

**THE BATTLE OUTSIDE OF THE
COURTROOM:
PRINCIPLES OF “AMATEURISM” VS.
PRINCIPLES OF SUPPLY AND DEMAND**

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INTRODUCTION

The topic for the symposium, “The Future of Amateurism,” raises an interesting question: What is “amateurism”?

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Amateurism is not a legal term.¹ The words “amateurism” and “amateur” do not even appear in *Black’s Law Dictionary*. The word “amateur” is defined in *Merriam-Webster’s Dictionary* as: 1) “devotee, admirer;” 2) “one who engages in a pursuit, study, science, or sport as a pastime rather than as a profession;” and 3) “one lacking in experience and competence in an art or science.”² But none of these definitions accurately describes athletes participating in major college sports. College athletes are certainly not lacking in experience or skill and are not devotees or admirers. College athletics is big business, not a pastime.

The dictionary’s “Synonym Discussion of Amateur” section provides, in pertinent part, that “in sports it may also suggest not so much lack of skill but avoidance of direct remuneration.”³ However, this statement is not apropos because college athletes do receive direct remuneration for play, albeit capped, in the form of a grant-in-aid.⁴ Moreover, the National Collegiate Athletic Association (NCAA) has even contemplated giving student-athletes an additional cash stipend of approximately \$2,000 to \$3,000 for living expenses. In a recent antitrust case, *Agnew v. NCAA*,⁵ the Seventh Circuit acknowledged that college athletes are in fact “paid” in the form of a scholarship, but referred to players who receive nothing more than educational expenses in return for their services as “unpaid athletes.”⁶ The *Agnew* court

¹ As noted by renowned civil rights historian Taylor Branch, “[n]o legal definition of amateur exists, and any attempt to create one in enforceable law would expose its repulsive and unconstitutional nature—a bill of attainder, stripping from college athletes the rights of American citizenship.” Taylor Branch, *The Shame of College Sports*, THE ATLANTIC (Sept. 7, 2011, 11:28 AM), <http://www.theatlantic.com/magazine/archive/2011/10/the-shame-of-college-sports/8643/7/>.

² “Amateur,” MERRIAM-WEBSTER. (Aug. 22, 2013), <http://www.merriam-webster.com/dictionary/amateur>.

³ *Id.*

⁴ Thomas A. Baker, III, Joel G. Maxcy & Cyntrice Thomas, *White v. NCAA: A Chink in the Antitrust Armor*, 21 J. LEGAL ASPECTS OF SPORTS 75,76 (2011) (“In theory, the ‘full ride’ grant-in-aid compensates a student-athlete for the cost of attendance at the university in which he is enrolled. However, a grant-in-aid, according to the NCAA, covers only tuition, fees, room and board, and course-related books (NCAA, Art. 15.02.5, 2010).”).

⁵ *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012).

⁶ *Agnew*, 683 F.3d at 344.

further found that “whether or not a player receives four years of educational expenses or one year of educational expenses, he is still an amateur. It is not until payment above and beyond educational costs is received that a player is considered a ‘paid athlete.’”⁷

The NCAA’s own eligibility decisions demonstrate that “amateurism” does not have an objective meaning or application such that a reasonable assessment can be made as to whether or not a particular activity, payment, or transaction violates “principles of amateurism.” In essence, “amateurism” is nothing more than a term designating a business model. “Principles of amateurism” mean whatever the NCAA says they mean and they apply whenever the NCAA says they apply. As such, consumers of major college sports are left confused and oftentimes unsatisfied with outcomes. Thus, whether intentional or unintentional, the NCAA has made its product a nebulous concept for its own consumers to understand. Not only are college sports consumers confused about the meaning of amateurism, but recent court decisions suggest that the judiciary is confused as well.

“Amateurism” is a growing indestructible immense “blob”⁸ that is engulfing all sorts of normal, moral, and legal activities and transactions performed by young adults who play college sports. For example, this “blob” has consumed, among other things, an athlete’s ability to: 1) license his name or likeness for use in a product or service to third parties; 2) retain a lawyer to speak to professional clubs on his behalf about a proposed contract; 3) sell his autograph or tangible personal property, of which he owns title, at market rates; and 4) declare for the NFL professional draft, as well as not timely withdrawing his name from the NBA draft before the draft even takes place. The amateurism “blob” is similar to the blob in the classic 1958 film, in that many people refuse to acknowledge this insatiable blob. Instead, the public should listen to the young athletes who have

⁷ *Id.*

⁸ See *The Blob*, IMDB, <http://www.imdb.com/title/tt0051418/> (referencing *The Blob*, a 1958 American science-fiction/thriller film, depicting a growing amoeba-like alien that terrorizes a small community by consuming everything in its path).

witnessed and have been subjected to its ongoing destructive power.

Part I of this paper addresses what I believe will be the most viable legal challenges to the principles of amateurism in the future. College athletes are filing more lawsuits, not only individually, but collectively in the form of class actions. Examples of such suits challenge the NCAA rules that: 1) cap the number and amount of scholarships; 2) prohibit athletes from retaining a lawyer to negotiate a proposed professional contract; and 3) prohibit athletes from receiving compensation for the commercial use of their identities in products and services. The media views the pending consolidated class action lawsuit, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*⁹ (hereinafter, the “O’Bannon-Keller Litigation”), as the potential game changer to the NCAA’s business model. While courts can certainly influence and contribute to a changing mindset about the fairness of amateurism principles as they relate to athletes, the future of amateurism will likely be determined by the athletes themselves, under principles of supply and demand.

Part II addresses a different battle brewing outside of the courtroom between the principles of amateurism and the principles of supply and demand; with the latter gaining ground over the former. The NCAA’s past victories in the courtroom, for example, rulings saying college athletes are not employees or that amateurism rules do not violate antitrust law, will not aid them in this battle. Ultimately, college athletes will not be able to completely destroy the amateurism blob, but they will change much of what it currently consumes.

I. VIABLE LEGAL CLAIMS CHALLENGING PRINCIPLES OF AMATEURISM

Historically, college athletes have had little success prevailing in lawsuits against the NCAA based on violations of antitrust, as well as substantive and procedural constitutional due process. However, in recent years there has been a shift in the way courts view the NCAA’s business model. Judges are giving

⁹ 724 F.3d 1268 (9th Cir. 2013).

less deference to the NCAA's interpretation of amateurism and how amateurism principles should apply to college athletes.

For example, the plaintiffs in *Agnew v. NCAA* challenged NCAA regulations that limit the duration of athletic scholarships to one year and the total number of scholarships a university may award for a particular sport. While the Seventh Circuit dismissed the plaintiffs' complaint for failing to identify a relevant product market for antitrust purposes, it nevertheless noted that the proper identification of a "labor market for student-athletes" would have met the plaintiffs' burden of describing a cognizable market under the Sherman Act.¹⁰ The Seventh Circuit's view of amateurism as articulated in *Agnew* is in stark contrast with its ruling twenty years earlier in the landmark case of *Banks v. NCAA*,¹¹ where it rejected the existence of a labor market for antitrust purposes:

The *Banks* majority, in dicta, opined that the market for scholarship athletes cannot be considered a labor market, since schools do not engage in price competition for players, nor does supply and demand determine the worth of student-athletes' labor. We find this argument unconvincing for two reasons. First, the only reason that colleges do not engage in price competition for student-athletes is that other NCAA bylaws prevent them from doing so. The fact that certain procompetitive, legitimate trade restrictions exist in a given industry does not remove that industry from the purview of the Sherman Act altogether. Rather, all NCAA actions that are facially anticompetitive must have procompetitive justifications supporting their existence. Second, colleges do, in fact, compete for student-athletes, though the price they pay involves in-kind benefits as opposed to cash. For instance, colleges may compete to hire the coach that will be best able to launch players from the NCAA to the National Football League, an attractive component for a prospective

¹⁰ *Agnew*, 683 F.3d at 346.

¹¹ 977 F.2d 1081 (7th Cir. 1992).

college football player. Colleges also engage in veritable arms races to provide top-of-the-line training facilities which, in turn, are supposed to attract collegiate athletes. Many future student-athletes also look to the strength of a college's academic programs in deciding where to attend. These are all part of the competitive market to attract student-athletes whose athletic labor can result in many benefits for a college, including economic gain.¹²

In *White v. NCAA*,¹³ the court denied the NCAA's motion to dismiss an antitrust case challenging its financial aid award cap at the value of tuition, fees, room and board, and books. The court found that the complaint sufficiently pleaded two relevant product markets of "Major College Football" and "Major College Basketball" whereby "colleges and universities compete to attract prospective student-athletes" as "potential buyers of the unique combination of coaching-services and academics offered by these colleges and universities."¹⁴ Even if the courts succumb to the idea that college athletes comprise a labor market or are consumers of higher education and coaching services for purposes of the Sherman Act, the outcome of a rule of reason analysis applied to restraints imposed by NCAA amateurism rules – in which the anticompetitive effects of the restraint are balanced against its procompetitive benefits – is far from clear. Although the prospect of recovering treble damages in an antitrust case is highly attractive, in my view the three most viable legal claims for challenging NCAA amateurism principles are: 1) arbitrary and capricious rules and decisions; 2) right of publicity violations for use of an athlete's name or likeness in a commercial product without compensation; and 3) unjust enrichment in the licensing of broadcast rights.

¹² *Agnew v. NCAA*, 682 F.3d 328, 346-47 (7th Cir. 2012) (internal citations omitted).

¹³ No. 2:06CV0999 RGK, 2008 WL 612046 (C.D. Cal., Jan. 28, 2008).

¹⁴ Order Denying Defendant's Motion to Dismiss, *White v. NCAA*, 2:06-cv-0999-VBF-MAN, at *3 (C.D. Cal. Sept. 21, 2006).

A. Arbitrary and Capricious Rules and Decisions

As third-party beneficiaries to the NCAA bylaws adopted by the member institutions, college athletes have standing to assert a claim that the application of an eligibility rule or an eligibility decision was arbitrary and capricious, or that the rule itself is arbitrary and capricious or violates public policy.¹⁵ The cases brought by Jeremy Bloom and Andy Oliver are instructive on this relatively uncommon asserted claim as third-party beneficiaries.¹⁶ The NCAA bylaws at issue in *Bloom v. NCAA*¹⁷ prohibit college athletes from engaging in endorsements and paid media appearances.¹⁸ Bloom, a professional skier and college football player, was offered various paid entertainment opportunities and agreed to commercially endorse certain ski equipment.¹⁹ In Bloom's legal claim, he pointed to another NCAA bylaw permitting a professional athlete in one sport to represent a member institution in a different sport.²⁰ Nevertheless, the *Bloom* court concluded that, when read together, the clear import of the bylaws is that, although college athletes have the right to be professional athletes, they do not have the right to simultaneously engage in endorsement or paid media activity.²¹

¹⁵ See *Bloom v. NCAA*, 93 P.3d 621, 623-24 (Colo. App. 2004) ("Here, the trial court found, and we agree, that the NCAA's constitution, bylaws, and regulations evidence a clear intent to benefit student-athletes. And because each student-athlete's eligibility to compete is determined by the NCAA, we conclude that [the plaintiff] had standing in a preliminary injunction hearing to contest the meaning or applicability of NCAA eligibility restrictions. . . . With respect to a claim of arbitrary and capricious action . . . 'relief from our judicial system should be available if voluntary athletic associations act arbitrarily and capriciously toward student-athletes.'" See also *Hall v. NCAA*, 985 F. Supp. 782, 796-97 (N.D. Ill. 1997); *NCAA v. Brinkworth*, 680 So. 2d 1081, 1083 (Fla. Dist. Ct. App. 1996); *NCAA v. Lasege*, 53 S.W.3d 77, 83 (Ky. 2001).

¹⁶ See *Bloom*, 93 P.3d at 624 ("[T]o the extent Bloom's claim of arbitrary and capricious action asserts a violation of the duty of good faith and fair dealing that is implied in the contractual relationship between the NCAA and its members, his position as a third-party beneficiary of that contractual relationship affords him standing to pursue this claim.").

¹⁷ *Id.*

¹⁸ See *infra* note 16.

¹⁹ *Bloom*, 93 P.3d at 622.

²⁰ *Id.*

²¹ *Id.* at 626.

The trial court found, and the appellate court affirmed, that the bylaw prohibiting endorsements and media appearances is not arbitrary and capricious because the rule is “rationally related to the legitimate purpose of retaining the ‘clear line of demarcation between intercollegiate athletics and professional sports.’”²² The trial court and the appeals court agreed with the NCAA that endorsements and paid entertainment activity invoke concerns about “the commercial exploitation of student-athletes and the promotion of commercial products” and that “the endorsement rule prevents students from becoming billboards for commercialism.”²³

While this decision is merely one state court’s view of amateurism in college athletics at that time, the question becomes whether this ruling would hold much weight today. Given how commercialized the business of college sports has become, along with the increasing exploitation of college athletes, it is not likely that, if faced with the same challenge to the NCAA’s endorsement rule today, the same court or any other would have much sympathy for the NCAA and its assertion that the endorsement rule prevents college athletes in major college sports “from becoming billboards for commercialism.”²⁴

Bloom further claimed that the bylaws arbitrarily applied to him on the ground that, while the NCAA bars him from accepting commercial endorsements, it allows colleges to commercially endorse athletic equipment by having college athletes wear the equipment with identifying logos and insignias during intercollegiate competition.²⁵ In rejecting this claim, the appellate court agreed with the trial court’s determination that “this application of the bylaws has a rational basis in economic necessity: financial benefits inure not to any single student-athlete but to member schools and thus to all student-athletes.”²⁶ The court of appeals held that Bloom “failed to demonstrate any inconsistency in application which would lead us to conclude that

²² *Id.*

²³ *Id.* at 627.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

the NCAA was arbitrarily applying its rules.”²⁷ A college athlete could thus prevail by demonstrating inconsistent application or enforcement of the NCAA’s amateurism rule.

In *Oliver v. NCAA*, an Erie County, Ohio judge struck down the NCAA’s “no agent” rule found in Bylaw 12.3.2.1, which prohibits an athlete from having a lawyer engage in *any* communications with professional club personnel, including negotiating a professional contract.²⁸ This case was the first to address the validity of Bylaw 12.3.2.1 in the context of a third-party beneficiary/arbitrary and capricious analysis. The plaintiff, Andy Oliver, was a sophomore college baseball player at Oklahoma State University (OSU). While competing in the post-season, OSU informed Oliver that he was immediately suspended indefinitely for having lawyers present during contract negotiations with a representative of the Minnesota Twins after he was drafted as a high school senior in 2006.²⁹

Because Oliver and the Twins did not reach an agreement on a professional contract, Oliver elected to attend OSU on a baseball scholarship.³⁰ Oliver challenged the suspension as a third-party beneficiary to the NCAA bylaws, arguing that: 1) Bylaw 12.3.2.1 is arbitrary on its face because preventing an amateur player from having a lawyer communicate and negotiate with a professional club about the *prospect of becoming* a professional athlete is not rationally related to the rule’s purpose of helping to maintain a clear line of demarcation between college and professional sports; and 2) Bylaw 12.3.2.1 was arbitrarily applied to Oliver because virtually all amateur baseball players who are draft prospects retain an “advisor” who communicates with professional teams about their “signability” and thus the NCAA selectively enforced the no agent rule against him.³¹

The *Oliver* case demonstrates that private association law does not give the NCAA carte blanche to determine what

²⁷ *Id.* at 628.

²⁸ 920 N.E.2d 203 (Ohio Com. Pl. 2009); *Presence of a Lawyer at Negotiations*, 2013-14 NCAA DIVISION I MANUAL art. 12.3.2.1 (2013), <http://www.ncaapublications.com/productdownloads/D114.pdf>.

²⁹ *Oliver*, 920 N.E. 2d at 207.

³⁰ *Id.*

³¹ *See id.*

“amateurism” means and that there are some outer boundaries to its definition. It is difficult to see any rational relation between maintenance of the college/professional demarcation line and the “no agent” rule when a student-athlete made the decision to stay in school and neither signed a professional contract nor received any compensation related to his athletic skill. The “no agent” rule inhibits a college athlete from having his individual interest protected to the fullest extent in a significant and complex business transaction with a professional club, by an experienced representative, so that he is situated in the best position possible in the event that he chooses to become a professional.³² Indeed, the NCAA should have no legitimate interest in, nor any concern with, the future compensation of its athletes, so long as they are not being paid by a club while also playing for a member institution.

To date, the NCAA has kept its “no agent” rule on its books. Following the bench trial in February 2009, where the *Oliver* court invalidated Bylaw 12.3.2.1 and restored Oliver’s eligibility, the judge scheduled a jury trial for mid-October to determine Oliver’s damages for the wrongful suspension.³³ However, one week before the jury trial was set to begin, Oliver and the NCAA settled, whereby Oliver was paid \$750,000 and the court order invalidating Bylaw 12.3.2.1 was vacated.³⁴

Applying the analysis in *Bloom* and *Oliver*, I foresee challenges brought by athletes who are declared ineligible for: 1) violating the “no agent” rule, 2) selling their autograph or tangible

³² *Id.* at 214 (“An attorney’s duty, in Ohio, in Oklahoma, in all 50 states, is to represent his client competently. Perhaps another term is used, other than that of ‘competently,’ within each state’s professional code of conduct, but it all boils down to the attorney being skilled and proficient and simply having the know-how to represent the best interests of his client.”). The *Oliver* court further noted that: (i) “Bylaw 12.3.2.1 . . . indeed stifles what attorneys are trained and retained to do,” (ii) “[t]he process advanced by the NCAA hinders representation by legal counsel, creating an atmosphere fraught with ethical dilemmas and pitfalls that an attorney consulting a student-athlete must encounter,” and (iii) “no entity, other than that one designated by the state, can dictate to an attorney where, what, how, or when he should represent his client.” *Id.* at 214-15.

³³ See *Oliver Receives \$750,000 Settlement*, ESPN.COM (last updated Oct. 8, 2009 6:52 PM), <http://sports.espn.go.com/ncaa/news/story?id=4543864>.

³⁴ *Id.*

personal property, of which they own title, at market rates; and 3) violating any of the NCAA rules pertaining to a professional draft, such as not timely withdrawing from the NBA draft before the draft even takes place. As salaries and draft bonuses paid to first year professional athletes continue to escalate – not only for those drafted in the first round, but also for players drafted in the subsequent rounds – college athletes with professional potential, particularly in football, men’s and women’s basketball, and baseball will increasingly have the economic incentive to challenge NCAA eligibility decisions in court. It will also become more difficult for the NCAA and universities to argue that economic damage suffered by these athletes is merely speculative. Andy Oliver, for example, received a \$1,495,000 signing bonus as the fifty-eighth pick in the 2009 draft.³⁵

B. Use of Names and Likenesses in Commercial Products

The day after Tim Tebow won the Heisman Trophy, I wrote him a letter, published on the *Sports Law Blog*, addressing his legal right to enforce violations of his right of publicity against third parties who use his identity in commercial products and services without his permission.³⁶ NCAA bylaws provide that an athlete is ineligible if he or she: “(a) [a]ccepts any remuneration for or permits the use of his or her name or picture to advertise, recommend or promote directly the sale or use of a commercial product or service of any kind; or (b) [r]eceives remuneration for endorsing a commercial product or service through the individual’s use of such product or service.”³⁷

NCAA bylaws also provide that if an athlete’s name or picture appears on commercial items or is used to promote a

³⁵ See Richard T. Karcher, *Rethinking Damages for Lost Earning Capacity in a Professional Sports Career: How to Translate Today’s Athletic Potential into Tomorrow’s Dollars*, 14 CHAP. L. REV. 75 (2010) (discussion of lost earning capacity damages of college athletes, including the methodology used to calculate damages in *Oliver v. NCAA*).

³⁶ Rick Karcher, *A Letter to Tim Tebow*, SPORTS LAW BLOG (Dec. 9, 2007), <http://sports-law.blogspot.com/2007/12/letter-to-tim-tebow.html>.

³⁷ *Advertisements and Promotions After Becoming a Student-Athlete*, 2013-14 NCAA DIVISION I MANUAL art. 12.5.2.1 (2013), <http://www.ncaapublications.com/productdownloads/D114.pdf>.

commercial product sold by a third party without the athlete's permission, the athlete or their school must take steps to prevent such activity.³⁸ Therefore, an athlete filing a lawsuit against a third party for violating his right of publicity should not be considered an NCAA violation because the athlete is not "accepting remuneration" or "permitting the use of his identity," but rather is lawfully protecting his property rights in his identity from theft. Moreover, enforcing publicity rights against third parties is arguably *in compliance with* the NCAA bylaw requiring athletes to take steps to prevent the use of their identity in commercial products. A purported cease-and-desist letter is often sent by the university stating that the seller is violating the NCAA's amateurism rules and has no right to use the athlete's identity. But unless the seller is somehow infringing upon the university's intellectual property rights, the letter has no legal force whatsoever because the seller is not subject to, nor bound by, the NCAA's bylaws.

The filing of lawsuits to enforce publicity rights began on May 5, 2009 when Sam Keller filed his class action complaint against Electronic Arts, the NCAA and Collegiate Licensing Company. Then, just two months later, Ed O'Bannon filed his antitrust class action complaint, which was ultimately combined with Keller's suit and consolidated into a class action comprised of "Right of Publicity Plaintiffs" and "Antitrust Plaintiffs."

Much more recently, however, the first college athlete with remaining eligibility to file a lawsuit on an individual basis against a third party for using his name in a commercial product without his permission came from the 2012 Heisman Trophy winner, Johnny Manziel, with respect to the third-party sale of "Johnny Football" t-shirts.³⁹ At the time Manziel filed his lawsuit, the NCAA pronounced that he could collect damages received from

³⁸ *Use of as Student-Athletes Name or Picture Without Knowledge or Permission*, 2013-14 NCAA DIVISION I MANUAL art. 12.5.2.2 (2013), <http://www.ncaapublications.com/productdownloads/D114.pdf>.

³⁹ See complaint, *JMAN2 Enterprises, L.L.C. v. Vaughan*, No. 6:13CV00158, 2013 WL 582308, at *6 (E.D. Tex. Feb. 15, 2013). See also Darren Rovell, *Suit Claims Nickname Infringement*, ESPN.COM (Feb. 23, 2013, 10:09 AM), http://espn.go.com/college-football/story/_/id/8977054/lawsuit-filed-claims-johnny-football-infringement?src=mobile.

the litigation without it affecting his eligibility. Nevertheless, the NCAA also announced that any “loophole” created by Manziel’s lawsuit was “closed” because they would consider it an NCAA violation if a lawsuit was an “orchestrated event” between the athlete and a booster to intentionally violate amateurism rules.⁴⁰

But to merely pose a hypothetical does not create a loophole. Putting aside the NCAA’s conspiracy theory of boosters funneling money to athletes through disguised right of publicity lawsuits, Manziel’s lawsuit exposes a dilemma that has always existed for the NCAA but which is no longer its best kept secret. Although the NCAA’s endorsement rule prohibits athletes from licensing (*i.e.* authorizing) the use of their identities to third parties for commercial purposes, the NCAA likely does not have any legal authority to prevent college athletes from collecting damages in a court of law through the enforcement of their own property interests against third parties who commercially exploit them without permission (*i.e.* without a license). Declaring an athlete ineligible under such circumstances and interfering with the judiciary could be seen as arbitrary and capricious enforcement or a violation of public policy, assuming that the NCAA could even survive another Bloom-like challenge to its endorsement rule.⁴¹

As college athletes’ names and likenesses become increasingly more valuable for use in commercial products, sellers of commercial products and services may become more willing to use and profit from the identities without permission, instead paying to settle the athlete’s lawsuit, which effectively becomes a pseudo-licensing fee. In other words, the settlement operates as an *ex post* licensing transaction that is negotiated and paid after the seller commercially exploits the athlete’s identity rather than *ex ante*. The issue then becomes whether there is any legitimate purpose served by burdening athletes with such unnecessary, time-consuming, and costly litigation. Why should athletes not be permitted under NCAA rules to license the use of their names and likenesses in commercial products and receive a substantive

⁴⁰ Andy Staples, *NCAA Rules Clarification Closes Johnny Football ‘Loophole’*, SI.COM (Feb 26, 2013, 4:59 PM), <http://sportsillustrated.cnn.com/college-football/news/20130226/johnny-manziel-ncaa-loophole/>.

⁴¹ See *supra* Part I(A).

equivalent payment that they otherwise would receive in litigation suing the seller for violating the athlete's right of publicity?

Within a two-month timeframe last summer, two federal appellate courts pounded two proverbial nails into the amateurism coffin when they ruled that the First Amendment does not trump college athletes' right of publicity in the context of video game use of their likenesses. The first nail came from the Third Circuit on May 21, 2013 in *Hart v. Electronic Arts, Inc.*⁴² and the second nail came from the Ninth Circuit on July 31, 2013 in the O'Bannon-Keller Litigation.⁴³

Interestingly, in the professional athlete context, various courts have rationalized their rejection of athletes' right of publicity claims on the basis that "they are already handsomely compensated."⁴⁴ However, the Third Circuit in *Hart* noted that, whatever validity this policy rationale may have pertaining to professional athletes, it is obviously not applicable in the context of college athletes, thereby making their right of publicity case stronger since they are forbidden from being compensated.⁴⁵

The decisions rendered by the Third and Ninth Circuits are without a doubt groundbreaking, not only suggesting a more skeptical view of amateurism principles that would allow commercial entities to profit off the backs of unpaid labor, but also signifying a movement towards college athletes receiving

⁴² 717 F.3d 141 (3rd Cir. 2013).

⁴³ *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, 724 F.3d 1268 (9th Cir. 2013).

⁴⁴ *Cardtoons, L.C. v. MLBPA*, 95 F.3d 959, 974 (10th Cir. 1996) ("[T]he additional inducement for achievement produced by publicity rights are often inconsequential because most celebrities with valuable commercial identities are already handsomely compensated."). See, e.g., *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 824 (8th Cir. 2007) (in discussing Major League Baseball players, "players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsement and sponsorship arrangements.").

⁴⁵ *Hart*, 724 F.3d at 153 n. 14 ("We reject as inapplicable in this case the suggestion that those who play organized sports are not significantly damaged by appropriation of their likeness because 'players are rewarded, and handsomely, too, for their participation in games and can earn additional large sums from endorsement and sponsorship arrangements.' (citations omitted) If anything, the policy considerations in this case weigh in favor of [the athletes]. As we have already noted, intercollegiate athletes are forbidden from capitalizing on their fame while in school.").

compensation for the use of their identities in commercial products and services. Within just two months of the Ninth Circuit's ruling, Electronic Arts and the Collegiate Licensing Company agreed to pay \$40 million to settle the pending lawsuits filed against them, covering a span of years whereby players' likenesses, including those of current players, were used in multiple versions of college video games without the athletes receiving compensation.⁴⁶

Assuming the court approves the settlement, it is in essence an *ex post* licensing transaction that was not performed *ex ante*. Moreover, receipt of the settlement proceeds by current players should not implicate "principles of amateurism" and affect their eligibility because this takes it back full circle to the NCAA's stance on Johnny Manziel's lawsuit, where it pronounced that he can collect damages assuming no "booster loophole" exists.⁴⁷ A substantively equivalent *ex ante* licensing transaction for the use of all college players in a video game should be viewed and treated no differently by the NCAA, particularly when the licensing transaction would result in all players in the sport being treated the same as opposed to a transaction whereby one athlete receives a benefit that others do not.

The pending Manziel lawsuit and settlement of the video game-likeness lawsuits, taken together, set the stage for what will be the next wave of college athlete litigation: challenges against universities for commercial use of players' identities in the context of jersey sales. State right of publicity laws generally do not require a plaintiff to establish that his or her actual name or picture is being used in a commercial product; the identity element to establish a cause of action is broadly construed to mean if the public would make the connection that the defendant was referring to the plaintiff.⁴⁸ Moreover, the college football and

⁴⁶ See Steve Berkowitz, *Distributing \$40 Million EA Settlement Looks Complex*, USA TODAY SPORTS (July 27, 2013, 9:03 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/09/27/ed-obannon-sam-keller-ea-court-settlement-payment/2886069/>.

⁴⁷ See Staples, *supra* note 40.

⁴⁸ See generally *Abdul-Jabbar v. Gen.-Motors Corp.*, 85 F.3d 407 (9th Cir. 1996) (holding that the plaintiff's birth name, Lew Alcindor, was not abandoned as indicia of identity despite name change to Kareem Abdul-Jabbar); *Ventura v. Titan Sports, Inc.*,

basketball players who compete in major college sports do not assign to their universities the rights to use their widely-recognized game jersey number in connection with the commercial sale of jerseys.

The NCAA Division I Student-Athlete Statement signed by every college athlete provides, “[y]ou authorize the NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] to use your name or picture to generally promote NCAA championships or other NCAA events, activities or programs.”⁴⁹ An objective meaning and interpretation of the foregoing provision is that it refers to use of names and pictures, and possibly past game footage, of the players to advertise and promote upcoming championship games, as well as NCAA-sponsored events, activities and programs. But, this provision does not at all address commercial use in products, such as jerseys.

C. Unjust Enrichment in the Licensing of Broadcast Rights

The NCAA, conferences, and universities collectively decide that they are entitled to keep and distribute amongst themselves one hundred percent of the licensing fees generated from selling the right to broadcast the live college games to media networks. There are some who question how it is that college athletes have a

65 F.3d 725 (8th Cir. 1995) (voice); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992) (robotic caricature); *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831, 835 (6th Cir. 1983) (“If the celebrity’s identity is commercially exploited, there has been an invasion of his right whether or not his ‘name or likeness’ is used.”); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974) (distinctive car driven by professional racer); *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978) (defendant’s use of a drawing of a black man seated on a stool in the corner of a boxing ring captioned “Mystery Man” and “the Greatest” sufficiently identified the plaintiff, Muhammad Ali).

⁴⁹ See *Form 13-3a Student-Athlete Statement - NCAA Division I*, NCAA, <http://www.ncaa.org/sites/default/files/DI%2BForm%2B13-3a%2B-%2BStudent-Athlete%2BStatement.pdf>. See also *Promotions Involving NCAA Championships, Events, Activities or Programs*, 2013-14 NCAA DIVISION I MANUAL art. 12.5.1.1.1 (2013), <http://www.ncaapublications.com/productdownloads/D114.pdf> (providing that “[t]he NCAA [or a third party acting on behalf of the NCAA (e.g., host institution, conference, local organizing committee)] may use the name or picture of an enrolled student-athlete to generally promote NCAA championships or other NCAA events, activities or programs.”).

legal right to a portion of this broadcast licensing revenue. But a more pertinent question is what gives the NCAA, conferences, and universities an *exclusive* legal right to it? It is unclear what gives this group a right or justification to be enriched by the portion of the broadcast rights fees that are attributed to the players' expense and effort, beyond the value of the grant-in-aid they are given by the universities.

On the surface it would seem that there is no law or precedent that gives athletes a property right in the licensing of broadcasting rights. However, if one digs below the surface, one would find that no law or precedent exists that gives the NCAA, conferences, and universities a property right in it either.⁵⁰ Under copyright law, the media network is the "author" of the broadcast and therefore the owner of the copyright. Pursuant to broadcast licensing agreements, the networks: 1) pay the NCAA, conferences and universities billions of dollars for access to the live performances of the athletes in the stadiums; and 2) assign to them the copyright to the broadcast.

The issue, then, is whether college athletes have the *equivalent* "rights" as the NCAA, conferences, and universities, *i.e.*, the right to sell the broadcast rights to their live games. Indeed, their live performances are the *sine qua non* of the broadcast—the broadcast does not, and cannot, exist without them.

In a law review article published in 2012,⁵¹ I argued that the college and professional sports models are substantively distinct from a rights perspective and make the case that taking from college athletes the portion of broadcasting rights fees that are attributed to the athletes' contribution in the copyrighted telecast is the quintessential unjust enrichment scenario.⁵² Even if one

⁵⁰ However, there is historical precedent establishing that professional leagues and teams have a property right to sell the broadcasting rights. *See Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (W.D. Pa. 1938); *Johnson-Kennedy Radio Corp. v. Chi. Bears Football Club*, 97 F.2d 223 (7th Cir. 1938).

⁵¹ *See* Richard T. Karcher, *Broadcast Rights, Unjust Enrichment, and the Student-Athlete*, 34 CARDOZO L. REV. 107 (2012).

⁵² *See id.* at 143-46 (discussing how universities and professional teams are dissimilar in terms of both the extent of their economic investment and the incentive to make that investment).

accepts the premise that principles of amateurism justifiably and legally deny college athletes a right to: 1) profit from marketing their reputation as athletes; 2) earn wages as employees; 3) freely compete against one another in a market for their services; and 4) collectively bargain under federal labor law, the “principles of amateurism” should not give all of the people who control major college sports a corresponding right to unjustly enrich themselves with multi-million dollar annual salaries.

When exorbitant and exponentially increasing annual broadcast licensing revenue permits management to exponentially enrich themselves at the expense of the performers of the event who make the broadcast possible, but are not permitted to perform at market rates, it is an unjust inequitable distribution. In order to make the distribution just, management must allocate a greater portion of the licensing revenue to college athletes in any form, including stipends, more scholarship funds, and cash payments following graduation.

The O’Bannon-Keller Litigation that began in 2009 does not assert a claim to a portion of the revenue generated by the licensing of broadcast rights to the live games, but the Antitrust Plaintiffs’ motion for class certification recently filed on August 31, 2012 attempts to add this claim by tweaking the Antitrust Plaintiffs’ class definition in the complaint.⁵³ In response, the NCAA asserts that various state laws and legal precedents provide that athletes have no property rights for appearing in live, unscripted events and, thus, the NCAA and the universities are not committing any infringement.⁵⁴ In other words, according to the NCAA, they are merely selling the networks “access to their stadiums.”⁵⁵ Granted, college athletes do not have an intellectual property right, based on copyright or right of publicity, in the act of selling broadcast rights to the media networks. But the NCAA’s

⁵³ See Antitrust Plaintiffs’ Motion for Class Certification, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. 4:09-cv-01967-CW, at *n. 2 (N.D. Cal. Aug. 31, 2012).

⁵⁴ See Steve Berkowitz, *Current NCAA Athletes May Join Plaintiffs in O’Bannon Suit*, USA TODAY SPORTS (Jun. 20, 2013, 10:41 PM), <http://www.usatoday.com/story/sports/college/2013/06/20/obannon-ncaa-class-action-hearing/2443791/>.

⁵⁵ *Id.*

response does not explain: 1) why those who perform the live game and make it possible do not have the same rights that the NCAA, conferences, and universities have to sell the broadcasting rights or the “access” as they refer to it; nor 2) why the NCAA, conferences, and universities have the right to enrich themselves at the performers’ expense.

II. PRINCIPLES OF SUPPLY AND DEMAND

Irrespective of the legal system, it is fairly evident that the basic economic principles of supply and demand will ultimately transform the business model of major college sports, in particular football, because of the huge profits these sports generate for universities.

A. The Profits Generated by Universities in Major College Sports

When it comes to the economics of intercollegiate athletics, the NCAA touts the statistic that in 2012, only twenty-three out of one hundred-twenty public university athletic departments managed to earn a profit.⁵⁶ There are multiple reasons why this statistic is meaningless in relation to the revenues and profits generated by universities selling the product of major college football.

First, because the universities are non-profit entities, they do not have to answer to investors who want to see strong earnings, equity appreciation, and dividends. As a result, these institutions not only reap the benefit of tax-exempt status and escape reporting requirements under securities laws, but also have the luxury of being able to spend the millions of dollars generated by their football programs on virtually anything they want and in such amounts as they want. Because these institutions do not distribute earnings to shareholders, the people running major

⁵⁶ See Steve Berkowitz & Jodi Upton, *NCAA Member Revenue Spending Increase*, USA TODAY SPORTS (Jul. 1, 2013, 4:25 PM), <http://www.usatoday.com/story/sports/college/2013/05/01/ncaa-spending-revenue-texas-ohio-state-athletic-departments/2128147/> (noting that in 2010 and 2011, there were twenty-two athletic departments that were profitable). See also *Behind the Blue Disk*, NCAA (Oct. 15, 2010).

college sports programs excessively enrich themselves with multi-million dollar annual salaries, travel in private airplanes, and build cathedral-like stadiums. The average pay for head football coaches in the Football Bowl Subdivision for 2012 was a whopping \$1.64 million, an increase of 12% from the previous year and more than 70% since 2006.⁵⁷ According to a *USA Today* database, athletic directors at forty-six universities are currently earning annual compensation between \$500,000 and \$1.5 million.⁵⁸

Second, athletic departments are only one part of the larger university system. It is important to note that universities are not consistent in the reporting of their sport-by-sport revenues and expenses. There are wide disparities in how portions of major revenue streams and expense items are reported and assigned or allocated to individual teams.⁵⁹ As such, it begs the following questions: of what significance is it that a university reports on a financial statement that its athletic department operated at a loss and if a university has its athletic department write a check to its bursar's department for the cost of tuition and room and board for its athletes, should that be construed as "spending"? So while the cost of grant-in-aids is frequently reported as an "expense" of the athletic department, perhaps it is more appropriate to view it as merely a transfer of some of the university's revenue from one department to another. Also, grant-in-aid for an athlete is essentially a foregone tuition revenue, which the university has the ability to make up through enrollment by adding an additional seat in the classroom.⁶⁰ Moreover, the financial statement does not

⁵⁷ *Pay Rises Yet Again for College Football's New Hires*, USA TODAY (Jul. 1, 2013, 4:29 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/02/11/college-football-coach-salary-changes-ncaa/1907359/>.

⁵⁸ *NCAA Athletic Directors*, USA TODAY SPORTS (last visited Jan. 31, 2014), <http://www.usatoday.com/sports/college/salaries/all/director/>.

⁵⁹ Steve Berkowitz & Jodi Upton, *Texas had \$163.3 Million in Athletic Revenue in 2011-12*, USA TODAY SPORTS (Feb. 9, 2013, 3:20 PM) <http://www.usatoday.com/story/sports/ncaaf/2013/02/09/university-of-texas-athletic-finances-revenues-expenses/1903915/> (noting that in 2011-12, the University of Texas reported \$24 million in facilities-related expenses and, of that amount, \$23.6 million was not specific to any one team; less than \$150,000 was assigned to football).

⁶⁰ See Alfred D. Mathewson, *The Eligibility Paradox*, 7 VILL. SPORTS & ENT. L.J. 83, 84 n. 5 (2000) (noting that the real cost to universities of extending a tuition waiver

reflect the value that a powerhouse football or basketball program brings to the university's overall admissions, both in regards to the quality and quantity of applicants.⁶¹

Lastly, even if one assumes that the reporting of athletic department finances accurately reflects profit and loss, the sum of the total revenues, minus the total expenses, of an entire athletic department, which often includes over two dozen sports, is irrelevant when the issue of the commercialization of major college athletics specifically pertains to football and men's basketball. The following chart reveals the exponentially increasing revenue that major college football programs have been generating since 2004:⁶²

NCAA Division I Football Team Revenues - Top Ten Teams
2012 vs. 2004

(Ranked by 2012 Revenues)

to a student-athlete is substantially less than tuition and potentially only amounts to the cost of another seat in the classroom).

⁶¹ See Devin G. Pope & Jaren C. Pope, *Understanding College Application Decisions: Why College Sports Success Matters*, (Nov. 26, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1307788 (finding that success in college sports has a large impact on student application decisions such that certain demographic groups—e.g., males, Blacks, out-of-state students, and students who played sports in high school—are more likely to be influenced by sports success than their counterparts); see also Devin G. Pope & Jaren C. Pope, *The Impact of College Sports Success on the Quantity and Quality of Student Applications*, (Jan 30, 2008) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275853 (findings include: (1) football and basketball success increases the quantity of applications to a school; (2) private schools see increases in application rates after sports success that are two-to-four times higher than public schools; (3) the extra applications received are composed of both low and high SAT scoring students, thus providing potential for schools to improve their admission outcomes; and (4) schools appear to exploit these increases in applications by improving both the number and the quality of incoming students).

⁶² Richard A. Lipsey, *College Athletics: "We'll Show You the Money,"* SBRNET NEWSLETTER (Sept. 30, 2013), <https://www.sbrnet.com/newsletter/september30-2013.html>.

| | 2004 | 2011 | 2012 | % Change 2004-2012 |
|--------------------|--------------|--------------|---------------|-------------------------------|
| Texas | \$47,556,281 | \$95,749,684 | \$103,813,684 | +118.3% |
| Michigan | \$38,547,937 | \$70,300,676 | \$85,209,247 | +121.1% |
| Alabama | \$39,848,836 | \$76,801,800 | \$81,993,762 | +105.8% |
| Auburn | \$37,173,943 | \$76,227,804 | \$77,170,242 | +107.6% |
| Georgia | \$42,104,214 | \$74,888,175 | \$74,989,418 | +78.1% |
| Florida | \$42,710,967 | \$72,807,236 | \$74,117,435 | +73.5% |
| Notre Dame | \$38,596,090 | \$68,782,560 | \$68,986,659 | +78.7% |
| Louisiana State | \$38,381,625 | \$68,510,141 | \$68,804,309 | +79.3% |
| Penn State | \$37,112,257 | \$72,747,734 | \$66,210,503 | +78.4% |
| Arkansas | \$27,337,120 | \$61,131,707 | \$64,193,826 | +134.8% |

Source: U.S. Department of Education

The next table shows the total football profit generated by each school in the USA Today's pre-season Top-25 poll for the 2013 college football season. This information is based on 2011-12 data obtained from the Department of Education, which, as of the date of this writing, is the most recent publicly available data related to athletics departments' spending and revenue generation.⁶³

⁶³ Alicia Jessop, *The Economics of College Football: A Look at the Top-25 Teams' Revenues and Expenses*, FORBES.COM (Aug. 31, 2013, 10:23 AM),

| | 2011-12 Total Football Expenses | 2011-2012 Total Football Revenue | 2011-12 Football Profit |
|-------------------|--|---|--|
| Alabama | \$36,918,963 | \$81,993,762 | \$45,074,799 |
| Ohio State | \$34,026,871 | \$58,112,270 | \$24,085,399 |
| Oregon | \$20,240,213 | \$51,921,731 | \$31,681,518 |
| Stanford | \$18,738,731 | \$25,564,646 | \$6,825,915 |
| Georgia | \$22,710,140 | \$74,989,418 | \$52,279,278 |
| Texas A&M | \$17,929,882 | \$44,420,762 | \$26,490,880 |
| South Carolina | \$22,063,216 | \$48,065,096 | \$26,001,880 |
| Clemson | \$23,652,472 | \$39,207,780 | \$15,555,308 |
| Louisville | \$18,769,539 | \$23,756,955 | \$4,987,416 |
| Florida | \$23,045,846 | \$74,117,435 | \$51,071,589 |
| Notre Dame | \$25,757,968 | \$68,986,659 | \$43,228,691 |
| Florida State | \$22,052,228 | \$34,484,786 | \$12,432,558 |
| LSU | \$24,049,282 | \$68,804,309 | \$44,755,027 |
| Oklahoma State | \$26,238,172 | \$41,138,312 | \$14,900,140 |
| Texas | \$25,896,203 | \$103,813,684 | \$77,917,481 |
| Oklahoma | \$24,097,643 | \$59,630,425 | \$35,532,782 |
| Michigan | \$23,640,337 | \$85,209,247 | \$61,568,910 |
| Nebraska | \$18,649,947 | \$55,063,437 | \$36,413,490 |
| Boise State | \$8,537,612 | \$15,345,308 | \$6,807,696 |
| TCU | \$25,984,011 | \$25,984,011 | \$0 |

<http://www.forbes.com/sites/aliciajessop/2013/08/31/the-economics-of-college-football-a-look-at-the-top-25-teams-revenues-and-expenses/>.

| | | | |
|--------------|--------------|--------------|--------------|
| UCLA | \$19,193,346 | \$25,168,004 | \$5,974,658 |
| Northwestern | \$20,148,403 | \$27,547,684 | \$7,399,281 |
| Wisconsin | \$24,231,297 | \$48,416,449 | \$24,185,152 |
| USC | \$23,123,733 | \$34,410,822 | \$11,287,089 |
| Oregon State | \$11,903,213 | \$20,666,946 | \$8,763,733 |

This last table ranks the fifty most profitable college athletic teams in 2010-11, and shows that these programs generate annual profits in the range of \$9 million to \$70 million after paying coaches' compensation.⁶⁴

| | 2010-11 Revenue | 2010-11 Expenses | 2010-11 Profit |
|--------------------------|----------------------------|-----------------------------|-----------------------|
| Texas (Football) | \$95,749,684 | \$24,507,352 | \$71,242,332 |
| Penn State (Football) | \$72,747,734 | \$19,519,288 | \$53,228,446 |
| Georgia (Football) | \$74,888,175 | \$22,036,338 | \$52,851,837 |
| LSU (Football) | \$68,510,141 | \$21,492,741 | \$47,017,400 |
| Michigan (Football) | \$70,300,676 | \$23,552,233 | \$46,748,443 |
| Florida (Football) | \$72,807,236 | \$26,263,539 | \$46,543,697 |
| Alabama (Football) | \$76,801,800 | \$31,580,059 | \$45,221,741 |

⁶⁴ *Top 50 Most Profitable FBS Football and Men's Basketball Programs*, THEBUSINESSOFCOLLEGESPORTS.COM (Dec. 28, 2011), <http://businessofcollegesports.com/2011/12/28/top-50-most-profitable-fbs-football-and-mens-basketball-programs/>.

| | | | |
|------------------------------|--------------|--------------|--------------|
| Notre Dame (Football) | \$68,782,560 | \$25,164,887 | \$43,617,673 |
| Tennessee (Football) | \$56,831,514 | \$19,135,650 | \$37,695,864 |
| Auburn (Football) | \$76,227,804 | \$39,069,676 | \$37,158,128 |
| Arkansas (Football) | \$61,131,707 | \$24,059,193 | \$37,072,514 |
| Oklahoma (Football) | \$58,811,324 | \$23,191,402 | \$35,619,922 |
| Nebraska (Football) | \$54,712,406 | \$20,147,302 | \$34,565,104 |
| Texas A&M (Football) | \$45,414,074 | \$15,560,216 | \$29,853,858 |
| Michigan State (Football) | \$45,040,778 | \$17,420,499 | \$27,620,279 |
| Louisville (Basketball) | \$40,887,938 | \$13,336,649 | \$27,551,289 |
| Ohio State (Football) | \$60,837,342 | \$34,373,844 | \$26,463,498 |
| Iowa (Football) | \$44,506,832 | \$20,510,807 | \$23,996,025 |
| South Carolina (Football) | \$45,464,058 | \$22,482,479 | \$22,981,579 |
| Kentucky (Football) | \$34,020,276 | \$14,352,110 | \$19,668,166 |
| Wisconsin (Football) | \$43,296,599 | \$23,662,925 | \$19,633,674 |
| Oklahoma State (Football) | \$33,213,396 | \$13,787,271 | \$19,426,125 |

| | | | |
|--------------------------------------|--------------|--------------|--------------|
| Washington (Football) | \$39,405,237 | \$21,306,380 | \$18,098,857 |
| Florida State (Football) | \$35,870,789 | \$18,689,809 | \$17,180,980 |
| Illinois (Football) | \$28,079,694 | \$12,910,507 | \$15,169,187 |
| Duke (Basketball) | \$28,917,329 | \$13,819,529 | \$15,097,800 |
| Virginia Tech (Football) | \$35,083,799 | \$20,009,657 | \$15,074,142 |
| Arizona (Basketball) | \$21,209,980 | \$6,918,239 | \$14,291,741 |
| Clemson (Football) | \$31,730,042 | \$17,992,943 | \$13,737,099 |
| Minnesota (Football) | \$30,524,945 | \$16,985,182 | \$13,539,763 |
| North Carolina (Basketball) | \$19,672,012 | \$6,510,942 | \$13,161,070 |
| Ohio St. (Basketball) | \$17,020,807 | \$5,251,724 | \$11,769,083 |
| Southern California (Football) | \$31,148,724 | \$19,423,723 | \$11,725,001 |
| Syracuse (Basketball) | \$19,017,231 | \$7,532,455 | \$11,484,776 |
| North Carolina (Football) | \$26,385,760 | \$15,050,721 | \$11,335,039 |
| Arizona State (Football) | \$27,842,879 | \$16,564,598 | \$11,278,281 |
| Mississippi State (Football) | \$22,575,985 | \$11,766,024 | \$10,809,961 |
| Texas Tech (Football) | \$26,569,287 | \$15,788,943 | \$10,780,344 |

| | | | |
|------------------------------------|--------------|--------------|--------------|
| Mississippi (Football) | \$28,515,471 | \$17,764,174 | \$10,751,297 |
| North Carolina State (Football) | \$21,856,742 | \$11,329,718 | \$10,527,024 |
| Louisville (Football) | \$25,658,653 | \$15,582,161 | \$10,076,492 |
| Wisconsin (Basketball) | \$16,353,313 | \$6,394,547 | \$9,958,766 |
| Indiana (Basketball) | \$17,804,586 | \$7,945,102 | \$9,859,484 |
| Utah (Football) | \$21,235,202 | \$11,426,280 | \$9,808,922 |
| Illinois (Basketball) | \$15,408,818 | \$5,630,297 | \$9,778,521 |
| Colorado (Football) | \$25,955,136 | \$16,308,544 | \$9,646,592 |
| Minnesota (Basketball) | \$15,141,713 | \$5,549,650 | \$9,592,063 |
| Oregon (Football) | \$27,713,278 | \$18,198,476 | \$9,514,802 |
| Oregon State (Football) | \$21,690,794 | \$12,282,221 | \$9,408,573 |
| Iowa State (Football) | \$21,862,535 | \$12,513,317 | \$9,349,218 |

B. Increasing Demand and Short Supply of Talent

The economic principles of supply and demand determine prices in most unregulated areas of commerce.⁶⁵ A shortage in supply of a service in high demand means that some buyers will be willing to pay more for it, and, conversely, as more supply

⁶⁵ Steven Fox, *Litigation Under Florida's Deceptive and Unfair Trade Practices Act, the Florida Antitrust Act, or Federal Antitrust Statutes*, THE FLORIDA BAR § 20.31 (2012).

becomes available, the cost decreases.⁶⁶ As the revenue generated in major college football continues to grow each year, primarily in the five BCS conferences, the demand for the top athletic talent in the country becomes even greater. Yet, there is a relatively small pool (*i.e.*, shortage in supply) of talented players in the country who are capable of playing at an elite level and producing that revenue. Economic principles of supply and demand dictate that the fewer the number of elite athletes available in the supply chain, the more that football programs desire their services. Accordingly, as programs are forced to compete against one another to obtain the elite athletes' services, the demand increases the value of their services and, accordingly, the price to obtain their services as well.⁶⁷

Because the expense of the athletes' services is artificially capped, universities obtain a competitive advantage by employing coaches who are the best at recruiting talented athletes. As I previously wrote in an article on the topic of coaches' contracts, "[t]he suppressed market value of the players is shifted to the salaries of coaches, who, unlike the players, are able to freely market their services to the highest bidders."⁶⁸ Indeed, FBS programs pay their football coaches millions in guaranteed annual compensation namely for one purpose, to win games by aggressively recruiting and obtaining the most talented football players in the country, which results in fierce competition among the top football programs for these athletes' services.⁶⁹

The competition for the elite athletes is so fierce that a few days after Alabama won the national championship in 2013, it

⁶⁶ *Id.*

⁶⁷ See, e.g., Kristin Madison, *The Residency Match: Competitive Restraints in an Imperfect World*, 42 HOUS. L. REV. 759, 822 (2005) (citing HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 6-7 (1985) (noting in the context of residency programs, "while supply and demand conditions for each program vary, the higher the number of qualified applicants, the less programs will need to pay to attract candidates, all else equal.")).

⁶⁸ See Richard T. Karcher, *The Coaching Carousel in Big-Time Intercollegiate Athletics: Economic Implications and Legal Considerations*, 20 FORDHAM INTEL. PROP. MEDIA & ENT. L. J. 46-47 (2009).

⁶⁹ See Madison, *supra* note 67, at 771 (citing PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 55-61 (17th ed. 2001) ("In a competitive market, if demand exceeds supply of a good or service, the price would ordinarily rise").

was reported that a University of Texas regent spoke with University of Alabama head football coach Nick Saban's agent about his possible interest in coaching at Texas.⁷⁰ Nationally known and recognized as "Four- and Five-Star" recruits out of high school, these elite athletes possess unique and extraordinary talent and skill and, as such, are not fungible. If the starting offense for Alabama's football team at the start of a season simply informed Nick Saban that they were not going to play, then Alabama would not even be in the "conversation" for a national title and very likely would not even finish in the Top 25. On a broader scale, the public will only consume the multi-billion dollar, major college football product if these highly and uniquely talented college athletes choose to play. That is some serious power—or perhaps leverage is the more accurate term—possessed by this small pool of elite athletes.

But more importantly, these elite athletes are beginning to comprehend the leverage they possess and they are beginning to act on it. Athletes with remaining collegiate eligibility, who at one time feared the NCAA, have increasingly become more outspoken and litigious and are much more willing to publicly challenge the perceived unfairness of the amateurism principles without fear of repercussions. Within just the past two years alone, we have witnessed unprecedented defiance to the current amateurism model by college athletes. For example, a number of current athletes playing at schools in BCS conferences signed their names to class action lawsuits. In October 2011, more than 300 current athletes at five different schools—Arizona, Georgia Tech, Kentucky, Purdue, and UCLA—signed a petition asking the NCAA to set aside some of the additional \$784 million in new television deals. They asked that this money be set aside to further benefit players by: 1) helping cover educational expenses in the event a scholarship ends before a player has earned a degree, or 2) possibly distributing the money to the players once

⁷⁰ *Texas Regent Asked About Nick Saban*, ESPN.COM (Sept. 20, 2013, 5:17 PM), http://espn.go.com/college-football/story/_/id/9694474/university-texas-regent-talked-agent-alabama-crimson-tide-coach-nick-saban.

their eligibility is exhausted.⁷¹ Some players have also participated on a conference call whereby they agreed to mark their equipment during football games being played on September 21, 2013 with the letters “APU”—an abbreviation for “All Players United.” This symbolic act is intended to push for more protections and benefits for college athletes from the NCAA.⁷² Lastly, in what appears to be the ignition of a labor movement in college football, on January 28, 2014, football players at Northwestern University filed a formal petition with the National Labor Relations Board seeking to be recognized as a certified union under the National Labor Relations Act.⁷³

CONCLUSION

Today, the conversation surrounding the threat to amateurism is fixated on the legality of amateurism rules and whether the NCAA can prevail in court. The game changer in the future may not ultimately require athletes to win their courtroom battle. The mere fact that athletes with remaining collegiate eligibility are now willing to sign their names to class action lawsuits against the NCAA, in and of itself, evidences a significant shift in the mindset of college athletes. Furthermore, irrespective of the result of any lawsuit, their recent actions constitute an unprecedented step towards a collective and organized effort to change amateurism principles. The inevitable result of an increasing demand for a short supply of elite college athletes who possess the necessary talent and skill to play major college sports is that the athletes themselves, collectively, will insist upon and obtain more rights and benefits in exchange for their services.

⁷¹ Dan Wetzel, *Bowl Boycott Would Shock Unfair System*, YAHOO! SPORTS (Oct. 24, 2011, 11:35 PM), <http://sports.yahoo.com/news/bowl-boycott-shock-unfair-system-033500454--ncaaf.html>.

⁷² Daniel Uthman, *Will ‘APU’ Reappear in College Football on Saturday?*, USA TODAY SPORTS (Sept. 27, 2013, 7:51 PM), <http://www.usatoday.com/story/sports/ncaaf/2013/09/27/college-football-nepa-apu-all-players-united-statement-protest/2885969/>.

⁷³ Tom Farrey, *Kain Colter Starts Union Movement*, ESPN.COM (Jan. 28, 2014, 9:08 PM), http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union.