

The Future of Amateurism After
Antitrust Scrutiny: Why a Win for the
Plaintiffs in the *NCAA Student-Athlete
Name & Likeness Licensing Litigation*
Will Not Lead to the Demise of
College Sports

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On June 21, 2009, twelve former Division I student-athletes filed an antitrust complaint against the National Collegiate Athletic Association (“NCAA”) alleging that the NCAA rules that prevent student-athletes from controlling the commercial rights to their names and likenesses violate Section 1 of the Sherman Act.¹ In response, the

¹ See Class Action Complaint Demand for Jury Trial, *O’Bannon v. NCAA*, No. CV 09 3329, 2009 WL 2416720 (N.D. Cal. July 21, 2009) [hereinafter *O’Bannon* Complaint]. Since this complaint was filed, plaintiffs have revised their complaint on numerous occasions, both adding and subtracting plaintiffs, and changing slightly their underlying

NCAA has argued that its restraints on student-athlete names and likenesses serve the necessary purpose of maintaining competitive balance in college sports.² In addition, the NCAA has asserted that if its nationwide restraints are overturned, it would financially “destroy college sports for the vast majority of student-athletes.”³

This Article analyzes the pertinent legal issues in the *NCAA Student-Athlete Name & Likeness Licensing Litigation* and explains why a plaintiffs’ victory would not lead to the demise of college sports as the NCAA suggests. Part I of this Article provides a history of the college sports marketplace, including its historic governance structure and its transition of economic power from individual colleges to the NCAA. Part II discusses the *NCAA Student-Athlete Name & Likeness Licensing Litigation* in terms of its procedural history and core legal principles. Part III explains why a win for the plaintiffs in the *NCAA Student-Athlete Name & Likeness Licensing Litigation* would not truly destroy competitive balance in college sports. Finally, Part IV explains why a win for the plaintiffs similarly would not destroy the financial viability of college sports.

legal theories. NCAA’s Memorandum of Points & Authorities in Support of Motion for Summary Judgment; Opposition to Antitrust Plaintiffs’ Summary Judgment Motion at 6, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09-CV-1967-CW, 2013 WL 6818041 (N.D. Cal. Dec. 12, 2013) [hereinafter NCAA’s Memorandum in Support of Summary Judgment Motion].

² See NCAA’s Memorandum in Support of Summary Judgment Motion, *supra* note 1, at *17–22 (explaining various reasons as to how the NCAA’s “amateurism” rules purportedly help to maintain competitive balance in college sports and thus keep college athletics viable); see also Order Denying Motions to Compel Production of Documents by Nonparties, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, Nos. 09-cv-01967-CW (NC), 11-mc-80300 CW (NC), 12-mc-80020 CW (NC), 2012 WL 629225, at *2 (N.D. Cal. Feb. 27, 2012) (“In support of one of its affirmative defenses, the NCAA claims that the NCAA’s rules . . . promote amateurism and competitive balance between and among NCAA member institutions.”).

³ See Lester Munson, *Players Seek ‘Quick Look’ Win in Court*, ESPN OUTSIDE THE LINES (Nov. 22, 2013, 7:35 PM), http://espn.go.com/espn/otl/story/_id/10018003/lawyers-obannon-vs-ncaa-case-trying-same-tactic-defeated-ncaa-1984-case (quoting NCAA chief legal officer Donald Remy, who stated that the plaintiffs suing the NCAA in the *O’Bannon* case seek “to destroy college sports for the vast majority of student-athletes in order to pay a few”); see also Defendant NCAA’s Reply in Support of Motion to Dismiss Third Consolidated Amended Class Action Complaint at 3, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09-cv-1967-CW, 2013 WL 5402510 (N.D. Cal., Sept. 27, 2013) (purporting that the NCAA rules that preclude student-athlete compensation “allow its survival in the face of commercializing pressures” (quoting *McCormack v. Nat’l Collegiate Athletic Ass’n*, 845 F.2d 1338, 1344–45 (5th Cir. 1988)).

I
THE COLLEGE SPORTS MARKETPLACE

A. Brief Snapshot of the NCAA

The National Collegiate Athletic Association (“NCAA”) is the “dominant association” for the eleven-billion-dollar college sports industry.⁴ It consists of 1066 colleges that participate in ninety-five athletic conferences.⁵ Although some accredited colleges are not NCAA members, “[f]or all practical purposes, the NCAA . . . directs and controls all major revenue-producing collegiate athletic events.”⁶

In terms of its organizational structure, the NCAA is a bottom-up trade association.⁷ It operates pursuant to a more than four-hundred-page manual that is voted upon by its membership (“NCAA Manual”).⁸ The NCAA Manual includes a formal constitution, numerous bylaws, and “literally thousands of rules.”⁹ Some of these rules grant the NCAA exclusive rights to use student-athletes’ names and likenesses to “promote NCAA championships or other NCAA events, activities or programs.”¹⁰ Meanwhile, other rules prevent

⁴ Banks v. NCAA, 746 F. Supp. 850, 852 (N.D. Ind. 1990), *aff’d*, 977 F.2d 1081 (7th Cir. 1992); *see also* 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) [hereinafter Edelman, *Amateurism and Antitrust Law*]; Daniel A. Rascher & Andrew D. Schwarz, “Amateurism” in *Big-Time College Sports*, 14 ANTITRUST 51, 52 (2000) (“The NCAA’s market share is most likely in the upper 90 percent range for college athletics.”).

⁵ *See* NCAA.ORG, <http://ncaa.org/wps/wcm/connect/public/ncaa/about+the+ncaa/membership+new> (last visited Dec. 30, 2013) (listing the number of colleges that are NCAA members at 1066); *cf.* Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 64–65 (estimating the NCAA’s total membership at “approximately twelve hundred”).

⁶ Rascher & Schwarz, *supra* note 4, at 52 (quoting ARTHUR A. FLEISHER, BRIAN L. GOFF & ROBERT D. TOLLISON, *THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION: A STUDY IN CARTEL BEHAVIOR* (1992)) (internal quotation marks omitted).

⁷ *See generally* Order on NCAA’s and CLC’s Motions to Dismiss, O’ Bannon v. NCAA, Nos. C 09-1967 CW, 2010 WL 445190, at *3 (N.D. Cal. Feb. 8, 2010) (accepting the plaintiffs’ description of the NCAA as a bottom-up trade association); *see also* Rohith A. Parasuraman, Note, *Unionizing NCAA Division I Athletics: A Viable Solution?*, 57 DUKE L.J. 727, 727 n.1 (2007) (noting that as recently as November 2007, the NCAA described itself on its own website as a “bottom-up organization”).

⁸ *See* NCAA, 2011-12 NCAA DIVISION 1 MANUAL (2011) [hereinafter NCAA MANUAL], *available at* <https://www.ncaapublications.com/p-4224-2011-2012-ncaa-division-i-manual.aspx>; Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 66.

⁹ Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2647 (1996); *see also* Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 66 (discussing generally the structure of the NCAA Manual).

¹⁰ NCAA MANUAL, *supra* note 8, § 12.5.1.1.1. Students who wish to compete in an NCAA sport further must agree to adhere to granting such exclusive rights to the NCAA.

student-athletes from accepting remuneration, in any form, in connection with their athlete status.¹¹

B. College Sports Before the NCAA

College sports did not always operate in today's manner.¹² In its early days, college sports operated outside the formal education process, and students raised the funds for sporting events themselves.¹³ During this era, students regulated their own athletic activities, and they determined which prospective athletes were eligible to compete.¹⁴ The proceeds derived from college sports, if any, stayed with the athletic teams.

By the late 1800s, many colleges had begun to assume greater control over their sports teams.¹⁵ At the same time, these colleges joined together into athletic conferences.¹⁶ One of the earliest athletic conferences was the Intercollegiate Conference of Faculty Representatives, which was formed in 1895 by several Midwest colleges.¹⁷ In 1899, this conference expanded to nine teams and

See generally Order Granting EA's Motion to Dismiss and Denying CLC's and NCAA's Motions to Dismiss, *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2011 WL 1642256, at *1 (N.D. Cal. May 2, 2011) (discussing how the NCAA requires all student-athletes to sign Form 08-3a, designating away any rights to their own names and likenesses); *see also* Order Denying Defendants' Motion to Transfer, *O'Bannon v. NCAA*, No. C 09-3329 CW, 2009 WL 4899217, at *1 (N.D. Cal., Dec. 11, 2009) (further describing NCAA Form 08-3a).

¹¹ *See, e.g.*, Marc Edelman, *Closing the "Free Speech" Loophole: The Case for Protecting College Athletes' Publicity Rights in Commercial Video Games*, 65 FLA. L. REV. 553, 557 (2013) [hereinafter Edelman, *Closing the "Free Speech" Loophole*] (citing NCAA MANUAL, *supra* note 8, § 12.1.2).

¹² *See infra* notes 13–25 and accompanying text.

¹³ Robert N. Davis, *Academics and Athletics on a Collision Course*, N.D. L. REV. 239, 243 (1990).

¹⁴ *See generally* Jim Peach, *College Athletics, Universities, and the NCAA*, 44 SOC. SCI. J. 11, 13 (2007) (explaining that "[p]rior to the organization of the NCAA, college athletes formed clubs and often performed all of the management functions of running a team themselves").

¹⁵ *See* Rodney K. Smith, *The National Collegiate Athletic Association's Death Penalty: How Educators Punish Themselves and Others*, 62 IND. L.J. 985, 990 (1987) (providing examples of colleges beginning to take control over their athletic teams).

¹⁶ *See* Smith, *supra* note 15, at 990; *see also* JOHN SAYLE WATTERSON, *COLLEGE FOOTBALL: HISTORY SPECTACLE CONTROVERSY 2* (2000) (mentioning the passing of rules to regulate college football "at the conference and institutional level").

¹⁷ *See* Davis, *supra* note 13, at 244 (explaining that the initial meetings to form this conference were held in January 1895 in Chicago); *Big Ten History*, BIGTEN.ORG, <http://www.bigten.org/trads/big10-trads.html> (last visited Feb. 22, 2014) (noting that these

adopted the moniker, the Big Nine Conference.¹⁸ In 1917, it added a tenth team and changed its moniker to the Big Ten.¹⁹

The Big Ten Conference, from its inception, has been the most organized of the early college athletic conferences.²⁰ Whereas many early athletic conferences ignored issues related to athlete eligibility, the Big Ten Conference has long enforced rules that limit eligibility to “full-time students who were not delinquent in their studies.”²¹ Under the leadership of a conference commissioner, the Big Ten Conference has also historically prohibited its members from scheduling non-conference games against colleges that do not adhere to its strict academic requirements.²²

Nevertheless, none of the early athletic conferences—not even the Big Ten Conference—have historically enforced meaningful rules to limit on-field violence in college football. As a result, by the early twentieth century, investigative journalists had come to criticize college football for its high number of head and neck injuries.²³ In November 1905, the *Washington Post* even detailed the fate of William Moore, a Union College football player who lost consciousness when he attempted “to get through the [New York

seven colleges included the University of Chicago, University of Illinois, University of Michigan, University of Minnesota, Northwestern University, Purdue University, and University of Wisconsin); *see generally* WATTERSON, *supra* note 16, at 50 (noting that for a brief period of less than one year, this conference included Wake Forest University rather than the University of Michigan).

¹⁸ *See Big Ten History*, *supra* note 17.

¹⁹ *See id.*

²⁰ *See id.* (discussing the implementation of the Big Ten’s first eligibility rules).

²¹ *Id.* (internal quotation marks omitted); *cf.* Memorandum of Points and Authorities in Support of Motion by Antitrust Plaintiffs for Summary Judgment at 15, *In re Student-Athlete Name & Likeness Licensing Litig.*, No. 4:09-cv 1967 CW (N.D. Cal. Nov. 15, 2013) [hereinafter Memorandum in Support of Summary Judgment for Antitrust Plaintiffs] (noting that “when college football was first developed, colleges and conferences adopted different definitions of amateurism”); Parasuraman, *supra* note 7, at 731 (referencing the concept of “home rule” where the home team made decisions about who was eligible to compete in a particular game).

²² *See* Teddy Greenstein, *With Changes on Way, Big Ten’s Delany Staying Put*, CHI. TRIB. (July 1, 2008), http://articles.chicagotribune.com/2008-07-01/sports/0806300782_1_tranghese-bcs-commissioner-jim-delany (discussing the creation of the Big Ten’s commissioner position in 1922); *see also* WATTERSON, *supra* note 16, at 183 (detailing the Big Ten Conference commissioner’s discussion of a potential “white list” of acceptable opponents and blacklisting unacceptable ones).

²³ *See* Marc Edelman & David Rosenthal, *A Sobering Conflict: The Call for Consistency in the Message Colleges Send About Alcohol*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1389, 1398 (2010) (mentioning the disclosure of 149 serious injuries in football in 1905); *see also infra* note 24 and accompanying text.

University football team's center and] went at the line head first like a catapult."²⁴ Moore died six hours later.²⁵

C. Founding of the NCAA

As journalists wrote with increasing ferocity about the dangers of college football, U.S. President Theodore Roosevelt felt compelled to intervene.²⁶ In 1905, President Roosevelt summoned the leaders of several well-known colleges to the White House to discuss ways to improve player safety.²⁷ Shortly thereafter, New York University chancellor H.M. MacCracken held a separate meeting with college chancellors and presidents from throughout the country.²⁸ At the meeting, MacCracken proposed "the reform . . . of intercollegiate athletics as a whole" through the auspices of a private national association.²⁹

From these meetings came the charter of the National Collegiate Athletic Association as a trade association designed to devise formal game rules, promote safety, and give college athletics some degree of public respectability.³⁰ Although the NCAA's founding members did not cede any independent authority to the NCAA, they empowered their new association to serve as "a declarant of ideals" and as a

²⁴ W. Burlette Carter, *The Age of Innocence: The First 25 Years of the National Collegiate Athletic Association, 1906 to 1931*, 8 VANDERBILT J. ENT. & TECH. L. 211, 215 (2006) (citing *Football Player Killed. William Moore, of Union College, Dies from Blow on Head.*, WASH. POST, Nov. 26, 1905, in Sporting Section).

²⁵ *Id.*

²⁶ See *supra* notes 23–24 and accompanying text.

²⁷ See Edelman & Rosenthal, *supra* note 23, at 1398 (discussing President Roosevelt's intervention in the college football injury crisis); see also Carter, *supra* note 24, at 215 (same). Some scholars believe that President Theodore Roosevelt was not entirely bothered by the physically dangerous nature of college football, but rather feared that, without change, the game would soon be abolished in its entirety. See, e.g., WATTERSON, *supra* note 16, at 64–65 (noting that President Roosevelt "believed strongly that football built character" and "believed just as strongly that roughness was necessary," however, "he worried that brutality and lack of sportsmanship destroyed the good effects of football").

²⁸ See Carter, *supra* note 24, at 217.

²⁹ *Id.* at 217–18 (internal quotation marks omitted).

³⁰ See Marc Edelman, Note, *Reevaluating Amateurism Standards in Men's College Basketball*, 35 U. MICH. J.L. REFORM 861, 864 (2002) [hereinafter Edelman, *Reevaluating Amateurism Standards*] (noting that "[t]he NCAA was initially formed . . . for preventing student-athletes from on-the-field injuries"); see also Peach, *supra* note 14, at 13 (mentioning the public respectability argument underlying the NCAA's founding).

vehicle to make non-binding recommendations to its membership and the various athletic conferences.³¹

D. College Sports Under the NCAA as a “Declarant of Ideals”

In its incipience, the NCAA served in accordance with its charter as a “minor force” in the governance of college athletics.³² Its primary responsibilities included hosting championship events and providing a forum for colleges to discuss on-field safety issues.³³ The NCAA’s most notable recommendations in its early years included adding the forward pass and the first down marker to college football—both innovations that were designed to open the playing field and reduce player injuries.³⁴

With the NCAA serving in this limited capacity, collegiate athletics thrived in the first half of the twentieth century.³⁵ As fan interest skyrocketed, colleges from around the country built large national stadiums to meet the needs of their growing fan base.³⁶ The popularity of college football grew most rapidly in the Midwest, where the Big Ten colleges emerged as the on-field elite.³⁷ In 1922,

³¹ Carter, *supra* note 24, at 220, 227; *see also* Kevin Sherrington, *Rising Up Against the ‘Sanity Code,’* DALL. MORNING NEWS, Aug. 18, 2013, 2013 WLNR 26652352 (noting that until 1948, “[t]he NCAA had no enforcement powers”); Parasuraman, *supra* note 7, at 731 (explaining that even after the creation of the NCAA, college sports maintained its system of “home rule” where individual colleges determined player eligibility for given contests).

³² Smith, *supra* note 15, at 991.

³³ *See id.*; *see also* Edelman, *Reevaluating Amateurism Standards*, *supra* note 30, at 866 (explaining that “through the 1920s collegiate sports regulation remained primarily a function of student-athletes and faculty, with the NCAA playing a minor role in developing on-the-field rules and organizing championship events”).

³⁴ *See* WATTERSON, *supra* note 16, at 101–02.

³⁵ *See, e.g.,* RAYMOND SCHMIDT, *SHAPING COLLEGE FOOTBALL: THE TRANSFORMATION OF AN AMERICAN SPORT 1919–1930*, at 1, 4, 7 (2007) (describing the 1920s as the “glory era” of college football).

³⁶ *See* Gary Andrew Poole, *Classic Stadiums, Classic Memories*, N.Y. TIMES, Oct. 21, 2005, at F1 (noting that “[w]ith professional football just a bunch of ragtag company-sponsored teams in the 1920’s, the university squads could barely keep up with their growing fan base,” and that “[t]o satisfy the demand, colleges scrambled to erect stadiums that could hold tens of thousands of people, especially in the Midwest”).

³⁷ *See id.* (discussing how the growth of college football and erecting of large football stadiums occurred most rapidly in the Midwest); *see also* *College Football National Championships in NCAA Division I FBS*, WIKIPEDIA, http://en.wikipedia.org/wiki/College_football_national_championships_in_NCAA_Division_I_FBS (last visited Feb. 22, 2014) (showing that between 1918 and 1933, a Big Ten Conference football team was selected as the national champion on thirteen occasions by one or more of the college football selection committees).

the Big Ten's Ohio State University opened a 66,210-seat stadium in the heart of its Columbus campus—a stadium that was more than quadruple the size of its old home field.³⁸ Although Ohio State initially struggled to fill this stadium, it ultimately sold out all 66,210 seats for a late 1922 game against the University of Michigan, and it thereafter began to sell out games with regularity.³⁹ In fact, Ohio Stadium became so popular among Big Ten football fans that just five years later the University of Michigan decided to build an even bigger stadium that held 72,000 fans, which Michigan fans thereafter nicknamed the “Big House.”⁴⁰

As college sports enjoyed a growing national audience, student-athletes began to gain celebrity status.⁴¹ In football, University of Illinois running back Red Grange emerged in the late 1920s as the most famous of all college athletes after he scored six touchdowns in a single game against the University of Michigan.⁴² Nicknamed “the

³⁸ See Jim Naveau, *Ohio Stadium—90 Years Tradition, Memories, O-H-I-O*, TROY DAILY NEWS, Aug. 30, 2012, at B4 (describing the first season at Ohio Stadium, including the stadium's inaugural game between Ohio State University and Ohio Wesleyan).

³⁹ See *id.* (noting that seventy thousand fans packed into the stadium in 1922 to watch Ohio State University play the University of Michigan, even though the stadium only had seats for 66,210).

⁴⁰ See *Michigan Stadium Top 10 Facts*, MICH. ATHLETICS, <http://www.mgoblue.com/genrel/070109aaa.html> (last visited Mar. 9, 2014) (estimating the original capacity of Michigan Stadium at 72,000); see also *The Big House is Getting Bigger*, N.Y. TIMES, June 22, 2007, at D6 (noting that the cost to build the Big House in 1927 was \$950,000).

⁴¹ See *infra* notes 42–44 and accompanying text (discussing celebrity status of Red Grange). In addition to Red Grange, another one of the earliest college football players to gain national celebrity status was Jim Thorpe, a Native American who excelled at football, baseball, and Olympics competition. See *Thorpe, James Francis (1888–1953)*, OKLA. HISTORICAL SOC'Y, <http://digital.library.okstate.edu/encyclopedia/entries/T/TH016.html> (last visited Feb. 22, 2014). In addition, the “Four Horsemen” of Notre Dame collectively gained great fame during a period of Notre Dame's offensive dominance from 1922 through 1924. See *The Four Horsemen*, U. NOTRE DAME ATHLETICS, <http://www.und.com/trads/horse.html> (last visited Feb. 22, 2014).

⁴² See Poole, *supra* note 36 (“On the day in 1924 when Memorial Stadium at the University of Illinois was dedicated, Red Grange ran for five touchdowns and threw for a sixth against Michigan. Football historians still consider the first 12 minutes of that game, in which Grange ran for 265 yards and 4 of the touchdowns, college football's greatest individual performance.”); see also Gerald Eskenazi, *Red Grange, Football Hero of 1920's, Dead at 87*, N.Y. TIMES, Jan. 29, 1991, <http://www.nytimes.com/1991/01/29/obituaries/red-grange-football-hero-of-1920-s-dead-at-87.html> (“The Grange legend flowered one afternoon in 1924, when his Illinois team was facing undefeated Michigan. That day was also dedication day for Illinois Memorial Stadium, and 66,609 fans turned out for the game. While many people were still finding their seats, Mr. Grange took the opening kickoff 95 yards for a touchdown. Then, on the Illini's first play from scrimmage,

Galloping Ghost,” Grange enjoyed as much fame as any U.S. celebrity of his time, other than perhaps Charles Lindbergh or Babe Ruth.⁴³ By his final year in college, Grange had hired an agent to help him negotiate career opportunities in business and in Hollywood.⁴⁴ Ultimately, Grange accepted a job with the National Football League’s Chicago Bears, a decision that helped to popularize professional football throughout the United States.⁴⁵

E. Transformation of the NCAA

Yet, despite the overwhelming popularity of college sports from 1905 through the 1930s, members of the Big Ten Conference were ready to tear everything apart.⁴⁶ By the end of World War II, members of this powerful athletic conference had come to believe that there was a second crisis emerging in college sports: one that involved southern colleges paying “scholarships” to their student-athletes as a way to recruit premier talent.⁴⁷ Members of the Big Ten Conference argued for the need to impose strict national rules to prevent southern colleges from continuing to pay their athletes.⁴⁸

In truth, the Big Ten’s allegations of a national crisis were likely overstated; the only clear effect of colleges paying “scholarships” was

he broke through for a 67-yard touchdown. He followed that with touchdown runs of 54 yards and then 44 yards. He astounded everyone present, as well as the larger football world, by rushing for 265 yards and 4 touchdowns in the first 12 minutes of the game. . . . Soon after, he returned and scored his fifth touchdown of the day, on a 13-yard run. For good measure, he tossed a 20-yard scoring pass in the fourth quarter as Illinois won, 39-14. In 41 minutes of play, he was responsible for 402 yards of offense, including 64 yards as a passer.”).

⁴³ See Eskenazi, *supra* note 42 (mentioning Grange’s nickname of “Galloping Ghost” and recounting a story of Babe Ruth inviting himself to Grange’s hotel room to give him two items of advice about fame: “don’t believe anything they write about you, and don’t pick up too many dinner checks”).

⁴⁴ WATTERSON, *supra* note 16, at 153 (explaining that Grange was “the first big-time celebrity [college] football player”); Marc Edelman, *Disarming the Trojan Horse of the UAAA and SPARTA: How America Should Reform its Sports Agent Laws to Conform with True Agency Principles*, 4 HARV. J. SPORTS & ENT. L. 145, 149–50 (2013) (explaining that Red Grange’s fame as a college running back was so great that he became among the first athletes to hire a player agent to represent his interests).

⁴⁵ See Eskenazi, *supra* note 42 (mentioning Grange’s later induction into the Professional Football Hall of Fame in 1963).

⁴⁶ See *supra* notes 35–37 and accompanying text (discussing overwhelming popularity of college football from 1905 through the 1930s); see *infra* notes 48–51 and accompanying text (discussing Big Ten Conference’s efforts to change the status quo by implementing strong, centralized control of college football via the NCAA).

⁴⁷ WATTERSON, *supra* note 16, at 183.

⁴⁸ See *id.* at 183–98.

that it shifted on-field dominance in college football away from the Big Ten and toward the Southeastern Conference.⁴⁹ Nevertheless, Big Ten members sought the support of other traditionally strong football schools to prevent the power dynamic from shifting.⁵⁰ Thus, the Big Ten Conference worked to transform the NCAA from a “declarant of ideals” into an association with direct authority to punish colleges that did not adhere to its vision of “amateurism.”⁵¹

Based on the Big Ten Conference’s lobbying efforts, the NCAA in 1948 adopted a “Sanity Code” that empowered the association to ban any member school that compensated a student-athlete with more than just the cost of tuition.⁵² The Sanity Code “stipulated that institutions could provide tuition and fees for student athletes but nothing more.”⁵³ Thus, “[i]f athletes wanted something to eat or a place to sleep, they had to pay for it themselves or work for it.”⁵⁴

After some southern colleges threatened to leave the NCAA in objection to the Sanity Code, the Big Ten Conference members developed an alternative scheme that replaced the Sanity Code with a complex national regulatory structure for college sports.⁵⁵ The Big Ten Conference leaders then successfully nominated one of their own assistants, Walter Byers, to assume the new role as NCAA Executive Director and implement this structure.⁵⁶

⁴⁹ See generally *College Football National Championships in NCAA Division I FBS*, *supra* note 37 (noting that between 1940 and 1953, the University of Tennessee was selected as national champion by at least one selection committee on three occasions, and the University of Alabama, University of Georgia, and Georgia Tech University were each selected as national champion by at least one selection committee on two occasions).

⁵⁰ See WATTERSON, *supra* note 16, at 184 (discussing a letter written by Big Ten Conference commissioner John Griffiths to Amos Alonzo Stagg of California, requesting his support in a national effort to take steps to prevent Southeastern Conference colleges from providing financial benefits to student-athletes).

⁵¹ Carter, *supra* note 24, at 220, 227.

⁵² See Sherrington, *supra* note 31; see also Parasuraman, *supra* note 7, at 731 (explaining further that the “Sanity Code” consisted of five principles, ranging from financial aid, recruitment, athletic standards for athletes, institutional control, and the principle of amateurism itself).

⁵³ Sherrington, *supra* note 31.

⁵⁴ *Id.*

⁵⁵ See WATTERSON, *supra* note 16, at 236 (discussing the creation of the modern NCAA).

⁵⁶ See *id.* (discussing the appointment of Walter Byers); see also Joe Nocera, Op-Ed., *The Lawsuit and the N.C.A.A.*, N.Y. TIMES (June 21, 2013), http://www.nytimes.com/2013/06/22/opinion/nocera-the-lawsuit-and-the-ncaa.html?_r=0 (explaining how Byers took

Byers turned to the sale of television broadcast rights for NCAA sporting events as a way to increase revenues to implement the complex regulatory structure.⁵⁷ By selling national television rights to a college football game of the week, Byers generated more than \$1 million in revenue during the first year alone.⁵⁸ This revenue provided the NCAA with the funds it needed to launch a new investigative arm.⁵⁹ But the selling of television rights also opened up a Pandora's Box.⁶⁰ Before long, the NCAA was commercializing most aspects of college sports, including the sale of rights to use student-athletes' names and likenesses.⁶¹

F. College Athletics Under the Modern, Commercial NCAA

The NCAA's paradoxical goal of maximizing revenues in college sports while at the same time preventing student-athletes from participating in commercial ventures has served as a core part of its mission for at least the past half century.⁶² Although the NCAA has insisted that it is a nonprofit association that cares deeply about curbing commercialism, the NCAA admitted to Congress in 2006 that its operating revenues for all divisions of college sports totaled approximately \$7.8 billion.⁶³ Since then, the NCAA's aggregate

over an NCAA that was "toothless and penniless" and was asked initially to operate the NCAA out of the back of the Big Ten Conference offices).

⁵⁷ See generally WATTERSON, *supra* note 16, at 249 (noting that "the NCAA decided to adopt a [televised] game-of-the-week policy" in 1951).

⁵⁸ See WALTER BYERS, UNSPORTSMANLIKE CONDUCT: EXPLOITING COLLEGE ATHLETES 79 (1995) (explaining that in 1952 the NCAA sold NBC rights to a dozen "Game of the Week" shows for a total rights fee of \$1,144,000); see also Edelman & Rosenthal, *supra* note 23, at 1401 (noting that Walter Byers signed this television contract "[w]ithin months of his initial appointment").

⁵⁹ Cf. BYERS, *supra* note 58, at 90 (explaining that among the NCAA's expenditures that followed the signing of its first television contract was the 1952 establishment of a 26,900 square-foot NCAA headquarters office in Kansas City, Missouri, at a cost of \$1.5 million).

⁶⁰ See *infra* notes 63–72 and accompanying text (discussing many of the subsequent ways that the NCAA and its members thereafter commercialized college sports).

⁶¹ See, e.g., Peach, *supra* note 14, at 14 (describing as "controversial" the NCAA's more recent attempts to ensure that none of the revenue from college athletics flows to the student-athletes).

⁶² See generally *infra* notes 63–72 and accompanying text.

⁶³ Letter from Myles Brand, President, NCAA, to Hon. William Thomas, Chairman, House Comm. on Ways and Means (Nov. 13, 2006), at 16, available at http://www.nacua.org/documents/NCAALetter_TaxExempt_ResponsetoHouseWaysMeansCmte.pdf.

revenues have only continued to increase.⁶⁴ Today, the total value of the college sports enterprise is estimated at more than \$11 billion.⁶⁵

In recent years, the broadcasting and licensing arms of college sports have grown most rapidly, transforming Division I college athletics into something akin to a professional sports league.⁶⁶ There are now at least fifty NCAA Division I colleges that produce annual revenues in excess of \$50 million, and at least five NCAA Division I colleges that produce annual revenues that exceed \$100 million.⁶⁷ Among these high revenue-producing schools, the University of Alabama reported revenues of \$143.4 million for the 2012–13 academic year—an amount greater than the annual revenues of 25 NBA teams and all 30 NHL teams.⁶⁸

These revenues, in turn, are passed along in the form of higher salaries and other fringe benefits for NCAA officers, college presidents, athletic directors, and coaches.⁶⁹ During the 2011 calendar year, NCAA Commissioner Mark Emmert received \$1.7 million in salary for his role in overseeing the NCAA, and NCAA Chief Operating Officer Jim Isch received \$977,531.⁷⁰ Meanwhile, salaries of the forty-four head football coaches at NCAA Bowl Championship

⁶⁴ See *infra* note 65 and accompanying text.

⁶⁵ See Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 63.

⁶⁶ See generally Jeff Ostrowski, *For UF Athletic Programs, Blue + Orange = Green*, PALM BEACH POST, Dec. 16, 2007, at 1A (quoting former University of Michigan President James Duderstadt who expressed concern that the NCAA spends more time “negotiating broadcasting contracts or licensing agreements than on cost containment, much less concern about the welfare of student-athletes or the proper role of college sports in a university”); see also *infra* notes 67–68 and accompanying text.

⁶⁷ *College Athletics Revenues and Expenses—2008*, ESPN.COM, <http://espn.go.com/ncaa/revenue> (last visited Feb. 22, 2014).

⁶⁸ See Brian Leigh, *Alabama Athletics Report \$143.4 Million in Revenue for the 2012-13 Year*, BLEACHER REP. (Oct. 22, 2013), <http://bleacherreport.com/articles/1821041-alabama-athletics-report-1434-million-in-revenue-for-2012-13-year> (providing details of University Alabama athletic revenues for 2012-13); see also *NBA Team Values: The Business of Basketball*, FORBES, <http://www.forbes.com/nba-valuations> (last visited Feb. 22, 2014); *NHL Team Values: The Business of Hockey*, FORBES, <http://www.forbes.com/nhl-valuations/list> (last visited Feb. 22, 2014).

⁶⁹ See *infra* notes 70–72 and accompanying text; see also Edelman, *Reevaluating Amateurism Standards*, *supra* note 30, at 864 (discussing how the NCAA maintains the wealth of college sports “in the hands of a select few administrators, athletic directors, and coaches”).

⁷⁰ Steve Berkowitz, *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>.

Series colleges have skyrocketed from \$273,300 in 1986 to \$2,054,700 today.⁷¹ In forty of the fifty U.S. states, the highest paid public official is currently the head coach of a state university's football or men's basketball team.⁷²

Nevertheless, current NCAA rules continue to require member colleges to control the commercial rights to student-athlete identities, as well as to prevent member colleges from sharing licensing revenues with their student-athletes.⁷³ Thus, at a time when the NCAA executives, college presidents, athletic directors, and coaches have all become exceedingly wealthy, many student-athletes remain poor.⁷⁴ A 2011 report entitled *The Price of Poverty in Big Time College Sports* notes that more than eighty-five percent of college athletes on scholarships continue to live below the poverty line.⁷⁵

II

THE NCAA STUDENT-ATHLETE NAME & LIKENESS LICENSING LITIGATION

A. Prologue

As differences in the standard of living between NCAA Division I employees and their student-athletes have increased, so too has the legal friction between the two groups.⁷⁶ Although traditional deterrents to student-athletes suing the NCAA have included the fear of negative backlash from their coaches and the media, this fear has

⁷¹ Memorandum in Support of Summary Judgment for Antitrust Plaintiffs, *supra* note 21, at 14 (citing to the case's record at 108–09).

⁷² Josephine (Jo) R. Potuto, William H. Lyons & Kevin N. Rask, *What's in a Name? The Collegiate Mark, the Collegiate Model, and the Treatment of Student-Athletes*, 92 OR. L. REV. 879, 893.

⁷³ See Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 68–69.

⁷⁴ See Edelman, *Reevaluating Amateurism*, *supra* note 30, at 876 (recounting former University of Michigan basketball star Chris Webber discussing that, despite the University of Michigan's huge profits from his basketball success, he “could not [even] afford to buy fast-food dinner”) (internal citations and quotations omitted); see also *infra* note 75 and accompanying text.

⁷⁵ See Edelman, *Closing the “Free Speech” Loophole*, *supra* note 11, at 581.

⁷⁶ See, e.g., Tom Dowd, *Inequities on the Way to Catching Up with College Sports*, STATEN ISLAND ADVANCE (Aug. 18, 2013, 6:30 AM), http://www.silive.com/sports/advance/dowd/index.ssf/2013/08/inequities_on_the_way_to_catch.html (noting the growing “backlash” among student-athletes toward their coaches and others in the college sports system that are making millions of dollars but ignoring the economic realities faced by student-athletes).

vanquished with greater public understanding about the inequity in college sports.⁷⁷

By the early 2000s, it seemed inevitable that a student-athlete would seek redress from the courts if the NCAA did not reform its own policies.⁷⁸ Yet the NCAA stubbornly maintained its status quo. Thus, a legal battle ensued.⁷⁹

B. Procedural History

On June 21, 2009, twelve former NCAA football and men's basketball players, led by former UCLA basketball standout Ed O'Bannon, filed an antitrust complaint against the NCAA in the U.S. District Court for the Northern District of California.⁸⁰ The complaint alleged, in pertinent part, that NCAA members violated Section 1 of the Sherman Act by "conspir[ing] to fix the prices they received for the 'use and sale of [former student athletes'] images, likenesses and/or names at zero dollars'" and by "engag[ing] in a group boycott / refusal to deal conspiracy."⁸¹ The complaint further alleged that these restraints occurred within a product market for live broadcasts, various kinds of non-live game video footage, and college sports videogames.⁸²

⁷⁷ Cf. Andy Staples, *Current College Athletes Added to O'Bannon Suit Against NCAA*, SICOM (July 18, 2013, 9:52 PM), <http://sportsillustrated.cnn.com/college-football/news/20130718/obannon-lawsuit-college-players-ncaa> (explaining that plaintiffs' lawyers were concerned about their ability to find a current Division I college athlete based on the fear of backlash; however, that proved not to be a problem).

⁷⁸ See NAT'L COLLEGE PLAYERS ASS'N, <http://www.ncpanow.org/about> (last visited Feb. 22, 2014) (stating that the National College Players Association has sought various means to change the status quo in college sports since holding its first press conference in January 2011).

⁷⁹ See *infra* notes 80–95 and accompanying text.

⁸⁰ See *O'Bannon* Complaint, *supra* note 1; see also Order Granting EA's Motion to Dismiss and Denying CLC's and NCAA's Motions to Dismiss, *supra* note 10, at *1 (stating that the plaintiffs included "eight former college basketball players and four former college football players"); Order Denying Motions to Dismiss at *1, *In re* Student-Athlete Name & Likenesses Licensing Litig., No. C 09-1967 CW (N.D. Cal. Oct. 25, 2013) (explaining that all the plaintiffs in the case played their sport "between 1953 and the present").

⁸¹ Order Granting EA's Motion to Dismiss and Denying CLC's and NCAA's Motions to Dismiss, *supra* note 10, at *2; see also NCAA's Memorandum in Support of Summary Judgment Motion, *supra* note 1, at *3 (discussing the three types of uses of former college athlete likenesses under challenge).

⁸² See *O'Bannon* Complaint, *supra* note 1.

Since filing their antitrust complaint, the plaintiffs' case has morphed "like Heraclitus's river: always changing, yet always the same."⁸³ On January 15, 2010, the U.S. District Court for the Northern District of California consolidated the *O'Bannon* litigation with a similar case before that same court, *Keller v. Electronic Arts*.⁸⁴ The *Keller* litigation had asserted claims against the NCAA, the College Licensing Company (the NCAA's independent licensing arm), and the videogame developer Electronic Arts, all related to an alleged conspiracy to violate student-athletes' publicity rights in college sports videogames.⁸⁵ The central link between the two cases was one of Electronic Arts's affirmative defenses in *Keller*: that the NCAA granted it the rights to use student-athlete likenesses.⁸⁶ Meanwhile, in the early stages of *O'Bannon*, the NCAA denied having granted any such rights to third parties.⁸⁷

After the court consolidated *O'Bannon* and *Keller* into a single litigation (i.e., *NCAA Student-Athlete Name & Likeness Licensing Litigation*), the plaintiffs then filed an amended complaint and moved for class certification—a motion that the NCAA vehemently

⁸³ See *Indianapolis Colts, Inc. v. Metro. Baltimore Football Club Ltd. P'ship*, 34 F.3d 410, 413 (7th Cir. 1994) ("A professional sports team is like Heraclitus's river: always changing, yet always the same.").

⁸⁴ See Order Granting in Part and Denying in Part EA's Motion to Stay (Docket No. 156), Denying CLC's and NCAA's Motions to Stay (Docket Nos. 163 and 166) at *1, and Denying Without Prejudice Publicity Rights Plaintiffs' Motion to Deconsolidate (Docket No. 236), *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. C 09-1967 CW, 2010 WL 5644656 (N.D. Cal. Dec. 17, 2010).

⁸⁵ See *id.* For a further discussion of student-athletes' publicity rights and their potential violation by Electronic Arts videogames, see, e.g., Edelman, *Closing the "Free Speech" Loophole*, *supra* note 11, at 559 (providing a comprehensive analysis on this topic).

⁸⁶ See Electronic Arts Inc.'s Answer to Antitrust Allegations in Second Consolidated Amended Class Action Complaint at *63, *In re Student-Athlete Names & Likeness Litig.*, No. C 09-01967 CW, 2011 WL 3565064 (N.D. Cal. Aug. 11, 2011) (noting as Electronic Arts's fourteenth affirmative defense that "[p]laintiffs' claims are barred, in whole or in part, by the doctrine of license, because some Antitrust Plaintiffs and putative class members have licensed the right to use their Names, Images, and/or Likenesses").

⁸⁷ See generally Jon Solomon, *NCAA Knew EA Sports Videogames Used Real Players, E-Mails from Ed O'Bannon Lawsuit Show*, AL.COM (Nov. 12, 2012, 8:18 PM), http://www.al.com/sports/index.ssf/2012/11/ncaa_knew_ea_sports_video_game.html (quoting NCAA spokesperson Erik Christianson as continuing to take the position that "the NCAA never marketed student-athlete likeness[es]"). The credibility of such a claim, however, was suspect from the very beginning. See, e.g., *id.* (describing emails from the NCAA that are contrary to what the NCAA has claimed); Pototo et al., *supra* note 72, at 958 ("[T]he NCAA cannot credibly claim that it had no knowledge that EA Sports used avatars and a computer application. In fact, in 2004, Collegiate Licensing Company (CLC) advised the NCAA to permit greater verisimilitude in the games to protect sales revenue.").

opposed.⁸⁸ Thereafter, the court notified the plaintiffs that they would need to add at least one current student-athlete to their complaint, which led the plaintiffs to file a third amended complaint adding six current student-athletes as named plaintiffs.⁸⁹

Nevertheless, before the court could review this third amended complaint, the plaintiffs entered into settlement negotiations with both Electronic Arts and the College Licensing Company, which led to the filing of a stipulation of settlement.⁹⁰ This left the court to review the merits of the plaintiffs' antitrust claims only vis-à-vis the NCAA.⁹¹ Once again, the plaintiffs' claims survived a motion to dismiss.⁹²

Most recently, on November 8, 2013, the U.S. District Court for the Northern District of California certified a class to pursue

⁸⁸ See Order Denying Motions to Dismiss, *supra* note 80, at *3 (“In September 2012, Plaintiffs moved to certify a class to pursue their antitrust claims.”); *id.* at *5–6 (explaining that the NCAA moved in October 2012 to strike plaintiffs’ class certification motion, and that the court denied the motion but granted the NCAA additional time to file supplemental briefs; based on this grant of additional time, the court did not hear oral arguments on the class certification motion until June of 2013). See also Tom Fornelli, *Court Asks O’Bannon’s Lawyers to Add Current Players to Lawsuit*, CBSSPORTS.COM (June 21, 2013, 2:29 PM), <http://www.cbssports.com/collegefootball/eye-on-college-football/22498428/obannons-lawyers-asked-to-add-current-players-to-lawsuit> (noting that “[t]he NCAA maintains the lawsuit should not be a class-action lawsuit because the claims of thousands of college athletes are different and should not be treated the same”); *cf.* Stewart Mandel, *Some Movement, But No Ruling in Ed O’Bannon v. NCAA Hearing*, SI.COM (June 20, 2013, 10:17 PM), <http://sportsillustrated.cnn.com/college-football/news/20130620/ruling-obannon-ncaa-case/> (noting that on June 20, 2013, “after months of cumbersome motions and rebuttals, attorneys for all parties finally stood before Judge Claudia Wilken and argued why she should or shouldn’t grant the plaintiffs’ motion to certify a class of several thousand current and former college athletes”).

⁸⁹ See Third Consolidated Amended Class Action Complaint ¶ 1, *In re Student-Athlete Name & Likenesses Licensing Litig.*, No. C 09-01967 CW, 2013 WL 3810438 (N.D. Cal., July 19, 2013); see also Steve Berkowitz, *Judge Will Allow Current Player to Join O’Bannon Suit*, USA TODAY (July 5, 2013, 6:24 PM), <http://www.usatoday.com/story/sports/college/2013/07/05/ed-obannon-ncaa-likeness-lawsuit/2492981> (discussing the U.S. District Court for the Northern District of California’s July 5, 2013 ruling to allow the plaintiffs in *O’Bannon* “to amend their complaint against the NCAA . . . and to add a new named plaintiff who is a current college athlete”); Fornelli, *supra* note 88.

⁹⁰ See Order Denying Motions to Dismiss, *supra* note 80, at *1, *7; see also Nicole Auerbach, *NCAA’s Emmert Not Talking Settlement in O’Bannon Lawsuit*, USA TODAY, Dec. 11, 2013 (noting that final settlement is still pending before the courts); *cf.* Potuto et al., *supra* note 72, at 911 (explaining that “[t]he settlement was no surprise, given that EA Sports’ claim that its videogames were entitled to First Amendment protection was rejected by two federal circuit courts”).

⁹¹ See Order Denying Motions to Dismiss, *supra* note 80.

⁹² See *id.*

injunctive relief against the NCAA.⁹³ The certified class includes the following:

All current and former student-athletes residing in the United States who compete on, or competed on, an NCAA Division I . . . college or university men's basketball team or on an NCAA Football Bowl Subdivision . . . men's football team and whose images, likenesses, and/or names may be, or have been, included in game footage or videogames licensed or sold by [the NCAA], their co-conspirators, or their licensees after the conclusion of the athlete's participation in intercollegiate athletics.⁹⁴

The court did not certify a damages subclass.⁹⁵ However, former student-athletes who seek to recover money from the NCAA may still attempt to do so through separate litigation.

C. Perfunctory Analysis of the NCAA Student-Athlete Name & Likeness Licensing Litigation

While it is too soon to predict the outcome of the *NCAA Student-Athlete Name & Likeness Licensing Litigation*, the plaintiffs' antitrust arguments enjoy strong legal and factual support.⁹⁶ Section 1 of the Sherman Act, in pertinent part, states that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."⁹⁷ This Act "reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."⁹⁸

Traditionally, courts have interpreted Section 1 of the Sherman Act, in conjunction with preexisting common law, to prohibit any

⁹³ See Order Granting in Part and Denying in Part Motion for Class Certification at *3–7, C 09-1967 CW, 2013 WL 5979327 (N.D. Cal. Nov. 8, 2013).

⁹⁴ *Id.* at *5.

⁹⁵ *Id.* at *6, *17 (explaining that the certification of a damages subclass failed under Rule 23(b)(3) of the Federal Rules of Civil Procedure, as the plaintiffs "failed to satisfy the manageability requirement because they have not identified a feasible way to determine which members of the Damages Subclass were actually harmed by the NCAA's allegedly anticompetitive conduct").

⁹⁶ See generally *NCAA v. Board of Regents*, 468 U.S. 85, 99 (1984) ("By participating in an association which prevents member institutions from competing against each other . . . the NCAA member institutions have created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law.").

⁹⁷ Sherman Act, 15 U.S.C. §§ 1–7 (2012); see generally Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 70 (explaining that the NCAA's bar on compensation of student-athletes "can reasonably be interpreted as the very antithesis to the type of competitive markets envisioned by drafters of the Sherman Act").

⁹⁸ *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

restraints deemed to be “unreasonable.”⁹⁹ To ascertain whether a restraint is unreasonable, courts apply a three-part test.¹⁰⁰ First, courts will assess whether the restraint involves concerted action between two legally distinct entities that affects trade or commerce among several states (“Threshold Requirements”).¹⁰¹ Then, courts must determine whether the alleged restraint impermissibly suppresses competition within any relevant market (“Competitive Effects Test”).¹⁰² Finally, courts must decide whether “any antitrust exemption or affirmative defense[] negate[s] the finding of [antitrust] liability.”¹⁰³

When applying this three-part test based on publicly available information, it seems feasible that the NCAA’s restraints against student-athletes’ commercial control of their identities violate Section 1 of the Sherman Act.¹⁰⁴ First, in terms of the Threshold Requirements, it has been widely held that rules implemented by the NCAA represent concerted activity because the NCAA is a bottom-up trade association with its rulemaking powers delegated to its membership.¹⁰⁵ Similarly, most courts have held that NCAA rules

⁹⁹ See, e.g., *Board of Regents*, 468 U.S. at 98 (noting that “the Sherman Act [is] intended to prohibit only unreasonable restraints of trade”).

¹⁰⁰ See Marc Edelman, *Are Commissioner Suspensions Really any Different from Illegal Group Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains Trade*, 58 CATH. U. L. REV. 631, 640 (2009) [hereinafter Edelman, *Commissioner Suspensions*].

¹⁰¹ *Primetime 24 Joint Venture v. NBC*, 219 F.3d 92, 103 (2d Cir. 2000); see also Edelman, *Commissioner Suspensions*, *supra* note 100, at 640–41.

¹⁰² Edelman, *Commissioner Suspensions*, *supra* note 100, at 640.

¹⁰³ See *id.* at 641.

¹⁰⁴ See *infra* notes 105–19 and accompanying text.

¹⁰⁵ See, e.g., *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012) (finding “the showing of an agreement or contract is . . . not at issue” because “[t]here is no question that all NCAA member schools have agreed to abide by the [NCAA] Bylaws”); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319 (9th Cir. 1996) (similarly finding that an agreement among all of the colleges in the Pac-10 conference fulfills the concerted activity prong); Order on NCAA’s and CLC’s Motion to Dismiss, *supra* note 7, at *4 (finding that the plaintiffs in *O’Bannon* “adequately plead[ed] facts to satisfy the first prong of [the] Sherman Act claims” by alleging that the NCAA represents itself as a bottom-up organization, ruled by its membership). *But see* *Pennsylvania v. NCAA*, 948 F. Supp. 2d 416, 424 (M.D. Penn. 2013) (rejecting what the court describes as a “conclusory allegation” that the NCAA’s actions, in themselves, constitute concerted activity).

affect interstate commerce based on their impact on the nationwide broadcasting and licensing markets.¹⁰⁶

Second, with respect to the Competitive Effects Test, the legal issues are even more fact intensive.¹⁰⁷ A plaintiff challenging the NCAA's control over student-athletes' names and likenesses would need to show that the NCAA exercises market power in some relevant market involving student-athlete names and likenesses and that the anti-competitive effects in this market outweigh any pro-competitive benefits in the same market.¹⁰⁸

With respect to the market power aspect of the Competitive Effects Test, there are subtle differences among the circuits in defining the relevant market.¹⁰⁹ However, most courts have long accepted that “[a] relevant market ‘encompasses notions of geography as well as product use, quality, and description.’”¹¹⁰ Applying this view, “[t]he geographic market [definition] extends to the area of effective competition . . . where buyers can turn for alternative sources of supply” and “[t]he product market [definition] includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand.”¹¹¹ In the context of collegiate sports,

¹⁰⁶ See, e.g., Order on NCAA's and CLC's Motion to Dismiss, *supra* note 7, at *5 (noting that the District Court for the Northern District of California found that the plaintiffs in *O'Bannon* had met their requirement with respect to pleading an impact on interstate commerce by alleging that “the anti-competitive effects of which he complains occur in the nation-wide collegiate licensing market”). *But see* Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 83 (“[E]ight lower courts within the First, Third, and Sixth Circuits have contrarily held that the NCAA's ‘eligibility’ rules are exempt from antitrust scrutiny because these rules do not affect ‘trade or commerce’ and thus fail to meet one of the threshold requirements for antitrust scrutiny. These decisions, however, rely on inaccurate factual presumptions about the NCAA and outdated interpretations of antitrust law that have since been rejected by the Supreme Court. Thus, although these decisions survive as a deviant strain of precedent within three federal circuits, they cannot survive the Supreme Court's current antitrust jurisprudence.”).

¹⁰⁷ See *infra* notes 108–13 and accompanying text.

¹⁰⁸ See Marc Edelman, *Upon Further Review: Will the NFL's Trademark Licensing Practices Survive Full Antitrust Scrutiny? The Remand of American Needle v. Nat'l Football League*, 16 STAN. J.L. BUS. & FIN. 183, 201 (2011); see also *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (describing the Rule of Reason as “an inquiry into market power and market structure”).

¹⁰⁹ See generally Marc Edelman, *Does the NBA Still Have “Market Power?” Exploring the Antitrust Implications of an Increasingly Global Market for Men's Basketball Player Labor*, 41 RUTGERS L.J. 549, 582–85 (2010) (discussing some of the different ways, and the challenges, of defining relevant markets in labor antitrust claims such as those involving athletic labor).

¹¹⁰ Order on NCAA's and CLC's Motions to Dismiss, *supra* note 7, at *4 (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)).

¹¹¹ *Id.* (internal quotation marks omitted).

there are thus several plausible antitrust markets in which the NCAA at least arguably exercises market power.¹¹² Among them, the NCAA at least arguably exercises market power within a national market for the “rights to use the images of athletes connected with collegiate sports.”¹¹³

Finally, the third step of the analysis—that of determining whether any antitrust exemption or affirmative defense negates the finding of antitrust liability—requires a balancing of the economic effects within such market. The academic literature on this issue widely recognizes that the NCAA’s practices yield at least some bona fide anti-competitive effect.¹¹⁴ As University of Indiana Sports Law professor Gary Roberts astutely pointed out in his 1996 *Tulane Law Review* article, “rules restricting the compensation student-athletes can be given by their universities for athletic services [are generally seen as] a blatant price (wage) fix.”¹¹⁵ Thus, unless the NCAA can prove an economically recognizable pro-competitive benefit of its restraints on student-athlete compensation, it “has no reasonable defense for its otherwise collusive wage fixing.”¹¹⁶

The NCAA’s pleadings in the *NCAA Student-Athlete Name & Likeness Licensing Litigation* nevertheless indicate that the NCAA believes there are at least two broad categories of affirmative defenses that support its restraints on student-athletes’ commercial rights to their own likenesses.¹¹⁷ First, the NCAA believes that its rules precluding student-athletes from controlling the commercial rights to their likenesses are pro-competitive because they preserve

¹¹² See generally Order on NCAA’s and CLC’s Motions to Dismiss, *supra* note 7, at *4 (quoting *Newcal Indus., Inc. v. Ikon Office Solutions*, 513 F.3d 1038, 1045 (9th Cir. 2008), for the proposition that “the validity of the ‘relevant market’ is typically a factual element rather than a legal element”).

¹¹³ *Id.* at *5; see generally Rascher & Schwarz, *supra* note 4, at 52 (explaining that “[t]he relevant geographic market [in antitrust lawsuits against the NCAA] is generally accepted to be the United States”). Without conducting a full factual discovery on this matter, plaintiffs theoretically might be able to support the finding of such a market based on the Collegiate Licensing Company’s statement that it manages “more than 75%” of this purported market. Order on NCAA’s and CLC’s Motions to Dismiss, *supra* note 7, at *5 (internal quotation marks omitted).

¹¹⁴ See *infra* notes 115–16 and accompanying text.

¹¹⁵ Roberts, *supra* note 9, at 2649.

¹¹⁶ Rascher & Schwarz, *supra* note 4, at 51.

¹¹⁷ See *infra* notes 118–19 and accompanying text.

competitive balance in college sports competitions.¹¹⁸ In addition, the NCAA alleges that, even absent competitive balance concerns, controlling the commercial rights to student-athletes' names and likenesses is necessary to maintain the financial viability of college sports.¹¹⁹ These arguments are explored further in the next two sections of this article.

III

AN ANALYSIS OF NCAA COMMERCIAL RESTRAINTS AND COMPETITIVE BALANCE

A. The NCAA's Argument that Revenue Sharing Would Destroy Competitive Balance

The NCAA has long argued that "amateurism is a sine qua non of college sports" and its rules that forbid members from sharing revenues with student-athletes are both pro-competitive and necessary for the maintenance of college athletics because they "preserve amateurism and thereby maintain competitive balance."¹²⁰ Without these rules, the NCAA argues, prospective student-athletes would flock to high-revenue producing schools, and competitive balance in college sports would be destroyed.¹²¹

Courts are currently in flux as to whether competitive balance even constitutes a legally cognizable affirmative defense under antitrust law.¹²² On the one hand, past decisions such as *Smith v. Pro Football, Inc.* and *Mackey v. NFL* have held that closer game scores alone can

¹¹⁸ See Order Denying Motions to Compel Production of Documents by Nonparties at *2, *In re NCAA Student-Athlete Name & Likeness Litig.*, Nos. 09-cv-01967-CW (NC), 11-mc-80300 CW (NC), 12-mc-80020 CW (NC), 2012 WL 629225 (N.D. Cal. 2012) (noting that "[i]n support of one of its affirmative defenses, the NCAA's claims that the NCAA rules . . . promote amateurism and competitive balance between and among NCAA member institutions"); Rascher & Schwarz, *supra* note 4, at 51 (discussing the longstanding nature of this argument by the NCAA). As a matter of law, there remains some question as to whether competitive balance is truly a pro-competitive benefit that courts may consider. See Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 96.

¹¹⁹ See Defendant NCAA's Reply in Support of Motion to Dismiss Third Consolidated Amended Class Action Complaint, *supra* note 3, at 2 (purporting that the NCAA rules that preclude student-athlete compensation "allow its survival in the face of commercializing pressures").

¹²⁰ Rascher & Schwarz, *supra* note 4, at 51.

¹²¹ See NCAA's Memorandum in Support of Summary Judgment Motion, *supra* note 1, at *17 (stating that "it is basic economics that providing substantial and widely varying payments to prospective recruits would create strong incentives for recruits to move to high revenue schools").

¹²² Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 96.

never offset an otherwise anti-competitive labor restraint.¹²³ However, on the other hand, dictum in the Supreme Court's recent *American Needle, Inc. v. NFL* decision, as well as other recent lower court decisions, leaves open the possibility that competitive balance might be deemed pro-competitive under certain circumstances.¹²⁴

Nevertheless, it is unnecessary to delve into a nuanced discussion about when, if at all, competitive balance legitimizes a sports league's labor restraints.¹²⁵ Even if one were to presume that competitive balance is always a bona fide defense to labor market restraints in organized sports, the NCAA's competitive balance argument still fails for four separate reasons: (1) the college sports industry already lacks year-to-year competitive balance; (2) the college sports industry also lacks seasonal competitive balance; (3) lack of competitive balance does not translate into poor attendance; and (4) there are less restrictive ways to maintain competitive balance.¹²⁶

B. The College Sports Industry Already Lacks Year-to-Year Competitive Balance

First, the NCAA's competitive balance defense may be called into doubt by strong evidence that there has never been competitive balance in college sports on a year-to-year basis.¹²⁷ According to a thorough study performed by New Mexico State University economics professor Jim Peach, the historic distribution of the top eight rankings among Division I college football teams indicates a very high concentration among winners in Division I sports

¹²³ *Id.*; see also *Smith v. Pro Football, Inc.* 593 F.2d 1173, 1186 (D.C. Cir. 1978) (finding the NFL draft's alleged pro-competitive effect based on increased on-field competitive balance to be "nil"); *Mackey v. NFL*, 542 F.2d 606, 621 (8th Cir. 1976) (finding that the possibility of a decline in quality of play based on alleged loss of competitive balance does not justify the NFL's current restraints on the free market for NFL player labor).

¹²⁴ Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 96; see also *American Needle, Inc. v. NFL*, 560 U.S. 183, 204 (2010) (noting that "the interest in maintaining competitive balance among athletic teams is legitimate and important" (citation omitted) (internal quotation marks omitted)); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 833 (3rd Cir. 2010) (analyzing competitive balance concerns in the context of an antitrust analysis involving competitive tennis contest).

¹²⁵ See *infra* note 126 and accompanying text.

¹²⁶ See discussion *infra* Parts III.B–E.

¹²⁷ See *infra* notes 128–39 and accompanying text.

contests.¹²⁸ For example, between 1950 and 2005, just five college football teams have accounted for a quarter of all top eight finishers, and just twenty-two teams have accounted for three-quarters of all top eight finishers.¹²⁹ The University of Oklahoma has finished in the top eight on twenty-nine separate occasions.¹³⁰ Meanwhile, numerous Division I college football teams have not even finished in the top eight once.¹³¹

The same general findings about lack of competitive balance also extend to men's college basketball.¹³² Between 1950 and 2005, just four men's Division I college basketball teams represented nearly a quarter of all Final Four appearances, and thirteen colleges represented half of all appearances.¹³³ Both the University of North Carolina and the University of California-Los Angeles have made the Final Four on fifteen occasions.¹³⁴ Duke University has made it fourteen times.¹³⁵ Meanwhile, many other NCAA Division I colleges have not appeared in even a single Final Four.

There has also been a lack of competitive balance over time in both low-revenue producing sports and in women's sports.¹³⁶ Since the NCAA first began to sponsor men's volleyball championships in 1970, just two schools—UCLA and Pepperdine—have been to the championship game thirty-four times, and just six schools combine to account for more than eighty percent of all possible championship appearances.¹³⁷ Similarly, in women's college basketball, just two schools—the University of Tennessee and Louisiana Tech University—account for twenty-seven percent of all Final Four appearances, and just six schools account for more than half of all Final Four appearances.¹³⁸ The University of Tennessee women's basketball team has appeared in the Final Four on sixteen of twenty-four occasions; meanwhile, many Division I women's college basketball teams have not appeared in a single Final Four.¹³⁹

¹²⁸ Peach, *supra* note 14.

¹²⁹ *Id.* at 16 tbl.1.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See *infra* notes 133–35 and accompanying text.

¹³³ Peach, *supra* note 14, at 17.

¹³⁴ *Id.* at 17 tbl.3.

¹³⁵ *Id.*

¹³⁶ See *id.* at 15.

¹³⁷ See *id.* at 18 tbl.6.

¹³⁸ See *id.* at 19 tbl.7.

¹³⁹ See *id.*

C. The College Sports Industry Also Already Lacks Seasonal Competitive Balance

The NCAA's competitive balance defense also must fail because there is little competitive balance within many individual college games.¹⁴⁰ For example, during college football's 2013 season, there were sixteen different games in which a Top Twenty-Five ranked team defeated its scheduled opponent by forty-five or more points.¹⁴¹ Those blowouts included three games played on September 21, 2013, with the following scores: Ohio State University 76, Florida A&M 0; Louisville University 72, Florida International University 0; and the University of Miami 77, Savannah State College 7.¹⁴²

NCAA Division I men's basketball likewise has featured many contests that lack any semblance of competitive balance.¹⁴³ In November 2013, there were six NCAA Division I men's basketball games in which a Top Twenty-Five ranked team defeated its opponent by more than forty-five points.¹⁴⁴ Those games included the University of Iowa's 103-41 annihilation of Abilene Christian, Iowa State University's 110-51 victory over University of Missouri-Kansas City, and Oklahoma State University's 117-62 win over Mississippi Valley State University.¹⁴⁵ Even in the annual NCAA men's basketball tournament, which has become one of the most popular college sporting events of the year, there are regularly first-round games between No. 1 and No. 16 seeded teams with final scores separated by more than thirty points.¹⁴⁶

¹⁴⁰ See *infra* notes 141–46 and accompanying text.

¹⁴¹ See *FBS College Football Scores*, CBSSPORTS.COM, <http://www.cbssports.com/collegefootball/scoreboard/top25/2013/> (last visited Mar. 30, 2014).

¹⁴² See *id.* (clicking on link to week 4 will display relevant scores).

¹⁴³ See *infra* notes 144–46 and accompanying text.

¹⁴⁴ See *Div. I: Men's Basketball Scoreboard*, NCAA.COM, <http://www.ncaa.com/scoreboards/basketball-men/d1> (last visited Feb. 23, 2014).

¹⁴⁵ Jason Brummond, *Iowa Routs Abilene Christian 103-41*, NCAA.COM, <http://www.ncaa.com/game/basketball-men/d1/2013/11/17/abilene-christian-iowa> (last visited Feb. 23, 2014); Luke Meredith, *No. 17 Iowa State Thumps UMKC 110-51*, NCAA.COM, <http://www.ncaa.com/game/basketball-men/d1/2013/11/25/umkc-iowa-st> (last visited Dec. 30, 2013); Nash, *Forte Help No. 8 Oklahoma St Top MVSU 117-62*, NCAA.COM, <http://www.ncaa.com/game/basketball-men/d1/2013/11/08/mississippi-val-oklahoma-st> (last visited Feb. 23, 2014).

¹⁴⁶ See *March Madness Betting: Tournament Seed Trends*, SBR FORUM (Feb. 17, 2011, 12:00 AM), <http://www.sbrforum.com/ncaa-basketball/news/march-madness-betting-tournament-seed-trends-a-18372/> (noting that from 2000 to 2010, the average point

D. Lack of Competitive Balance Does Not Translate into Poor Attendance

The third reason why the NCAA's competitive balance defense must fail is because those games most lacking in competitive balance have not harmed college sports' revenue stream.¹⁴⁷ To the contrary, many of the more attended college football games during the 2013 season were games in which fans should have reasonably expected one team to defeat the other by a large point margin.¹⁴⁸ For instance, there were 103,595 fans in attendance at Ohio Stadium on September 21, 2013, when Ohio State University annihilated Florida A&M 76-0.¹⁴⁹ Similarly, there were 81,411 fans in attendance at University of South Carolina's Williams-Brice Stadium on November 23, 2013, when the University of South Carolina defeated Coastal Carolina 70-10.¹⁵⁰ While the strong fan turnout at both of these games cannot preclude the possibility that competitive balance is one factor in determining fan attendance, it fully rebuts the argument that competitive balance is the determinant factor.

Equally as revealing, a few of the top-ranked college football teams in 2013 actually had *better* home attendance for blowout wins against unranked opponents than for close wins against highly-ranked opponents.¹⁵¹ For example, the University of Oklahoma football team had 84,776 home fans in attendance for its 48-10 blowout win over Iowa State University, but just 84,734 fans in attendance for its narrow 38-30 home win over comparably ranked Texas Tech University.¹⁵² Similarly, the UCLA football team had higher home attendance for its 37-10 home victory against the unranked University of California-Berkeley than for its 38-33 loss to a comparably ranked

differential in NCAA men's basketball games between No. 1 and No. 16 seeds was 26.4 points).

¹⁴⁷ See *infra* notes 148–49 and accompanying text.

¹⁴⁸ See *NCAA College Football Scoreboard*, ESPN.COM, <http://espn.com/college-football/scoreboard> (last visited Feb. 23, 2014).

¹⁴⁹ See *Box Score: Florida A&M vs. Ohio State*, ESPN.COM (Sept. 21, 2013, 12:00 PM), <http://espn.com/ncf/boxscore?gameId=332640194>.

¹⁵⁰ See *Nov. 23, 2013 Box Score: Coastal Carolina Chanticleers vs. South Carolina Gamecocks*, ESPN.COM, <http://espn.com/ncf/boxscore?gameId=333272579> (last visited Dec. 30, 2013).

¹⁵¹ See *infra* notes 152–53 and accompanying text.

¹⁵² See *Box Score: Iowa State vs. Oklahoma*, ESPN.COM (Nov. 16, 2013, 12:00 PM), <http://espn.go.com/ncf/boxscore?gameId=333200201>; see also *Box Score: Texas Tech vs. Oklahoma*, ESPN.COM (Oct. 26, 2013, 4:45 PM), <http://espn.go.com/ncf/boxscore?gameId=332990201>.

opponent, Arizona State University.¹⁵³ Although idiosyncrasies in ticket resale markets could have played some role in fan preferences, these findings on their face seem to indicate that fans of both the University of Oklahoma and the University of California-Los Angeles might actually prefer games with less competitive balance, and thus the higher likelihood of a home team victory.

E. There Are Less Restrictive Ways of Maintaining Competitive Balance

Finally, the NCAA's competitive balance defense must fail because even if it were true that college sports currently maintain some competitive balance (which is doubtful for the reasons discussed above) and that the loss of competitive balance would lead to a loss of revenues (again, doubtful for the reasons discussed above), the NCAA still could implement competitive balance in numerous other ways that would be less restrictive on the financial rights of student-athletes.¹⁵⁴ One alternative would be to allow student-athletes to form a national association to collectively bargain against the NCAA in a manner similar to how professional athletes currently bargain with their sports leagues.¹⁵⁵ Collective bargaining might lead to an arrangement under which competitive balance is maintained through negotiated compensation floors and caps, as well as some revenue sharing among college athletic departments.¹⁵⁶ If

¹⁵³ See *Box Score: California vs. UCLA*, ESPN.COM (Oct. 12, 2013, 10:30 PM), <http://espn.go.com/ncf/boxscore?gameId=332850026> (listing spectator attendance at 84,272); *Box Score: Arizona State vs. UCLA*, ESPN.COM (Nov. 23, 2013, 7:00 PM), <http://espn.go.com/ncf/boxscore?gameId=333270026> (listing spectator attendance at 70,131).

¹⁵⁴ See Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 96 (noting that "short of imposing a national, industry-wide bar on student-athlete compensation" there are "other, less restrictive ways that colleges can level the sports playing field"); see also *infra* notes 157–62 and accompanying text.

¹⁵⁵ See generally Parasuraman, *supra* note 7, at 727 (discussing the possibility of student-athletes unionizing).

¹⁵⁶ See generally Alan M. Levine, Note, *Hard Cap or Soft Cap: The Optimal Player Mobility Restrictions for the Professional Sports Leagues*, 6 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 243 (1995) (discussing how professional sports leagues, through collective bargaining, have adopted salary caps, salary floors, luxury taxes, and a host of other mechanisms to maintain certain levels of competitive balance in their leagues); Marc Edelman, *Why the "Single Entity" Defense Can Never Apply to the NFL Clubs: A Primer on Property-Rights Theory in Professional Sports*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 891, 905–06, 911–24 (2008) (discussing professional sports leagues' use of

organized properly, this alternative would be entirely exempt from antitrust scrutiny based on antitrust law's non-statutory labor exemption.¹⁵⁷

Another alternative would be “to devolve power from the NCAA to the various collegiate conferences.”¹⁵⁸ As economists Daniel A. Rascher and Andrew D. Schwarz explained in a 2000 article published by *Antitrust Magazine*, this result would allow each conference to “choose a common wage regime, and within [each] conference, the necessary balance for the creation of a team sport would be maintained, without the need for an overarching supercartel [sic] to control the entire market for college-age athletes.”¹⁵⁹ Imposing these restraints on the conference level, rather than the national level, makes economic sense for two reasons: (1) no single individual athletic conference is likely to exercise market power,¹⁶⁰ and (2) many athletic conferences already have a program for revenue sharing among members.¹⁶¹ Furthermore, because most college

various revenue sharing arrangements to smooth differences in revenues between the independent professional sports teams).

¹⁵⁷ See generally Marc Edelman & Brian Doyle, *Antitrust and “Free Movement” Risks of Expanding U.S. Professional Sports Leagues into Europe*, 29 NW. J. INT’L L. & BUS. 403, 415–16 (2009) (“The non-statutory labor exemption is a court-created exemption, resulting from judicial decisions to give aspects of collective bargaining agreements further immunity from antitrust law. [This] exemption has an important place in sports law because players’ associations (unions) collectively bargain with teams (employers) to form a league’s collective bargaining agreement.”); Marc Edelman & Joseph A. Wacker, *Collectively Bargained Age/Education Requirements: A Source of Antitrust Risk for Sports Club-Owners or Labor Risk for Players Unions?*, 115 PENN ST. L. REV. 341, 366 (2010) (explaining that a majority of the circuits have found the non-statutory labor exemption to insulate from antitrust liability any restraint that involves mandatory subjects of bargaining, which primarily affects the parties involved, and that is reached through bona fide, arm’s-length bargaining; other circuits, such as the Second, apply this exemption even more broadly).

¹⁵⁸ See Rascher & Schwarz, *supra* note 4, at 54; see also Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 96 (suggesting that “colleges could just as easily implement salary caps at the conference level rather than at the league level”).

¹⁵⁹ See Rascher & Schwarz, *supra* note 4, at 54.

¹⁶⁰ See Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 97 (explaining that unlike the NCAA, which is a national trade association, individual member conferences are not likely to be large enough to exercise power over student-athlete labor within any relevant market); see generally *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001) (finding the market for college athletes’ labor to be “national in scope”); cf. *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1319–20 (9th Cir. 1996) (finding that the enforcement of a rule created at the conference level that prevents colleges from paying their athletes was permissible under the rule of reason).

¹⁶¹ See, e.g., *Big Ten History*, BIGTEN.ORG, <http://www.bigten.org/trads/big10-trads.html> (last visited Feb. 23, 2014) (“In 1955, the Big Ten formulated a revenue-sharing model designed to pool all football television rights of its members and share those

sporting events are already played by teams from within a single athletic conference, a conference-wide wage regime would help to equalize game scores without having such a ubiquitous anti-competitive effect on student-athletes' commercial rights to their own identities.¹⁶²

IV

AN ANALYSIS OF NCAA COMMERCIAL RESTRAINTS AND THE FINANCIAL VIABILITY OF COLLEGE SPORTS

A. *Three Additional NCAA Arguments About Why Revenue Sharing Would Destroy the Financial Viability of College Sports*

In addition to the NCAA's competitive balance defense of its commercial restraints on student-athletes, the NCAA further argues that the financial viability of college sports overall would be destroyed if it were not able to control the commercial rights to student-athlete names and likenesses.¹⁶³ This argument arises from a number of different NCAA theories of financial ruin.¹⁶⁴

Among those theories, the NCAA's most common argument is that its restraints on student-athletes' identities are needed to make "NCAA sports more popular, increasing output, consumer demand and consumer value."¹⁶⁵ The NCAA supports this claim through a self-commissioned survey that purports fans would be less likely "to watch, listen to, or attend games" if football or men's basketball players were paid.¹⁶⁶ It also relies upon the declarations of University of Michigan President Mary Sue Coleman and University of Wisconsin-Madison Chancellor Rebecca Blank, who claim that

proceeds equally. The conference and its members continue to utilize a revenue-sharing model, dividing media rights, bowl payouts and other profits among all conference institutions.").

¹⁶² Edelman, *Amateurism and Antitrust Law*, *supra* note 4, at 96–97 (discussing this same argument in the broader context on salary/wage restraints).

¹⁶³ *See infra* notes 165–71 and accompanying text.

¹⁶⁴ *See id.*

¹⁶⁵ NCAA's Memorandum in Support of Summary Judgment Motion, *supra* note 1, at *12.

¹⁶⁶ *Id.* at *12–13 (citing the "Dennis survey" commissioned by an NCAA purported expert, which alleges that 68.9% of respondents were opposed to revenue sharing with student-athletes, and that a minority of respondents would be "less likely to watch, listen to, or attend games if football or men's basketball players were paid").

compensated student-athletes would undermine the popularity of college sports.¹⁶⁷

Another variation of this financial viability argument theorizes that allowing NCAA members to share revenues with student-athletes would create legal obstacles under Title IX of the Education Amendments of 1972, which in turn could destroy the financial backbone of the NCAA and its member colleges.¹⁶⁸ This argument seems to assume that if NCAA members were allowed to share revenues with student-athletes, they might do so in a manner that violates Title IX, thus resulting in a barrage of lawsuits against member colleges that would destroy the colleges' bottom lines.¹⁶⁹

Meanwhile, yet a third variant of the NCAA's financial viability argument is that, if not for its commercial restraints on student-athletes, the NCAA members would enter into bidding wars to provide the best revenue sharing structure for student-athletes, which, when coupled with NCAA members' other financial commitments, would lead to the financial demise of college sports.¹⁷⁰ This argument

¹⁶⁷ See NCAA's Memorandum in Support of Summary Judgment Motion, *supra* note 1, at *14 (quoting testimony from University of Michigan President Mary Sue Coleman that "amateurism is fundamental to Michigan athletics" and that paying student-athletes "would undermine the popularity of Michigan football and men's basketball," and testimony from University of Wisconsin-Madison Chancellor Rebecca Blank stating that "the popularity of college sports would be impacted negatively if football and men's basketball players were paid for participating . . . in televised games" (internal quotation marks omitted) (citations omitted)).

¹⁶⁸ See, e.g., Nicole Auerbach & Steve Berkowitz, *Big Ten's Delany Sees No Settlement in O'Bannon Case*, USA TODAY (Oct. 31, 2013, 5:45 PM), <http://www.usatoday.com/story/sports/ncaab/bigten/2013/10/31/jim-delany-big-ten-ed-obannon-lawsuit-no-settlement/3329665/> (quoting Big Ten Conference commissioner Jim Delany proclaiming that "[i]f the plaintiffs were to win [the *NCAA Student-Athlete Name & Likeness Litigation*], then Congress has to figure out what they'll do with Title IX and the schools have to figure out how they react and respond"); see also Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (1994).

¹⁶⁹ See David Wharton, *It's Judgment Day for NCAA: Athletes' Antitrust Lawsuit Seeking Revenue Sharing at Crucial Juncture*, CHI. TRIB., June 20, 2013, § 3A, at 7, available at <http://ireader.olivesoftware.com/Olive/iReader/chicagotribune/SharedArticle.aspx?document=CTC%5C2013%5C06%5C20&article=Ar07502> (noting that critics allege that revenue sharing in college sports "might preclude athletic departments from maintaining women's teams in compliance with Title IX"); see also Auerbach & Berkowitz, *supra* note 168.

¹⁷⁰ See Potuto et al., *supra* note 72, at 918 (stating that if student-athletes were compensated, "the world of intercollegiate athletics might morph into something much like minor league baseball or arena football. In turn, there is risk that intercollegiate athletics will lose its viability and attraction to fans. Were that to happen, collegiate athletic revenues would then begin to dry up—even in football and men's basketball—to the ultimate detriment of college athletics and all student-athletes.").

is similar to the failed arguments in defense of professional sports leagues' labor restraints that were argued in federal court during the late 1960s and 1970s.¹⁷¹

B. College Sports Fans Do Not Truly Care if the Athletes Are Unpaid

Nevertheless, none of the NCAA's arguments of financial doom can be supported by any meaningful facts.¹⁷² The NCAA's argument that consumers are only interested in college sports because student-athletes are unpaid is dubious.¹⁷³ Other than the NCAA's recent self-serving study, there has never been any empirical evidence that indicates fan devotion to college sports emerges from the NCAA's 100:0 revenue split with its student-athletes.¹⁷⁴ To the contrary, even at times when it has been widely reported that student-athletes have received some pay, fan attendance at college sporting events featuring these athletes has remained strong.¹⁷⁵ For example, the average attendance at Southern Methodist University college football games rose between 1985 and 1986, even as the NCAA was publicly investigating the college for allowing impermissible stipends to student-athletes.¹⁷⁶

¹⁷¹ See generally *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978) (holding that the NFL's amateur draft violated antitrust law); *Mackey v. Nat'l Football League*, 543 F.2d 606 (8th Cir. 1976) (finding NFL restraint on player movement could not be saved by NFL's purported financial rationales).

¹⁷² See *infra* notes 174–81 and accompanying text.

¹⁷³ See NCAA's Memorandum in Support of Summary Judgment Motion, *supra* note 1, at *12.

¹⁷⁴ See Rascher & Schwarz, *supra* note 4, at 54 (describing that whether consumers truly prefer unpaid student-athletes is "an open question"); *infra* note 175 and accompanying text.

¹⁷⁵ See *Conference Attendance by School*, STREET & SMITH'S SPORTS BUS. J., <http://www.sportsbusinessdaily.com/Journal/Issues/2012/01/02/Research-and-Ratings/Attendance.aspx> (last visited Feb. 23, 2014) (noting that Ohio State University averaged 105,231 fans per game in home attendance for the 2011 college football season, down just forty-seven fans per game from the previous season, even though numerous Ohio State University football players were investigated during the summer of 2011 for having purportedly received improper benefits in violation of the NCAA rules); see generally Adam Rittenberg, *Terrelle Pryor Facing Significant Inquiry*, ESPN.COM (June 1, 2011, 11:11 AM), <http://sports.espn.go.com/nfc/news/story?id=6608432> (noting that Ohio State University quarterback Terrelle Pryor and "four other players have been suspended for the first five games [of the Ohio State 2011 season] for accepting improper benefits from a local tattoo-shop owner").

¹⁷⁶ See e-mail from Alan Cannon, Texas A&M University Athletic Department (Aug. 15, 2013, 11:13 AM) (on file with author).

Additionally, the recent testimony by University of Michigan President Mary Sue Coleman and University of Wisconsin-Madison Chancellor Rebecca Blank in favor of preventing revenue sharing with student-athletes is fraught with self-interest. Both Coleman and Blank are employees of Big Ten Conference colleges—the very same colleges that sought to impose the NCAA’s current restraints on student-athletes beginning with their lobbying on behalf of the Sanity Code in the late 1940s. In addition, if a share of the University of Michigan and University of Wisconsin-Madison athletic revenues were reallocated to student-athletes, there would be a smaller fund of money to compensate either Coleman or Blank, thus providing a direct financial incentive for each to oppose granting NCAA members the option of sharing revenues with student-athletes.

Furthermore, to the contrary of the NCAA’s purported evidence of fan demand for college sports featuring only unpaid athletes, actual past behaviors of college sports fans indicate that many fans might actually prefer college sports if the athletes were paid.¹⁷⁷ For example, the college booster clubs are some of “the biggest supporters of college sports,” and yet they “are also the ones who are often caught professionalizing the sport by paying their alma mater’s athletes under the table.”¹⁷⁸ In addition, the NCAA has not hesitated to give fans the impression that student-athletes are professionals by scheduling important games during class days and displaying their images throughout campuses and the Internet as part of their own marketing efforts.¹⁷⁹

¹⁷⁷ See *infra* notes 178–79 and accompanying text.

¹⁷⁸ Rascher & Schwarz, *supra* note 4, at 54.

¹⁷⁹ See, e.g., Laura Pappano, *How Big-Time Sports Ate College Life*, N.Y. TIMES, Jan. 22, 2012 (Education Life), at 23, 25 (discussing how “[c]lasses are canceled [at Ohio State University] to accommodate [sports] broadcast schedules” and “[e]ven Boston College bowed, canceling afternoon classes because the football game against Florida State was on ESPN at 8 p.m.”); Joe Nocera, Op-Ed, *Let’s Start Paying College Athletes*, N.Y. TIMES, Dec. 30, 2011, § MM, at 30, available at http://www.nytimes.com/2012/01/01/magazine/lets-start-paying-college-athletes.html?pagewanted=all&_r=0 (explaining that college athletes “look around and see jerseys with their names on them being sold in the bookstores” and due to the time commitment involved in playing their sport “learn early on not to take any course that might require real effort or interfere with the primary reason they are on campus”); Sean Gregory, *It’s Time to Pay College Athletes*, TIME MAG. (Sept. 16, 2013), <http://content.time.com/time/magazine/article/0,9171,2151167,00.html> (noting that “[t]he athlete is the most available publicity material [a] college has” and that “[a] great scientific discovery will make good press material for a few days, but nothing to compare to that of the performance of a first-class athlete”); cf. Matthew J. Mitten et al., *Targeted Reform of Commercialized Intercollegiate Athletics*, 47 SAN DIEGO L. REV. 779,

Finally, if it were true that fan interest in college athletics would decline if student-athletes were compensated, there would be no need for the NCAA to impose an association-wide rule to prevent member colleges from reaching other arrangements with their student-athletes. Indeed, if college athletics truly would be more popular if no student-athletes received compensation, no NCAA member college would ever make the decision to compensate student-athletes even if the NCAA allowed it.

C. Sharing Revenues with Student-Athletes Will Not Place NCAA Members at High Risk of Title IX Lawsuits, Nor Does the NCAA Truly Even Care Much About Gender Pay Equality

It is similarly doubtful that either the NCAA or its member colleges would face liability under Title IX of the Education Amendments of 1972 for sharing licensing revenues for the use of student-athletes' names and likenesses, even if a greater aggregate amount in revenues are shared with male student-athletes.¹⁸⁰ Although this would be a legal issue of first impression, Title IX's requirements prohibiting gender-based pay discrimination are generally interpreted as coextensive with the antidiscrimination provisions that appear in the Equal Pay Act of 1963 and the Civil Rights Act of 1964.¹⁸¹ Thus, disparate compensation of male and female student-athletes would be permissible under Title IX of the Education Amendments of 1972 as long as the male student-athletes' job descriptions involved greater skill, effort, and responsibility than the female student-athletes' job descriptions.¹⁸²

792 (2010) (detailing at length how "academic leaders increasingly use intercollegiate sports as a catalyst and means" to achieve various economic goals).

¹⁸⁰ See *infra* notes 181–88 and accompanying text.

¹⁸¹ See John Gaal et al., *Gender-Based Pay Disparities in Intercollegiate Coaching: The Legal Issues*, 28 J.C. & U.L. 519, 545–46 (2002) (explaining that "the few courts that have addressed Title IX as an independent employment discrimination statute in the context of coaches' compensation have not viewed it as any broader than the EPA or Title VII"); see also *Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1077 (9th Cir. 1999) (explaining that the plaintiff's Title IX claim fails for the same reasons her Equal Pay Act claim fails).

¹⁸² See *Stanley*, 178 F.3d at 1074 ("To make out a prima facie case [under the Equal Pay Act,] the plaintiff bears the burden of showing that the jobs being compared are 'substantially equal.'"); see also Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (2012) ("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

There is a strong argument that male student-athletes' jobs indeed involve greater skill, effort, and responsibility for purposes of pay discrimination laws because male student-athletes in football and men's basketball typically generate substantially higher revenues for their colleges from the use of their names and likenesses than do female student-athletes.¹⁸³ The case that seems to best support such a view is *Stanley v. University of Southern California*.¹⁸⁴ There, the U.S. Court of Appeals for the Ninth Circuit rejected a motion to enjoin the University of Southern California from paying more to its men's basketball coach than to its women's basketball coach, citing that the revenue generated by the men's coach is "90 times greater than the revenue generated by the women's basketball team."¹⁸⁵

Furthermore, it is worth noting that the NCAA's alleged concerns about the gender pay gap seem disingenuous in light of various NCAA members' longstanding practice of allowing for a wide pay gap between male and female coaches, even in sports where differences in revenue generation would not justify such a distinction.¹⁸⁶ A 2001 *Chronicle of Higher Education* survey on the gender pay gap in college sports found that the disparity in pay among college athletic coaches was far greater than the disparity in society

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 . . .").

¹⁸³ See Gaal et al., *supra* note 181, at 527 ("Courts have recognized that differences in revenue production and media expectations can provide evidence of a difference in responsibilities sufficient to preclude a finding of 'equal work'"); see also *Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1322 (9th Cir. 1994) ("The responsibility to produce a large amount of revenue is evidence of a substantial difference in responsibility."); *Jacobs v. Coll. of William & Mary*, 517 F. Supp. 791, 797 (E.D. Va. 1980), *aff'd without opinion*, 661 F.2d 922 (4th Cir. 1981) (stating that the obligation to produce revenue demonstrates that coaching jobs are not substantially equal).

¹⁸⁴ 13 F.3d 1313.

¹⁸⁵ *Id.* at 1321 (rejecting a request by the former head coach of the University of Southern California women's basketball team for a preliminary injunction enjoining the university from offering a lower wage to its women's basketball coach). Nevertheless, it is important to note that nearly five years later, upon motion for summary judgment, the same court avoided addressing the issue of whether substantial differences in revenue generation necessarily make jobs dissimilar, finding that the University of Southern California had separately proven that the pay differential between its men's and women's coaches was due to bona fide difference in the levels of experience and qualifications between the coaches. See *Stanley*, 178 F.3d at 1074–75.

¹⁸⁶ See Gaal et al., *supra* note 181, at 520 (quoting a thirty-two percent disparity in salary levels for softball and baseball coaches, and a fifty-four percent disparity in salary levels for men's and women's ice hockey coaches).

overall.¹⁸⁷ Meanwhile, statistics accumulated by the Department of Education from 2003 to 2010 show that the average salary for NCAA Division I men's team coaches increased sixty-seven percent, whereas the salary for women's team coaches increased just sixteen percent.¹⁸⁸ In the context of the gender disparity of college coaches' pay, the NCAA has remained largely silent.

D. There Are Enough Revenues to Go Around for College Athletics to Operate Profitably Even After Sharing Revenues with Student-Athletes

Finally, despite the NCAA's assertions to the contrary, it is indeed possible for the NCAA and its member schools to operate at a profit even after compensating student-athletes for the use of their likenesses.¹⁸⁹ What would be required, however, would be for the NCAA to operate as a leaner, more efficient trade organization, and for NCAA member colleges to begin paying their presidents, athletic directors, and coaches at salary rates that are more reflective of the free market.¹⁹⁰

Much like many other monopolist trade associations, the NCAA currently operates inefficiently.¹⁹¹ Since the early 1950s, the NCAA has maintained a complex operating manual, which today

¹⁸⁷ See *id.* (citing Jennifer Jacobson, *Female Coaches Lag in Pay and Opportunities to Oversee Men's Teams*, CHRON. HIGHER EDUC., June 8, 2001, at A39).

¹⁸⁸ See James K. Gentry & Raquel Meyer Alexander, *Pay for Women's Coaches Lags that for Men's Coaches*, N.Y. TIMES, Apr. 3, 2012, at B10, available at <http://www.nytimes.com/2012/04/03/sports/ncaabasketball/pay-for-womens-basketball-coaches-lags-far-behind-mens-coaches.html?pagewanted=all> (further noting that "[f]or Division I basketball, the median salary for coaches of a men's team in 2010 was \$329,300, nearly twice that of coaches for women's teams, who had a median of \$171,600. Over the past four years, the median pay of men's head coaches increased 40 percent compared with 28 percent for women's coaches.").

¹⁸⁹ See *infra* notes 190–98 and accompanying text.

¹⁹⁰ See Patrick Hruby, *The Free Market Case Against the NCAA Chokehold on College Sports*, WASH. TIMES (Mar. 30, 2012), <http://www.washingtontimes.com/news/2012/mar/30/the-free-market-case-against-the-ncaa-chokehold-on/?page=all> (providing a journalist's perspective on the above-market contracts awarded to college coaches and administrators due to market inefficiencies); Edelman, *Reevaluating Amateurism Standards*, *supra* note 30, at 864 (same, from a law and economics perspective).

¹⁹¹ See generally Hruby, *supra* note 190 (discussing various areas of "inefficiency" created by the NCAA cartel arrangement, including the overpaying of coaches and athletic department employees and expenditures on weight rooms and other facilities that the author deems meaningless and unnecessary to the typical consumer).

astoundingly includes “literally thousands of rules.”¹⁹² In addition, the NCAA maintains a bloated staff of employees to handle all of the enforcement, infractions, and student-athlete reinstatement cases that arise from its complex set of rules.¹⁹³ The NCAA also maintains an Eligibility Center, which certifies eligibility for domestic and international prospective student-athletes based on both academic and amateurism requirements.¹⁹⁴

Of course, none of these services are necessary, as they are merely creations of the association’s own internal bureaucracy. Indeed, college sports operated efficiently and enjoyably in the United States from the late 1800s until the early 1950s without such operating expenses.¹⁹⁵ For example, at the time of Red Grange, the NCAA maintained very few rules and it did not have a single employee—not even an association president.¹⁹⁶ Nevertheless, fans packed into college football stadiums to watch their teams play.¹⁹⁷ There was just as much fan interest in the games, and perhaps there was even more passion about the final results.¹⁹⁸

CONCLUSION

It is not surprising that the NCAA goes to great lengths to construct a myth about how sharing revenues with student-athletes would “destroy college sports.”¹⁹⁹ The NCAA’s current licensing arrangement is simply too profitable for college administrators, athletic directors and coaches to willingly forgo.

Nevertheless, the NCAA’s arguments for prohibiting revenue sharing with student-athletes are not based on bona fide economic benefits to society. The NCAA’s competitive balance argument ignores that Division I college sports already lack substantial

¹⁹² Roberts, *supra* note 9, at 2647.

¹⁹³ See generally Potuto et al., *supra* note 72, at 889-905 (discussing all the functions that the modern NCAA provides).

¹⁹⁴ *Id.* at 915 (citing NCAA MANUAL, *supra* note 8, § 4.01.2.2).

¹⁹⁵ See *supra* notes 13–45 and accompanying text.

¹⁹⁶ See *supra* notes 35–45 and accompanying text.

¹⁹⁷ See *supra* notes 35–40 and accompanying text.

¹⁹⁸ See *supra* notes 35–40 and accompanying text.

¹⁹⁹ See Munson, *supra* note 3 (quoting the NCAA chief legal officer Donald Remy stating that the plaintiffs suing the NCAA in the *O’Bannon* case seek “to destroy college sports for the vast majority of student-athletes in order to pay a few”); see also Defendant NCAA’s Reply in Support of Motion to Dismiss Third Consolidated Class Action Complaint, *supra* note 3, at 2 (purporting that the NCAA rules that preclude student-athlete compensation “allow its survival in the face of commercializing pressures”).

competitive balance, and that this lack of competitive balance has not translated into meaningful loss of consumer interest. In addition, the NCAA's competitive balance argument overlooks that there are less restrictive ways to maintain competitive balance in college sports without depriving student-athletes of free market opportunities to sell the rights to their names and likenesses.

Likewise, the NCAA's argument that sharing revenues with student-athletes would lead to the financial demise of college sports is farfetched. There is little, if any, evidence that consumers would stop attending college sporting events if some revenues were shifted to student-athletes. Similarly, there is little, if any, evidence that sharing licensing revenues with student-athletes would create a bona fide issue under Title IX of the Education Amendments of 1972 or otherwise exacerbate gender inequity in college sports.

Lastly, a plaintiffs' win in the *NCAA Student-Athlete Name & Likeness Licensing Litigation* would not truly deprive NCAA members of the economic means to host athletic events in a wide range of sports or to pay their essential employees reasonable salaries. Rather, a win for the plaintiffs would simply require NCAA members to make more efficient business decisions about what ventures to enter and what levels of compensation to pay to their employees.

For all of the foregoing reasons, it is extraordinarily unlikely that a win for the plaintiffs in the *NCAA Student-Athletes Name & Likeness Litigation* would have the deleterious effects on college sports that the NCAA and its members so capriciously proclaim. If anything, a win for the plaintiffs would only improve the college sports marketplace by better allocating student-athlete labor with consumer demand for their services. In addition, a win for the plaintiffs would force NCAA member colleges to make more efficient business decisions, and would preclude the NCAA from operating as a cartel that hoards its wealth "in the hands of a select few administrators, athletic directors, and coaches."²⁰⁰

²⁰⁰ Edelman, *Reevaluating Amateurism Standards*, *supra* note 30, at 864 (explaining that today's NCAA operates like a "commercial cartel" that "maximizes profits beyond a competitive rate and maintains wealth in the hands of a select few administrators, athletic directors, and coaches").

