action and held a meeting of the nation's top intercollegiate athletics leaders at the White House to discuss reformation of intercollegiate football.[9] New York University's Chancellor Henry M. MacCracken also worked to reform the intercollegiate football playing rules by calling a meeting of prominent university officials from the country's top thirteen universities.[10] In order to address the growing concerns with intercollegiate athletics, a sixty-two-member body formed the Intercollegiate Athletic Association of the United States (IAAUS).[11] In 1910, the body governing intercollegiate athletics took on its

3. *See* RONALD A. SMITH, SPORTS AND FREEDOM: THE RISE OF BIG-TIME COLLEGE ATHLETICS 168, 172–73 (1988).

4. *Id.*

5. Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 989 (1987).

6. *Id.* at 990 ("In 1905, there were approximately eighteen deaths, and over one hundred major injuries in intercollegiate football.").

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 991. It was the flying wedge, football's major offense in 1905 that spurred the formation of the NCAA. *See* Dr. Myles Brand, President, NCAA, Address to the National Press Club (Mar. 4, 2003), *available at* http://www.npr.org/programs/npc/2003/030304.mbrand.html.

11. Smith, *supra* note 5, at 991.

current name, the NCAA.[12] For the next ten years, the NCAA prepared and adopted rules governing intercollegiate athletics.[13]

Over the last one hundred years, intercollegiate athletics has grown into a large and viable commercial industry.[14] The NCAA, a voluntary unincorporated association, governs over 1,200 universities, sports organizations, and athletic conferences; eighty-nine championship events in three divisions; and nearly 400,000 student-athletes.[15] The NCAA is the dominant force behind intercollegiate athletics and governs a multitude of issues and matters facing member institutions, conferences, student-athletes, and coaches—including bylaws governing amateurism,[16] recruiting,[17] eligibility,[18] financial aid,[19] and practice and playing seasons.[20] Volunteer representatives from member institutions and conferences establish NCAA rules and regulations and seek to further the goals set forth by the NCAA.[21] The NCAA has a number of established goals, including: "[p]romot[ing] student-athletes and college sports through public awareness . . . ; [p]rotect[ing] student-athletes through standards of fairness and integrity . . . ; [p]repar[ing] student-athletes for lifetime leadership, and [p]rovid[ing] student-athletes and college sports with the funding to help meet these goals."[22]

The popularity of intercollegiate athletics has grown rapidly—aided by the continued growth of the television industry and the rise of social media.[23] The first televised intercollegiate football contest

12. *Id.*

13. *Id.*

14. *Revenue*, NCAA, http://www.ncaa.org/about/resources/finances/revenue (last visited Apr. 13, 2015) (stating that in the fiscal year 2011-2012, the NCAA's total revenue was $871.6 million).

15. *Championship*, NCAA, http://www.ncaa.org/about/what-we-do/championships (last visited Apr. 13, 2015).

16. *See* NCAA, 2014-2015 NCAA DIVISION I MANUAL § 12 (2014) [hereinafter NCAA BYLAWS].

17. *See id.* § 13.

18. *See id.* § 14.

19. *See id.* § 15.

20. *See id.* § 17.

21. *See* NCAA, 2014-2015 NCAA DIVISION I MANUAL § 1.2–1.3 (2014) [hereinafter NCAA CONSTITUTION].

22. Cedric W. Dempsey, President, NCAA, State of the Association Address at the 2000 NCAA Convention (Jan. 17, 2000), *available at* http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/state%2Bof%2Bthe%2Bassociation%2Baddress%2B-%2B1-17-00.html.

23. For example, in 1982 the NCAA made $49.9 million in a media rights agreement for three years with CBS. Contrast that amount with the 2010 CBS/Turner media rights agreement for fourteen years for $10.8 billion. *Revenue*, *supra* note 14.

occurred in 1938 on the University of Pennsylvania's campus.[24] From 1951 to 1981, the NCAA and its members developed a program that called for limited telecasts of intercollegiate football games that the NCAA administered and controlled.[25] The NCAA controlled the television broadcasts of intercollegiate football contests until 1983, when the United States Supreme Court held that the NCAA television plan violated antitrust laws.[26] Although the NCAA no longer controls the broadcast of intercollegiate football contests, it still remains a major player in the broadcast of NCAA championship events such as the Division I Men's Basketball Tournament ("March Madness").[27] In June 2010, the NCAA renegotiated its agreement to broadcast March Madness by entering into a blockbuster deal that will pay the NCAA $10.8 billion over fourteen years.[28] In 2012, the College Football Playoff, formerly known as the Bowl Championship Series (BCS), entered into a twelve-year media rights agreement with ESPN valued at $5.64 billion.[29] Intercollegiate athletic conferences are also negotiating and obtaining enormous media rights packages, as evidenced by the Pacific 12 Conference's twelve-year, $2.7 billion agreement with ESPN/Fox.[30] Universities are even themselves joining the lucrative television market. The University of Texas, in a twenty-year, $300 million agreement, partnered with ESPN to launch the

24. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 89 (1984).

25. *Id.* at 89–91.

26. *Id.* at 104–13 (holding that the record supported the district court's conclusion that the NCAA unreasonably restrained trade under the Sherman Act).

27. "March Madness" refers to the Division I NCAA Men's Basketball Tournament, which culminates in a national championship game. *See, e.g.*, Ill. High Sch. Ass'n v. GTE Vantage Inc., 99 F.3d 244, 245 (7th Cir. 1996). March Madness became the source of litigation when the Illinois High School Association ("IHSA") filed a reverse confusion trademark action in federal court alleging the trademark "March Madness" belonged to IHSA and caused confusion among consumers. *Id.* at 245–46. The NCAA began using the term after former CBS Sports broadcaster Brent Musburger designated the NCAA Division I men's basketball tournament as "March Madness." *Id.* at 245. The court held there was no trademark protection, as "March Madness" had become a generic term. *Id.* at 245, 247.

28. Steve Weiberg, *NCAA President: Time to Discuss Players Getting Sliver of Revenue Pie*, USA TODAY (Mar. 30, 2011), http://usatoday30.usatoday.com/sports/college/mensbasketball/2011-03-29-ncaa-pay-for-play-final-four_N.htm.

29. Rachel Bachman, *ESPN Strikes Deal for College Football Playoff*, WALL ST. J. (Nov. 21, 2012, 1:46 PM), http://online.wsj.com/news/articles/SB10001424127887324851704578133223970790516.

30. *Pac-10 Announces ESPN/Fox TV Deal*, ESPN (May 4, 2011, 8:04 PM), http://sports.espn.go.com/ncf/news/story?id=6471380 (reporting a twelve-year contract worth more than $225 million a year or $2.7 billion total).

Longhorn Network.[31] The growing value of media packages associated with intercollegiate athletics shows the material advancement of the commercialization and value of intercollegiate athletics competition.

Intercollegiate athletics has grown into a multibillion-dollar industry annually, and the NCAA is the "dominant trade association."[32] Scholars have indicated that "[f]or all practical purposes, the NCAA directs and controls all major revenue-producing collegiate athletic events."[33] As a result of the economic prosperity in intercollegiate athletics, coaches and administrators are receiving generous compensation packages and benefits.[34] These highly competitive financial packages are key components that led to the desire for student-athletes to receive a piece of the growing financial pie.

II. ANTITRUST LAW IN INTERCOLLEGIATE ATHLETICS

This section will address the Sherman Act and its application to intercollegiate athletics. Specifically, this section will discuss key decisions that have framed the law as applied to intercollegiate athletics, including the United States Supreme Court's seminal decision in *NCAA v. Board of Regents*.[35] Further, this section addresses the expansion of the law in recent years and discusses decisions that have provided student-athletes with a more proactive basis to seek judicial relief.

31. *Branding for Longhorn Network Unveiled*, ESPN (June 17, 2011, 12:37 PM), http://sports.espn.go.com/ncaa/news/story?id=6286128.

32. Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 CASE W. RES. L. REV. 61, 64 (2013).

33. Daniel A. Rascher & Andrew D. Schwarz, *Neither Reasonable nor Necessary: "Amateurism" in Big-Time College Sports*, 14 ANTITRUST 50, 52 (2000) (indicating the NCAA's market share is above ninety-nine percent for intercollegiate athletics).

34. *See generally* Cork Gaines, *Here Are The Salaries For The Highest-Paid College Basketball Coaches,* BUSINESS INSIDER (Dec. 7, 2013, 1:57 PM), http://www.businessinsider.com/here-are-the-salaries-for-the-highest-paid-college-basketball-coaches-2013-12?op=1 (reporting that Coach Mike Krzyewski of Duke University is the highest paid Division I men's basketball coach making $7.2 million annually); Steve Weiberg, *Emmert Made $1.7 Million, According to NCAA Tax Return*, USA TODAY (July 14, 2013, 1:16 PM), http://www.usatoday.com/story/sports/college/2013/07/10/ncaa-mark-emmert-salary-million-tax-return/2505667/ (reporting that NCAA President Mark Emmert's 2011 compensation was $1.7 million).

35. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98 (1984).

The Sherman Act, codified in 1890, is America's oldest antitrust law.[36] The Sherman Act's primary purpose was to promote and maintain competition between businesses in the marketplace.[37] Section 1 of the Sherman Act provides that "[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, is declared to be illegal."[38] Although it prohibits "every" contract, section 1 does not preclude all restraints on trade, but only unreasonable restraints.[39] The United States Supreme Court has held "the statute . . . evidenced the intent not to restrain the right to make and enforce contract"[40] and, thus, determined Congress intended to apply "the standard of reason which had been applied at common law"[41]—only restraints that are unreasonable will be precluded.[42] It is assumed that section 1 regulates only transactions that are commercial in nature.[43] However, the statute was intended to embrace the widest array of conduct possible.[44]

Section 1's broad scope allows it to reach the activities of a nonprofit organization like the NCAA.[45] Nonprofit organizations are not beyond the purview of the Sherman Act because the absence of profit is no guarantee that an entity will act in the best interests of

36. *See* Jeffrey C. Sun & Philip T.K. Daniel, *The Sherman Act Antitrust Provisions and Collegiate Action: Should There be a Continued Exception for the Business of the University?*, 25 J.C. & U.L. 451, 453 (1999).

37. *See id.* The Sherman Act was enacted at a time when trusts and combinations of businesses controlled the market by limiting competition for goods and services, functioning as monopolies, and threatening the market. The Sherman Act intended to prevent restraints on competition in business and commercial transactions that restricted production, raised prices, or controlled the market to the detriment of consumers. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 492–93 (1940).

38. 15 U.S.C. § 1 (2012).

39. *See Bd. of Regents*, 468 U.S. at 98; *see also* Ariz. v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 342–44 (1982) ("Section 1 of the Sherman Act of 1890 literally prohibits *every* agreement 'in restraint of trade.' ").

40. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

41. *Id.*

42. *See id.* at 66–68; *see, e.g.*, Bd. of Trade of Chi. v. United States, 246 U.S. 231, 239 (1918); *see also* Christopher J. Gawley, *Protecting Professionals from Competition: The Necessity of a Limited Antitrust Exemption for Professionals*, 47 S.D. L. REV. 233, 248 (2002).

43. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959).

44. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 787–88 (1975) ("Congress intended to strike as broadly as it could in § 1 of the Sherman Act.").

45. *See, e.g.*, NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 n.22 (1984) ("There is no doubt that the sweeping language of § 1 applies to nonprofit entities."); *see also* Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576 (1982) (holding nonprofit entities are subject to the perils of the Sherman Act).

consumers.[46] The exchange of money for services by a nonprofit organization is a standard commercial transaction.[47] Therefore, the payment of financial aid in return for a service constitutes trade or commerce and falls under the purview of the Sherman Act.[48] NCAA rules and regulations have also commonly been held to implicate trade or commerce.[49] To set forth a prima facie case under section 1, a plaintiff must establish: (1) the defendant participated in an agreement; and (2) the agreement "unreasonably restrained trade in the relevant market."[50]

Unlike other industries where any agreement between competitors would invoke suspicion in the eyes of the courts,[51] sports leagues require "a certain degree of cooperation" between

46. *See* United States v. Brown Univ., 5 F.3d 658, 666 (3rd Cir. 1993); United States v. Rockford Mem'l Corp., 898 F.2d 1278, 1285 (7th Cir. 1990). *See generally* Frank J. Nawalanic, *Motives of Non-Profit Organizations and the Antitrust Laws*, 21 CLEV. ST. L. REV. 97 (1972) (arguing that nonprofits fall under the purview of antitrust law).

47. *See Brown*, 5 F.3d at 666.

48. *See id.*

49. *See* Law v. NCAA, 134 F.3d 1010, 1017–18 (10th Cir. 1998); Metro. Intercollegiate Basketball Ass'n v. NCAA, 339 F. Supp. 2d 545, 550–52 (S.D.N.Y. 2004).

50. *Law*, 134 F.3d at 1016. "In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." United States v. E.I. du Pont De Nemours & Co., 351 U.S. 377, 395 (1956). "[T]he term 'relevant market' encompasses notions of geography as well as product use, quality, and description." Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001) (quoting Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988)) (holding plaintiff failed to establish a relevant market by stating the market for intercollegiate athletics was a single athletic program in Los Angeles); *see also* Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 962 (6th Cir. 2004) (holding that plaintiff failed to present evidence indicating the products or services are identical to or available substitutes for the NCAA's product or service). 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. *See Tanaka*, 252 F.3d at 1063 (quoting Oltz v. St. Peter's Cmty. Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988)). Reasonable interchangeability may be gauged by: (1) the product's uses (whether reasonable substitutes exist), or (2) consumer response to changes in price level (cross-elasticity). *See Worldwide Basketball*, 388 F.3d at 962 (citing White & White, Inc. v. Am. Hosp. Supply Corp., 723 F.2d 495, 500 (6th Cir. 1983)). "The burden is on the antitrust plaintiff to define the relevant market within which the alleged anticompetitive effects of the defendant's actions occur." *Id.* If a plaintiff fails to articulate and identify a relevant market, then grounds exist to dismiss a Sherman Act claim. *Id.*

51. *See generally* Thomas A. Piraino, Jr., *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 853 (2000) (arguing that courts do little to distinguish between antitrust claims where competition is beneficial form claims where it is harmful).

competitors in order for the industry to exist.[52] This unique aspect of the sports industry does not mean that all agreements reached by members are immune from antitrust scrutiny and liability.[53] In fact, the seminal antitrust case involving the NCAA, *NCAA v. Board of Regents*, concluded the NCAA illegally "curtail[ed] output and blunt[ed] the ability of member institutions to respond to consumer preference," which violated section 1 of the Sherman Act.[54] The United States Supreme Court made clear that the NCAA will be provided some latitude, but the NCAA must still abide by standards that justify a restraint.

The NCAA is no stranger to antitrust review. Parties have challenged NCAA rules and policies relating to the enforcement of NCAA bylaws,[55] prohibitions placed on entering a professional draft and obtaining an athlete-agent,[56] coaching limits,[57] eligibility,[58] compensation,[59] preseason tournaments,[60] financial aid,[61] camps,[62]

52. *See* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984).

53. *Id.*

54. *Id.* at 120.

55. Justice v. NCAA, 577 F. Supp. 356, 383 (D. Ariz. 1983) (holding that the sanctions enforced by the NCAA were not anticompetitive, were "reasonably related to the association's central objectives" (amateurism and fair competition), and were not overbroad; therefore, the NCAA's actions did not "constitute an unreasonable restraint in violation of the Sherman Act").

56. *See* Banks v. NCAA, 977 F.2d 1081, 1091 (7th Cir. 1992) (holding that the restrictions were in place to further the core values of amateur competition—amateurism and eligibility—and upholding the no-draft and no-agent bylaws); *see also* Gaines v. NCAA, 746 F. Supp. 738, 746 (M.D. Tenn. 1990) (holding that no-draft and no-agent bylaws have a pro-competitive effect).

57. *See* Bassett v. NCAA, 528 F.3d 426, 433 (6th Cir. 2008) (holding plaintiff failed to allege an antitrust injury); Hennessey v. NCAA, 564 F.2d 1136, 1154 (5th Cir. 1977) (holding that although the plaintiffs filed a claim that fell just short of antitrust scrutiny, the defendant's behavior was nonetheless a reasonable restraint on "trade or commerce" under section 1).

58. Smith v. NCAA, 139 F.3d 180, 185 (3d Cir. 1998) (holding that the NCAA's eligibility bylaws do not have an anticompetitive effect as they allow for the survival of the product of amateur sports and for the establishment of a level playing field), *vacated on other grounds*, NCAA v. Smith, 525 U.S. 459 (1999) (holding that the NCAA's eligibility rules allow for the survival of the product of amateur sports and allows for the establishment of a level playing field, thus the eligibility bylaws do not have an anticompetitive effect).

59. *See* McCormack v. NCAA, 845 F.2d 1338, 1345 (5th Cir. 1988) (holding that the NCAA eligibility rules do not violate antitrust laws and enforcement procedures used to deny football student-athletes compensation do not create an anticompetitive effect); Jones v. NCAA, 392 F. Supp. 295, 304 (D. Mass. 1975) ("The NCAA eligibility rules were not designed to coerce students into staying away from intercollegiate athletics, but to implement the NCAA basic principles of amateurism.").

60. *See* Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 962–64 (6th Cir. 2004) (holding that plaintiff failed to establish that the NCAA had market power over preseason men's basketball events, thus upholding the NCAA "Two in Four Rule").

equipment standards,[63] apparel,[64] and many others. Historically, the NCAA has been very successful in protecting its legislation and policies, particularly when they pertain to internal governance such as rules relating to competition and student-athlete restrictions.[65] On the other hand, the NCAA has been less successful when its rules pertain to external relations such as NCAA regulations and policies pertaining to a restricted college football television plan,[66] restrictions on compensation for coaches,[67] and restricted participation in post-season tournaments.[68] It is important to address *NCAA v. Board of Regents* and its application to review the standards provided by the United States Supreme Court.

61. *See* Agnew v. NCAA, 683 F.3d 328, 347 (7th Cir. 2012) (holding that plaintiff failed to establish a relevant market for student-athlete labor).

62. *See* Pocono Invitational Sports Camp, Inc. v. NCAA, 317 F. Supp. 2d 569, 587 (E.D. Penn. 2004) (holding that the plaintiff failed to set forth a relevant product market and, thus, the court could not "conclude that the proposed market for summer basketball camps is a separate and district market").

63. *See* Marucci Sports, L.L.C. v. NCAA, 751 F.3d 368, 377 (5th Cir. 2014) (holding baseball bat standards were presumptively procompetitive and, further, the plaintiff failed to set forth a practice that was violative of the Sherman Act); Warrior Sports, Inc. v. NCAA, No. 08-14812, 2009 U.S. Dist. LEXIS 25700, at *11 (E.D. Mich. Mar. 11, 2009) (holding the 2008 rule changes to lacrosse stick requirements do not restrict trade).

64. *See* Adidas America, Inc. v. NCAA, 64 F. Supp. 2d 1097, 1104 (D. Kan. 1999) (rejecting the plaintiff's allegations that NCAA Bylaw 12.5.5 caused injury to competition in the "markets for the sale of certain athletic uniforms, related athletic apparel and athletic footwear to consumers in which [plaintiff] competes").

65. *See supra* notes 50–59.

66. In 1981, the NCAA developed a restricted television plan for college football. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 85 (1984). The plan set the dollar amount each institution could receive from a telecast and how many opportunities each institution would have to play on television. *Id.* The court held the plan violated the Sherman Act as a horizontal price restraint on college football telecasts. *Id.* at 120.

67. Law v. NCAA, 134 F.3d 1010, 1019–24 (10th Cir. 1988) (holding an NCAA bylaw restricting coaching salaries to no more than $16,000.00 annually constituted a horizontal restraint fixing prices in violation of the Sherman Act). Following the Tenth Circuit's decision, the parties settled the dispute for $54.5 million. *See* RAY YASSER ET AL., SPORTS LAW: CASES AND MATERIALS 222 (7th ed. 2011).

68. NCAA rules prohibit Division I men's basketball teams from competing in two postseason tournaments in a given year. Plaintiff filed suit claiming NCAA bylaws were an unreasonable restraint on trade. Metro. Intercollegiate Basketball Ass'n v. NCAA, 339 F. Supp. 2d 545, 547 (S.D.N.Y. 2004). During trial, the parties settled the dispute for $56.5 million to be paid over a ten-year period, and the NCAA purchased ownership of the National Invitational Tournament ("NIT"). As a part of the settlement, the NCAA agreed to operate the NIT for at least five years. *See* Paul Fellin, *The Commitment to Participate Rule: The NCAA Fights to Keep the March Madness Ball in Its Court*, 20 ST. JOHN'S J.L. COMM. 501, 529 (2006).

In the seminal United States Supreme Court case[69] *NCAA v. Board of Regents*, the NCAA was not successful in protecting its restricted form of college football telecasts.[70] However, in dicta, the United States Supreme Court laid the foundation for the NCAA's most prominent and successful procompetitive justification to alleged anticompetitive restraints: amateurism.[71] The Court stated:

> The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act.[72]

The United States Supreme Court made it clear that it is reluctant to sanction the NCAA and will provide latitude for the NCAA to govern intercollegiate athletics. The United States Supreme Court further stated:

> In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might

69. In *Bd. of Regents*, the Supreme Court clarified the standard of review for NCAA rules and regulations in a Sherman Act challenge. The Court stated:

> Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal *per se*" approach because the probability that these practices are anticompetitive is so high; a *per se* rule is applied "when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." In such circumstances, a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, 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. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

Bd. of Regents, 468 U.S. at 100–01 (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979)).

70. *Id.* at 120.

71. *Id.*

72. *Id.*

> otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.[73]

The United States Supreme Court showed, in dicta, that it finds importance in maintaining an amateur product. Lower courts have issued subsequent decisions that rely heavily on the aforementioned dicta and some have indicated such language "essentially doomed the next round of student-athlete challenges of NCAA rules."[74] Four years following the United States Supreme Court's decision in *NCAA v. Board of Regents*, the Fifth Circuit followed the aforementioned dicta in a challenge a group of football student-athletes brought relating to the "death penalty" the NCAA issued against Southern Methodist University.[75] In *McCormack v. NCAA*,[76] the Fifth Circuit upheld NCAA regulations and stated "[t]he eligibility rules create the [amateur] product and allow its survival in the face of commercializing pressures. The goal of the NCAA is to integrate athletics with academics. Its requirements reasonably further this goal."[77] Next, the Seventh Circuit addressed the application of the NCAA amateurism rules and continued the expansion of the NCAA's procompetitive justification.

The Seventh Circuit further advanced the dicta from *NCAA v. Board of Regents* in *Banks v. NCAA*.[78] Banks was a Notre Dame University football student-athlete who challenged the NCAA's no agent and no draft legislation, which prohibits student-athletes from obtaining an athlete-agent and entering a professional draft during their tenure as student-athletes.[79] The Seventh Circuit upheld the no agent and no draft legislation by concluding the NCAA's rules amply prevent commercialism and promote educational pursuits.[80] However, the dissent took a cynical view of intercollegiate athletics and chastised the majority for succumbing to an "outmoded image of

73. *Id.* at 102.

74. *See* McCormack v. NCAA, 845 F.2d 1338, 1340 (5th Cir. 1988); Law v. NCAA, 134 F.3d 1010, 1012 (10th Cir. 1998); Jeffrey J.R. Sundram, *The Downside of Success: How Increased Commercialism Could Cost the NCAA Its Biggest Antitrust Defense*, 85 TUL. L. REV. 543, 554–55 (2010).

75. *McCormack*, 845 F.2d at 1340.

76. 845 F.2d 1338 (5th Cir. 1988).

77. *Id.* at 1344–45; *see also* Gaines v. NCAA, 746 F. Supp. 738, 747 (M.D. Tenn. 1990) ("The public interest is promoted by preserving amateurism and protecting the educational objectives of intercollegiate athletics.").

78. 977 F.2d 1081 (7th Cir. 1992).

79. *Id.* at 1082.

80. *Id.* at 1089.

intercollegiate sports that no longer jibes with reality."[81] In fact, the dissent stated these NCAA rules are an "agreement among colleges to eliminate an element of competition in the college football labor market."[82] A number of subsequent decisions have agreed with the dissent's analysis, and some courts have therefore been less inclined to view the NCAA's procompetitive justification of amateurism with such reverential appeal.[83] Although *Agnew v. NCAA*[84] did not produce a positive result for individual student-athletes, the Seventh Circuit indicated that "student-athletes are paid" and, further, stated that "the prohibition against multi-year scholarships is, in a sense, a rule concerning the amount of payment a player receives for his labor and thus may seem to implicate the split between amateur and pay-for-play sports."[85] Although most of the cases set forth by student-athletes have not ended well, it appears courts are open to entertaining student-athletes' arguments as long as they are properly submitted and not lacking in key antitrust components like the market definition. Student-athletes have not had overwhelming success at the courthouse when challenging NCAA rules on antitrust grounds; however, signals indicate the tides are changing and the historic view of amateurism jurists have followed is now being met with skepticism.

III. *O'BANNON V. NCAA*: FOLLOWING THE CASE

O'Bannon v. NCAA has an extensive procedural history that provides insight on the court's thought process and rulings. subpart A will describe the claims set forth by O'Bannon; subpart B will discuss the court's rulings on the NCAA's motion to dismiss; subpart C will consider O'Bannon's motion for class certification; subpart D will describe the NCAA's motion for summary judgment; and subpart E will discuss the Court's opinion.

A. Claims Set Forth by O'Bannon

In 2009, Ed O'Bannon, a former University of California, Los Angeles ("UCLA") student-athlete and National Basketball

81. *Id.* at 1099 (Flaum, J., dissenting).

82. *Id.* at 1097.

83. *See, e.g.*, Agnew v. NCAA, 683 F.3d. 328, 341 (7th Cir. 2012).

84. 683 F.3d 328 (7th Cir. 2012).

85. *Id.* at 344 (holding the plaintiff failed to properly identify a relevant cognizable market in his complaint and, thus, the District Court's dismissal was justifiable); *see also* Thomas A. Baker III, Joel G. Maxcy & Cyntrice Thomas, White v. NCAA: *A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS SPORT 75, 92 (2011).

Association ("NBA") player, filed a class action complaint in the U.S. District Court for the Northern District of California.[86] O'Bannon sought unspecified monetary damages for the NCAA's use and license of student-athletes' names, images, and likenesses by multiple commercial enterprises.[87] O'Bannon complained the NCAA allowed his and other student-athletes' images, names, likenesses, and other identifiable characteristics to be used to sell DVDs of championship seasons, classic competitions featured on television, action figurines, memorabilia, trading cards, television broadcasts, and videogames.[88] He argued the NCAA receives substantial compensation from these commercial ventures but bars former and current student-athletes from receiving compensation relating to the use of their images, names, likenesses, and other identifiable characteristics.[89]

O'Bannon set forth a class action lawsuit with a class of plaintiffs,[90] including current and former NCAA student-athletes

86. O'Bannon's class representatives include former college and professional basketball legends Oscar Robertson and Bill Russell. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 962 (N.D. Cal. 2014). Robertson is no stranger to protracted litigation; he was the president of the National Basketball Player's Association and lead plaintiff in the NBA players' fight for free agency. *See generally* Robertson v. Nat'l Basketball Ass'n, 556 F.2d 682 (2d Cir. 1977) (affirming a settlement agreement that result in the NBA's current free agency rules).

87. Third Consolidated Amended Class Action Complaint at 4–5, *In re* NCAA Student-Athlete Name & Likeness Licensing Litig. Keller v. Elec. Arts, Inc., No. C 09-01967 CW, (N.D. Cal July 19, 2013), 2013 WL 3810438 [hereinafter O'Bannon Class Action Complaint].

88. *Id.*

89. *Id.* at 5–6. Licensed NCAA products are a part of a $4 billion collegiate licensing industry. Michael Rietmulder, *Lawsuit Threatens Big Business of Collegiate Licensing*, MINN. DAILY (Feb. 25, 2010), http://www.mndaily.com/2010/02/25/lawsuit-threatens-big-business-collegiate-licensing.

90. O'Bannon's case was consolidated with a right of publicity case brought by former Arizona State University and University of Nebraska quarterback Sam Keller (Keller). In 2009, Keller, a former football student-athlete, filed a lawsuit against Electronic Arts ("EA"), the NCAA, and the Collegiate Licensing Company ("CLC"), alleging these defendants blatantly and unlawfully misappropriated his and other student-athletes' likenesses in videogames produced by EA. *See* Keller v. Elec. Arts, Inc., 724 F.3d 1268, 1271 (9th Cir. 2013); Class Action Complaint ¶ 1, Keller v. Elec. Arts, Inc., 2010 WL 530108 (N.D. Cal. 2010) (No. CV-09-1967), at *1 [hereinafter Keller Class Action Complaint]; *see also* Hart v. Elec. Arts, Inc., 717 F.3d 141, 146–47 (3d Cir. 2013) (alleging that EA violated Hart's right of publicity); Brown v. Elec. Arts, Inc., 724 F.3d 1235, 1238–39 (9th Cir. 2013) (alleging that EA misappropriated his likeness); *Athletes Challenge NCAA's Use of Likenesses in Video Games*, SPORTS BUS. DAILY (July 6, 2009), http://www.sportsbusinessdaily.com/article/131499 (stating that former Rutgers University quarterback Ryan Hart filed a similar lawsuit against EA in a New Jersey court); *Jim Brown Doesn't Want Anyone to Play Madden '09*, SPORTS BUS. DIG. (Aug. 5, 2008), http://sportsbusinessdigest.com/jim-brown-doesnt-want-anyone-to-play-madden-09 (stating that Jim Brown is suing EA for using his likeness). Keller asserted EA utilizes the likenesses of current and former student-athletes in NCAA basketball and football

competing in major Division I football and men's basketball whose names, images, and likenesses the NCAA and its official licensing representative had commercially licensed.[91] O'Bannon's case, based in two areas of the law, argued: (1) the NCAA had unlawfully restrained trade in violation of section 1 of the Sherman Act;[92] and (2) the NCAA had violated the student-athletes' right of publicity[93] by

videogames to increase sales and profits. Keller Class Action Complaint at 2. Keller also argued that EA "intentionally circumvent[ed]" NCAA rules and regulations prohibiting the use of student-athletes' names in commercial endeavors by allowing game players to upload team rosters from a third party through the "EA Locker" feature, which applied the student-athletes' names to their corresponding team within a "matter of seconds." *Id.* EA produces videogames under the names *NCAA Football* and *NCAA Basketball*. *Id.* at 3, 5. These games depict virtual basketball and football games between NCAA member institutions that feature student-athletes in the correct uniform, jersey number, skill set, and size. EA also replicated university logos, marks, mascots, and stadia. *Id.* at 23. As a result of the aforementioned conduct, Keller set forth multiple causes of action including: (1) common law right of publicity; (2) statutory violations under California and Indiana right of publicity law; (3) civil conspiracy; (4) breach of contract; (5) unjust enrichment; and (6) unfair trade practices. *Id.* at 23–33. Ultimately, EA and the NCAA agreed to separate settlements with the Keller plaintiffs for $40 million and $20 million, respectively. Associated Press, *Former NCAA Athletes to Get $40 Million in Videogames Lawsuit Settlement*, LA TIMES (June 1, 2014), http://www.latimes.com/sports/la-sp-sn-ncaa-lawsuit-videogames-settlement-20140601-story.html (EA settlement); Martin Rickman, *NCAA Announces $20M Settlement with Keller Plaintiffs over Video Game Claims*, SI.COM (June 14, 2014), http://www.si.com/college-football/campus-union/2014/06/09/ncaa-keller-lawsuit-settlement (NCAA settlement).

91. O'Bannon Class Action Complaint, *supra* note 87, at 6–7.

92. 15 U.S.C. § 1 (2012).

93. The right of publicity has grown out of the commercial reality of the burgeoning "associative value" that celebrities impose upon products and services and has been recognized to protect a celebrity's nickname, likeness, portrait, performance, biographical facts, statistics, and symbolic representations from unwanted commercial misappropriation. *See* Sheldon W. Halpern, *The Right of Publicity: Maturation of an Independent Right Protecting the Associative Value of Personality*, 46 HASTINGS L.J. 853, 856–59 (1995) ("The phenomenon of celebrity generates commercial value. A celebrity's persona confers associative value."); *see also* J. Thomas McCarthy, *The Spring 1995 Horace S. Manges Lecture—The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM.-VLA J.L. & ARTS 129, 133–34 (1995) ("What the right of publicity is about ninety-percent of the time is the use of some aspect of a person to help sell a product."); William Smith, Comment, *Saving Face: Adopting a Right of Publicity to Protect North Carolinians in an Increasingly Digital World*, 93 N.C. L. Rev. 2065, 2066 (2014) (noting, however, that the rapid rise in technology and social media has made it possible for almost anyone to become a "celebrity"). The right of publicity, as explained by the Second Circuit in *Haelan Laboratory, Inc. v. Topps Chewing Gum, Inc.*, gives a celebrity the right to damages and other relief for the unauthorized commercial appropriation of that celebrity's identity independent of a common law or statutory right of privacy. 202 F.2d 866, 868 (2d Cir. 1953). Section 46 of the *Restatement (Third) of Unfair Competition* states, "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability . . . ." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995). Section 47 of the *Restatement (Third) of Unfair Competition* states, however, that

failing to compensate the former student-athletes for the use of their names, images, likenesses, and other identifiable characteristics.[94] O'Bannon requested a constructive trust be established for any resulting damages or compensation.[95] The trust would be available to current student-athletes upon exhaustion of their intercollegiate athletic eligibility.[96]

B. NCAA's Motion to Dismiss Denied

On October 25, 2013, the Honorable Claudia Wilken denied the NCAA's request to dismiss the proceedings as set forth in the NCAA's Motion to Dismiss.[97] The NCAA initially and justifiably relied on the dicta from *NCAA v. Board of Regents* to support its basis for dismissal. The NCAA argued that the United States Supreme Court "has explicitly endorsed its rules prohibiting student-athlete compensation"[98] by stating "[i]n order to preserve the character and quality of the [NCAA's] 'product,' athletes must not be paid, must be required to attend class, and the like."[99] The court, however, stated that "[t]his . . . does not preclude Plaintiffs' claims here."[100]

The court followed a new and more progressive review of *NCAA v. Board of Regents.* Accordingly, the court distinguished *NCAA v. Board of Regents* by articulating that "*Board of Regents* focused on a different set of competitive restraints" and the United States Supreme Court has "never examined whether or not the ban on student-athlete compensation actually had a procompetitive effect on the college

"use 'for purposes of trade' does not ordinarily include the use of a person's identity in news reporting, commentary, entertainment, works of fiction or nonfiction, or in advertising that is incidental to such uses." *Id.* § 47.

94. O'Bannon Class Action Complaint, *supra* note 87, at 6–7 ("Defendants have unjustly enriched the NCAA, its member conferences and schools, and its for-profit business partners. Defendant's actions have deprived Class members of their ability to exploit their right of publicity . . . .").

95. *Id.* at 8 ("Plaintiff further seeks an accounting of the monies received by Defendants, their co-conspirators, and their licensees in connection with the exploitation of Damages Class members' images, and the establishment of a constructive trust to benefit Damages Class members.").

96 *Id.*; *see also* Katie Thomas, *College Stars See Themselves in Video Games, and Pause to Sue*, N.Y. TIMES, July 4, 2009, at A1.

97. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 990 F. Supp. 2d 996, 998 (N.D. Cal. 2013).

98. *Id.* at 1001.

99. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984).

100. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d at 1002.

sports market . . . ."[101] In turn, the court noted several other NCAA cases involving restraints on financial aid and compensation that were permitted to overcome dismissal.[102] The court emphasized recent analysis by the Seventh Circuit in *Agnew v. NCAA*, limiting the breadth of *NCAA v. Board of Regents*, by stating:

> The Sherman Act clearly applies to at least some of the NCAA's behavior. The question for us, however, is whether and when the Sherman Act applies to the NCAA and its member schools in relation to their interaction with student-athletes. The Supreme Court has not weighed in on this issue directly, but *Board of Regents*, the seminal case on the interaction between the NCAA and the Sherman Act, implies that *all* regulations passed by the NCAA are subject to the Sherman Act.[103]

The court further concluded *NCAA v. Board of Regents* "does not stand for the sweeping proposition that student-athletes must be barred, both during their college years and forever thereafter, from receiving any monetary compensation for the commercial use of their names, images, and likenesses."[104] Accordingly, the court denied the NCAA's Motion to Dismiss.[105]

C. The Court Certifies O'Bannon's Injunctive Relief Class, but Denies Certification for the Subclass for Monetary Damages

At a key phase of the litigation, O'Bannon submitted his request for certification of the injunctive relief and damages class. This subpart will address the key issues the court addressed and analyze

101. *Id.*

102. *See, e.g.*, *In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005) (holding the restriction placed on the number of athletics scholarships offered was a valid antitrust claim because NCAA member institutions compete for top amateur athletes); Rock v. NCAA, No. 1:12-CV-1019-JMS-DKL, 2013 U.S. Dist. LEXIS 116133, at *14 (S.D. Ind. Aug. 16, 2013) (holding plaintiff set forth a viable antitrust claim by alleging NCAA legislation limited the "number and distribution of Division I football scholarships and that, as a result, the student-athletes in the market received less for their labor than they would have received without the restrictions"); White v. NCAA, No. CV 06-999-RGK, 2006 U.S. Dist. LEXIS 101366, at *7 (C.D. Cal. Sept. 20, 2006) (holding that limitations placed on athletics financial aid was a valid antitrust claim because colleges and universities compete to attract top athletes).

103. Agnew v. NCAA, 683 F.3d 328, 338–39 (7th Cir. 2012) (citations omitted).

104. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d at 1005.

105. *Id.* at 1009. The NCAA also sought dismissal of the complaint based on the First Amendment and Copyright Act preemption doctrine. *Id.* at 1005–09 The court concluded that neither of these defenses prevented the plaintiffs' claims from moving forward. *Id.*

the court's review of each element of class certification for the injunctive relief and damages class.

On November 8, 2013, the Honorable Claudia Wilken ruled on O'Bannon's request for class certification.[106] In her order, Judge Wilken provided a detailed analysis guided by Rule 23 of the Federal Rules of Civil Procedure and concluded O'Bannon's request for class certification was granted in part and denied in part.[107] O'Bannon sought to certify a class to pursue injunctive relief and a subclass to pursue monetary damages.[108]

The injunctive relief class was defined as follows:

> All 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 in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees after the conclusion of the athlete's participation in intercollegiate athletics.[109]

The damages subclass was defined as follows:

> All former student-athletes residing in the United States who 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 whose images, likenesses and/or names have been included in game footage or in videogames licensed or sold by Defendants, their co-conspirators, or their licensees from July 21, 2005 and continuing until a final judgment in this matter.[110]

The court first analyzed the four requirements of Rule 23(a) of the Federal Rules of Civil Procedure: numerosity, commonality, typicality, and adequacy.[111] The parties agreed the numerosity

106. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-1967 CW, 2013 U.S. Dist. LEXIS 160739, at *42–43 (N.D. Cal. Nov. 8, 2013).

107. *Id.* at *41–43.

108. *Id.* at *15–16.

109. *Id.*

110. *Id.* at *16.

111. *Id.* at *12–15. Rule 23(a) of the Federal Rules of Civil Procedure requires a showing that

requirement as set forth in Rule 23(a)(1) of the Federal Rules of Civil Procedure was met as the "classes are sufficiently large."[112] Next, the court analyzed the commonality prong[113] as set forth in Rule 23(a)(2) of the Federal Rules of Civil Procedure[114] by finding O'Bannon satisfied the requirements for both the injunctive relief class and the damages subclass.[115] The court concluded O'Bannon identified and articulated several common questions of law and fact, including "the size of the 'education' and 'group licensing' markets . . . ; whether NCAA rules have harmed competition in those markets; and whether the NCAA's procompetitive justifications for its conduct are legitimate."[116]

The court then turned to the typicality prong as set forth in Rule 23(a)(3) of the Federal Rules of Civil Procedure.[117] The court found the putative class members have common characteristics that form the basis of antitrust injuries because the class representatives "play or played for a Division I men's football or basketball team; all were depicted, without their consent and without payment, in videogames or game broadcasts; and all complied with NCAA rules that allegedly barred them from selling or licensing the rights to their names, images, and likenesses."[118] Importantly, uniformity of injuries, claims,

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a)(1)–(4).

112. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 U.S. Dist. LEXIS 160739, at *17.

113. *Id.* at *17–20. In an antitrust context, class members present common issues of law and fact when the defendant's conduct is "actionably anticompetitive under antitrust standards" and when the conduct produced "anticompetitive effects within the relevant product and geographic markets." Sullivan v. DB Invs. Inc., 667 F.3d 273, 336 (3d Cir. 2011) (Scirica, J., concurring).

114. The requirements of Rule 23(a)(2) are "less rigorous than the companion [commonality] requirements of Rule 23(b)(3)." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

115. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 U.S. Dist. LEXIS 160739, at *18–20.

116. *Id.* at *19–20.

117. *Id.* at *20–23. A "class representative must be part of the class and possess the same interest and suffer the same injury as the class members." Gen. Tel. Co. v. Falcon, 457 U.S. 147, 156 (1982) (internal citations and quotation marks omitted).

118. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 U.S. Dist. LEXIS 160739, at *21–22.

and legal theories in antitrust cases are generally sufficient together to establish the typicality prong of class analysis.[119]

In the final step of Rule 23(a) analysis, the court analyzed the adequacy prong as set forth in Rule 23(a)(4) of the Federal Rules of Civil Procedure,[120] which requires a showing that "the representative parties will fairly and adequately protect the interests of the class."[121] The NCAA heavily disputed this prong and argued that there was a dispute among class members that precluded class certification because some putative class members would garner higher prices and greater value for their names, images, and likenesses.[122] Further, the NCAA argued the damages model O'Bannon set forth failed to account for the difference in value of class members.[123] The court, however, articulated the method for allocating damages would not be sufficient to prevent class certification.[124] In fact, other courts have previously clearly indicated that "damages calculations alone cannot defeat [class] certification"[125] and have also allowed for class certification in claims relating to group licensing for athletes where the value of publicity rights varied.[126]

119. *In re* NCAA I-A Walk-On Football Players Litig., No. C04-1254C, 2006 U.S. Dist. LEXIS 28824, at *19–22 (W.D. Wash. May 3, 2006) (concluding that the typicality prong is satisfied when the legal theory set forth by all class members is identical); White v. NCAA, No. CV 06-0999(RGK), 2006 U.S. Dist. LEXIS 101374, at *6–7 (C.D. Cal. Oct. 19, 2006) (concluding that a claim asserting a horizontal agreement by the NCAA in violation of the Sherman Act and that student-athletes were all affected by the NCAA legislation satisfied the typicality prong).

120. In resolving the adequacy prong, courts must determine whether "the named plaintiffs and their counsel have any conflicts of interest with other class members" and whether "the named plaintiffs and their counsel [will] prosecute the action vigorously on behalf of the class." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1020 (9th Cir. 1998).

121. FED. R. CIV. P. 23(a)(4).

122. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 U.S. Dist. LEXIS 160739, at *23–24 ("The NCAA contends that there are conflicts of interest among class members that preclude class certification here.").

123. *Id.* at *24 ("According to the NCAA, if Plaintiffs were to prevail in this case, those high-value class members would be entitled to a larger share of damages than others because they would have suffered greater economic losses from the NCAA's ban on student-athlete compensation.").

124. *Id.* at *26–27 ("[The principle] illustrates that Plaintiffs' proposed model for allocating damages does not create a real conflict of interest among class members. Even if Plaintiffs' method of allocating damages did create such a conflict, this would not be sufficient to prevent class certification.").

125. Yokoyama v. Midland Nat'l Life Ins. Co., 594 F.3d 1087, 1089, 1094 (9th Cir. 2010) ("The potential existence of individualized damage assessments, however, does not detract from the action's suitability for class certification.").

126. Parrish v. Nat'l Football League Players Ass'n, C 07-00943(WHA), 2008 U.S. Dist. LEXIS 120158, at *17–22 (N.D. Cal. Apr. 29, 2008) (stating retired NFL player's have a common interest to determine their rights under group licensing agreements); *see also* Brown v. Nat'l Football League Players Ass'n, 281 F.R.D. 437, 442–43 (C.D. Cal.

Likewise, the court concluded O'Bannon met the requirements of Rule 23(a) of the Federal Rules of Civil Procedure as it pertained to both the injunctive relief class and the damages subclass.[127] Thereafter, the court turned to the requirements of Rule 23(b) of the Federal Rules of Civil Procedure. First, the court analyzed whether the injunctive relief class met the requirements of Rule 23(b)(2) of the Federal Rules of Civil Procedure.[128] Class certification may be appropriate even when some class members have not been injured by the challenged issue at bar.[129] The court is simply required to determine "whether class members seek uniform relief from a practice applicable to all of them."[130] In a rather short form of analysis, the court concluded class certification is appropriate because injunctive relief would offer all class members "uniform relief."[131] The NCAA argued extensively that O'Bannon's claim for injunctive relief was merely ancillary to the putative class' predominate claim for monetary damages; however, the court summarily rejected this notion by responding that a request for injunctive relief barring the NCAA from prohibiting current and former student-athletes from entering into group licensing agreements for their names, images, and likenesses with videogame manufacturers and broadcasters was "necessary to eliminate the restraints [imposed by] the NCAA."[132] Accordingly, the court certified the injunctive relief class.[133]

The court then turned to the damages subclass to determine whether the subclass met certification requirements pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.[134] In price-fixing

2012) (stating a retired NFL players "lack of celebrity" does not prohibit him from representing a class of former players relating to licensing agreements).

127. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 U.S. Dist. LEXIS 160739, at *29 ("Plaintiffs have therefore satisfied all the Rule 23(a) requirements with respect to both the Injunctive Relief Class and the Damages Subclass.").

128. *Id.* at *29–30. Rule 23(b)(2) of the Federal Rules of Civil Procedure states, "A class action may be maintained if Rule 23(a) is satisfied and if the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2).

129. *See* Walters v. Reno, 145 F.3d 1032, 1047 (9th Cir. 1998) ("Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate.").

130. Rodriguez v. Hayes, 591 F.3d 1105, 1125 (9th Cir. 2010).

131. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 U.S. Dist. LEXIS 160739, at *30.

132. *Id.* at *31–32.

133. *Id.* at *41–42 ("For the reasons set forth above, Plaintiffs' motion for class certification . . . is GRANTED in part and DENIED in part.").

134. *See id.* at *32–34. Rule 23(b)(3) of the Federal Rules of Civil Procedure states that

antitrust cases, class manageability problems arise where the "fact of injury" cannot be determined by a "virtually mechanical task."[135] The court rejected O'Bannon's request for class certification for the damages subclass by indicating that O'Bannon "failed to satisfy the manageability requirement because [O'Bannon has] not identified a feasible way to determine which members of the [damages subclass] were actually harmed[136] by the NCAA's allegedly anticompetitive conduct."[137]

The court identified numerous purported shortcomings in class certification for the damages subclass with the chief concern being the failure to set forth a "feasible method" to determine the members of the damages subclass that would have still competed as a Division I student-athlete in the absence of the challenged restraints.[138] The court further noted many of the putative class members of the damages subclass may have benefited from the challenged restraints by obtaining roster spots that might otherwise not have been available and would have been provided to more talented athletes.[139] Additionally, the court concluded that there was no "feasible method" to determine which student-athletes were depicted in videogames during the relevant class period as only sixty-eight players were depicted for each team in the NCAA-licensed videogames but

> [a] class action may be maintained if Rule 23(a) is satisfied and if the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

FED. R. CIV. P. 23(b)(3).

135. *See* Windham v. Am. Brands, Inc., 565 F.2d 59, 67–68 (4th Cir. 1977). Rule 23(b)(3)(D) of the Federal Rules of Civil Procedure requires the court to examine the "likely difficulties in managing a class action." FED. R. CIV. P. 23(b)(3)(D).

136. *In re* NCAA I-A Walk-On Football Players Litig., No. C04-1254C, 2006 U.S. Dist. LEXIS 28824, at *22–29 (W.D. Wash. May 3, 2006) (concluding class certification would be inappropriate because every putative class member would have to show they would have obtained a scholarship but for the NCAA restrictions on the number of scholarships offered).

137. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., 2013 U.S. Dist. LEXIS 160739, at *33.

138. *Id.* at *37 ("Plaintiffs have not provided a feasible method for determining which members of the Damages Subclass would still have played for Division I teams—and thus, suffered the injuries alleged here—in the absence of the challenged restraints.").

139. *Id.* at *36 ("Indeed, many of these individuals—all of whom are putative members of the Damages Subclass—may have even *benefited* from the challenged restraints by earning roster spots that would have otherwise gone to more talented student-athletes.").

each team operated with up to 105 players.[140] Consequently, the court indicated O'Bannon failed to present a "feasible method for determining on a class-wide basis which student-athletes appeared in game footage during the relevant period."[141] In light of its analysis, the court denied O'Bannon's request to certify the damages subclass, because the court determined a class is not "a superior method for adjudicating this controversy."[142] In short, the court denied O'Bannon's request to certify the damages subclass but did certify the injunctive relief class, which allowed O'Bannon to move forward on behalf of similarly situated student-athletes rather than with individual mass tort actions.

D. NCAA's Motion for Summary Judgment Denied

On April 11, 2014, the Honorable Claudia Wilken ruled on the parties' competing motions for summary judgment.[143] The court first determined the proper standard to apply to claims brought under section 1 of the Sherman Act.[144] Plaintiffs urged the court to review

140. *Id.* at *38–40 ("Plaintiffs have not offered a feasible method for determining on a class-wide basis which student-athletes are depicted in these videogames and which are not.").

141. *Id.* at *38–40.

142. *Id.* at *40 ("In light of these obstacles to manageability, class resolution does not provide a superior method for adjudicating this controversy.").

143. *See In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. C 09-1967 CW, 2014 U.S. Dist. LEXIS 50693, at *77–79 (N.D. Cal. Apr. 11, 2014). Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. FED. R. CIV. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986) ("Under Rule 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (internal quotation marks and citations omitted)). The moving party bears the burden of showing that there is no material factual dispute; therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary support. *Celotex*, 477 U.S. at 322–23 ("[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the pleadings] which it believes demonstrate the absence of a genuine issue of material fact."). The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). If the moving party discharges its burden by showing an absence of evidence to support an essential element of a claim or defense, it is not required to produce evidence showing the absence of a material fact on such issues, or to support its motion with evidence negating the non-moving party's claim. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 885 (1990) ("Rule 56 does not require the moving party to *negate* the elements of the nonmoving party's case . . . .").

144. In order to prevail on a claim set forth under section 1 of the Sherman Act, a plaintiff must establish "(1) that there was a contract, combination, or conspiracy; (2) that

the case by using "quick look"[145] or "truncated" rule of reason analysis rather than by applying a traditional burden-shifting rule of reason analysis.[146] The court, however, decided against adopting the quick look method of review because "courts have found that the NCAA's general restrictions on student-athlete compensation could conceivably enhance competition . . . ."[147] Accordingly, the court opted to apply the traditional burden-shifting framework of rule of reason analysis.[148]

1. The Relevant Market

The plaintiffs identified and set forth two identifiable markets where the NCAA's regulations arguably had anticompetitive effects: the "college education market" and the "group licensing market."[149] First, the court concluded that the evidence supporting an inference that restrictions put in place by the NCAA undermine Division I institutions' ability to freely compete for the top football and basketball recruits[150] was sufficient to satisfy the plaintiffs' initial

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

145. Quick look rule of reason analysis is an abbreviated form of rule of reason analysis that presumes the challenged restraint is unlawful and shifts the burden to the defendant to show empirical evidence of procompetitive justifications. FTC v. Actavis, Inc., 133 S. Ct. 2223, 2237 (2013); Worldwide Basketball & Sport Tours, Inc. v. NCAA, 388 F.3d 955, 959–60 (6th Cir. 2004). Quick look analysis may be used 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." Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999). Conversely, if the agreement at issue could "plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," then quick look analysis is not appropriate. *Id.* at 771.

146. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014 U.S. Dist. LEXIS 50693, at *20–21.

147. *Id.* at *21. Under a traditional rule of reason review, "the plaintiff bears the initial burden of showing that the restraint produces significant anticompetitive effects within [a] relevant . . . market[]." Hairston v. Pac. 10 Conf., 101 F.3d 1315, 1319 (9th Cir. 1996). If the plaintiff satisfies the initial burden, the defendant must come forward with evidence of the restraint's competitive effects. *Id.* If the defendant produces this evidence, the plaintiff must show that "any legitimate objectives can be achieved in a substantially less restrictive manner." *Id. But see* Gabe Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 563 (2009) (arguing that this additional prong adds confusion rather than clarity to the analysis).

148. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014 U.S. Dist. LEXIS 50693, at *21.

149. *Id.* at *23.

150. Experts for the plaintiffs provided evidence indicating market restraints prohibited Division I institutions from offering recruits revenue from broadcast and videogame licenses. *Id.* at *24–25.

summary judgment burden for the "college education market."[151] Second, the court concluded the evidence sufficiently established anticompetitive effects on the "group licensing market" by providing evidence from experts showing NCAA legislation prohibits videogame producers and broadcasters from competing freely to offer licenses to student-athletes for use of their names, images, and likenesses.[152]

The NCAA, however, took umbrage with the group licensing market by arguing broadcasts of college football and basketball games are a form of protected speech, and thus, the plaintiffs have no cognizable claim.[153] The court then launched into a lengthy analysis of the First Amendment as it pertains to live broadcasts and initially indicated the United States Supreme Court has never considered whether the First Amendment prevents an athlete from asserting right of publicity claims relating to the use of game footage.[154] The court turned to *Zacchini v. Scripps-Howard Broadcasting Company*,[155] the only right of publicity case that has been heard by the United States Supreme Court, and stated that the "reasoning in *Zacchini* strongly suggests that the First Amendment does not guarantee media organizations an unfettered right to broadcast entire sporting events without regard for the participating athletes' right of publicity."[156] Additionally, the court reviewed a recent Seventh Circuit decision, *Wisconsin Interscholastic Athletic Association v. Gannett Company, Inc.*,[157] and concluded the First Amendment does not "provide the media with a right to transmit an entire performance or to prohibit performers from charging fees . . . [because] this would

151. *Id.* at *23–25; *see also* In re NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1150 (W.D. Wash. 2005) (holding football student-athletes established a valid antitrust claim by alleging restraints on the number of scholarships offered).

152. *Id.* at *25–26.

153. *Id.* at *31–32.

154. *Id.* at *32.

155. 433 U.S. 562, 563–64 (1977) (holding a television station was not entitled to First Amendment protection for broadcasting the entire fifteen-second "human cannonball" act of a performer); *see also* Ettore v. Philco Television Broad. Co., 229 F.2d 481 (3d Cir. 1956) (holding a television network violated a professional boxer's right of publicity by broadcasting one of his old fights without his consent); Pittsburgh Athletic Co. v. KQV Broad. Co., 24 F. Supp. 490 (W.D. Pa. 1938) (holding a radio station violated a baseball team owner's rights to disseminate, sell, or license broadcasting rights for its games by broadcasting games without the owner's consent).

156. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014 U.S. Dist. LEXIS 50693, at *33.

157. 658 F.3d 614, 615 (7th Cir. 2011) (holding the high school athletic association had the exclusive right to license broadcasts to a regional television network of events it organized and the First Amendment did not foreclose such right).

harm, not help, the interests of free speech."[158] After reviewing *Zacchini* and *Wisconsin Interscholastic*, the court reasoned "the First Amendment does not create a right to broadcast an entire athletic performance without first obtaining a license or consent from all of the parties who hold valid ownership rights in that performance."[159] Accordingly, the First Amendment does not prohibit student-athletes from entering into group licenses.[160]

2. Procompetitive Justifications

After concluding the plaintiffs adequately set forth a relevant market that was restrained by NCAA legislation, the court turned to the NCAA's procompetitive justifications as required under rule of reason analysis. The following subpart will address the court's analysis of the NCAA's procompetitive justifications.

a. Preservation of Amateurism

The NCAA, as it has done historically, argued the promotion of amateurism is a procompetitive justification to the alleged restraint.[161] The NCAA produced evidence in the form of surveys showing that consumers are opposed to compensating student-athletes.[162] The plaintiffs, however, argued the surveys the NCAA presented were deficient because they failed to distinguish between pay-for-play and compensation for the use of student-athletes' names, images, and likenesses.[163] The plaintiffs produced an expert report showing other sporting events that formerly restricted competition to amateurs, like the Olympics, have not undermined their popularity when allowing professionals to compete.[164] In light of the competing evidence the parties offered, the court concluded the NCAA was not entitled to summary judgment on this point.[165]

158. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014 U.S. Dist. LEXIS 50693, at *36–37.

159. *Id.* at *38.

160. *Id.* at *39; Pooley v. Nat'l Hole-In-One Ass'n, 89 F. Supp. 2d 1108, 1113–14 (D. Ariz. 2000) (holding footage of athletic performances is not protected by the First Amendment if used for "strictly commercial" purposes).

161. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014 U.S. Dist. LEXIS 50693, at *51–54.

162. *Id.* at *52–53.

163. *Id.* at *53–54.

164. *Id.* at *55; *see also* Virginia A. Fitt, *The NCAA's Lost Cause and the Legal Ease of Redefining Amateurism*, 59 DUKE L.J. 555, 581–84 (2009) (discussing the standards for Olympic competition).

165. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014 U.S. Dist. LEXIS 50693, at *54–56.

b. Competitive Balance

The NCAA next argued that competitive balance in Division I football and basketball is a procompetitive justification to the alleged restraint.[166] Generally, competitive balance in sports is considered a "legitimate" procompetitive justification that provides leagues with latitude to restrain competition for the betterment of the overall product.[167] As such, the NCAA argued restrictions on student-athlete compensation enhance competition because it prevents institutions with healthy financial resources from gaining advantages over their less prosperous competitors.[168] In support of their contentions, the NCAA offered declarations by university administrators and conference representatives asserting that sharing broadcast and licensing revenue with student-athletes would jeopardize competitive balance.[169] Although the court was less than swayed by the evidence the NCAA provided, the court concluded the NCAA presented "some evidence" that competitive balance is a procompetitive justification to the alleged restraint, and thus, the plaintiffs were not entitled to summary judgment.[170] However, the court noted the evidence the NCAA offered was self-serving, failed to identify the level of competitive balance necessary to maintain existing consumer demand, and failed to indicate how NCAA restrictions on student-athlete compensation helped the NCAA achieve a level of competitive balance.[171]

c. Integration of Education and Athletics

In the NCAA's third argument, it contended the integration of education and athletics advances the educational mission of colleges and universities and thus, is a procompetitive justification for the alleged restraint.[172] The court chastised the NCAA for offering this as a procompetitive justification by stating "these may be worthwhile

166. *Id.* at *57.

167. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 204 (2010); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984). *But see* Smith v. Pro Football, Inc., 593 F.2d 1173, 1179–80 (D.C. Cir. 1981) (holding that the NFL player draft is not a proper "group boycott" and, thus, excludes horizontal competitors); Mackey v. Nat'l Football League, 543 F.2d 606, 621 (8th Cir. 1976) (holding that the NFL's Rozelle Rule's, anti-competitive effects were not justified by the competitive balance that it allegedly fostered).

168. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014 U.S. Dist. LEXIS 50693, at *56–57.

169. *Id.* at *57.

170. *Id.* at *61.

171. *Id.* at *58.

172. *Id.* at *61–64.

goals, [but] they are not procompetitive" and are merely social welfare benefits.[173] However, the Third Circuit articulated an agreement to provide financial assistance to "needy" students may "regulate competition in order to enhance it, while also deriving social benefits."[174] The NCAA failed to present evidence to establish the integration of athletics and education actually benefits sports fans and/or student-athletes.[175] Accordingly, the court denied the relief the NCAA sought and indicated that in order for the NCAA to support such a contention at trial, the NCAA will be required to show "(1) the ban on student-athlete compensation actually contributes to the integration of education and athletics and (2) the integration of education and athletics enhances competition in the 'college education' or 'group licensing' market."[176]

d. Viability of Other Sports

The NCAA argued the alleged restraints on competition enabled institutions to provide financial support for women's sports and other men's sports, whereas the plaintiffs argued there was no support for this alleged justification.[177] The court flatly concluded this is not a legitimate procompetitive justification because the United States Supreme Court has stated competition "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy."[178] Accordingly, the court granted summary judgment in favor of the plaintiffs, holding that the challenged restraint was unjustified by the NCAA's "desire to support women's sports or less prominent men's sports."[179]

173. *Id.* at *61. It is inappropriate to argue social welfare benefits justify anticompetitive conduct in violation of the Sherman Act. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (1990) (holding social justifications for restraint of trade are no less unlawful).

174. United States v. Brown Univ., 5 F.3d 658, 677 (3d Cir. 1993).

175. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014 U.S. Dist. LEXIS 50693, at *63.

176. *Id.* at *64.

177. *Id.* at *65.

178. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); Sullivan v. Nat'l Football League, 34 F.3d 1091, 1112 (1st Cir. 1994) (holding that it is "improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market").

179. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 2014 U.S. Dist. LEXIS 50693, at *67–68.

e. Increased Output Benefits

The NCAA argued the alleged restraint increases output of Division I football and basketball teams, players, scholarships, and games and, thus, is a procompetitive justification to the alleged restraint.[180] The NCAA's expert articulated the restraint on student-athlete compensation provides more revenue for NCAA member institutions to apply towards scholarships and other costs.[181] Contrarily, the plaintiffs' expert indicated the NCAA's revenue sharing model may hurt the product by increasing the number of teams and players and, therefore, decreasing the quality of play.[182] Being that the experts had differing opinions and material facts were in dispute, the court denied the plaintiffs' request for summary adjudication.[183]

E. The Court's Opinion Granting Relief to O'Bannon

On August 8, 2014, the Honorable Claudia Wilken issued an opinion finding "the challenged NCAA rules unreasonably restrain trade in the market for certain educational and athletic opportunities offered by NCAA Division I schools."[184] The following will address the court's analysis of the pertinent points of the case.

1. Relevant Market

The court found that plaintiffs established an adequate market in the "college education market" as colleges and universities compete to recruit the top football and men's basketball student-athletes. In exchange for providing athletic services and their names, images, and likenesses, student-athletes are granted athletic scholarships, tutoring, school supplies, academic support, superior coaching, and access to fantastic athletic facilities.[185] The court did not believe that other academic and athletic opportunities the NCAA Division I member institutions offered had reasonable alternatives—including the opportunities offered by the NBA Development League, the Arena Football League, foreign leagues, and other intercollegiate athletic associations.[186]

180. *Id.* at *68–69.
181. *Id.* at *68.
182. *Id.* at *69.
183. *Id.*
184. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 963 (N.D. Cal. 2014).
185. *Id.* at 965.
186. *Id.* at 967, 987.

In finding that NCAA Division I institutions are the only suppliers in the "college education market," the court turned to the price-fixing restraint of trade as it relates to the undervaluing of student-athletes' names, images, and likenesses.[187] The agreement among NCAA member institutions to refrain from offering student-athletes a share of licensing revenue constitutes fixing of prices indirectly.[188] Initially, the plaintiffs argued NCAA member institutions were characterized as sellers in the antitrust review; however, they changed course and set forth arguments that NCAA member institutions are buyers of student-athlete services.[189] This distinction is relevant because the plaintiffs' claims constitute monopsony behavior rather than monopolistic behavior.[190] Although the distinction is relevant, price-fixing among buyers is just as violative of section 1 of the Sherman Act as price-fixing among sellers.[191] Ultimately, the court concluded the plaintiffs submitted sufficient evidence to support a monopsony theory during trial.[192]

In turning to the "group licensing market," the court analyzed whether the plaintiffs established a relevant market after having identified three submarkets: (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."[193] The plaintiffs contended they would be afforded the opportunity to sell group licenses for the use of their names, images, and likenesses to NCAA member institutions and third parties but for NCAA restrictions.[194] The NCAA, however,

187. *Id.* at 989–93.

188. *Id.* at 990. Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 337 (2d Cir. 2008) (Sotomayor, J., concurring) (stating that an antitrust plaintiff meets its burden by identifying an agreement to fix prices indirectly).

189. *O'Bannon*, 7 F. Supp. 3d at 991.

190. "A monopsony occurs when a single purchaser dominates the relevant market for a factor of production." *In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1151 n.4 (W.D. Wash. 2005).

191. *O'Bannon*, 7 F. Supp. 3d at 991; *see also* Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 322 (2007) (holding that the "kinship between monopoly and monopsony suggest that similar legal standards should apply to claims of monopolization and to claims of monopsonization"); Omnicare, Inc. v. UnitedHealth Grp., 629 F.3d 697, 705 (7th Cir. 2011).

192. *O'Bannon*, 7 F. Supp. 3d at 993.

193. *Id.* at 968.

194. *Id.* at 968–71.

argued that former student-athletes are not prohibited from selling their names, images, and likenesses subsequently to exhaustion of NCAA eligibility and thus, student-athletes have access to the market. The court concluded that absent NCAA rules, markets would exist for student-athletes to group license their names, images, and likenesses for game telecasts, videogames, and other third-party endeavors.[195]

However, the court found the plaintiffs failed to present evidence establishing there would be increased competition for student-athlete services if the restraint were not in place. In the "group licensing market," the court indicated the evidence strongly suggested there would not be greater competition for student-athlete group licenses.[196] Although the plaintiffs adequately showed they were injured by the NCAA's restraint on group licenses for the sale of student-athlete names, images, and likenesses, the plaintiffs did not show an injury to competition.[197] Accordingly, the "group licensing market" was not adequately established.

2. Procompetitive Justifications

The court found the plaintiffs adequately established the "college education market" and the NCAA restrained trade in that market. The court applied the rule of reason test to determine whether the defendant could offer procompetitive justifications for the restraints at issue.[198] The NCAA offered four procompetitive justifications for the restraint on the "college education market": (1) preservation of amateurism; (2) competitive balance; (3) integration of academics and athletics; and (4) increased outputs.

195. *Id.* at 969.

196. *Id.* at 995.

197. *Id.* at 996–98; *see also* O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1469 (9th Cir. 1986) ("Injury to an antitrust plaintiff is not enough to prove injury to competition.").

198. "A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects." Tanaka v. Univ. of S. Cal., 252 F.3d 1059, 1063 (9th Cir. 2001). The rule of reason analysis employs a burden shifting analysis, wherein "[t]he plaintiff bears the initial burden of showing that the restraint produces 'significant anticompetitive effects' within a 'relevant market.' " *Id.* (quoting Hairston v. Pac. 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996)). Then, if the plaintiff meets its initial burden, "the defendant must set forth evidence showing the restraint at issue as procompetitive." *Id.* If this burden is met, the plaintiff must show that there are less restrictive alternatives to the restraint. *See id.*

a. Preservation of Amateurism

The NCAA argued that the challenged restraints promote consumer demand by preserving the time-honored tradition of amateurism.[199] In an effort to show amateurism is supported by consumer demand, the NCAA offered surveys and testimony provided by Dr. J. Michael Dennis, which showed consumer demand could wane if student-athletes were compensated.[200] The court noted Dr. Dennis' surveys were flawed for failure to ask consumers whether there was opposition to compensation of student-athletes for the use of their names, images, and likenesses.[201]

The court indicated NCAA amateurism bylaws and the policies associated with amateurism have changed substantially and have been inconsistent.[202] Further, there was no link between the restrictions at issue and increasing consumer demand.[203] For example, Chris Plonsky, Women's Athletics Director at University of Texas, testified that University of Texas fans would cheer for anything associated with the university.[204] Accordingly, the court concluded the evidence demonstrated consumers are interested in intercollegiate athletics for reasons other than amateurism.[205] In fact, the court stated the "current restrictions on student-athlete compensation, which cap athletics-based financial aid below the cost of attendance, are not justified by the definition of amateurism set forth in its current bylaws."[206] This salient point is paramount because the court concluded the justification of amateurism is not a total exclusion of predatory practices.

To counter, the NCAA again argued that *NCAA v. Board of Regents* supports the proposition that student-athletes must not be compensated.[207] However, this argument proved futile as the court rejected the NCAA's argument and noted the NCAA's counsel had previously undercut their own argument in the oral arguments during

199. *O'Bannon*, 7 F. Supp. 3d at 973.
200. *Id.* at 975.
201. *Id.* at 976.
202. *Id.* at 974–75.
203. *Id.* at 977–78.
204. *Id.* at 978. Ms. Plonsky also testified, "I would venture to say that if we [UT] offered a tiddlywinks team that would somehow be popular with some segment of whoever loves our university." *Id.* at 1001.
205. *Id.* at 977–78.
206. *Id.* at 975.
207. *See id. See generally* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102 (1984) ("In order to preserve the character and quality of the 'product,' athletes must not be paid, must be required to attend class, and the like.").

Board of Regents. There, the NCAA conceded that the NCAA "might be able to get more viewers and so on if it had semi-professional clubs rather than amateur clubs."[208] Ultimately, the court concluded that *NCAA v. Board of Regents* was not applicable to the present matter.

In sum, the court noted the NCAA does not adhere to a consistent definition of amateurism and often provides for exceptions to allow certain student-athletes to receive compensation for athletic competition.[209] The evidence further established amateurism is not the driving force behind athletics; therefore, the court concluded restrictions on student-athlete compensation "play a limited role" in driving consumer demand.[210]

b. Competitive Balance

Next, the NCAA argued the challenged restraints were procompetitive because the restraints promote competitive balance.[211] The United States Supreme Court has concluded the optimal competitive balance among competitors is a procompetitive justification if competitive balance increases demand for the athletic product.[212] However, the evidence adduced at the *O'Bannon* trial showed that the restraints at issue did not promote competitive balance in large part because the restrictions on student-athlete compensation lead NCAA member institutions to spend greater amounts on coaches, facilities, and other budgetary items.[213] Further hurting their case, the NCAA failed to produce evidence indicating how the restraints at issue promote competitive equity or to identify the level of competition necessary to sustain the present consumer demand.[214] Accordingly, the court concluded that the NCAA failed to set forth sufficient evidence to show the restraint at issue created a

208. *O'Bannon*, 7 F. Supp. 3d at 999.

209. *Id.* at 1000.

210. *Id.* at 1001.

211. *Id.*

212. *See* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 204 (2010); *Bd. of Regents*, 468 U.S. at 114. *But see* Smith v. Pro Football, Inc., 593 F.2d 1173, 1186 (D.C. Cir. 1981) (finding that the justification for the NFL Draft's procompetitive effects do not outweigh its "anticompetitive evils"); Mackey v. Nat'l Football League, 542 F.2d 606, 621 (8th Cir. 1976) (holding that the NFL's asserted need to regain player development costs did not outweigh the restraints of the Rozelle Rule).

213. *O'Bannon*, 7 F. Supp. 3d at 978.

214. *Id.* at 979, 1001–02. The experts agreed the "ideal level of competitive balance for a sports league is somewhere between perfect competitive balance (where every team has an equal chance of winning every game) and perfect imbalance (where every game has a predictable outcome)." *Id.* at 979.

level playing field in NCAA Division I competition that helped maximize consumer demand for the product.[215]

c. Integration of Academics and Athletics

The NCAA argued that "the integration of academics and athletics increases the quality of the educational services its member schools provide to student-athletes."[216] To be sure, improving product quality may be a procompetitive justification; however, the justification must be more than a mere social justification.[217] The NCAA produced and relied on evidence showing both the short-term and long-term benefits, including graduation rates, of student-athletes.[218] Additionally, the NCAA submitted testimony from athletics administrators indicating paying student-athletes may "create a wedge" between student-athletes and other students on campus.[219]

The court, however, rejected this argument. To the contrary, the court noted that the purported benefits do not specifically derive from restrictions on student-athlete compensation.[220] In fact, the court indicated student-athletes would receive similar education benefits even if the NCAA permitted student-athletes to receive compensation for the use of their names, images, and likenesses.[221] Moreover, the court noted that certain "limited restrictions" on student-athlete compensation may help integrate student-athletes in the academic community, but the restraints at issue do not enhance academic outcomes.[222] Although the court indicated limited restrictions may provide a narrow procompetitive justification, the court ultimately concluded "sweeping" restrictions on student-athlete compensation do not justify the prohibition on licensing revenue derived from the sale of student-athletes' names, images, and likenesses.[223] Nonetheless, the court found there was some evidence

215. *Id.* at 1002.
216. *Id.* at 979.
217. *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990) (holding that promoting social values is not a procompetitive justification to an anticompetitive restraint); *see also* Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1160 (9th Cir. 2001) (stating improving product quality is a procompetitive justification to an anticompetitive restraint).
218. *O'Bannon*, 7 F. Supp. 3d at 979–80.
219. *Id.* at 980.
220. *Id.*
221. *Id.* at 1003.
222. *Id.* at 980.
223. *Id.* at 1003.

to establish integration of student-athletes in the academic community improved the quality of education services.

d. Increased Output

The NCAA argued its challenged regulations relating to student-athlete compensation are procompetitive because they increase the number of participation opportunities (i.e., games played and student-athlete competitors)[224] available to NCAA member institutions and student-athletes.[225] The evidence adduced at trial showed the number of major Division I football and men's basketball games have steadily increased over time and continue to increase.[226] The NCAA argued this increase was as a result of institutions' increased commitment to amateurism.[227] The court found this argument "implausible" because there was no evidence to support that Division I institutions joined the NCAA because of the principles or rules associated with amateurism.[228]

Additionally, the NCAA argued Division I institutions would flee from Division I for financial reasons if the restraints at issue were removed.[229] The NCAA's own witnesses provided testimony contrary to these assertions and acknowledged that most institutions competing at the NCAA Division I level would continue to compete at the same level and offer football and men's basketball teams.[230] The court concluded NCAA Division I institutions are unlikely to exit this level of competition if they were permitted to pay student-athletes a "limited amount of compensation beyond the value of their scholarships."[231] In conclusion, the court found the challenged restrictions do not increase the number of participation opportunities for NCAA member institutions or student-athletes.[232]

The court concluded that the NCAA had raised sufficient procompetitive justifications to move to the next layer of antitrust

224. In *NCAA v. Board of Regents*, the United States Supreme Court recognized that increased output constitutes a procompetitive justification to an anticompetitive restraint. 468 U.S. 85, 114 (1984).

225. *O'Bannon*, 7 F. Supp. 3d at 981.

226. *Id.*

227. *Id.*

228. *See id.*

229. *Id.*

230. *Id.* at 981–82.

231. *Id.* at 982. The Court noted NCAA Division I member institutions spend substantial and sometimes staggering sums on coaches' salaries and facilities and, thus, would likely be able to afford to provide a "limited share of the licensing revenue" generated from the use of students-athletes' names, images, and likenesses. *Id.* at 1004.

232. *Id.* at 982.

review. The burden, then, turned back to the plaintiffs to show there are less restrictive alternatives to the legislation at issue.

3. Less Restrictive Alternatives

After reviewing the procompetitive justifications as set forth by the NCAA, the court found the NCAA produced some evidence indicating there are procompetitive benefits to cap student-athlete compensation. Specifically, the court found the NCAA produced evidence showing: (1) there is some basis that capping compensation may serve to increase consumer demand for the amateur product; and (2) there is some evidence showing student-athlete integration into academic communities improves the quality of education services.[233] Accordingly, pursuant to the rule of reason burden used in antitrust cases, the court shifted the burden to the plaintiffs to establish less restrictive alternatives.[234]

The plaintiffs offered three less restrictive alternatives to the challenged restraints:

> (1) raise the grant-in-aid limit to allow schools to award stipends, derived from specified sources of licensing revenue, to student-athletes;
>
> (2) allow schools to deposit a share of licensing revenue into a trust fund for student-athletes which could be paid after the student-athletes graduate or leave school for other reasons; or
>
> (3) permit student-athletes to receive limited compensation for third-party endorsements approved by their schools.[235]

The court was supportive of the plaintiffs' first and second proposed less restrictive alternatives. First, the court concluded allowing student-athletes to receive stipends above the current grant-in-aid legislation would limit anticompetitive effects because the stipend would be capped at the cost of attendance and such funds would be used to "only cover educational expenses."[236] Second, the court concluded holding funds in trust is an acceptable less restrictive alternative as long as the compensation "was limited and distributed equally among team members."[237] The court specifically addressed

233. *Id.* at 1004.

234. The plaintiff must establish that "an alternative is substantially less restrictive *and* is virtually as effective in serving the legitimate objective *without significantly increased cost*." Cnty. of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1159 (9th Cir. 2001).

235. *O'Bannon*, 7 F. Supp. 3d at 982.

236. *Id.* at 982–83.

237. *Id.* at 983.

testimony the NCAA elicited in which its witnesses indicated they were concerned about "six figure[], seven figure[]" payments made to student-athletes, but would not be "troubled" if student-athletes were permitted to receive $5,000.00.[238] According to the court, a narrowly tailored trust payment system "would not erect any new barriers to schools' efforts to educate student-athletes or integrate them into their schools' academic communities."[239] Lastly, the court did not find endorsement opportunities for student-athletes to be an appropriate less restrictive alternative because such a policy would undermine the NCAA's efforts to curb "commercial exploitation"[240] of student-athletes.[241]

4. Conclusion

The court found in favor of the plaintiffs and enjoined the NCAA "from enforcing any rules or bylaws that would prohibit its member schools and conferences from offering their FBS or Division I basketball recruits a limited share of the revenues generated from the use of their names, images, and likenesses in addition to a full grant-in-aid."[242] Additionally, the court enjoined the NCAA from "enforcing any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires."[243] However, the court was careful not to restrict the NCAA's authority to implement legislation to place a cap on the amount of compensation to be paid to student-athletes as long as the cap is not set below the cost of attendance and the cap placed on the amounts deposited in trust is not less than $5,000.00 for each year of eligibility.[244] The court also made it clear the NCAA is permitted to continue to enforce legislation prohibiting student-athletes from endorsing commercial

238. *Id.* at 983.

239. *Id.* at 984.

240. A 2009 NCAA Task Force on Commercial Activity made a number of recommendations relating to student-athletes' commercial exposure, yet it did not recommend any restrictions on the use of student-athletes' names, images, and likenesses in commerce. *See generally* DI LEADERSHIP COUNCIL, REPORT OF THE NCAA DIVISION I LEADERSHIP COUNCIL (2009) (detailing recommendations and actions by the committee on April 16–17, 2014).

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

242. *Id.* at 1007–08.

243. *Id.* at 1008.

244. *Id.* The court's finding that the NCAA is permitted to cap the funds deposited in trust appears to be yet another artificial cap on compensation that does not address market factors or concerns.

products among other restrictions.[245] O'Bannon received a successful result, albeit not quite as successful as he and his classmates had hoped. This modicum of success opened the door to future and better opportunities for student-athletes.

IV. THE NCAA ANNOUNCED ITS DESIRE TO APPEAL: ANALYZING THE DISCUSSION FOR APPEAL TO THE NINTH CIRCUIT

The NCAA has announced its desire to appeal Judge Wilken's ruling.[246] The primary issues on appeal relate to the NCAA's procompetitive justifications of amateurism and competitive balance as balanced against the less restrictive alternatives set forth by O'Bannon.[247] This subpart will provide a detailed analysis addressing these issues and framing the issues for the Ninth Circuit.

A. Preservation of Amateurism

The NCAA has historically relied heavily on the preservation of amateurism as a procompetitive justification to alleged restraints. As such, it is important to review amateurism historically and legally. The following will provide a discussion on the same.

1. The History of Amateurism

In the nineteenth century, the term "amateur" was more highly regarded than the term "professional."[248] "Amateurism" derives from the social elite of England and was created to exclude the working class from athletic competitions.[249] The English reasoned the wealthy did not need to become a professional in a sport, because they had more leisure time and did not need compensation for athletic competition.[250] Social class provided the distinction between amateur and professional.[251]

245. *Id.*

246. Donald Remy, *NCAA Will Appeal O'Bannon Ruling*, NCAA (Aug. 10, 2014), http://www.ncaa.org/about/resources/media-center/press-releases/ncaa-will-appeal-o%E2%80%99bannon-ruling (stating that the "NCAA has not violated the antitrust laws and intends to appeal [the *O'Bannon* holding]").

247. The Honorable Claudia Wilken addressed additional procompetitive justifications in the *O'Bannon* opinion: integration of student-athletes in the academic community and increased outputs. *See supra* Part III.E. The remainder of this Article will not address these justifications, as such justifications are implausible and not the primary emphasis of NCAA legislation and effects that it may have on student athletes.

248. *See* SMITH, *supra* note 3, at 166.

249. *Id.*

250. *Id.* at 167.

251. *Id.*

The important components of amateurism were: an amateur athlete had 1) never competed in open competition; 2) never competed for public money; 3) never competed for gate money; 4) never competed with a professional; and 5) never taught[252] or pursued athletics as a means of livelihood.[253] As intercollegiate athletic competition began in the United States in the nineteenth century, these traditions were adopted. Initially, institutions of higher learning did not fund intercollegiate athletics as the students provided all funds necessary to compete.[254] In the 1870s, the faculty at Harvard University exemplified the prevailing view that collecting gate receipts had an "undesirable professional tone," which ultimately led Harvard University to ban gate receipts.[255] By the 1880s and 1890s, however, most institutions of higher learning accepted money from spectators to view and attend intercollegiate athletic contests.[256] Even Harvard University decided to accept gate receipts and, ultimately, built the first reinforced concrete stadium in the United States in 1903 to hold 40,000 spectators.[257]

In 1906, the IAAUS, subsequently known as the NCAA, held its first convention to address the principles of amateurism and, ultimately, adopt legislation.[258] The IAAUS, and later the NCAA, was initially a "minor force" in the governance of intercollegiate athletics.[259] Initially, the governing body of intercollegiate athletics determined there would be no recruiting (called "proselytizing") and student-athletes were not permitted to receive any form of athletics

252. Under the NCAA structure, student-athletes may accept compensation for teaching and coaching sports skills and techniques. *See* NCAA BYLAWS, *supra* note 16, § 12.4.2.1.

253. *See* SMITH, *supra* note 3, at 166.

254. Robert N. Davis, *Academics and Athletics on a Collision Course*, 66 N. D. L. REV. 239, 243 (1990).

255. SMITH, *supra* note 3, at 169.

256. *Id.*

257. *Id.* Shortly thereafter, in 1922, Ohio State University opened a 66,210 seat stadium. *See* Jim Naveau, *Ohio Stadium—90 Years Tradition, Memories, O-H-I-O*, LOGAN DAILY NEWS (Logan, OH), Aug. 30, 2012, at B4. Not to be outdone, five years later, the University of Michigan opened a larger stadium that would seat 75,000 spectators. *See* W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VAND. J. ENT. & TECH. L. 211, 220, 236 (2006).

258. Kay Hawes, *Debate on Amateurism Has Evolved over Time*, NCAA NEWS (Jan. 3, 2000), http://fs.ncaa.org/Docs/NCAANewsArchive/2000/association-wide/debate%2Bon%2Bamateurism%2Bhas%2Bevolved%2Bover%2Btime%2B-%2B1-3-00.html.

259. Kevin E. Broyles, *NCAA Regulation of Intercollegiate Athletics: Time for a New Game Plan*, 46 ALA. L. REV. 487, 491 (1995).

financial aid.[260] At the time, the gentility and sportsmanship remained.[261] Initially, baseball caused the most ardent debate and discussion when addressing the issues of amateurism.[262] In the early twentieth century, baseball grew in popularity and athletes had numerous opportunities to play baseball for pay in minor, major, and summer leagues.[263] Summer baseball leagues that attracted numerous intercollegiate baseball players caused the greatest concern.[264] Some believed student-athletes should not be permitted to play with and against professional players and, thus, would no longer have intercollegiate athletic eligibility if they chose to play with professional teams.[265] Conversely, others argued that student-athletes should be afforded the opportunity to offer their talents for pay like other talented students, namely actors and musicians. [266]

The viewpoint of two top university administrators best outlines this amateurism debate.[267] Amos Alonzo Stagg of the University of Chicago desired to have strong amateurism rules and prohibited outside competition.[268] Stagg argued: "It is my prophecy that in a few years you will find that many of our large cities will be supporting professional football teams composed of ex-college players . . . the passing of [less restrictive amateurism rules] would be an unceasing catastrophe."[269] Whereas, Professor J. P. Welsh of Pennsylvania State University argued that student-athletes should be afforded the opportunity to make money and stated students' "need[] to be let alone in the full, free, untrammeled exercise of his American citizenship, which entitles him to life, liberty and the pursuit of happiness, which sometimes means money."[270]

Intercollegiate athletics has changed substantially over the last one hundred years. The NCAA Constitution provides, "Student-

260. *Id.*
261. *Id.*
262. *See Trying to Define Amateur Athlete: Intercollegiate Athletic Association Committee Suggests Strict Law*, N.Y. TIMES, Mar. 14, 1909, at 53 (discussing the term "amateurism" and prohibition against college students playing summer baseball in leagues for pay).
263. Hawes, *supra* note 258 ("One of the first divisive issues in the NCAA involved amateurism. In the 1900s, professional baseball began to grow in popularity. Many college athletes began turning to minor-league baseball as a way to make money during the summer months, setting off a heated debate.").
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*

athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[271] Courts have further emphasized the important role the NCAA plays in maintaining tradition: that "[t]he NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports," and that the NCAA "needs ample latitude to play that role."[272] Thus, "most of the regulatory controls of the NCAA [are] justifiable means of fostering competition among the amateur athletic teams and therefore . . . enhance public interest in intercollegiate athletics."[273] Historically, courts have adopted the NCAA's views of amateurism when those views address the honesty and integrity of intercollegiate athletics.[274]

For over fifty years, the NCAA closely followed the principles of amateurism adopted in England. However, in the last thirty years, the NCAA has made meaningful changes to NCAA amateurism and now allows student-athletes to compete as professionals in one sport and as amateurs in another,[275] to obtain prize money for competition prior to enrollment,[276] and to compete as a member of a professional team.[277] Presently, amateurism is merely a modified version of amateurism as used in England over one hundred years ago.[278] The NCAA's definition of amateurism is a moving target (i.e., it is what we say it is).[279]

271. NCAA CONSTITUTION, *supra* note 21, § 2.9.

272. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

273. *Id.* at 117.

274. Banks v. NCAA, 977 F.2d 1081, 1090 (7th Cir. 1992).

275. NCAA BYLAWS, *supra* note 16, § 12.1.3 ("A professional athlete in one sport may represent a member institution in a different sport and may receive institutional financial assistance in the second sport.").

276. *Id.* § 12.1.2.4.1 ("Prior to collegiate enrollment, an individual may accept prize money based on his or her place finish or performance in an open athletics event.").

277. *Id.* § 12.2.3.2.1 ("Before initial full-time collegiate enrollment, an individual may compete on a professional team, provided he or she does not receive more than actual and necessary expenses to participate on the team.").

278. Mary Grace Miller, *The NCAA and the Student-Athlete: Reform is on the Horizon*, 46 U. RICH. L. REV. 1141, 1168 (2012); Stephen M. Schott, *Give Them What They Deserve: Compensating the Student-Athlete for Participation in Intercollegiate Athletics*, 3 SPORTS LAW. J. 25, 44 (1996).

279. In an interview in 2010, former NCAA President Myles Brand provided the following as it relates to amateurism and compensating student-athletes:

> Brand: "They can't be paid."
> Interviewer: "Why?"

2. Analyzing Amateurism as a Procompetitive Justification on Appeal

The NCAA argued the artificial cap placed on compensation furthers the time-honored tradition of amateurism and is closely linked to the eligibility requirements of an amateur student-athlete.[280] The NCAA Constitution provides, "Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises."[281] Courts have advanced amateurism as a procompetitive justification for a restraint on "trade or commerce" by citing dicta from *Board of Regents*.[282] There, the Court stated that "the NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports" and the NCAA "needs ample latitude to play that role."[283] Thus, "most of the regulatory controls of the NCAA [are] justifiable means of fostering competition among the amateur athletic

Brand: "Because they're amateurs."
Interviewer: "What makes them amateurs?"
Brand: "Well, they can't be paid."
Interviewer: "Why not?"
Brand: "Because they're amateurs."
Interviewer: "Who decided they are amateurs?"
Brand: "We did."
Interviewer: "Why?"
Brand: "Because we don't pay them?"

Michael Rosenberg, *Change Is Long Overdue: College Football Players Should Be Paid*, SI.COM (Aug. 26, 2010), http://www.si.com/more-sports/2010/08/26/pay-college. Similarly, current NCAA President Mark Emmert has unequivocally stated, "There's certainly no interest in turning college sports into the professional or semi-professional." Darren Rovell, *NCAA Holds Firm: No Pay for Play*, ESPN (Dec. 11, 2013), http://espn.go.com/college-sports/story/_/id/10119750/ncaa-president-mark-emmert-insists-pay-play-model-coming.

280. An individual loses his or her amateur status and will be ineligible to compete in intercollegiate competition in a particular sport if the individual: (1) uses his or her athletics skill for pay; (2) accepts a promise of pay to be received upon completion of his or her intercollegiate athletics eligibility; (3) signs a contract to play professional athletics; (4) receives pay, reimbursement, or any other form of financial aid from a professional sports organization, unless otherwise permitted by NCAA rules and regulations; (5) competes on a professional athletics team; (6) subsequent to full-time collegiate enrollment enters a professional athletics draft; or (7) enters into an agreement with an agent. NCAA BYLAWS, *supra* note 16, § 12.1.2.

281. NCAA CONSTITUTION, *supra* note 21, § 2.9.

282. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 120 (1984).

283. *Id.*

teams and therefore [are] procompetitive because they enhance public interest in intercollegiate athletics."[284]

Following the *NCAA v. Board of Regents* dicta, courts have applied the principles of amateurism as a procompetitive justification that outweighs the harm of an anticompetitive restraint. In *Banks v. NCAA*, the court stated that college football student-athletes simultaneously pursue academic degrees while playing college football and these academic pursuits prepare student-athletes for non-athletic occupations.[285] Thus, the NCAA amateurism and eligibility rules were promulgated to preserve the honesty and integrity of intercollegiate athletics.[286] Similarly, in *McCormack v. NCAA* and *Jones v. NCAA*,[287] the courts stated the principles of amateurism play a vital role in enabling intercollegiate athletics to preserve its character as a unique product, and thus student-athletes may not be compensated.[288]

The principles of amateurism can be analyzed and distinguished from the assertions commonly set forth by the NCAA, factually and legally. The reality of major Division I football and men's basketball simply does not conform to a purist's view of amateurism.[289] Student-athletes are not athletes competing solely for the love of competition. If so, they could compete without receiving athletics-based financial aid like their contemporaries at the NCAA Division III level. Courts have consistently failed to accurately acknowledge the rift between "the ideal of amateurism" and the reality of the commercialization of intercollegiate athletics.[290] For many student-athletes competing in major Division I football and men's basketball, academics and amateurism are mere illusions. These student-athletes practice or compete each night of the week. In efforts to consume sizeable profits for colleges and universities, these student-athletes must travel all across the country at the expense of their education.

Judge Wilken correctly noted her suspicion of amateurism as a basis to further the intercollegiate athletics product. It would be naïve to assume the amateur ideal is essential to maintaining intercollegiate athletics as was clearly pointed out by University of Texas athletics

284. *Id.* at 117.

285. Banks v. NCAA, 977 F.2d 1081, 1090 (7th Cir. 1992).

286. *Id.*

287. 392 F. Supp. 295 (D. Mass. 1975).

288. McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988); *Jones*, F. Supp. 295 at 304.

289. Jeffrey Lynch Harrison & Casey C. Harrison, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1301 (1992).

290. *Id.* at 1304.

administrator Chris Plonsky who stated University of Texas fans will follow nearly anything associated with the university.[291] Consumers want to see student-athletes compete on behalf of a college or university.[292] Beyond the mere association with a college or university, the principles of amateurism are a sham justification for artificially capping compensation. The NCAA routinely argues its rules and regulations enhance the purity of intercollegiate athletics.[293] However, the rationale proffered for the limitation placed on compensation is simply a cost-cutting measure and has no legitimate relationship to the principles of amateurism.[294]

Amateurism as a justification for anticompetitive effects on "trade or commerce" should also be discounted as a legal justification for a horizontal price restraint on compensation.[295] Courts have reasoned the consideration of noneconomic values requires some ultimate balancing of social value, which should be the responsibility of Congress.[296] Noneconomic values are dismissed as beyond the ability of the court to balance under a rule of reason analysis.[297] Precedent indicates the social justifications for advancing the principles of amateurism are nothing more than elusive ideals.[298] These social values will only be considered if the NCAA can show amateurism serves to "regulate and promote competition."[299]

291. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 978, 1001 (N.D. Cal 2014); *see also* Harrison & Harrison, *supra* note 289, at 1311 (arguing that no-draft and no-agent rules do not destroy the NCAA's unique product).

292. Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2659 (1996).

293. Banks v. NCAA, 977 F.2d 1081, 1089–90 (7th Cir. 1992).

294. *See* Law v. NCAA, 134 F.3d 1010, 1015 n.5 (10th Cir. 1998) (stating the NCAA Special Committee on Cost Reduction reduced financial aid grants to student-athletes in an effort to reduce costs); *In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005) (stating the NCAA attempts to mischaracterize scholarship restrictions as furthering the ideals of amateurism); Lee Goldman, *Sports and Antitrust: Should College Students Be Paid to Play?*, 65 NOTRE DAME L. REV. 206, 217 (1990); *see also* Harrison & Harrison, *supra* note 289, at 1305 n.37, 1314 n.84.

295. Gabe Feldman, *A Modest Proposal for Taming the Antitrust Beast*, 41 PEPP. L. REV. 249, 252–54 (2014).

296. *Id.* at 255.

297. Ford Motor Co. v. United States, 405 U.S. 562, 569–70 (1972) (holding a merger illegal because its social benefits were unquantifiable); United States v. Phil. Nat'l Bank, 374 U.S. 321, 371 (1953) (refusing to balance social against economic values and striking down a bank merger); *see also* Carl L. Reisner, *Tackling Intercollegiate Athletics: An Antitrust Analysis*, 87 YALE L.J. 655, 668 (1978) (describing how a rule of reason analysis gives little guidance with regard to balance of social values).

298. *See In re* NCAA I-A Walk-On Football Players Litig., 398 F. Supp. at 1149; *Law*, 134 F.3d at 1022.

299. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423–24 (1990) (holding that boycotting court-appointed trial work was not a justification to increase the quality of

Although Judge Wilken found there was limited evidence to show a connection between capping compensation and furthering the amateur product, there are economic reasons to classify amateurism as a justification for an anticompetitive market restraint.[300] The NCAA has argued amateurism is necessary to promote intercollegiate athletics as a unique product and distinguish it from other forms of entertainment.[301] This argument presents concerns for the market. If the NCAA is allowed to continue to artificially cap compensation, presumably all industries would be allowed to fix input markets and claim they were doing so under the guise of creating a unique product that consumers want.[302] In turn, NCAA members could require student-athletes, coaches, and administrators to participate in any number of unrelated activities that are "necessary" to produce intercollegiate athletics contests thus limits on compensation in order to define a product to meet consumer preferences seems implausible. If consumers truly preferred amateur athletics to other forms of entertainment, NCAA rules and regulations requiring amateurism would be unnecessary to promote a "unique product."[303] In a free market, student-athletes would have the opportunity to choose a college or university based on the compensation package offered by the institution, invariably increasing competition among colleges and universities for talented student-athletes. Competition enhances the market and precludes an inquiry into whether competition is positive or negative.[304]

B. Competitive Equity and Balance

The NCAA argued the artificial cap placed on compensation was promulgated to maintain competitive equity in intercollegiate athletics.[305] This argument supposes the rationale for maintaining

representation); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 462–64 (1986) (holding an ethical policy to insure proper dental care is not a procompetitive justification); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695–96 (1978) (holding that policy goals of protecting public safety and promoting ethical conduct do not qualify as procompetitive justifications unless they serve to "regulate and promote" competition); *Law*, 134 F.3d at 1021–22 (holding that the alleged social value of opening up coaching positions for younger people does not impact competition).

300. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 984 (N.D. Cal. 2014).

301. Banks v. NCAA, 977 F.2d 1081, 1090 (7th Cir. 1992).

302. *See* Roberts, *supra* note 292, at 2660–61.

303. *Id.* at 2644, 2658–60.

304. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695.

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

competitive equity is two-fold: parity and program advancement.[306] As such, the artificial cap placed on athletics-based financial aid prohibits colleges and universities from recruiting talented student-athletes based on market-justified compensation.[307] In *NCAA v. Board of Regents*, the Court explained, "It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition . . . because they enhance public interest in intercollegiate athletics."[308] In *Law v. NCAA*,[309] however, the court stated salary restrictions placed on coaches did not "enhance competition, level an uneven playing field, or reduce coaching inequities."[310] The Tenth Circuit indicated the NCAA rule capping coaches' compensation did not consider competitive balance.[311] The rule was structured not to "exacerbate competitive imbalance."[312] Therefore, the NCAA would have to prove the anticompetitive restraint creates a competitive balance that enhances the quality of intercollegiate athletics competition as viewed by consumers.[313] Merely maintaining the status quo does not enhance a legitimate procompetitive end. Judge Wilken correctly concluded NCAA legislation capping compensation does not provide a connection to increased competition amongst competitors.

It is arguable and even whimsical, to some extent, to characterize NCAA regulations as promoting balanced competition. The so-called "power elite" dominate intercollegiate athletics year after year.[314] Parity is a dream, and the advancement of a program into the clutches of the power elite is similarly far-fetched. A gross disparity exists between those colleges and universities competing at the highest level and those wading in the water of intercollegiate athletics

306. Drew N. Goodwin, *Not Quite Filling the Gap: Why the Miscellaneous Expense Allowance Leaves the NCAA Vulnerable to Antitrust Litigation*, 54 B.C. L. REV. 1312–13 (2013).

307. *Id.*

308. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 117 (1984).

309. 134 F.3d 1010 (10th Cir. 1998).

310. *Id.* at 1024.

311. *Id. But see* McCormack v. NCAA, 845 F.2d 1338, 1344 (5th Cir. 1988) (stating that most NCAA rules were promulgated "to prevent institutions . . . from taking advantage of . . ." their competitive and economic success (quoting *Bd. ofegents*, 468 U.S. at 123 (White, J., dissenting))); Hennessey v. NCAA, 564 F.2d 1136, 1153 (5th Cir. 1977) (stating that prior to the advent of the NCAA, economically sound institutions were taking advantage of their wealth by expanding programs to the detriment of all intercollegiate athletics programs).

312. *Law*, 134 F.3d at 1024.

313. *See* Roberts, *supra* note 292, at 2664.

314. Michael McCann, *Antitrust, Governance, and Postseason College Football*, 52 B.C. L. REV. 517, 522 (2011).

mediocrity.[315] The NCAA has shown little concern for the vast imbalance that exists in intercollegiate athletics.[316]

The cap placed on compensation falls well short of creating balanced competition. A restriction placed on compensation does not address how colleges and universities spend their funds.[317] Colleges and universities channel the money they save on student-athlete compensation (*i.e.*, the athlete labor market) to coaches, elaborate facilities, and other athletics suppliers.[318]

The NCAA argued eliminating the restriction on athletics-based financial aid would create a greater disparity among colleges and universities competing in intercollegiate athletics and would ultimately cause a clear demarcation among the power elite and lower level competitors.[319] This demarcation occurred many years ago because colleges and universities are members of conferences and five power conferences currently house the nation's power elite.[320] Colleges and universities in these conferences have greater access to the College Football Playoff, major bowl games, and are more likely to be selected for participation in March Madness.[321] For example, the University of Oklahoma's ("OU") 2006–2007 senior football class competed in each of the BCS bowl games during their tenure at OU.[322] Programs like OU have a storied history of intercollegiate athletics success and have developed power elite status.[323] Further, a member of the Southeastern Conference has won seven out of the last ten BCS football national championship games, and a power

315. Matthew Mitten & Stephen F. Ross, *A Regulatory Solution to Better Promote Educational Values and Economic Sustainability of Intercollegiate Athletics*, 92 OR. L. REV. 837, 848–52 (2014).

316. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 979, 1001–02 (N.D. Cal 2014).

317. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 119 (1984).

318. Goldman, *supra* note 294, at 239.

319. *O'Bannon*, 7 F. Supp. 3d at 978.

320. The conferences commonly referred to as the power conferences are the Atlantic Coast Conference, Big 10 Conference, Big 12 Conference, Pacific 12 Conference, and Southeastern Conference. *Power Five Endorse Benefit Changes*, ESPN (Oct. 2014), http://espn.go.com/college-football/story/_/id/11624238/power-five-conferences-endorse-more-benefits-athletes.

321. *See* McCann, *supra* note 314, at 522.

322. *See Oklahoma Bowl History*, SOONERSPORTS (JAN. 22, 2014), http://www.soonersports.com/ViewArticle.dbml?&ATCLID=208798504 (stating that the OU football team competed in the 2003 Rose Bowl, 2004 Nokia Sugar Bowl, 2005 FedEx Orange Bowl, and 2007 Tostitos Fiesta Bowl).

323. *See* JIM DENT, THE UNDEFEATED: THE OKLAHOMA SOONERS AND THE GREATEST WINNING STREAK IN COLLEGE FOOTBALL 264 (2002) (stating that OU won forty-seven consecutive intercollegiate football contests from 1954 to 1956—an NCAA Division I-A record).

conference institution has won each in the last ten years.[324] However, colleges and universities striving to advance their programs to power elite status have been nothing more than a "Cinderella story." Power programs have devoted substantial resources to solidify themselves as the power elite. Programs that do not have a long history of success and money to establish themselves have found difficulty obtaining staying power.

Even if the artificial cap on compensation enhances a competitive balance in major Division I football and men's basketball, it remains unclear whether it rises to the level of a procompetitive justification. In the aftermath of *NCAA v. Board of Regents*, the removal of television restrictions increased competition and allowed smaller colleges and universities to increase their exposure by obtaining regional television contracts.[325] Antitrust jurisprudence assumes that a free and unrestricted market will result in favorable product quality, levels of output, and prices.[326] Therefore, if the NCAA's position is correct, one-sided blowouts would cause consumers to reduce interest in intercollegiate athletics competition. As such, a free market would resolve evils associated with a clear segregation of competition without the need for an artificial cap on compensation.[327] The present NCAA structure does not support competitive balance and, thus, should not be the basis for overcoming antitrust scrutiny.

C. Less Restrictive Alternatives

The Ninth Circuit will likely be called upon to examine the less restrictive alternatives the plaintiffs set forth, which included: (1) "rais[ing] the grant-in-aid limit to allow schools to award stipends, derived from specified sources of licensing revenue, to student-athletes"; (2) "allow[ing] schools to deposit a share of licensing revenue into a trust fund for student-athletes which could be paid

324. *BCS, Alliance, and Coalition Games Year-by-Year*, BOWL CHAMPIONSHIP SERIES (Oct. 8, 2013), http://www.bcsfootball.org/news/story?id=4809942.

325. *See generally* M. Todd Carroll, Note, *No Penalty on the Play: Why the Bowl Championship Series Stays In-Bounds of the Sherman Act*, 61 WASH. & LEE L. REV. 1235, 1246 (2004) (stating that bowl games can provide a substantial amount of revenue for participating colleges and universities).

326. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

327. *See* Goldman, *supra* note 294, at 239–40; *see also* Thomas Scully, NCAA v. Board of Regents of the University of Oklahoma: *The NCAA's Television Plan is Sacked by the Sherman Act*, 34 CATH. U. L. REV. 857, 884–86 (1985) (stating that in the aftermath of *Board of Regents*, the removal of television restrictions actually increased competition and allowed smaller colleges and universities to increase their exposure by obtaining regional television contracts).

after the student-athletes graduate or leave school for other reasons"; and (3) "permit[ting] student-athletes to receive limited compensation for third-party endorsements approved by their schools." The Ninth Circuit will evaluate whether O'Bannon adequately established less restrictive alternatives, as it was his burden to set forth viable options.[328] Navigating the contours of the less restrictive alternative doctrine can be difficult because the doctrine is "extraordinarily vague."[329]

To arrive at this level of the analysis, at least one of the NCAA's procompetitive justifications must hold water. Thus, O'Bannon will argue if the cap placed on compensation was removed, it would allow colleges and universities to choose whether to provide student-athletes with compensation up to the cost of attendance and as placed in trust up to $5,000.00 annually and thereby increase competition for talented student-athletes in a free market. O'Bannon can effectively argue removal of the cap will not affect the promotion or production of major Division I football and men's basketball, since consumers truly want to associate student-athletes with a college or university. The principles of amateurism play virtually no role in consumer preference for intercollegiate athletics.[330] As such, the output market will not be negatively impacted by the removal of the cap, but it would likely produce a higher quality product due to a free market recruitment process for student-athletes. In effect, student-athletes will be afforded the opportunity to select an institution based on an athletic grant-in-aid package up to the cost of attendance and monies placed in trust up to $5,000.00. As such, student-athletes will be in the position to accept offers from institutions that may offer different levels of payments for the use of student-athlete names, images, and likenesses—all because Judge Wilken has only provided for compensation up to $5,000.00 annually for the use of student-athletes' names, images, and likenesses, thus, institutions can offer less money to student-athletes as long as the amount is equivalent to the funds offered to other similarly situated student-athletes. The restrictions provide an artificial cap that are too restrictive being that ample other structures can justify compensation, or limited compensation, to

328. *See* Bhan v. NME Hosps., Inc., 929 F.2d 1404, 1413 (9th Cir. 1991).

329. Roberts, *supra* note 292, at 2669; *see* L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1396–98 (9th Cir. 1984) (applying the less restrictive alternative doctrine in a confusing manner).

330. *Cf.* NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 114 (1984) (stating that the NCAA television plan did not produce procompetitive efficiency that enhanced the competitiveness of college football television rights; to the contrary, the NCAA could have marketed NCAA college football "just as effectively without the television plan").

student-athletes. The amateur product can remain strong and lucrative with these less restrictive options.

V. WHAT DOES THE *O'BANNON* RULING MEAN FOR COLLEGES AND UNIVERSITIES?

This Part will address some of the many concerns associated with present day intercollegiate athletics. Additionally, this section will explore changes in NCAA legislation and the effect of Title IX on the *O'Bannon v. NCAA* ruling.

Intercollegiate athletics is a highly commercialized product that has led institutions of higher learning to seek their piece of the pie and to seek to win at all costs.[331] This sentiment was recently echoed by Kansas State University head football coach Bill Synder when he said, "We've sold out to the cameras over there . . . ."[332] Bill Synder is not alone in his critique of intercollegiate athletics. Most commentators direct their attention to the NCAA and its longstanding practices and treatment of student-athletes. Famed author Michael Lewis joined the discussion in 2007 when he penned an opinion column in the New York Times and stated:

> Everyone associated with [intercollegiate athletics] is getting rich except the people whose labor creates the value. At this moment there are thousands of big-time college football players, many of whom are black and poor. They perform for the intense pleasure of millions of rabid college football fans, many of whom are rich and white . . . . The poor black kids put up with it because they find it all but impossible to pursue N.F.L. careers unless they play at least three years in college. Less than one percent actually sign professional football contracts and, of those, an infinitesimal fraction ever make serious money. But their hope is eternal, and their ignorance exploitable. Put that way the arrangement sounds like simple

331. *See* SMITH, *supra* note 3, at 991.

332. Coach Synder was quoted as saying,

> It's changed. I mean, college athletics, football in particular, has changed dramatically over the years. I think we've sold out. We're all about dollars and cents. The concept of college football no longer has any bearing on the quality of the person, the quality of students. Universities are selling themselves out.

Kevin McGuire, *Bill Synder: College Football Has Sold Out*, NBCSPORTS (Aug. 6, 2014), http://collegefootballtalk.nbcsports.com/2014/08/06/bill-synder-college-football-has-sold-out/.

> theft; but up close, inside the university, it apparently feels like high principle.[333]

Similarly, former shoe company executive, Sonny Vacarro, has argued that student-athletes are exploited in the system of intercollegiate athletics and stated "young kids [are] misused in the system of the NCAA."[334] Basketball legend, Kareem Abdul-Jabbar shared similar sentiments by comparing restraints placed on student-athletes to "a subtle but insidious form of child abuse."[335] In short, many student-athletes, coaches, professional athletes, authors, and others see serious deficiency in the intercollegiate athletics model.

The NCAA is zealously attempting to maintain a system of amateurism that has survived over one hundred years of scrutiny.[336] However, athletics administrators have started to soften in their view

333. Michael Lewis, *Serfs of the Turf*, N.Y. TIMES (Nov. 11, 2007), http://www.nytimes.com/2007/11/11/opinion/11lewis.html.

334. Lewis Rice, *At HLS Symposium, the "Godfather of Grassroots Basketball" Decries Exploitation of College Athletes,* HARV. L. TODAY (Apr. 7, 2011), http://today.law.harvard.edu/at-hls-symposium-the-godfather-of-grassroots-basketball-decries-exploitation-of-college-athletes-video/.

335. Kareem Abdul-Jabbar described his tenure as a student-athlete at UCLA and explained that he did not have appropriate funds to do anything and often times simply sat in his dorm room because he could not afford to go anywhere. Abdul-Jabbar further explained the NCAA structure propounds extreme inequities and stated:

> The irony is that the NCAA and other supporters claim it will sully the purity of college sports—desecrating our image of it as a youthful clash of school rivalries that always ends at the malt shop with school songs being sung and innocent flirting between boys in letterman jackets and girls with pert ponytails and chastity rings. In reality, what makes college sports such a powerful symbol in our culture is that they represent our attempt to impose fairness on an otherwise unfair world. Fair play, sportsmanship, and good-natured rivalry are lofty goals to live by. By treating athletes like indentured servants, we're tarnishing that symbol and reducing college sports to just another exploitation of workers, no better than a sweat shop.

Kareem Abdul-Jabbar, *Kareem Abdul-Jabbar: Stop Keeping College Athletes Poor and Trapped*, TIME (July 25, 2014), http://time.com/3030399/kareem-abdul-jabbar-college-sports-players-unionize/; *see* Timothy Davis, *The Myth of the Superspade: The Persistence of Racism in College Athletics*, 22 FORDHAM URB. L.J. 615, 668 (1995); Timothy Davis, *African-American Student-Athletes: Marginalizing the NCAA Regulatory Structure?*, 6 MARQ. SPORTS L.J. 199, 215–16 & n.86 (1996) (describing the disparity between student athletes' compensation and revenue generated by schools).

336. *See* Rick Reilly, *Corrupting Our Utes*, SPORTS ILLUSTRATED (Aug. 11, 2003), http://www.si.com/vault/2003/08/11/347763/corrupting-our-utes (criticizing the nit-picking nature of NCAA violations); *see also* Monte Poole, *Big-Time College Athletics Are Sordid Zoo Run by Inmates*, SAN JOSE MERCURY NEWS (Apr. 2, 2011), http://www.mercurynews.com/ci_17761052 (stating that "in big-time college sports, cheating is the norm"); Joe Nocera, *N.C.A.A.'s Double Standard*, N.Y. TIMES (Apr. 8, 2011), http://www.nytimes.com/2011/04/09/opinion/09nocera.html?_r=0 (criticizing the NCAA's treatment of Baylor University's freshman basketball player Perry Jones III).

of compensation for student-athletes and, specifically, compensation as it relates to use of student-athletes' names, images, and likenesses. Big 12 commissioner Bob Bowlsby said we have "learned a lesson about taking a broad latitude with name, image and likeness," which was echoed by than West Virginia University Director of Athletics Oliver Luck who said, "I think [student-athletes] should be compensated for use of that name, image and likeness."[337] In addition to individuals softening their opinions, with changes to the amateurism model coming in full force, even the NCAA has hinted at seeking relief from Congress to provide for an antitrust exemption similar to the protection provided to Major League Baseball by the judiciary.[338] A codified exemption to antitrust laws is extremely unlikely.[339] Over the course of the next several years, however, the NCAA may be forced to accept the unionization of student-athletes, which will ultimately provide an exemption to antitrust laws for matters relating to collective bargaining by and through the nonstatutory labor exemption.[340] As student-athletes receive more benefits and start looking more like employees, unionization efforts will be more prevalent and thus, the National Labor Relations Board is more likely to certify student-athletes as a labor organization.

Until further movement is made to seek an antitrust exemption or decision relating to unionization, the two most critical points of discussion relating to the *O'Bannon v. NCAA* decision concern the changes made to NCAA legislation and Title IX. The following discussion will address these concerns and matters. This article concludes that changes to NCAA legislation are not catastrophic and Title IX does not prohibit compensation to be paid to student-athletes relating to the use of their names, images, and likenesses.

337. Joe Schad, *Big 12, WVU Execs Say Player Pay OK*, ESPN (Aug. 7, 2014), http://www.espn.go.com/espn/print?id=11320172&type=story; *see also* Orion Riggs, Note, *The Façade of Amateurism: The Inequities of Major College Athletics*, 5 KAN. J.L. & PUB. POL'Y 137, 142 (1996) (stating former Florida State University head football coach Bobby Bowden supports compensation for student-athletes).

338. Kuhn v. Flood, 407 U.S. 258, 282 (1972) (describing the baseball antitrust exemption); Sharon Terlep, *Colleges May Seek Antitrust Exemption for NCAA*, WALL ST. J. (July 30, 2014), http://online.wsj.com/articles/colleges-may-seek-antitrust-exemption-for-ncaa-1406741252.

339. Jon Solomon, *Can Congress (Yes, Congress) Help NCAA Find Solutions?*, CBSSPORTS.COM (Aug. 18, 2014), http://www.cbssports.com/collegefootball/writer/jon-solomon/24666147/can-congress-yes-congress-help-ncaa-find-solutions.

340. Brown v. Pro Football, Inc., 518 U.S. 231, 235 (1996); Clarett v. Nat'l Football League, 369 F.3d 124, 241 (2d Cir. 2004); Mackey v. Nat'l Football League, 543 F.2d 606, 647 (8th Cir. 1976).

A. Changes to NCAA Legislation

Historically, the NCAA has prohibited member institutions from offering grant-in-aid[341] packages in excess of cost of attendance.[342] In fact, a full athletic grant-in-aid package consists of commonly accepted educational expenses known as "tuition and fees, room and board, and required course-related books."[343] However, student-athletes[344] are permitted to receive aid in excess of full grant-in-aid in circumstances such as Pell Grant recipients.[345] Following the ruling in *O'Bannon v. NCAA*, NCAA legislation relating to grant-in-aid packages will be modified to allow student-athletes to receive full grant-in-aid up to cost of attendance.[346] However, this ruling does not require member institutions to provide aid up to the cost of attendance.[347] The ruling merely gives member institutions the authority to do so and enjoins the NCAA from prohibiting the same.[348]

NCAA legislation prohibits student-athletes from using their names, images, and likenesses to endorse a commercial product and receive remuneration in exchange for participation.[349] However, NCAA legislation permits member institutions or a recognized entity

341. NCAA BYLAWS, *supra* note 16, § 15.01.6 (stating that an institution may not award financial aid in excess of cost of attendance).

342. Cost of attendance is the "amount calculated by an institutional financial aid office, using federal regulations, that includes the total cost of tuition and fees, room and board, books and supplies, transportation, and other expenses related to attendance at the institution." *Id.* § 15.02.2; *see also id.* § 15.02.2.1.

343. *Id.* § 15.02.5.

344. Under NCAA legislation, a student-athlete is "a student whose enrollment was solicited by a member of the athletics staff or other representative of athletics interests with a view toward the student's ultimate participation in the intercollegiate athletics program. Any other student becomes a student-athlete only when the student reports for an intercollegiate squad that is under the jurisdiction of the athletics department . . . ." *Id.* § 12.02.12.

345. *Id.* §§ 15.1, 15.1.1, 15.1.2, 15.1.3.

346. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1007-08 (N.D. Cal. 2014).

347. *Id.*

348. *Id.*

349. NCAA BYLAWS, *supra* note 16, § 12.5.2.1 (stating that a student-athlete "shall not be eligible for participation in intercollegiate athletics if the individual accepts remuneration for or permits the use of his or her [name, image, or likeness] . . . [to] promote . . . a commercial product or service of any kind; or receive remuneration for endorsing a commercial product . . . ."); *see also id.* § 12.02.2 (stating that pay is "the receipt of funds, awards or benefits not permitted by the governing legislation of the Association for participation in athletics"); *id.* § 12.1.2 (stating that an individual loses amateur status when he "[a]ccepts a promise of pay even if such pay is to be received following completion of intercollegiate athletics participation").

thereof, member conferences, the NCAA,[350] and noninstitutional charitable, educational, or nonprofit agencies to use student-athletes names, images, and likenesses as long as certain criteria is met including approval by the member institution.[351] If a third-party impermissibly uses a student-athlete's name, image, or likeness, the student-athlete "is required to take steps to stop such an activity."[352]

The NCAA has claimed removing the financial restraints on student-athletes will "destroy college sports for the vast majority of student-athletes."[353] Although sharing revenue with student-athletes would certainly cause a paradigm shift and a reallocation of revenue, it is very unlikely intercollegiate athletics will experience perceived catastrophic effects. At first blush, *O'Bannon v. NCAA* certainly provides student-athletes with the opportunity to receive up to $5,000.00 annually for the use their names, images, and likenesses, which in many respects appears to be an arbitrary number not tied to market decisions.[354] This amount is a cap on the funds to be received by student-athletes for the use of their names, images, and likenesses.[355] Thus, member institutions are not required to pay $5,000.00, but are simply required to provide equal amounts to the affected student-athletes (i.e., football and men's basketball student-athletes).

Interestingly, the court concluded it is inappropriate to allow student-athletes to use their names, images, and likenesses for financial gain in the marketplace like their contemporaries competing in professional athletics.[356] Specifically, the court indicated the

350. *Id.* § 12.5.1.1.1 (stating that the NCAA or a third-party acting on behalf of the NCAA may use a student-athlete's name, image, and likeness to promote NCAA championships and other events, activities, or programs).

351. *Id.* § 12.5.1.1.

352. *Id.* § 12.5.2.2 (stating that when a third-party impermissibly uses a student-athlete's name, image, or likeness, the student-athlete must "take steps" to stop such activity in order to retain his or her athletics eligibility); *see also id.* § 12.5.2.2 (stating that if a member institution impermissibly uses a student-athlete's name, image, or likeness, the violation is considered an institutional violation and shall not affect the student-athlete's eligibility).

353. Lester Munson, *Players Seek 'Quick Look' Win in Court*, ESPN (Nov. 22, 2013), http://espn.go.com/espn/otl/story/_/id/10018003/lawyers-obannon-vs-ncaa-case-trying-same-tactic-defeated-ncaa-1984-case.

354. O'Bannon v. NCAA, 7 F. Supp. 3d 955, 1007–08 (N.D. Cal. 2014).

355. *Id.*

356. Student-athletes may compete as professionals under NCAA legislation as long as the compensation received does not exceed actual and necessary expenses. NCAA BYLAWS, *supra* note 16, § 12.1.2.4.2 (prize money), § 12.1.2.4.11 (Olympic exhibitions), § 12.1.3 (professional in another sport), § 12.2.3.2.5 (Olympic or National Team competition).

NCAA's role is to prohibit "exploitation" of student-athletes.[357] However, it appears the court missed the point. The plaintiffs were seeking to allow student-athletes to control and exploit the use of their own names, images, and likenesses.[358]

It appears justifiable for the market to determine whether to support student-athletes receiving compensation from third parties for the use of their names, images, and likenesses—a favorable ruling would have permitted the upper echelon student-athlete with fantastic marketability to "exploit" his name, image, and likeness for financial gain. For example, Johnny Manziel would have permissibly been afforded the opportunity to sign autographs for compensation, and Jeremy Bloom would have been afforded the opportunity to endorse commercial products as a model.[359] Student-athletes, many of whom do not have marketability as professionals,[360] would have been afforded the opportunity to gain financially from the use of their names, images, and likenesses like other college students.[361]

The big concern amongst athletics administrators, if this would have been granted by the court, was the failure to promote competitive balance. Some believe larger and more financially stable athletic departments and boosters would guarantee compensation for student-athletes during the recruiting process. NCAA bylaws already prohibit such inducements. Specifically, NCAA Bylaw 13.2 and its progeny[362] prohibit institutional staff members and representatives of athletics interests (i.e., boosters) from "making arrangements for or giving or offering to give any financial aid or other benefits to a

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

358. *See id.* at 982; Ali v. Playgirl, Inc., 447 F. Supp. 723, 731–32 (S.D.N.Y. 1978) (holding Muhammad Ali had the authority to determine when his name, image, and likeness was to be used); No Doubt v. Activision Publ'g, Inc., 122 Cal. Rptr. 3d 397, 400 (Cal. Ct. App. 2011) (stating the use of the rock band No Doubt's names, images, and likenesses was not transformative and, thus, the band had the authority to control such use).

359. Bloom v. NCAA, 93 P.3d 621, 626–28 (Colo. App. 2004) (holding that NCAA bylaws prohibit the student-athlete from using his name, image, or likeness for compensation); George Schroeder, *'No Evidence' Manziel Took Money for Autographs, A&M Says*, USA TODAY (Aug. 28, 2013), http://www.usatoday.com/story/sports/ncaaf/sec/2013/08/28/johnny-manziel-suspended-for-first-half-of-texas-am-opener-vs-rice/2723767/ (discussing allegations that Johnny Manziel received compensation for autographs).

360. Jim Reineking, *Recent Heisman Winners Who Were NFL Disappointments*, NFL (Dec. 12, 2013), http://www.nfl.com/photoessays/0ap2000000296988 (referencing college football stars and Heisman trophy winners who did not have successful professional careers).

361. Solomon, *supra* note 339 (discussing actress Emma Watson receiving payment for starring in movies while attending Brown University).

362. NCAA BYLAWS, *supra* note 16, §§ 13.2–13.2.10.

prospective student-athlete."[363] There is presently codified legislation that alleviates this concern to the extent boosters and others will not circumvent NCAA legislation.

Allowing student-athletes to take part in the commercial market may have returned a result that would benefit member institutions, conferences, and the NCAA. As professional salaries have substantially increased, there has been considerable desire for student-athletes to leave the nurturing environment of the college campus to seek gainful employment as professional athletes, some before they were ready to take the giant leap to a vocation. If these student-athletes were given the opportunity to make respectable wages, appearance fees, and endorsement revenue while within the confines of the college system, these athletes may be more inclined to remain in college and advance towards a college degree. As the NCAA has articulated ad nauseam, intercollegiate athletics is supposed to represent the opportunity to obtain a college degree.[364] These changes could have resulted in the benefit of keeping top athletes on campus, which could enhance competition and advance academic pursuits.

B. Title IX

Athletics administrators have long argued Title IX of the Education Amendments of 1972 (Title IX)[365] prohibits compensating football and men's basketball student-athletes. Title IX was enacted as a remedial scheme to protect the interests of the disproportionately burdened gender.[366] Title IX presents another layer of discussion for athletic administrators to consider when addressing compensation. Unlike many of the statements issued by athletic administrators, Title IX is not an absolute bar to compensation and, moreover, is not a bar

363. *Id.* § 13.2.1.

364. Horace Mitchell, *Students Are Not Professional Athletes*, U.S. NEWS (Jan. 6, 2014), http://www.usnews.com/opinion/articles/2014/01/06/ncaa-athletes-should-not-be-paid.

365. Title IX, Prohibition of Sex Discrimination, Pub. L. No. 92-318, § 901, 86 Stat. 373, 373–375 (1972) (codified as amended at 20 U.S.C. § 1681 (2012)). Title IX states, "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity [other than those specifically described in the Act] receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (2012).

366. Kelley v. Bd. of Trs., Univ. of Ill., 35 F.3d 265, 272 (7th Cir. 1994); *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982) ("[A] gender-based classification favoring on sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."); Cohen v. Brown Univ., 991 F.2d 888, 900–01 (1st Cir. 1993).

to compensating male student-athletes greater than female student-athletes.

Generally, gender-based discrimination in relation to compensation is addressed by analyzing the requirements of the Equal Pay Act of 1963 (EPA)[367] even when addressing such claims under Title IX.[368] In the seminal case on compensation discrimination in intercollegiate athletics, *Stanley v. University of Southern California*,[369] the Ninth Circuit addressed differences in coaching pay in intercollegiate athletics under the EPA.[370] In EPA cases, the plaintiff has the burden to establish a prima facie case of discrimination by showing an employee of the opposite sex is paid a higher wage for equivalent work.[371] To establish and meet the plaintiff's burden of proof under the EPA, the plaintiff must show the jobs at issue are "substantially equal."[372] The "substantially equal" test is a two-step analysis requiring a showing of a "common core of tasks" and whether any additional tasks make the job "substantially different."[373] If a plaintiff establishes the jobs at issue have a common core of tasks, then the defendant may show there is a nondiscriminatory basis for the difference in pay.[374] In *Stanley*, the women's basketball coach argued she was entitled to pay equivalent to the pay of the men's basketball coach.[375] The court found the coaches clearly had a common core of tasks, but the court concluded that the pay differential was based on factors other than sex, including the men's basketball coach had substantially more experience, was formerly the USA Olympic team coach, had nine years of marketing

367. Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (2012)). The Equal Pay Act states,

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .

29 U.S.C. § 206(d)(1) (2012).

368. Joel Gaal, *Gender-Based Pay Disparities in Intercollegiate Coaching: The Legal Issues*, 28 J.C. & U.L. 519, 545–46 (2002).

369. 178 F.3d 1069 (9th Cir. 1999).

370. *Id.* at 1075–76.

371. *Id.* at 1074–75.

372. 29 C.F.R. § 1620.13(a) (2012).

373. Brobst v. Columbus Srvs. Int'l, 761 F.2d 148, 156 (3d Cir. 1985).

374. *Stanley*, 178 F.3d at 1075–76.

375. *Id.* at 1072–73.

and promotions experience, had written books on basketball, his team had greater media attention and pressure, and larger crowds.[376]

Similarly, in *Deli v. University of Minnesota*,[377] the United States District Court of Minnesota addressed whether the women's gymnastics coach was entitled to pay equivalent to coaches for men's football, hockey, and basketball.[378] The court analyzed the claim under the standards of the EPA and concluded the University of Minnesota presented evidence showing the positions were not substantially equal because the coaches for the aforementioned men's teams supervise more employees, have greater spectator attendance, generate substantially more revenue, and have greater responsibility for public and media relations.[379] The court also denied the coach's claims as brought under Title IX because there was no evidence to show "policies or practices deny male and female athletes coaching of equivalent quality, nature or availability."[380] In short, gender is not the only evidence to consider when determining whether compensation and benefits violate the law. Other factors like spectator attendance and revenue generation can and will be considered when determining whether payment is equitable under the law.

Claims brought under Title IX[381] or the EPA relating to student-athlete compensation would be an issue of first impression for two reasons: (1) student-athletes have, until recently, not been considered employees;[382] and (2) student-athletes have never been compensated. However, it does not appear Title IX will serve as a roadblock to compensating football and men's basketball student-athletes. In short, Title IX and associated claims set forth under the EPA do not forbid compensation for male student-athletes at a level different than

376. *Id.* at 1074–77.

377. 863 F. Supp. 958 (D. Minn. 1994).

378. *Id.* at 959–61.

379. *Id.* at 961–62.

380. *Id.* at 962–63 (citing 44 Fed. Reg. 71413, 71416 (Dec. 11, 1974); *see also* Bedard v. Roger Williams Univ., 989 F. Supp. 94, 101 (D.R.I. 1997) (concluding that a former athletics administrator failed to establish a discriminatory pretext for her failure to receive a promotion).

381. Terry W. Dodds, *Equal Pay in College Coaching: A Summary of Recent Decisions*, 24 S. ILL. U. L.J. 319, 323 (2000) (stating Title IX does not specifically provide for a private cause of action, but the United States Supreme Court has impliedly granted the right to pursue a private cause of action).

382. NW. Univ. v. Coll. Athletes Players Ass'n, No. 13-RC-121359, N.L.R.B. (Mar. 26, 2014). *See generally* Michael H. LeRoy, *An Invisible Union for an Invisible Labor Market: College Football and the Union Substitution Effect*, 2012 WIS. L. REV. 1077 (discussing whether college football players should have union rights).

provided to female student-athletes. To the contrary, it must be shown there is either a difference in the common core of tasks or there is a gender-neutral basis for the difference in compensation.[383] As it relates specifically to football and men's basketball, it is fair to say there is greater skill, effort and responsibility required to compete at a high level in these sports than in any other. There are larger crowds, greater working hours, more media attention and scrutiny, and these sports generate substantially more revenue than other intercollegiate sports.

To argue that Title IX operates as a barricade to prohibit compensating male student-athletes is legally inaccurate as it does not prohibit compensation of male student-athletes in general. Certainly, there is no authority that suggests that a student-athlete would be prohibited from receiving remuneration for the use of student-athletes' names, images, and likenesses. At best, Title IX would merely require some level of compensation for female athletes, which does not necessarily need to be equivalent to the amounts received by their male counterparts; however, Title IX does require proportionate financial aid for female student-athletes. Accordingly, if cost of attendance is awarded to male student-athletes, female student-athletes must be proportionately provided aid.[384] Using gender-neutral factors to evaluate compensation shows that male student-athletes may be afforded the opportunity to receive payment without violating Title IX.

CONCLUSION

The NCAA and its member institutions and conferences offer a commercial product adored by fans, alumni, and casual spectators. The robust joy for competition and the spectacle of sport has led to rapid financial growth, yet the NCAA has failed to legislatively keep pace with such expansion and growth. *O'Bannon v. NCAA* provides promising advancements for student-athletes and their financial goals. After years of appeals and significant legal arguments, the Ninth Circuit will likely uphold the narrow decision reached by the Honorable Claudia Wilken. Although the student-athletes prevailed in court, the ruling does not provide for the financial growth many scholars and prognosticators envisioned. The sums afforded to

383. Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1075–76 (9th Cir. 1999).

384. B. Glenn George, *Symposium: Sports Law in the 21st Century: Title IX and the Scholarship Dilemma*, 9 MARQ. SPORTS L.J. 273, 278–81 (1999); *Title IX Frequently Asked Questions*, NCAA, http://www.ncaa.org/about/resources/inclusion/title-ix-frequently-asked-questions (last visited Apr. 13, 2015).

student-athletes placed in trust will not cripple intercollegiate athletics. Similarly, neither will Title IX implications. Student-athletes will be granted benefits they have not previously been provided and intercollegiate athletics will continue as a juggernaut of success.