

LANE VIOLATION: WHY THE NCAA'S AMATEURISM RULES HAVE OVERSTEPPED ANTITRUST PROTECTION & HOW TO CORRECT

*Alexander Knuth**

INTRODUCTION

At its core, the National Collegiate Athletics Association (NCAA) is a business created to promote, maintain, and facilitate sporting events between the colleges and universities that serve as its member institutions. Although many of these member institutions are nonprofit or state owned, the market surrounding their athletic competitions has generated billions of dollars and is growing considerably each year.¹ Ever-increasing amounts of money are spent annually by athletic departments building state-of-the-art facilities and signing coaches to contracts that rival their professional counterparts.² College athletics as a whole generates roughly \$11 billion in annual revenue.³ Even individual programs have amassed incredible value, such as the Texas A&M football program, which averaged over \$100 million in profits for each of the 2014, 2015, and 2016 seasons.⁴ Although NCAA

* Candidate for Juris Doctor, Notre Dame Law School, 2020; Bachelor of Science in Applied Engineering Sciences, Michigan State University, 2017. I would like to extend a special thanks to Professor Dan Kelly and Professor Margaret Brinig for allowing me to explore this topic as part of their Law and Economics course. I would also like to thank the members of *Notre Dame Law Review Reflection* for their edits. All errors are my own.

1 See Will Hobson & Steven Rich, *Playing in the Red*, WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/?utm_term=.03b9ee177f92.

2 See *id.* (“Ohio State, Texas and Alabama . . . annually bring in more than \$140 million, enough to cover seven-figure salaries for head coaches and a near constant process of building and upgrading facilities without losing money.”). Compare Thom Patterson, *America’s Incredibly Expensive College Football Stadiums*, CNN (Sept. 28, 2018), <https://www.cnn.com/2018/09/28/us/expensive-college-football-stadiums/index.html> (surveying recent multi-million dollar renovations of college football stadiums), with Jason Notte, *Even Sports Stadium ‘Facelifts’ Cost Taxpayers Millions*, MARKETWATCH (July 27, 2017), <https://www.marketwatch.com/story/even-sports-stadium-facelifts-cost-taxpayers-millions-2017-07-27> (surveying recent multi-million dollar renovations of professional sports stadiums).

3 Marc Edelman, *The Case for Paying College Athletes*, U.S. NEWS (Jan. 6, 2014), <https://www.usnews.com/opinion/articles/2014/01/06/ncaa-college-athletes-should-be-paid>.

4 Chris Smith, *College Football’s Most Valuable Teams: Texas A&M Jumps to No. 1*, FORBES (Sept. 11, 2018), <https://www.forbes.com/sites/chris-smith/2018/09/11/college-football-most-valuable-teams/#2d6d7c136c64>.

regulations prohibit paying athletes, a report estimated the value of men's basketball players at top-ranked schools to be upwards of \$500,000 per player.⁵ Obviously not every athlete in every sport derives the same demand for their performance, but it is clear that the NCAA has established itself as a lucrative enterprise in no small part because of its student-athletes.

However, the athletes that contribute so much to the popularity of college athletics have not received any reciprocation of the growth and have often been punished for seemingly innocuous benefits. For example, Joel Bauman, at the time a wrestler at the University of Minnesota, created music and placed it on both YouTube and iTunes in 2013.⁶ Because the music was created under his name and generated a small revenue stream, he was deemed ineligible for competition, a designation that would have cost him his scholarship if not corrected.⁷ Because NCAA regulations prohibit any promotion of a commercial product using the name, image, or likeness (NIL) rights of its athletes, Bauman could retain eligibility and continue to make music only under an alias.⁸ However, he contends that his music is meant to be inspirational and represents a message that he wants to stand behind.⁹ Should the NCAA be allowed to effectively revoke a student-athlete's scholarship simply because he places his name on something unrelated to his athletic ability that happens to generate a minimal revenue?

The NCAA defines academic excellence as one of its core values and promotes career opportunities as one of its main benefits to its athletes.¹⁰ Yet, Dakota and Dylan Gonzalez, twins and former women's basketball players at the University of Nevada Las Vegas, felt they had to forego their remaining eligibility to make the most of an opportunity they created for themselves in the music industry.

"We are bred and conditioned to believe that college is what's going to get you ready for that start in your life after school, so as a student-athlete when you feel like you're being held back from that, where are you really getting an advantage?"

5 John A. Maghamez, Comment, *An All-Encompassing Primer on Student-Athlete Name, Image, and Likeness Rights and How O'Bannon v. NCAA and Keller v. NCAA Forever Changed College Athletics*, 9 LIBERTY U. L. REV. 313, 317 (2015). The report estimated the value provided by individual players at the twenty highest-ranked teams in 2013 using the method adopted by the NBA (allocating forty-nine percent of revenues generated to the players). *Id.* at 317 n.29. The top-ranked team earned about \$1.5 million per player while the team ranked twentieth earned about \$500,000 per player. *Id.* at 317.

6 Pat Borzi, *Minnesota Wrestler Loses His Eligibility by Selling a Song*, N.Y. TIMES (Feb. 27, 2013), <https://www.nytimes.com/2013/02/28/sports/wrestler-hoping-to-inspire-through-song-loses-eligibility.html>.

7 *See id.*

8 *See id.*

9 *See id.*

10 *See Academics*, NCAA, <http://www.ncaa.org/about/academics> (last visited Sept. 10, 2019).

Because even though I'm getting an education, I don't have a resume," Dakota said.¹¹

The NCAA does seem to be loosening its grip on its athletes' NIL rights, as evidenced by Notre Dame women's basketball player Arike Ogunbowale's appearance on the popular, televised dance competition, *Dancing with the Stars*.¹² Ogunbowale was allowed to retain her amateur status and receive any prize money she earned with a stipulation that she not appear in any promotional materials.¹³ The NCAA reasoned that any compensation would be earned because of her dancing abilities rather than her skill as a basketball player.¹⁴ Justifying Ogunbowale's appearance on the show leaves the NCAA in a precarious position as it attempts to balance the admitted value of its athletes' individual NIL rights with its strained interest in disallowing their exploitation. They also face various forms of outside competition. An increasing number of high-profile athletes have explored alternative options in foreign professional leagues, and the NBA has recently announced changes to its eligibility rules to create enticing financial incentives for graduating high school basketball stars to join its G League.¹⁵

The bottom line is that the NCAA is in the midst of an era that will define the future of collegiate athletics and determine how young people participate in sports for the foreseeable future. This Essay ultimately concludes that both the NCAA and its athletes would benefit from a system that allows for the exploitation of NIL rights while preserving the core educational and nonprofessional nature of college sports as a product. Currently the NCAA requires its athletes to maintain a very broadly defined amateur status to remain eligible for competition.¹⁶ The current amateurism definition states that athletes must forego all compensation outside of education-related expenses and retain status as a full-time student in good academic standing.¹⁷ This ban on compensation has been challenged in court under antitrust analysis and has been allowed by the Supreme Court as a procompetitive advantage necessary to

11 Betsy Helfand, *Dylan and Dakota Gonzalez Find Many Opportunities Post-UNLV*, LAS VEGAS REV.-J. (Feb. 11, 2018), <https://www.reviewjournal.com/sports/unlv/unlv-basketball/dylan-and-dakota-gonzalez-find-many-opportunities-post-unlv/>.

12 Jacob Bogage, *Arike Ogunbowale on 'Dancing with the Stars' Forces NCAA into Tricky Two-Step*, WASH. POST (Apr. 19, 2018), <https://www.washingtonpost.com/news/early-lead/wp/2018/04/19/arike-ogunbowale-on-dancing-with-the-stars-forces-ncaa-into-tricky-two-step/>.

13 *See id.*

14 *See id.*

15 Jeremy Woo, *The Benefits and Risks of NBA G League's 'Professional Path' Program*, SPORTS ILLUSTRATED (Oct. 18, 2018), <https://www.si.com/nba/2018/10/18/nba-g-league-ncaa-basketball-professional-path-elite-prospects>. Interestingly, this article implies that playing in college for at least a year would still be a more sound financial decision for even the most elite athletes. *Id.* It also claims that college athletes are "worth way more money to Nike wearing the swoosh while draped in Duke blue than as a member of [a G League team]." *Id.*

16 *See* NAT'L COLLEGIATE ATHLETIC ASS'N, 2018-19 NCAA DIVISION I MANUAL, § 12.1 (2018), <https://www.ncaapublications.com/p-4547-2018-2019-ncaa-division-i-manual-august-version-available-august-2018.aspx> [hereinafter "NCAA BYLAWS"].

17 *Id.* §§ 12.1.2, 14.2, 14.4.

maintain the unique characteristics of the NCAA's product, college athletics.¹⁸ So far, the prohibition has been upheld to cover compensation both received directly for athletic performance and received for activities performed away from collegiate competition.¹⁹ This Essay will not address the possibility of directly compensating student-athletes for their abilities, but whether they should be allowed to receive payment related to any of their NIL rights. Though the courts have extended approval for bans to all compensation received by an athlete for their NIL rights, they have only properly analyzed game-related NIL rights, such as those contained in video game likenesses or game footage. Analysis will show that while the NCAA has a justifiable and viable business interest in disallowing any compensation to athletes related to athletic or even educational performance, its restriction on non-game-related NIL rights does not deserve the same deference.

The business model surrounding college athletics requires maintaining the integrity of its academic ideals and a bar on pay-for-play. Allowing athletes to earn compensation related to their non-game-related NIL rights does not interfere with these goals because the athletes' schools would not begin providing additional benefits and any payment by a third party would not be directly for an athlete's performance. This, along with a multitude of other reasons, shows that a blanket prohibition on compensation is not necessary to maintain the integrity of the NCAA's product. Thus, the NCAA's definition of "amateurism" should be narrowed to allow for the creation of a market for non-game-related NIL rights. It then follows that the NCAA should adopt new regulations to govern this market. By doing so, the NCAA can avoid putting itself at the mercy of the courts in future antitrust litigation and actually strengthen its position protecting its athletes' amateur status and promoting its overall educational mission.

This Essay will discuss the current legal landscape regarding the NCAA and its restrictions on NIL rights in Part I. It will then discuss the potential challenges facing the supposed legitimate business interest in protecting athletes' amateur status, and how the NCAA should react, in Part II. Finally, Part III will describe a potential framework for regulating a new market for non-game-related NIL rights and how this mechanism can address certain challenges that may arise.

I. CURRENT LEGAL LANDSCAPE

Courts have given virtually unwavering support to the NCAA's amateur restrictions beginning with the Supreme Court's decision in *NCAA v. Board of Regents*.²⁰ In that case, the Court decided that the NCAA's restriction should be interpreted under the "Rule of Reason" because of the unique academic tradition surrounding the product of college sports.²¹ The alternative would have been to declare the NCAA's restriction per se illegal as a type of wage fixing under the

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

19 See, e.g., *Bloom v. Nat'l Collegiate Athletic Ass'n*, 93 P.3d 621 (Colo. App. 2004).

20 468 U.S. 85 (1984).

21 *Id.* at 103.

Sherman Antitrust Act.²² The Court reasoned that the athletes' amateur status was necessary to, "preserve the character and quality of the 'product,'"²³ and that the wide deference given to the NCAA in its preservation efforts served viable procompetitive goals.²⁴ Therefore, the NCAA was justified in its complete restriction on compensation to athletes.²⁵

Only a few additional challenges have since been made to the validity of the NCAA's compensation restrictions. In *Bloom v. NCAA*,²⁶ a University of Colorado (CU) football player sought an injunction to the NCAA's restrictions against endorsements in order to promote ski equipment and model clothing, activities that he engaged in as an Olympic athlete prior to attending CU.²⁷ NCAA regulations allow athletes to earn compensation for professional participation in a sport different than the one they play in college,²⁸ and traditionally, professional skiers are primarily compensated through endorsements and paid media opportunities.²⁹ However, the Court upheld the NCAA's blanket ban on all endorsement compensation, irrespective of which activity the athlete may have earned it through, as vital to preserve the demarcation between college and professional sports.³⁰

Building on that decision at the federal level, *O'Bannon v. NCAA*³¹ has perhaps been the decision with the highest profile, as it represented the end of popular college football and basketball video games.³² This case was a class-action suit of basketball and football players claiming that the NCAA violated the Sherman Antitrust Act by preventing student-athletes from receiving a share of the revenue generated by use of their game-related NIL rights.³³ The district court held, and the Ninth Circuit affirmed, that (1) NCAA compensation rules are subject to antitrust scrutiny, (2) the plaintiffs suffered antitrust injuries due to these compensation rules, (3) the NCAA's compensation rules are to be subject to rule of reason, and (4) that the NCAA's current compensation restrictions were more restrictive than necessary to protect the amateur status of its product.³⁴ The district court accepted the plaintiff's recommendation of a less restrictive alternative to preserving amateurism and permanently enjoined the NCAA from disallowing member institutions to grant

22 *See id.* at 100.

23 *Id.* at 102.

24 *See id.* at 101–02.

25 *See id.* at 102.

26 93 P.3d 621 (Colo. App. 2004).

27 *Id.* at 622.

28 *See* NCAA BYLAWS, *supra* note 16, § 12.1.3.

29 *Bloom*, 93 P.3d at 625.

30 *Id.* at 626, 628.

31 802 F.3d 1049 (9th Cir. 2015).

32 Darren Rovell, *Will There Ever Be Another NCAA Football Video Game?*, ESPN (Aug. 30, 2016), https://www.espn.com/college-football/story/_/id/17421334/will-there-ever-another-ncaa-football-video-game.

33 *O'Bannon*, 802 F.3d at 1055. These game-related NIL rights include the use of athletes' images in live game broadcasts, related footage, and video games. *See generally* GABE FELDMAN, KNIGHT COMM'N ON INTERCOLLEGIATE ATHLETICS, THE NCAA AND "NON-GAME RELATED" STUDENT-ATHLETE NAME, IMAGE AND LIKENESS RESTRICTIONS (2016).

34 *See O'Bannon*, 802 F.3d at 1079.

stipends up to full cost of attendance (COA) and deferred payments of \$5000 per year for use of athletes' NIL rights payable through trusts after they leave school.³⁵ The Ninth Circuit affirmed the stipends up to COA as a substantially less restrictive alternative to current compensation rules, but ruled that student-athletes cannot receive cash payments untethered to their education expenses and thus denied the deferred payments.³⁶ Effectively, this decision forced the creation of a mechanism for universities to pay athletes stipends up to the institution's COA. Usually this is a few thousand dollars on top of tuition and other education-related expenses.³⁷

Although *O'Bannon* decided that the NCAA could retain restrictions on its athletes' compensation, it was in no way a complete victory. This was the first case to say that NCAA rules violated antitrust laws. Additionally, *O'Bannon* defined the market for student-athletes as NCAA member institutions "buying" NIL rights as well as athletic services. This important demarcation shows that the two categories are separable and could be subject to different regulations while maintaining core educational values. The majority decision indicated that the plaintiff's argument for deferred payments failed because they could not provide sufficient evidence showing it was an equally effective method for preserving amateurism.³⁸ This indication, coupled with the separation of athletic ability and NIL rights, opens the door for future litigants to make an evidentiary showing of even less restrictive methods of preserving amateurism.³⁹ As discussed below, allowing compensation related to non-game-related NIL rights could be a less restrictive alternative that continues to protect the NCAA's interest in maintaining amateurism.

35 See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F.Supp.3d 955, 1005, 1008 (N.D. Cal. 2014).

36 See *O'Bannon*, 802 F.3d at 1078–79.

37 Marc Tracy, *Top Conferences to Allow Aid for Athletes' Full Bills*, N.Y. TIMES (Jan. 17, 2015), <https://www.nytimes.com/2015/01/18/sports/ncaas-top-conferences-to-allow-aid-for-athletes-full-bills.html>.

38 *O'Bannon*, 802 F.3d at 1080 (Thomas, C.J., concurring in part and dissenting in part) ("There was sufficient evidence in the record to support the award. . . . The majority characterizes the weight of this evidence as 'threadbare.' I respectfully disagree." (citation omitted)).

39 A pending bench trial before the same District Court Judge that oversaw *O'Bannon* will once again attack the NCAA's ban on compensation past COA under antitrust analysis. See John Richard Carrigan, *Pay for Play Won't Go Away: The NCAA Is Again Defending Antitrust Litigation over Limits on Payments to Student-Athletes*, NAT'L L. REV. (Sept. 29, 2018), <https://www.natlawreview.com/article/play-pay-won-t-go-away-ncaa-again-defending-antitrust-litigation-over-limits>. Plaintiffs in this case will argue that member institutions should be allowed to offer payments above COA as a method of competing for the most talented athletes. See *id.* Although the main argument does not directly address NIL-related payments, they could be seen as a substantially less restrictive alternative that are virtually as effective at furthering the NCAA's goal of preserving amateurism.

II. PROCOMPETITIVE GOALS OF THE NCAA

Each person has a property interest in his or her public personality and has the sole right to restrict its commercial use.⁴⁰ While a vast majority of the public has limited value to exploit, many student-athletes have built significant value in their NIL rights through both athletic performance and a wide variety of off-field activities. However, NCAA regulations create a blanket restriction on practically all compensation to athletes, whether related to athletic performance or not.⁴¹ As discussed above, the courts have recognized the unique interdependence of the NCAA and its member institutions and have thus allowed restrictions on trade reasonably necessary to maintain college athletics. However, by permitting a blanket restriction on any compensation above educational expenses, the courts have left open the question of whether a prohibition on non-game-related NIL compensation is necessary to preserve college sports, and specifically the amateur nature that the NCAA contends makes its product viable.

The NCAA bylaws prohibit student-athletes from receiving anything of value for use of their NIL rights to promote commercial activity or sell commercial items.⁴² Essentially, players' NIL rights are controlled by the NCAA, the players' schools, and other member institutions. The NCAA retains the right to use the athletes' NIL rights to promote its own events.⁴³ Ironically, these regulations were implemented to prohibit commercial exploitation of the athletes and separate the supposedly amateur college sports from professional counterparts.⁴⁴ However, the NCAA earns billions of dollars off these licenses.

In support of its compensation restrictions, the NCAA in *O'Bannon* identified four necessary procompetitive advantages served by the ban: (1) preserving amateurism, (2) preserving a competitive balance amongst member institutions, (3) the integration of academics in athletics, and (4) increasing output of Division I athletics by allowing schools that have philosophical or financial restrictions requiring amateur status of their athletes.⁴⁵ Because amateurism was the only procompetitive advantage considered both necessary to preserve college athletics and sufficiently served by the compensation ban, it is the only advantage available for the NCAA to defend in future challenges. If a plaintiff could establish serious evidentiary proof that a significantly less restrictive mode for preserving amateurism exists, the courts could enjoin the NCAA to accept that method. In short, a market for non-game-related NILs would accomplish this goal. However, all four alleged procompetitive advantages of a compensation ban represent serious concerns of the NCAA should it accept the recommendation to allow for non-game-related NIL

40 See, e.g., *Uhlaender v. Henricksen*, 316 F. Supp. 1277, 1283 (D. Minn. 1970) ("It seems clear to the court that a celebrity's property interest in his name and likeness is unique, and therefore there is no serious question as to the propriety of injunctive relief.").

41 See NCAA BYLAWS, *supra* note 16, § 12.1.2.

42 NCAA BYLAWS, *supra* note 16, § 12.5.

43 *Id.*; see also Maghamez, *supra* note 5, at 320–21.

44 NCAA BYLAWS, *supra* note 16, §§ 1.3.1, 2.9.

45 See *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049, 1072 (9th Cir. 2015).

exploitation. This Part shall address each concern in turn, analyzing the NCAA's argument and responding with possible methods for mitigating concerns.

A. *Preserving Amateurism*

As discussed earlier, the court agreed with the NCAA in *O'Bannon* that preserving amateurism is a procompetitive advantage necessary to preserve college sports and is served by a ban on compensation because providing athletes payment outside of education-related expenses would erase the line of demarcation between professional and college sports. NCAA regulations define two broad requirements for collegiate athletics participation that are relevant here: (1) an athlete does not receive compensation for play outside of education-related expenses, and (2) an athlete must be a full-time student in good academic standing.⁴⁶ In contrast, professional athletes are compensated directly for their play and do not have academic requirements. Assuming the maintenance of the NCAA's educational requirements on amateurism, the creation of a non-game-related NIL market would not significantly affect the line between professional and college sports because student-athletes would still not be receiving compensation directly for their play. Thus, allowing for compensation from non-game-related NIL licenses would be a less restrictive alternative than a full compensation ban and would still accomplish the NCAA's goal of athletes retaining their amateur status.

By restricting earning potential to only an athlete's non-game-related NIL rights, the NCAA would avoid the need to differentiate between compensation received directly for athletic performance and compensation received for game-related NIL licenses, such as those used in TV broadcasts. A significant argument put forth in *O'Bannon* is that these two sources of income are too closely related to differentiate.⁴⁷ However, *O'Bannon* focused primarily on game-related NIL rights and failed to discuss why compensation for non-game-related NIL rights would defeat amateurism. Therefore, the NCAA could narrow its definition of amateurism to allow for compensation stemming from non-game-related NIL rights without destroying the demarcation between professional and college sports. In fact, adopting this recommendation could actually further clarify the difference between professional and college sports by placing the focus on academic requirements and the continuing avoidance of direct pay-for-play.

Additionally, as indicated in *Bloom*, the NCAA already allows athletes to earn compensation for play in a sport other than the one they play in college. So, for example, if a college football player were selected in the MLB draft, he would be allowed to receive his signing bonus worth millions of dollars and still retain his eligibility to participate in college football.⁴⁸ Yet under current NCAA regulations,

46 NCAA BYLAWS, *supra* note 16, §§ 12.1.2, 14.01.2.

47 See FELDMAN, *supra* note 33, at 4.

48 Oklahoma's starting quarterback, Kyler Murray, was selected by the Oakland A's with the ninth pick in the 2018 MLB Draft, earning a contract that paid him a \$4.7 million signing bonus and allowed him to continue to play college football for the 2018 season. See Alex Kirshner, *Why Kyler Murray Is NCAA-Eligible for Oklahoma Despite Signing a Baseball Contract*, SBATION

an athlete is forced to forego the pennies he or she would earn for selling music on iTunes, an activity that is not related to their participation in any sport.⁴⁹ If compensation for play in one sport does not indicate an athlete's professional status, it is difficult to imagine compensation for non-game-related NIL rights having a stronger effect.

B. Preserving a Competitive Balance

Although the court in *O'Bannon* did not accept the NCAA's argument that restricting compensation preserves a competitive balance between schools in recruiting and competition, it may still be a viable concern in creating a market for NIL rights.⁵⁰ Part of what makes college sports so popular is its unpredictability and the spectacular upsets that can occur due to the parity of a league filled with talented, albeit young, athletes.⁵¹ However, the NCAA does little to maintain this parity. Although it prohibits directly compensating athletes, it places no such restrictions on spending for facilities, coaching, or other aspects of an institution's athletic programs. The district court stated that this "negate[s] whatever equalizing effect the NCAA's restraints on student-athlete compensation might have once had."⁵²

The NCAA's main concern was likely that, if allowed to compensate athletes above COA, institutions operating with significant profit margins would outbid schools with tighter budgets.⁵³ Creating a market for non-game-related NIL rights instead removes the "point of purchase" from the school-athlete relationship to a relationship that can be dictated by the NCAA. While some schools will likely have certain advantages based on their local markets or alumni bases, the NCAA can choose to mitigate these using whichever mechanism they create. For example, one existing proposal recommends that student-athletes must obtain any compensation related to their NIL rights independently with no assistance from their school or the NCAA.⁵⁴ It also recommends that the student's agreement be reviewed to ensure

(Sept. 1, 2018), <https://www.sbnation.com/college-football/2018/9/1/17432194/kyler-murray-ncaa-eligible-mlb-draft>.

⁴⁹ Borzi, *supra* note 6.

⁵⁰ *O'Bannon*, 802 F.3d. at 1060.

⁵¹ Over the history of the NCAA Tournament, sixteenth-seeded teams were 0–135 against top-seeded teams until UMBC defeated Virginia in the 2018 Tournament. Dan Greene, *UMBC's Impossible Feat in the 2018 NCAA Tournament Changed March Madness Forever*, SPORTS ILLUSTRATED (Nov. 27, 2018), <https://www.si.com/college-basketball/2018/11/27/umbc-ncaa-tournament-win-virginia-sportsperson-2018-top-moments>.

⁵² *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d. 955, 1002 (N.D. Cal. 2014).

⁵³ Even if college athletes were allowed to receive direct compensation for their performance, competitive balance in college sports would be unlikely to be altered. *See generally* Brian Mills & Jason Winfree, *Athlete Pay and Competitive Balance in College Athletics*, 52 REV. INDUS. ORG. 211 (2017).

⁵⁴ D. LOPIANO ET AL., DRAKE GRP., POSITION STATEMENT: COMPENSATION OF COLLEGE ATHLETES INCLUDING REVENUES FROM COMMERCIAL USE OF THEIR NAMES, LIKENESSES, AND IMAGES 10 (rev. Dec. 27, 2017), <https://www.thedrakegroup.org/wp-content/uploads/2019/06/revision-tdg-position-paper-name-image-likeness-final.pdf>.

the compensation is within fair market range for the activity.⁵⁵ Further discussion of which methods could be implemented will take place in Part III, but any creation of a NIL market would be unlikely to decrease the parity already present among college athletic programs.

Rather, it is likely that schools will continue to recruit as they do now. Only a select few athletes will have actual NIL value coming out of high school. Thus, when choosing a school, only these particular athletes would have the school's NIL market advantages factor into their decision. More likely, these athletes would accept scholarships to play for the schools and then obtain opportunities to exploit their NIL value after they establish themselves as prominent athletes. Any unfair advantage for a school would likely come from an abuse of the potential NIL system. However, any fear of a disguised pay-for-play system does not override the benefits of a regulated non-game-related NIL market.

C. *The Integration of Education*

The third procompetitive advantage of restricting compensation presented to the court in *O'Bannon* was the integration of education and athletics, which the NCAA contends improves the academic services provided to student-athletes.⁵⁶ However, the court stated that this goal is better achieved by other NCAA rules, such as those requiring athletes to attend class or forbidding more than a certain number of practice hours per week.⁵⁷ The court acknowledged the NCAA's interest in preventing a potential social "wedge" between athletes earning large sums of money and the rest of the student body, but held that, "it does not justify a total, 'sweeping prohibition' on paying student-athletes for the use of their NILs."⁵⁸

The NCAA's fear, however, is more applicable to a situation in which athletes are paid directly for their athletic performance. Student-athletes are already permitted to receive payments for various noncollegiate activity ranging from a few hundred dollars to seven-figure amounts, dependent on the situation.⁵⁹ Paying athletes directly for the value they bring their universities through athletic performance would represent a significant increase in the total compensation athletes receive. However, restricting additional compensation to non-game-related NIL licenses would not create the same disparity. If student-athletes' earning

55 *See id.*

56 *O'Bannon*, 802 F.3d at 1059–60.

57 *See id.* at 1061.

58 *Id.* at 1060.

59 Football players can earn up to \$550 in gifts for playing in a postseason bowl game. Jon Solomon, *The History of the Debate Over Paying NCAA Athletes*, ASPEN INST. (Apr. 23, 2018), <https://www.aspeninstitute.org/blog-posts/history-behind-debate-paying-ncaa-athletes/>. Tennis players can earn up to \$10,000 a year in prize money before or during college. *Id.* Olympic athletes can earn thousands of dollars for winning medals, and, in one case, a University of Texas swimmer earned \$740,000 from Singapore for winning the country's first gold medal. *Id.* Two-sport athletes have received payments over \$1 million for participation in one sport while retaining NCAA eligibility in another. *Id.* Additionally, schools have paid thousands of dollars for insurance policies for elite athletes wanting to protect their financial futures. *Id.*

potential is increased only marginally compared to avenues already available, the “social wedge” on which the NCAA bases its fear would never come to exist.

If the NCAA intends to maintain its integration of education and athletics, the court in *O’Bannon* was correct in deciding it would be better served by strengthening academic requirements rather than worrying about compensation. The current amateur definition requires an athlete to forego compensation and attend class, but student-athletes are frequently forced to miss class for competition. A 2015 survey showed that Division I men’s basketball players missed over two classes a week and spent a significant amount of time away from campus.⁶⁰ Not only does this strain the academic resources available to student-athletes, but often limits their choices in degree programs or extracurricular activities. To strengthen the connection between education and athletics, the NCAA clearly needs to reform its model, but reinforcing academic requirements and minimizing competition conflicts with class schedules would be far less attenuated solutions than restricting athlete compensation.⁶¹

D. Avoiding Additional Financial Burdens

The final procompetitive benefit served by the compensation restriction put forward in *O’Bannon* was that of an increase in output of opportunities for students to participate in college athletics.⁶² The NCAA reasoned that if schools could pay athletes directly for their performance, programs that could not afford to do so would not be able to participate.⁶³ This argument was rejected by the court because the plaintiffs were not seeking to *require* all schools to pay their athletes, just an injunction *allowing* schools to do so.⁶⁴ Schools who could not afford to compensate their athletes would still be able to participate while incurring no additional costs.

Similarly, the creation of a NIL market would not create significant financial burdens on the NCAA, conferences, or individual schools aside from inconsequential compliance costs.⁶⁵ Because the payments would come solely from third parties, none of the educational entities involved would participate in the market; they would simply facilitate it.⁶⁶ Depending on the mechanism employed, the NCAA and individual schools could likely even collect a percentage of each NIL transaction should they choose to adopt a middle-man type role. If that were to happen, the NIL market could prove to be profitable for both the NCAA and its athletes.

⁶⁰ *Id.*

⁶¹ An argument has been made that the NCAA needs to either adopt a fully professional model or reform its system to truly embrace the academically centered amateur model that the NCAA envisions. While the argument that there cannot be a middle ground is overly simplistic, it does contain more effective ways the NCAA can reform its academic restrictions than limiting compensation avenues for athletes. *See, e.g.*, Andrew Zimbalist, *Whither the NCAA: Reforming the System*, 52 REV. INDUS. ORG. 337 (2017).

⁶² *O’Bannon*, 802 F.3d at 1060.

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ FELDMAN, *supra* note 33, at 6.

⁶⁶ *See id.*

III. THE REGULATORY MECHANISM

The most recent version of the NCAA's Division I Manual is 427 pages long.⁶⁷ Developing a word-for-word reformation of each relative NCAA bylaw necessary to create an avenue for athletes to receive compensation for use of their NIL rights is well beyond the scope of this Essay. To ensure that all interests are acknowledged, any implementation would require the collaborated efforts of the NCAA with a representative contingent of athletes, coaches, and officials from schools and conferences. Instead, this Part will identify some key characteristics necessary to create a successful mechanism for the NCAA, schools, and athletes alike. Several proposals have been put forth by various commissions, the National College Players Association, and even the PAC-12 Conference.⁶⁸ However, none have persuaded the NCAA to publicly take action. While this could be due to pressure from pending litigation regarding the amateurism restriction,⁶⁹ the NCAA would be best served by making changes sooner rather than later. Primarily, the new system for allowing athletes to earn compensation related to their NIL rights would regulate agreements between student-athletes and third parties, but it should also allow for athletes' self-promotion. Although there are countless interests to consider, this system should, most importantly, preserve the educational interests of student-athletes while providing protection from unwarranted exploitation.

Paramount to any system should be the maintenance of the NCAA's commitment to education. Because the compensation ban has been shown to be both ineffective and unnecessary to maintain amateurism, the NCAA's academic requirement is truly the only aspect of college sports that differentiates it from its professional counterpart. Yet, the current compensation rules create a significant divide at schools between the rights retained by purely academic students and those allowed to athletes. Students are able to exploit the full range of their NIL rights while athletes are forced to forego NIL related compensation under a complicated system of regulations. Eliminating these restrictions on non-game-related NIL compensation would increase the validity of the NCAA's amateurism definition by strengthening its athletes' identity as students while concentrating its prohibition on the true mark of a professional, pay-for-play. This will create the distinct line between professional and amateur sports which the NCAA mistakenly believes it has already drawn because it pulls student-athletes even further under the umbrella of amateurism. By allowing athletes full access to their non-game-related NIL rights, the NCAA will be treating student-athletes more like their peers. Thus, while

⁶⁷ See NCAA BYLAWS, *supra* note 16.

⁶⁸ The PAC-12 has considered a proposal that would allow student-athletes to use their NIL rights to promote their own businesses, given the business is not related to athletics. See FELDMAN, *supra* note 33, at 8. The National College Players Association wants to institute the "Olympic" amateur model. See *id.* This would eliminate all restrictions on college players' commercial opportunities so long as they continue to forego direct compensation for performance. See Connelly for Comm'r, *Modernizing Amateurism*, SBNATION, <https://www.sbnation.com/a/college-football-commissioner/olympic-model> (last visited Oct. 10, 2019)

⁶⁹ Carrigan, *supra* note 39.

it is critical that the NCAA allow its athletes to fiscally exploit the value of their NIL rights, any change should not interfere with the unique scholastic characteristic of college athletics. Currently, the NCAA defines amateurism broadly to prevent athletes from receiving any compensation other than education related expenses.⁷⁰ This definition should be narrowed to prohibit only compensation related directly to performance so that athletes can profit off of their NIL rights while still maintaining strict academic requirements. Although this would allow for compensation related to NIL value tangentially gained from athletic participation, it would prohibit the exploitation of NIL rights contained directly in athletic events, such as TV broadcasts, thus preventing any direct pay-for-play comparisons.

The NCAA could further protect its athletes' academic interests with specific restrictions contained within the structure of their new regulations. The overall goal of any limitations should be to avoid conflict with an athlete's academic obligations from overburdensome agreements and to avoid dilution of the NCAA's overarching educational purposes. One effective method may be placing limits on responsibilities under third-party agreements such as the activities or time constraints required of the athlete. Where "[h]igher education has an important obligation in promulgating rules that place a student's academic success above the athletic success of its sports teams,"⁷¹ it also has an important obligation to ensure a student's academic success above financial success. Thus, to promote a healthy balance between education, athletics, and an athlete's financial opportunities, the NCAA would be justified in disallowing third-party financial conflicts with preexisting obligations.

To avoid conflict of NIL agreements with the NCAA's academic goals, any regulation should also limit the types of third parties with which an athlete may associate and subject all agreements to NCAA and school approval. The NCAA would want to prevent its athletes from associating with less-than-wholesome organizations that could taint its educational mission. Requiring approval, or even preregistration, of third parties wishing to license student-athlete NIL rights could prove to be an effective filter.

Implementation of this system will certainly provide challenges to avoid abuse or otherwise ineligible exploitation. Inadvertently allowing sham NIL agreements that disguise pay-for-play understandings would defeat the purpose of this rule change. Comparable fraud already exists to a certain extent in college athletics, as evidenced by an FBI probe into basketball recruiting practices.⁷² However, a system allowing compensation for NIL rights is more likely to eliminate this corruption than exacerbate it. Though the FBI investigation uncovered under-the-table payments to coaches and families influencing athletes in a variety of ways, the influences most relevant here pertain to the signing of endorsement deals. Rather than allowing

70 NCAA BYLAWS, *supra* note 16, § 12.1.2.

71 LOPIANO ET AL., *supra* note 54, at 6.

72 See Matt Norlander, *Ultimate College Basketball Corruption Scandal Primer: Explaining the Latest with the FBI Probe*, CBS SPORTS (Apr. 12, 2018), <https://www.cbssports.com/college-basketball/news/ultimate-college-basketball-corruption-scandal-primer-explaining-the-latest-with-the-fbi-probe/>.

current activities to continue, in which young athletes are heavily overmatched when it comes to bargaining power, a new system could provide a properly regulated avenue for the NCAA to monitor transactions and provide an appropriate level of assistance to its student-athletes.

One of the most important limitations to be included in new regulations should prohibit the use of marks of the NCAA or an athlete's school without express consent. This would help ensure that any compensation is based only on the fair market value of an athlete's NIL rights rather than peripheral value provided by the school's identity. Thus, any recruiting advantage provided through brand recognition would be mitigated by the requirement that athletes rely mostly on their own NIL value.

Additionally, the NCAA should require that upon the graduation of an athlete, NIL related agreements shall terminate, and the rights shall revert back to the athlete. This will prevent third parties from essentially gambling on athletes' potential to be professionally successful by offering them long-term deals at relatively low rates. Not only would such a practice harm the athletes' long-term earning potentials, but it would also attack the line between professional and college sports which this regulation seeks to enforce. Agreements made during an athletes' college tenures should be wholly separable from agreements made during their professional careers.

Furthermore, any regulation should include the requirement that student-athletes obtain any compensation without the aid of anyone affiliated with the NCAA or their schools. While athletes should be allowed to have agents represent them in any such agreement, this should be the only aid they are allowed in seeking opportunities. If schools were able to provide direct assistance to athletes in these endeavors, the distinction between NIL compensation and direct compensation would be unclear. Schools with better resources or more affluent alumni bases could dominate the market and provide impermissible benefits in the form of lucrative licensing deals.

The system should also provide an avenue for student-athletes to self-promote their NIL rights. Any such regulation should meet all the relevant criteria set forth in regulations for agreements with third parties but should particularly take care to monitor the market value received for an individual's work-product. For example, a student-athlete should not be able to sidestep the direct compensation ban by selling autographs for well-above the going rate to wealthy boosters of the athletic department. Selling autographs is one example of a currently banned activity likely to be allowed under the proposed system, and it is one which could be specifically susceptible to abuse.⁷³ Because individual self-promotion would be more difficult to monitor, it creates a unique challenge to enforce good faith behavior. However, if the NCAA were to implement specific reporting requirements for athletes who wished to promote their own business or sell direct impressions of their image, it could easily track compliant athletes while focusing monitoring activities on the rare noncompliant occurrences.

73 See Maghamez, *supra* note 5, at 314.

CONCLUSION

While many significant concerns will likely arise should the NCAA allow compensation related to athletes' NIL rights, they pale in comparison to the damage that could be done to the system of college athletics as a whole if the courts are able to rule again on the anticompetitive nature of the current amateurism rules. Should a plaintiff provide sufficient evidence of a less restrictive way for the NCAA to preserve its procompetitive advantage of amateurism, the NCAA would be at the court's mercy, much like it was in *O'Bannon*. Current litigation already threatens a system where schools would be able to compete on an open market directly for recruits' athletic abilities.⁷⁴ While it is unclear whether the courts will accept the validity of such a system, the exploitation of non-game-related NIL rights has shown to be a significantly less restrictive alternative which retains the NCAA's amateur requirement. Should the NCAA accept this fact and implement such a system, it would place a significantly higher burden on future challengers to prove an even less restrictive way for maintaining the amateurism of college athletics. Therefore, both the NCAA and its student-athletes would benefit tremendously from the implementation of a system allowing compensation for non-game-related NIL rights.

74 Carrigan, *supra* note 39.