

1-1-2011

## The NCAA and the Right of Publicity: How the O'Bannon/Keller Case May Finally Level the Playing Field

Julia Brighton

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### Recommended Citation

Julia Brighton, *The NCAA and the Right of Publicity: How the O'Bannon/Keller Case May Finally Level the Playing Field*, 33 HASTINGS COMM. & ENT. L.J. 275 (2011).

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# The NCAA and the Right of Publicity: How the O’Bannon/Keller Case May Finally Level the Playing Field

by  
JULIA BRIGHTON\*

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## I. Introduction

The National Collegiate Athletic Association (“NCAA”) and its licensing affiliate, The Collegiate Licensing Company (“CLC”), license the names and likenesses of college athletes and reap large profits from them. Under the NCAA’s bylaws, college athletes must remain “amateurs,” and as such, are barred from controlling use of their likenesses in the media and from profiting from their participation in collegiate sports. The ban on profiting from participation in college sports applies in perpetuity. The NCAA and CLC are now defendants in a number of putative class-action lawsuits

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brought by former college athletes alleging antitrust and Lanham Act violations in connection with the NCAA's licensing of their names and likenesses for video games, championship game DVDs and other merchandise.

Some of these cases have been consolidated in the U.S. District Court for the Northern District of California, including the two this Note will focus on: *O'Bannon v. NCAA* and *Keller v. Electronic Arts*. Ed O'Bannon was a star player for UCLA's basketball team, and his case focuses on NCAA/CLC's sale and distribution of commemorative DVDs containing footage of UCLA's 1995 championship win. Sam Keller, a former quarterback for the University of Nebraska, challenges NCAA/CLC's authorization of players' likenesses used in NCAA-licensed football and basketball games manufactured by Electronic Arts ("EA").

The NCAA has unfairly profited at the expense of college athletes, and the court should fashion relief for the class of plaintiffs to address the unjust enrichment. The NCAA should remedy the situation by creating a system of trusts into which profit-sharing payments could be deposited for college athletes while they are still subject to the rules of amateurism.

## II. Background

### A. The Defendants

The NCAA is an unincorporated association that describes itself as "the organization through which the colleges and universities of the nation speak and act on athletics matters at the national level."<sup>1</sup> It is a "voluntary association of more than 1,000 institutions, conferences and organizations."<sup>2</sup> The NCAA was founded in 1906 (as the Intercollegiate Athletic Association of the United States) to regulate collegiate football and to address growing safety concerns on behalf of student athletes.<sup>3</sup> The name of the association was changed in 1910 to reflect its national character.<sup>4</sup> Today, the NCAA encompasses approximately 1,315 member institutions and governs a

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1. Class Action Complaint at 3, *O'Bannon v. N.C.A.A.*, No. CV-09 3329 (N.D. Cal. July 29, 2009) [hereinafter "O'Bannon Complaint"].

2. *Id.*

3. Laura Freedman, Note, *Pay or Play? The Jeremy Bloom Decision and NCAA Amateurism Rules*, 13 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 673, 674-75 (2003).

4. *Id.*

full range of collegiate sports for men and women.<sup>5</sup> Its purposes have greatly expanded from merely regulating the safety of college football.<sup>6</sup> The NCAA's current objectives are to "[p]romote student-athletes and college sports through public awareness; protect student-athletes through standards of fairness and integrity; prepare student-athletes for lifetime leadership; [and p]rovide student-athletes and college sports with the funding to help meet these goals."<sup>7</sup>

CLC is a for-profit corporation and a division of IMG Worldwide, Inc. ("IMG"), a global entertainment and marketing corporation.<sup>8</sup> CLC is the "official licensing representative" for the NCAA, and "manag[es] the licensing rights for nearly 200 leading institutions that represent more than \$3 billion in retail sales and more than 75% share of the college licensing market."<sup>9</sup> CLC's website states that the market for collegiate licensed merchandise is an estimated \$4 billion per year.<sup>10</sup>

EA is a publicly-traded corporation that "develops, publishes, and distributes interactive software worldwide for video game systems, personal computers, cellular handsets and the Internet."<sup>11</sup> In the 2008 fiscal year, EA reported \$3.67 billion in revenues.<sup>12</sup> The NCAA has entered into license agreements with EA that authorize the use of likenesses of student-athletes in video games produced by EA.<sup>13</sup> EA produces the NCAA Football, NCAA Basketball, and NCAA March Madness franchises, which include video games that simulate matches between NCAA member schools.<sup>14</sup>

## B. The Plaintiffs

Ed O'Bannon played basketball as a student at the University of California, Los Angeles ("UCLA") from 1991 to 1995.<sup>15</sup> In the 1994–95 season, O'Bannon led his team to a national championship and

5. *Composition & Sport Sponsorship of the NCAA*, NCAA, [http://ncaa.org/wps/portal/ncaahome?WCM\\_GLOBAL\\_CONTEXT=/ncaa/NCAA/About%20The%20NCAA/Membership/membership\\_breakdown.html](http://ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/NCAA/About%20The%20NCAA/Membership/membership_breakdown.html) (last visited Jan. 16, 2011).

6. Freedman, *supra* note 3, at 675.

7. *Id.* at 675–76.

8. *See* O'Bannon Complaint, *supra* note 1, at 3.

9. *Id.* at 14.

10. *Id.* at 3.

11. *Id.* at 14.

12. *Id.*

13. *Id.*

14. Class Action Complaint at 3, *Keller v. Elec. Arts*, No. CV-09 1967 (N.D. Cal. May 5, 2009) [hereinafter "Keller Complaint"].

15. *See* O'Bannon Complaint, *supra* note 1, at 10.

received the John R. Wooden award as the nation's best men's basketball player for that season, as well as the postseason tournament Most Outstanding Player Award from the Associated Press.<sup>16</sup> He complied with the NCAA's regulations while a student-athlete at UCLA, and now alleges that his image is being offered for sale and/or use by the NCAA without his consent and without compensation.<sup>17</sup> O'Bannon specifically cites the NCAA's sale of championship game DVDs through its website, which features an advertising copy containing O'Bannon's name and image, identifying him as the Most Outstanding Player of the 1995 postseason tournament.<sup>18</sup>

Sam Keller played football for Arizona State University ("ASU") and the University of Nebraska ("Nebraska") from 2003 to 2007.<sup>19</sup> Keller alleges that the NCAA conspired with EA to license use of his name and likeness in various videogames without his consent and without compensating him, and points to the similarities between his physical appearance and jersey numbers in reality and within the EA games.<sup>20</sup> To highlight the injustice of the NCAA's collegiate licensing deal with EA, Keller notes in his complaint that EA paid the NFL Players' Union, through its licensing arm, nearly \$35 million per year for similar usage of professional players' names and likenesses in its video games.<sup>21</sup>

There are two plaintiff classes that O'Bannon and Keller seek to represent: The Damages Class and the Declaratory and Injunctive Relief Class. The "Damages Class" consists of former college athletes who are no longer subject to the NCAA's amateurism regulations, and the "Declaratory and Injunctive Relief Class" includes both former and current student-athletes.<sup>22</sup>

### C. The NCAA's Amateurism Rules

The NCAA's Constitution and Bylaws constitute a contract between the NCAA and member universities,<sup>23</sup> and the student-athletes who play for these universities are third-party beneficiaries of

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16. *Id.*

17. *Id.*

18. *Id.* at 10–11.

19. *Id.* at 11.

20. Keller Complaint, *supra* note 14, at 11–13.

21. *Id.* at 10.

22. See O'Bannon Complaint, *supra* note 1, at 15–16.

23. Freedman, *supra* note 3, at 688.

this contract.<sup>24</sup> Bylaw 12 establishes that only amateur athletes are allowed to participate in athletics sanctioned by the NCAA, and it outlines a number of different ways in which athletes may lose their amateur status by accepting compensation.<sup>25</sup> Generally, under Bylaw 12, student-athletes may not commercially exploit their own names and likenesses for profit as that is a direct violation of the amateurism regulations.<sup>26</sup>

While the student-athletes are themselves prohibited from profiting in such a way, Article 12.5.1.1 of the Bylaws (the "Institutional, Charitable, or Nonprofit Promotions" section) appears to allow schools and conferences to commercially exploit the names and likenesses of the student-athletes, as long as all monies derived go to the member institution.<sup>27</sup> The language of Article 12.5.1.1 states:

12.5.1.1.1 Promotions Involving NCAA Championships, Events, Activities or Programs. The NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of an enrolled student-athlete to generally promote NCAA championships or other NCAA events, activities or programs. (*Adopted: 8/7/03*)<sup>28</sup>

O'Bannon and Keller allege that the NCAA uses this ambiguous language to justify its licensing of student-athletes' (and former student-athletes') names and likenesses for profit while not sharing this profit with the athletes, as that would then violate the general prohibition under Bylaw 12.<sup>29</sup> While the language of Bylaw 12 allows use of names and likenesses of persons (including athletes) affiliated with a university for limited promotional reasons, O'Bannon and Keller allege that the NCAA has distorted this language to enter into profitable and illegal licensing agreements.<sup>30</sup>

In order to maintain eligibility, student-athletes are also required by the NCAA to sign "Form 08-3a" each year.<sup>31</sup> Form 08-3a purports

24. *Id.* at 689.

25. *NCAA Division I Manual art. 12*, NCAA, 61–76 (2009–2010), [http://www.ncaa.com/publications/uploads/PDF/D1\\_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf](http://www.ncaa.com/publications/uploads/PDF/D1_Manual9d74a0b2-d10d-4587-8902-b0c781e128ae.pdf) (setting forth the bylaws concerning amateurism).

26. *Id.* at 74.

27. Freedman, *supra* note 3, at 689.

28. *NCAA Division I Manual*, *supra* note 25.

29. *See* O'Bannon Complaint, *supra* note 1, at 5.

30. *See generally* O'Bannon Complaint, *supra* note 1; Keller Complaint, *supra* note 14.

31. Freedman, *supra* note 3, at 689.

to require the student-athletes to relinquish all rights in perpetuity to commercial use of their images, both while they are playing for member universities and after graduation,<sup>32</sup> when they are presumably no longer subject to the NCAA's amateurism regulations. O'Bannon and Keller allege that Form 08-3a does not act as a relinquishment in perpetuity, but only acts as a release form for the period of eligibility that it covers.<sup>33</sup> Thus, the plaintiffs allege that the NCAA and its member institutions have conspired to act as if these forms constitute perpetual licenses, and have based licensing agreements (such as those with CLC and EA) on these "perpetual licenses," creating a group boycott or refusal to deal.<sup>34</sup>

#### **D. The Right of Publicity**

Federal courts have found a common law property right in an individual's right to publicity, which amounts to the inverse of the right to privacy.<sup>35</sup> The right to one's identity has commercial value apart from concerns about privacy.<sup>36</sup> While much of the litigation concerning the right of publicity arises under the Lanham Act and the "likelihood of confusion" analysis, the right to publicity has also been recognized as a separate and distinct property right that may be defended regardless of whether or not confusion about the source is likely to result.<sup>37</sup>

Some believe that if profit is to be made from use or licensing of a name, likeness, or other distinguishing personal characteristic, the owner of the characteristic ought to have the right to those profits.<sup>38</sup> The perverse result of the NCAA's amateurism guidelines, specifically the loophole under "Institutional, Charitable, or Nonprofit Promotions" (Article 12.5.1.1), is that it takes that right away from the student-athletes and gives it entirely to the universities.<sup>39</sup>

The NCAA has acknowledged that student-athletes possess a right of publicity and that neither the NCAA nor its member

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32. *Id.*

33. *Id.* at 5-6.

34. *Id.*

35. *See Haelan v. Topps Chewing Gum*, 202 F.2d 866, 868 (2d Cir. 1953); *see also Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977)(recognizing a right of publicity cause of action and liability when defendant profited from violating it).

36. *Haelan*, 202 F.2d at 868.

37. *Id.*

38. *Id.*

39. *See Freedman*, *supra* note 3, at 693.

institutions own this right.<sup>40</sup> In September 2008, NCAA President Myles Brand stated that the NCAA would not sue its business partner, the CBS television network, over the use of college player information in a fantasy sports game:

The stake in the ground is the right to control publicity by athletes of their names, likenesses and identification. Indeed, courts might very well find that student-athletes should be held apart from professional athletes in this application. The benefit that naturally comes with the publicity of names and statistics for professionals is critical enough that those athletes assign their rights to organizations to manage. But in the case of intercollegiate athletics, the right of publicity is held by the student-athletes, not the NCAA. We would find it difficult to bring suit over the abuse of a right we don't own.<sup>41</sup>

The Restatement (Third) of Unfair Competition defines a violation of the right of publicity as a wrongful appropriation of "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. . . ."<sup>42</sup> The "other indicia of identity" language is important in cases such as O'Bannon's and Keller's because the plaintiffs will not need to show that their names or likenesses were used without their permission.<sup>43</sup> Rather, they will only need to meet the lower bar of showing that indicia of their identities has been misappropriated by the NCAA.<sup>44</sup> NCAA member schools, and the NCAA itself, have long engaged in the kind of hair-splitting that this inclusive rule is designed to discourage.<sup>45</sup>

For example, there is a common practice among NCAA member schools of selling numbered replica jerseys of their star players in campus bookstores and online.<sup>46</sup> These are not only retired jersey numbers, but also the active numbers currently being used by players

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40. See O'Bannon Complaint, *supra* note 1, at 7.

41. *Id.*

42. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

43. Anastasios Kaburakis, et al., *NCAA Student-Athletes' Rights of Publicity, EA Sports and the Video Game Industry: The Keller Forecast*, 27 ENT. & SPORTS LAW. 1, 21 (2009).

44. *Id.*

45. Sean Hanlon and Ray Yasser, *'J.J. Morrison' And His Right of Publicity Lawsuit Against the NCAA*, 15 VILL. SPORTS & ENT. L.J. 241, 267 (2008).

46. *Id.*

on NCAA teams.<sup>47</sup> The NCAA prohibits the selling of jerseys with the players' names on them, as that would violate the prohibition against using players' names or likenesses to promote commercial ventures.<sup>48</sup> However, it turns a blind eye to those featuring only numbers, even though it has been recognized that the numbers correspond to those stars' unique identities<sup>49</sup> and are a "meaningful substitute for their names."<sup>50</sup>

Similarly, in many of the EA video games, players are identified only by their jersey numbers, which should be enough "indicia of identity" to support a right of publicity claim, especially given the additional factors that identify these characters as specific real-life athletes. Keller's complaint cites the very obvious attempt by EA to recreate the physical likenesses of athletes in its games, which it achieves with near photographic realism:

Electronic Arts seeks to replicate each school's entire team. With rare exception, virtually every real-life Division I football or basketball player has a corresponding player in Electronic Arts' games with the same jersey number, and virtually identical height, weight, build and home state. In addition, Electronic Arts matches the player's skin tone, hair color, and often even a player's hair style . . . .<sup>51</sup>

In other words, just as in its acceptance of the practice of selling numbered jerseys, the NCAA has allowed EA to appropriate every element of identification of these athletes apart from their actual names. In the Ninth Circuit, where O'Bannon and Keller's cases have been filed, other right of publicity cases have been decided in favor of plaintiffs based only on this type of indicia, sometimes based on even less obvious appropriation.<sup>52</sup>

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47. Marcia Chambers, *Sales of College Stars' Jerseys Raise Ethical Concerns*, N.Y. TIMES, Mar. 31, 2004, at D1.

48. *Id.*

49. See O'Bannon Complaint, *supra* note 1, at 57.

50. Chambers, *supra* note 47.

51. See Keller Complaint, *supra* note 14, at 4.

52. See *White v. Samsung Elecs. Am. Inc.*, 989 F.2d 1512, 1515 (9th Cir. 1993) (expanding the right of publicity to include representation that only "suggested" the plaintiff through characteristic dress and behavior, even though name and likeness was not used); and *Motschenbacher v. R.J. Reynolds*, 498 F.2d 821, 827 (9th Cir. 1974) (holding that the impossibility of recognizing a racecar driver's face did not preclude a finding that his identity had been misappropriated because distinctive markings on his car made him readily identifiable).

### III. Analysis

#### A. Litigation History

The NCAA has been a defendant in a number of lawsuits brought by current and former student-athletes, some of which have involved challenges to the amateurism guidelines.<sup>53</sup> A notable recent case involved Jeremy Bloom, a University of Colorado (“Colorado”) quarterback who sought to maintain endorsement deals connected with his non-NCAA-governed Olympic and professional skiing career.<sup>54</sup> Bloom’s skiing career predated his enrollment at Colorado and was not subject to the amateurism conditions of his relationship with the school vis-à-vis football.<sup>55</sup> Bloom declined the scholarship Colorado offered him for playing football, and wanted only to continue skiing in the off-season and to collect his endorsements to pay for continued ski training.<sup>56</sup> The NCAA denied his request for a waiver, even though waivers are routinely granted to other student-athletes who play professional sports in their off-seasons.<sup>57</sup> This is because waivers are available only for student-athletes who draw traditional salaries in the off-season.<sup>58</sup> Because skiers are paid through endorsements, the NCAA deemed Bloom’s payments violated the precise language of its bylaws, and Bloom was disallowed from collecting his endorsements.<sup>59</sup> This case highlights the strict way in which the amateurism guidelines are generally interpreted.

Although the Bloom ruling was appealed to the district court, the NCAA generally settles cases in which it is a defendant by paying large amounts of money to plaintiffs.<sup>60</sup> In doing so, the NCAA has

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53. See, e.g. *Gaines v. Nat’l Collegiate Athletic Ass’n*, 746 F. Supp. 738, 744 (M.D. Tenn. 1990)(upholding the “no agent” and “no draft” provisions of Bylaw 12 and declaring college athlete ineligible for college play after participating in NFL draft); *Banks v. Nat’l Collegiate Athletic Ass’n*, 977 F. 2d 1081 (7th Cir. 1992)(holding that “no draft” and “no agent” rules do not constitute illegal restraint on trade).

54. *Bloom v. Nat’l Collegiate Athletic Ass’n*, 93 P. 3d 621, 622 (Colo. App. 2004).

55. *Id.*

56. Freedman, *supra* note 3, at 678–79

57. *Id.*

58. *Id.*

59. *Id.* at 679–80.

60. See *White v. NCAA*, No. CV 06-0999 VBF (C.D. Cal., filed 2007) (settlement pending among NCAA and class of Division I men’s football and basketball players who alleged that capping an institution’s scholarship-granting capabilities to Grant In Aid (“GIA”) was a violation of the Sherman Act), see also Mark Alesia, *3 Lawsuits May Change How NCAA Operates*, USA TODAY, July 26, 2009, [http://www.usatoday.com/sports/college/2009-07-26-ncaa-lawsuits\\_N.htm](http://www.usatoday.com/sports/college/2009-07-26-ncaa-lawsuits_N.htm) (describing a number of settlements,

been able to keep the terms of its contracts with licensees private.<sup>61</sup> Thus far, the NCAA has been unable to settle the claims brought by Keller and O'Bannon, fueling speculation that it may no longer be able to maintain this level of privacy.<sup>62</sup> In February 2010, the district court denied the NCAA's motion to dismiss the suit, which could have the important result of making its licensing deals subject to public scrutiny through discovery.<sup>63</sup> The suit has also attracted the attention of lawmakers who are interested in the tax-exempt status of the NCAA and its continuing viability.<sup>64</sup>

A recent case brought by retired National Football League ("NFL") players may also be influential here.<sup>65</sup> In 2007, Herb Adderley, a retired Hall of Fame cornerback, filed suit on behalf of a class of 2,056 retired players who claimed that the National Football League Players' Association ("NFLPA") cut them out of lucrative licensing deals with EA for its "Madden NFL" video games.<sup>66</sup> Specifically, the retired players objected to EA's obscuring their identities in its "Classic Series" games to avoid paying for use of their likenesses.<sup>67</sup> A federal jury, also in the Northern District of California, was moved by e-mails indicating that the NFL had conspired with EA, and awarded \$28.1 million to the plaintiffs (three quarters of which represented punitive damages).<sup>68</sup> Even though the award was later reduced to \$26.25 million, it still represented a significant victory for the retired players.<sup>69</sup> This case also sheds light on what may happen in O'Bannon and Keller's case, as it has now passed the summary judgment stage and could be placed in front of

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including a 1999 settlement where the NCAA paid a \$54 million to "restricted earnings" assistant basketball coaches, whose compensation was limited by association rules).

61. Pete Thamel, *NCAA Fails to Stop Licensing Lawsuit*, N.Y. TIMES, Feb. 8, 2010, at B14.

62. *Id.*

63. *Id.*

64. *Id.*

65. Kurt Streeter, *Former UCLA Star Ed O'Bannon Leads Suit against NCAA Over Use of Images*, L.A. TIMES, July 22, 2009, available at <http://articles.latimes.com/2009/jul/22/sports/sp-videogames-lawsuit22>.

66. *Union, Retired Players Agree to \$26.25 Million Settlement of Lawsuit*, ASSOCIATED PRESS, 2009, <http://www.nfl.com/news/story?id=09000d5d810aa9df&template=without-video-with-comments&confirm=true>.

67. *NFL Players Union Reaches \$26.25M Settlement with Retirees over Madden ... Is EA Lawsuit Next?*, GAME POLITICS (June 5, 2009), <http://www.gamepolitics.com/2009/06/05/nfl-players-union-reaches-2625m-settlement-retirees-over-madden-ea-lawsuit-next>.

68. *Id.*

69. *Id.*

another sympathetic jury.<sup>70</sup> It now seems likely that a jury could be persuaded that the individual players, especially former players, should be given some share of the egregiously large profits posted by EA and CLC.

Finally, the Supreme Court's decision in *NCAA v. Board of Regents of the University of Oklahoma* has important implications for any solution that may arise in response to the O'Bannon and Keller suit.<sup>71</sup> This decision resolved a dispute over the NCAA's license agreements with two broadcast networks and set forth the parameters for televising NCAA football games.<sup>72</sup> In addition, the Court's language and reasoning further suggests its strong preference for upholding the NCAA's amateurism requirements at all costs.<sup>73</sup> The Court noted the unique nature of the NCAA and its "product" (college football games) in this way:

The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.<sup>74</sup>

Thus, the Supreme Court in *Board of Regents* points out that amateurism is the very thing that makes college sports unique and popular.<sup>75</sup> In light of this position, it seems unlikely that any proposed solution that would tamper with the longstanding tradition of amateurism will be well-received. Further, such solutions may even prove harmful to the balance that makes NCAA-sanctioned sports profitable in the first place.<sup>76</sup>

70. Thamel, *supra* note 61.

71. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

72. *Id.*

73. Vladimir P. Belo, *The Shirts Off Their Backs: Colleges Getting Away with Violating the Right of Publicity*, 19 HASTINGS COMM. & ENT. L.J. 133, 152 (1996).

74. *Bd. of Regents*, 468 U.S. at 101-02.

75. Belo, *supra* note 73, at 152.

76. *See supra* Part III.B.

## B. Proposed Solutions Based on College Athletes as ‘Employees’

Many of the proposed solutions to resolve the dispute between the NCAA and both current and former student-athletes revolve around the designation of college athletes as “employees” and the creation of a union or unions with collective bargaining power.<sup>77</sup> While there is some indication that it may be possible to designate college athletes as “employees” of the universities (though maybe not of the NCAA itself), there are a number of practical and philosophical reasons that these solutions are not viable.

The first major obstacle to this type of solution arises from the difficulty of characterizing student-athletes as “employees.”<sup>78</sup> The most closely analogous group is graduate student assistants, who have attempted to obtain such a designation and have met with only limited and intermittent success.<sup>79</sup> In *New York University*, the National Labor Relations Board (“NLRB”) determined that graduate student assistants were employees, and could form a union to bargain collectively under the National Labor Relations Act (“NLRA”).<sup>80</sup> The NLRB reversed this decision four years later in *Brown University*, however, returning to its earlier jurisprudence on the subject of graduate assistants and denying them the right to organize under the NLRA.<sup>81</sup> This reflects the current trend in denying unionization to graduate student assistants, as they are thought to be students first, employees second, and only in a limited sense which is fully dependent on their student status.<sup>82</sup> This approach falls directly in line with the NCAA’s posture towards student-athletes and with the Supreme Court’s position in *Board of Regents*: that these athletes are students first and that their athletic pursuits depend entirely on their academic careers.<sup>83</sup>

Even if the NLRB agreed to designate college athletes as employees of the universities for which they play, there would still be significant difficulties in trying to create a workable union. First, the universities would face a line-drawing question because they would

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77. See Rohith A. Parasuraman, Note, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 729 (2007).

78. *Id.* at 735–36.

79. *Id.* at 736–39.

80. *New York Univ.*, 332 N.L.R.B. 1205 (2000).

81. *Brown Univ.*, 342 N.L.R.B. 483 (2004).

82. Parasuraman, *supra* note 77, at 738–39.

83. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984); see also *Belo*, *supra* note 73, at 152.

need to decide which student-athletes qualified as employees.<sup>84</sup> Presumably, the marquee sports of Division I men's football and basketball would be considered first, as they generate the largest revenues.<sup>85</sup> There are other sports, however, such as women's basketball, that also generate revenues.<sup>86</sup> Determining which athletes are allowed to unionize and how they should do so presents a significant practical challenge for the universities. Moreover, the fact that the universities must make this determination is also likely to cause resentment among athletes in different sports and among different schools. Eventually, the unionization of college sports could also profoundly affect athletic recruitment. If particular schools became known for their favorable collective bargaining agreements, they would likely draw top recruits away from other schools. Similarly, if football at a particular school was unionized but baseball was not, a future Deion Sanders might choose to focus on only one sport.<sup>87</sup>

Unionizing college sports would also have the broader impact of recalibrating the economics of the entire system.<sup>88</sup> Undoubtedly, any attempt at unionization would present significant costs to the universities, and would necessitate the creation of new administrative and oversight organizations. As each college athlete is only on campus for a maximum of a few years, professional staff would be required to ensure continuity at the bargaining table.

The creation of unions would also probably disrupt the system currently in place at many universities, where more lucrative programs fund those that are not profitable. Despite the large revenues generated by Division I men's basketball and football programs, most athletic programs operate at a loss.<sup>89</sup> Without the availability of football and basketball profits to keep other sports afloat, most universities would face the financial impossibility of fielding a full slate of teams.<sup>90</sup> If only the revenue-generating men's basketball and men's football teams were financially independent,

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84. See Parasuraman, *supra* note 77, at 739.

85. *Id.*

86. See Robert W. Brown & R. Todd Jewell, *The Marginal Revenue Product of a Women's College Basketball Player*, 45 INDUS. REL. 96, 100 (2006).

87. *Deion Sanders Career Biography and Statistics*, SPORTHAVEN (Jan. 21, 2011, 8:07 PM), <http://www.sporthaven.com/players/deion-sanders/>. While attending Florida State University, Deion Sanders excelled at football, baseball, and track. *Id.*

88. Parasuraman, *supra* note 77, at 750.

89. *Id.* at 748–49.

90. *Id.* at 749–50.

other teams would likely be eliminated.<sup>91</sup> Additionally, it is unclear what effect this might have on Title IX,<sup>92</sup> which requires universities fielding athletic teams for men to allocate equal funding to field teams that are available for participation by women.<sup>93</sup> While the smaller, but still significant, revenues of successful women's basketball programs might be enough to keep them viable,<sup>94</sup> there is no women's sport that could come close to balancing the financial juggernaut of a Division I men's football team.<sup>95</sup>

#### IV. Proposal

The most likely outcome of the O'Bannon and Keller lawsuits is that the NCAA will be forced to reevaluate its refusal to share profits from its licensing agreements with the student-athletes whose names and likenesses it exploits. Although the contract of adhesion presented by Form 08-3a will need to be revisited, it is possible to create a trust system that would allow the NCAA and its member schools to continue to profit from licensing arrangements while also sharing some of those profits with the student-athletes.

The elegance of a trust solution versus a collective-bargaining solution is that it is simple, cost efficient, and would preserve the overall structure of the NCAA. Under a trust system, costs would be minimal, as the solution could be limited to only the students who are actually affected. For example, it is obvious which players are included in EA's "NCAA March Madness" video games and who played on the UCLA Bruins' 1995 championship team. Further, universities are aware of exactly which jersey numbers are flying off their shelves, which is why they continue to market those specific jerseys. The players represented by these numbers are easily identifiable, and it would be simple and inexpensive to create a structure for sharing profits with them. By contrast, a solution involving unionization would necessitate great expense and the creation of a large infrastructure at both the university and the NCAA level.

Perhaps even more importantly, unionizing college athletics would upend the entire tradition of amateurism on which the NCAA's mission is founded and from which it derives value, as the

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91. *Id.*

92. *Id.* at 750.

93. 20 U.S.C. § 1681(a) (2000).

94. Parasuraman, *supra* note 77, at 750.

95. *Id.* at 753 n.111.

Supreme Court held in *Board of Regents of the University of Oklahoma*.<sup>96</sup> A trust solution would allow the NCAA to continue to operate under the ideal of amateurism, and its relationship with member schools could remain intact.<sup>97</sup> This is a minimally invasive solution that preserves the overall structure of the organization and would allow the NCAA to remain true to its ideals while still sharing its profits with the student-athletes who help to generate them.

**A. The USOC Provides a Workable Model for a Trust System for Current and Future College Athletes**

The NCAA should implement a trust system similar to that used by the United States Olympic Committee (“USOC”). The USOC also requires athletes to be amateurs, but its trust system recognizes the necessity of corporate sponsorships for athletes, who need funding for their significant training and competition expenses.<sup>98</sup> The USOC model allows athletes to accrue funds in a trust while they are amateurs.<sup>99</sup> These trusts are administered by USOC personnel, who oversee disbursement for sport-related expenses such as training costs while the athlete is still subject to the requirement of amateur status.<sup>100</sup> The USOC trustee ensures that the funds are disbursed properly and for the specific purposes allowed under the terms of the trust.<sup>101</sup> The remainder may be withdrawn when the athlete has completed his amateur career.<sup>102</sup>

A similar system would allow the NCAA to maintain its core structure and objectives of “academics first, athletics second” while offering two-fold benefits for college athletes.<sup>103</sup> First, the trust system would eliminate the basic unfairness that attends Bylaw 12’s blanket prohibition on student-athletes’ ability to profit from their names and likenesses by allowing them to defer any profits until after they are no longer subject to the amateurism regulations.<sup>104</sup>

Second, the availability of funds after graduation may help to ameliorate some of the difficulties faced by those who do not go on to earn large salaries as professional athletes after college. Many former

96. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 101–02 (1984).

97. *See supra* Part III.A.

98. Freedman, *supra* note 3, at 708.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

college athletes leave their universities in substantial debt because their scholarships did not cover the basic necessities of life.<sup>105</sup> A recent study conducted by an advocacy group, the National College Players' Association ("NCPA"), showed that college athletes could be left with as much as \$30,000 in normal student expenses uncovered over the course of a typical collegiate athletic career in a Division I program.<sup>106</sup> This occurs because, in addition to practicing and traveling with their teams up to forty hours per week, these college athletes are unable to maintain part-time work.<sup>107</sup> In many cases, their schools actually prohibit them from working, even during the off-season.<sup>108</sup>

The NCPA's study found that the average "scholarship shortfall" for athletes on Division I and II "full scholarships" was \$2,763 per year, or \$13,800 over the course of five years (which is a typical attendance estimate).<sup>109</sup> While it is a minority of these "full scholarship" athletes who are bona fide stars making large contributions to the NCAA's estimated \$4 billion in annual revenues, the fact that any of these athletes are left in debt after graduation while the NCAA profits from licensing their names and likenesses is simply unfair.

Additionally, many former college athletes have lingering medical expenses and require treatment and rehabilitation for long-term injuries that result from their college playing careers.<sup>110</sup> The NCAA does not comprehensively regulate insurance coverage for athletes, so coverage levels are inconsistent among member universities. As a result, athletes can be left with large medical bills long past their college playing days.<sup>111</sup> Profit sharing through a trust would certainly help to bridge the gap for many former college athletes.

## V. Conclusion

The Northern District of California should find that Keller, O'Bannon, and other college athletes possess the common law right

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105. See O'Bannon Complaint, *supra* note 1, at 59.

106. *Scholarship shortfall study reveals college athletes pay to play*, NATIONAL COLLEGE PLAYERS' ASSOCIATION (Mar. 26, 2009), [http://www.ncpanow.org/releases\\_advisories?id=0009](http://www.ncpanow.org/releases_advisories?id=0009) [hereinafter *Scholarship Shortfall Study*].

107. Parasuraman, *supra* note 77, at 740–41.

108. *Id.*

109. *Scholarship Shortfall Study*, *supra* note 97.

110. Kristina Peterson, *College Athletes Stuck With The Bill After Injuries*, N.Y. TIMES, July 15, 2009, at A1.

111. *Id.*

of publicity, and it should find that the NCAA has violated those rights in licensing the players' unique likenesses for its own profit. The NCAA has subverted the intent of its own Bylaw 12.5.1.1.1 which is only meant to cover charitable and promotional uses of the likenesses of university-affiliated persons. To use this provision as justification to license student-athletes' likenesses for purely commercial reasons is overreaching. To then exclude those very players from sharing in the profits derived from the licensing is simply unfair.

The NCAA seems to have stretched its ability to exploit these student and former student-athletes' likenesses to the limit. In addition to any damages it is required to pay, the NCAA should take the opportunity now to create a trust system that allows it to share profits from licensing arrangements with the student-athletes whose likenesses are used. This is an equitable solution that will allow student-athletes a fair share of the value of their own likenesses, will provide them with some income to make up for scholarship shortfall, and will still enable the NCAA to maintain its overall structure based on amateurism.

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