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REAL ACCOUNTABILITY: THE NCAA CAN NO LONGER EVADE ANTITRUST LIABILITY THROUGH AMATEURISM AFTER *O'BANNON v. NCAA*

Abstract: On August 8, 2014, in *O'Bannon v. National Collegiate Athletic Association*, the U.S. District Court for the Northern District of California held that the NCAA's restriction on compensating student-athletes for the use of their names, images, and likenesses violated the Sherman Act. The court ruled against the NCAA despite a long history of judicial deference grounded in preserving the amateur and educational nature of the NCAA. The NCAA has appealed the decision. Despite annual revenues approaching \$1 billion, the NCAA claims its amateur and educational fundamentals distinguish its product from commercialized professional sports. This Comment argues that the *O'Bannon* decision must be upheld because it correctly identified the contradiction of the NCAA's amateurism antitrust defense.

INTRODUCTION

For many years the National Collegiate Athletic Association (NCAA) has relied on its principle of amateurism to shield it from antitrust liability.¹ Courts have historically allowed the NCAA to impose restrictions to preserve its amateurism ideals that differentiate its product from professional sports.²

¹ See *Gaines v. NCAA*, 746 F. Supp. 738, 743 (M.D. Tenn. 1990) (asserting that the NCAA's eligibility rules in question are not subject to antitrust analysis because they are designed to preserve amateurism); *Coll. Athletic Placement Serv., Inc v. NCAA*, No. 74-1144, 1974 WL 998, at *3-4 (D.N.J. Aug. 22, 1974) (finding that the NCAA's newly enacted rule was not anticompetitive because its purpose was to uphold the academic standards and amateur status of student-athletes). Recently, however, the NCAA's rules that forbid college athletes from controlling the commercial rights to their names and likeness were determined to "unreasonably restrain trade in the market for certain education and athletic opportunities offered by the NCAA Division I schools." See *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1007 (N.D. Cal. 2014); Marc Edelman, *The District Court Decision in O'Bannon v. National Collegiate Athletic Association: A Small Step Forward for College-Athlete Rights, and a Gateway for Far Grander Change*, 71 WASH. & LEE L. REV. 2319, 2320-21 (2014). Controlling the commercial use of one's name, image, and likeness is referred to as "publicity rights." See Stacy L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1162 (2006).

² See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 101-02 (1984) ("The identification of this 'product' with an academic tradition differentiates college football Thus, the NCAA plays a vital role in enabling college football to preserve its character"); *McCormack v. NCAA*, 845 F.2d 1338, 1344-45 (5th Cir. 1988) (agreeing with *Board of Regents* that eligibility rules allow the NCAA product to survive in the face of commercializing pressures); *Jones v. NCAA*, 392 F. Supp. 295, 304 (D. Mass. 1975) (granting deference to NCAA's eligibility rules to preserve education and amateurism as essential aspects of intercollegiate athletics).

Most notably, the NCAA has been able to use amateurism as a means to limit student athlete compensation without antitrust ramifications.³ In 2014, in *O'Bannon v. NCAA*, the U.S. District Court for the Northern District of California held that prohibiting compensation for the use of student-athletes' names, images, and likenesses in Football Bowl Subdivision ("FBS") football and Division I men's basketball violated Section 1 of the Sherman Act.⁴ This ruling extinguished the long-standing practice of judicial deference towards the NCAA's amateurism principle.⁵

This Comment argues that the *O'Bannon* decision must be upheld because it exposes how the NCAA utilizes its amateurism principle to restrain trade and internalize profitability.⁶ Part I of this Comment details the procedural and factual history of *O'Bannon*.⁷ Part II examines the *O'Bannon* court's rule of reason antitrust analysis and the judicial shift away from blind deference to the NCAA under the Sherman Act.⁸ Finally, Part III argues the *O'Bannon* decision must be upheld because the NCAA uses student-athletes' names, images, and likenesses for commercial gain, not to endorse amateurism.⁹

I. *O'BANNON V. NCAA* AND THE NCAA'S RULES ON AMATEURISM

The NCAA does not compensate student-athletes for the use of their names, images, and likenesses pursuant to the NCAA's principle of amateur-

³ See Drew N. Goodwin, *Not Quite Filling the Gap: Why the Miscellaneous Expense Allowance Leaves the NCAA Vulnerable to Antitrust Litigation*, 54 B.C. L. REV. 1277, 1298 (2013).

⁴ 7 F. Supp. 3d at 1007; see The Sherman Act, 15 U.S.C. § 1 (2012). Section 1 of the Sherman Act declares any contract or conspiracy that restrains trade or commerce among the several States or internationally to be illegal. 15 U.S.C. § 1. Division I football is divided into two subdivisions: the Football Bowl Subdivision ("FBS") and the Football Championship Subdivision ("FCS"). *O'Bannon*, 7 F. Supp. 3d at 964. FBS Schools are permitted a larger number of scholarships compared to FCS schools, thus the FBS generally has a higher caliber of football competition resulting in larger revenues. See *id.* See generally Chris Smith, *College Football's Opening Weekend Blowouts Are Wins for Both Teams Involved*, FORBES (Aug. 26, 2013), <http://www.forbes.com/sites/chris-smith/2013/08/26/college-football-opening-weekend-blowouts-are-wins-for-both-teams-involved/>, archived at <https://perma.cc/HUX7-FPSP?type=image> (describing one-sided victories for FBS teams paying large sums to play FCS programs).

⁵ See, e.g., *McCormack*, 845 F.2d at 1344-45 (ruling in favor of the NCAA's eligibility requirements as a means to preserve amateurism); *Coll. Athletic Placement Serv.*, 1974 WL 998, at *3-4 (granting deference to the NCAA even though its rule effectively put the plaintiff out of business).

⁶ See *infra* notes 63-80 and accompanying text.

⁷ See *infra* notes 10-17 and accompanying text.

⁸ See *infra* notes 18-62 and accompanying text.

⁹ See Marc Edelman, *The Future of Amateurism After Antitrust Scrutiny: Why a Win for the Plaintiffs in the NCAA Student-Athlete Name & Likeness Litigation Will Not Lead to the Demise of College Sports*, 92 OR. L. REV. 1019, 1030 (2014) (describing the NCAA's paradoxical goal of maximizing revenues while preventing commercial exploitation); *infra* notes 63-80 and accompanying text (arguing that the commercial realities of the NCAA justify the *O'Bannon* ruling).

ism.¹⁰ Each year, student-athletes must sign a version of Form 08-3a titled “Student-Athlete Statement” to be eligible for participation in intercollegiate sports.¹¹ Part IV of Form 08-3a permitted the NCAA (or a party acting on its behalf) to use the name or image of student-athletes to generally promote NCAA championships, events, or programs.¹² A student-athlete that receives any form of compensation is immediately rendered ineligible to participate in his or her particular sport.¹³

On July 21, 2009, Ed O’Bannon and twenty current and former Division I student-athletes filed a class action lawsuit alleging that the NCAA is in violation of Section 1 of the Sherman Act.¹⁴ These alleged violations stemmed from the NCAA rules prohibiting men’s Division I football and basketball players from receiving a share of the revenues earned from the use of their names, images, and likenesses.¹⁵ On August 8, 2014, the U.S. District Court

¹⁰ See NCAA, 2014–15 NCAA DIVISION I MANUAL, art 2.9, at 4 (2014) [hereinafter NCAA DIVISION I MANUAL], available at <http://www.ncaapublications.com/productdownloads/D114.pdf>, archived at <http://perma.cc/X9N4-F2Y4>. The NCAA defines its principle of amateurism as follows: “Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental, and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and student-athletes should be protected from exploitation by professional and commercial enterprises.” *Id.*; see also Erin Cronk, Note, *Unlawful Encroachment: Why the NCAA Must Compensate Student-Athletes for the Use of Their Names, Images, and Likeness*, 34 U. LA VERNE L. REV. 135, 136–37 (2013) (explaining NCAA amateurism policies).

¹¹ See Class Action Complaint at 21, *O’Bannon*, 7 F. Supp. 3d 955 (N.D. Cal. Jul. 21, 2009) (No. CV-09-3329) [hereinafter *O’Bannon* 2009 Complaint]. The form title changes annually with the applicable academic year. See, e.g., NCAA Form 08-3a Academic Year 2008–09 at 4, UNIV. OF KENTUCKY, http://www.ukathletics.com/doc_lib/compliance0809_sa_statement.pdf, archived at <http://perma.cc/P8GH-XWL6> [hereinafter Kentucky Form 08-3a]; NCAA Form 14-3a Academic Year 2014–15, NCAA, http://www.ncaa.org/sites/default/files/DI%20Form%2014-3a%20-%20Student-Athlete%20Statement_0.pdf, archived at <http://perma.cc/6JGV-MUWS> [hereinafter NCAA Form 14-3a].

¹² Compare Kentucky Form 08-3a, *supra* note 11 (containing language of Section IV), with NCAA Form 14-3a, *supra* note 11 (removing the language of section VI). The same language however can be found in the NCAA bylaw 12.5.1.1.1. See NCAA DIVISION I MANUAL, *supra* note 10, art 12.5.1.1.1, at 68.

¹³ NCAA DIVISION I MANUAL, *supra* note 10, art 12.1.2, at 59. An individual is deemed ineligible to play upon using “his or her athletic skill (directly or indirectly) for pay in any form in that sport.” *Id.*

¹⁴ *O’Bannon*, 7 F. Supp. 3d at 962; *O’Bannon* 2009 Complaint, *supra* note 11, at 2; see 15 U.S.C. § 1 (2012) (declaring it illegal to conspire to restrain trade or commerce). To state a claim under Section 1 of the Sherman Act requires: (1) that there was a contract, combination, or conspiracy, (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis, and (3) that the restraint affected interstate commerce. 15 U.S.C. § 1; *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001).

¹⁵ *O’Bannon*, 7 F. Supp. 3d at 955. The plaintiffs consolidated with another class action in January 2010, and asserted claims relating to their publicity rights against Electronic Arts (EA) and Collegiate Licensing Company (CLC). See Consolidated Amended Class Action Complaint at 3, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, No. C 09–1967 CW (N.D.

for the Northern District of California granted an injunction preventing the NCAA from forbidding student-athlete compensation based on revenues generated from the names, images, and likenesses of the players.¹⁶ The NCAA has appealed the ruling to the U.S. Court of Appeals for the Ninth Circuit.¹⁷

II. THE SHERMAN ACT AND THE NCAA'S AMATEURISM DEFENSE

The Sherman Act's broad parameters once exploited by the NCAA to evade antitrust liability now serve to expose its contradicting amateurism policies.¹⁸ Part II of this Comment provides a brief overview of the Sherman Act and examines the jurisprudential shift away from deference to the NCAA's amateurism principle.¹⁹ Specifically, Section A explains the per se and rule of reason violations of the Sherman Act in the context of the NCAA.²⁰ Section B examines the 2014 U.S. District Court for the Northern District of California's rule of reason analysis in *O'Bannon v. NCAA*.²¹ Finally, Section C highlights U.S. Supreme Court dicta relied upon by the NCAA in its amateurism defense.²²

A. Overview of the Sherman Act

The Sherman Act functions as a policing tool against market manipulation that unreasonably restrains trade and competition.²³ Given that the Sherman Act is analyzed as a common law statute,²⁴ what constitutes a "restraint on trade" evolves with the dynamics of present economic conditions.²⁵

Cal. 2010) [hereinafter Consolidated Complaint]. The parties subsequently agreed to settle these claims against EA and CLC. *O'Bannon*, 7 F. Supp. 3d at 965.

¹⁶ See *O'Bannon*, 7 F. Supp. 3d at 1007–08; Permanent Injunction at 1, *O'Bannon*, 7 F. Supp. 3d 955 (No. C 09-3329 CW) [hereinafter *O'Bannon* NCAA Injunction].

¹⁷ Notice of Appeal at 1, *O'Bannon*, No. 09-CV-3329-CW (N.D. Cal. Aug. 20, 2014).

¹⁸ See *infra* notes 54–62 and accompanying text.

¹⁹ See *infra* notes 23–62 and accompanying text.

²⁰ See *infra* notes 23–34 and accompanying text.

²¹ See *infra* notes 35–53 and accompanying text.

²² See *infra* notes 54–62 and accompanying text.

²³ See 15 U.S.C. § 1 (2012) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."); see also *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (stating that the Sherman Act protects the public from market failures and conduct that unfairly destroys competition).

²⁴ Christine A. Burns, *Potential Game Changers Only Have Eligibility Left to Suit Up for a Different Kind of Court: Former Student-Athletes Bring Class Action Antitrust Lawsuit Against the NCAA*, 6 J. BUS. & TECH. L. 391, 402 (2011) ("The Sherman Act is treated as a common law statute."). As a common law statute, the Sherman Act provides a broad mandate, which courts shape and apply to the facts of each case. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

²⁵ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (reasoning that it is impractical to create a single framework of what constitutes a "restraint on trade" because

Therefore, courts must determine on a case-by-cases basis whether a restraint on trade is “unreasonable” to the point of illegality.²⁶

An agreement between parties can unreasonably restrain trade under either a per se rule of illegality or a rule of reason analysis.²⁷ An agreement is per se illegal when it is plainly harmful to competition with no significant benefits that it does not warrant the time and expense to analyze its effects.²⁸ Given that some trade restraints are necessary in order for the NCAA to maintain fair and balanced intercollegiate athletics, the restraint against compensation for student-athletes’ names, images, and likenesses must be analyzed under the more flexible rule of reason analysis.²⁹

Under a rule of reason analysis, a court will find liability when a restraint’s harm to competition outweighs its procompetitive effects.³⁰ Some circuits evaluate the rule of reason through a three-step analysis to determine Section 1 violations of the Sherman Act.³¹ First, the plaintiff must illustrate adverse effects on competition in a relevant market caused by the defendant.³² If the plaintiff meets this initial step in the analysis, then the burden shifts to the defendant to assert procompetitive justifications for its action.³³ If the defendant succeeds in the second step, then the burden shifts back to the

the circumstances of each case must be considered); *see* Burns, *supra* note 24, at 402–03 (explaining how the Sherman Act adapts to the current economic landscape).

²⁶ *Leegin*, 551 U.S. at 899 (discussing how all Sherman Act analyses implement a case-by-case common law approach).

²⁷ *See Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 691–92 (describing the “two complementary categories of antitrust analysis”).

²⁸ *See NCAA v. Bd. of Regents*, 468 U.S. 85, 103–04 (1984) (explaining the legal framework of the Sherman Act). Agreements not challenged as per se illegal are analyzed under the rule of reason framework. *See FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458–59 (1986) (reasoning that the restraint must be analyzed under the rule of reason because per se analysis is inappropriate).

²⁹ *See Bd. of Regents*, 468 U.S. at 101 (acknowledging that the NCAA must be given some leeway to adopt anticompetitive restraints because horizontal restraints on competition are essential to maintain intercollegiate athletics); *O’Bannon v. NCAA*, 7 F. Supp. 3d 955, 985 (N.D. Cal. 2014). When economic impact is not immediately obvious, the U.S. Supreme Court has been reluctant to adopt per se rules of analysis. *See id.* (citing *State Oil Co. v. Khan*, 552 U.S. 3, 10 (1997)).

³⁰ *O’Bannon*, 7 F. Supp. 3d at 985.

³¹ *See, e.g., Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977) (explaining that “[u]nder this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition”); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) (same); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991) (same).

³² *Worldwide Basketball*, 388 F.3d at 959; *K.M.B. Warehouse*, 61 F.3d at 127.

³³ *K.M.B. Warehouse*, 61 F.3d at 127.

plaintiff to provide less restrictive alternatives to achieve the same procompetitive effects.³⁴

B. O'Bannon v. NCAA's Application of the Rule of Reason Analysis

The *O'Bannon* plaintiffs' successful Sherman Act claim asserted that the NCAA restrained trade in the national college education market.³⁵ The NCAA conceded that the rules prohibiting compensation for student-athletes' names, images, and likenesses were enacted pursuant to an agreement among its member schools.³⁶ Nor did the NCAA contest that the rules affect interstate commerce.³⁷ Accordingly, the court only analyzed whether the restrictions unreasonably restrained trade under the three-part rule of reason analysis.³⁸

1. Adverse Effects in Relevant Market

The plaintiffs illustrated the effect of the NCAA's unlawful restraint on the national market where schools recruit athletes to participate in FBS football or Division I men's basketball while receiving a higher education.³⁹ FBS football and Division I men's basketball leagues experience unmatched recruitment opportunities due to scholarship availability and the overall league competition.⁴⁰ For this reason, the opportunities offered by these schools operate as a distinct market in the college recruitment process.⁴¹ When acting in harmony with the NCAA, these select schools utilize their position to fix the price of recruits' publicity rights.⁴² The court concluded that not offering recruits a share of licensing revenues eliminates a form of price competition,

³⁴ See *id.* The plaintiff need not address less restrictive alternatives if the defendant fails to meet its obligation under the rule of reason burden-shifting analysis. *O'Bannon*, 7 F. Supp. 3d at 1005 (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1913b (3d ed. 2006)).

³⁵ See *O'Bannon*, 7 F. Supp. 3d at 965, 1007.

³⁶ *Id.* at 985.

³⁷ *Id.*

³⁸ See *id.*; *supra* notes 31–34 and accompanying text (discussing the rule of reason three-part test).

³⁹ See *O'Bannon*, 7 F. Supp. 3d at 986.

⁴⁰ See *id.* at 965–66; *Rock v. NCAA*, 928 F. Supp. 2d 1010, 1022 (S.D. Ind. 2013) (concluding that lower-tier Division I football schools cannot offer the same level of benefits in coaching, facilities, and publicity as top-tier Division I football programs).

⁴¹ See *O'Bannon*, 7 F. Supp. 3d at 987; Cronk, *supra* note 10, at 146–48 (describing lucrative broadcasting deals with national outlets involving FBS football and Division I men's basketball).

⁴² *O'Bannon*, 7 F. Supp. 3d at 988. Any school attempting to offer a recruit compensation for the use of his name, image, and likeness would be subject to sanctions by the NCAA. *Id.* Student-athletes are forbidden to receive financial aid based on athletic ability that is greater than a full “grant-in-aid,” which covers tuition and fees, room and board, and course-related materials. *Id.* at 971.

and creates higher prices than would exist if schools competed over such benefits.⁴³

2. NCAA's Procompetitive Justifications for Restraint

In response to the NCAA's procompetitive justifications for its restriction on student-athlete compensation,⁴⁴ the court held that the restrictions played a limited role in driving the consumer demand for the NCAA's product⁴⁵ and facilitating integration of academics and athletics.⁴⁶ Accordingly, the court rejected the NCAA's claims that restricting players' access to licensing revenues maintains a competitive balance among FBS football and Division I basketball teams⁴⁷ and increases the total output of its product.⁴⁸

⁴³ *See id.* at 987. The court allowed the same evidence used to support the plaintiffs' monopoly theory to support an alternative monopsony (agreement to fix prices among buyers) theory, which it held to be a sufficient restraint of trade in the market for recruits' athletic services. *See id.* at 991.

⁴⁴ *See id.* at 999–1004.

⁴⁵ *Id.* at 1001, 1003. The NCAA asserted that not compensating student-athletes maintains its amateur tradition, which contributes to the popularity of college sports compared to professional sports. *Id.* at 999. The court found that public opinion was dependent on the level of compensation student-athletes would receive. *Id.* at 1000–01. The court concluded that although the NCAA's amateurism principle might justify restricting large payments to student-athletes, it does not justify an overall ban on compensation for student-athletes' names, images, and likenesses. *See id.* at 1001.

⁴⁶ *See id.* at 1003. The NCAA had university administrators testify that paying student-athletes large sums of money would create a wedge between student-athletes and the rest of the academic community. *Id.* at 980.

⁴⁷ *See id.* at 1001. The NCAA's economic expert failed to produce any evidence illustrating that the NCAA's restrictions on student-athlete compensation promotes competitive balance. *See id.* The court otherwise noted that revenues from FBS football and Division I basketball have grown exponentially creating an "arms race" that rewards schools with already large athletic budgets. *See id.* at 1002.

⁴⁸ *See id.* at 1004. The NCAA claimed the ban on compensation increases output by attracting schools philosophically committed to amateurism, and enabling schools who could not otherwise afford to compete in Division I to do so. *Id.* The court noted that some major Division I conferences have conversely sought greater autonomy from the NCAA to enact their own rules, which may result in more student aid. *Id.* *See generally* Eben Novy-Williams, *NCAA's Richest Get Autonomy, Paving Way for More Aid to Athletes*, BLOOMBERG (Aug. 8, 2014), <http://www.bloomberg.com/news/2014-08-07/ncaa-s-richest-get-autonomy-paving-way-for-more-aid-to-athletes.html>, archived at <http://perma.cc/2GS9-E6QW> (discussing that the NCAA restructuring might give athletes at the richest schools a piece of the billion-dollar industry). The court also reasoned that schools have the option of whether or not to re-allocate their athletic budget. *O'Bannon*, 7 F. Supp. 3d at 1004.

3. Less Restrictive Alternatives

The plaintiffs effectively established less restrictive alternatives to the same benefits sought by the NCAA, and therefore the court held that the NCAA unreasonably restrained trade in violation of the Sherman Act.⁴⁹

The first alternative proposed by the plaintiffs would allow schools to reward stipends to student-athletes as long as they do not exceed the cost of attendance.⁵⁰ Next, the plaintiffs proposed that schools hold payments in a trust for student athletes.⁵¹ Both alternatives would derive from revenues generated from athletes' names, images, and likenesses, and the trust would be distributed after graduation or when eligibility expired.⁵² Ultimately, the court granted an injunction to prevent the NCAA from prohibiting FBS football or Division I basketball schools from offering recruits a limited share of the revenues generated from student-athletes' names, images, and likenesses.⁵³

C. U.S. Supreme Court Dicta and the NCAA's Amateurism Defense

The NCAA's amateurism defense in *O'Bannon* relied heavily on U.S. Supreme Court dicta to endorse its restraints as necessary to maintain a unique intercollegiate product.⁵⁴ In 1984, in *NCAA v. Board of Regents of the University of Oklahoma*, the U.S. Supreme Court acknowledged in dicta that the NCAA must be given leeway to adopt anti-competitive rules in order to maintain its unique product.⁵⁵

⁴⁹ See 15 U.S.C. § 1 (2012); *O'Bannon*, 7 F. Supp. 3d at 1007–08. The court found that each alternative discredited the NCAA's procompetitive justifications. See *O'Bannon*, 7 F. Supp. 3d at 982–84. The NCAA's justifications based on consumer demand and integration with academics were grounded in the fear of overly-lucrative compensation for student-athletes. See *id.* at 980, 1000. The NCAA's principle of amateurism would be maintained because the student-athletes' deferred payment vests after eligibility expires and the stipend payments only cover cost of attendance. See *id.* at 982–84. The NCAA's own expert witness testified that his general concerns about paying student-athletes would be partially assuaged if the payments were held in a trust, and he would not be troubled if schools were allowed to make \$5,000 payments. *Id.* at 983.

⁵⁰ See *O'Bannon*, 7 F. Supp. 3d at 982. The NCAA's member schools provided student-athletes with similar stipends before the NCAA lowered its cap on grant-in-aid. *Id.* at 983.

⁵¹ *Id.* at 983; Consolidated Complaint, *supra* note 15, at 4.

⁵² *O'Bannon*, 7 F. Supp. 3d at 983; Consolidated Complaint, *supra* note 15, at 4.

⁵³ *O'Bannon* NCAA Injunction, *supra* note 16, at 1–2. Consistent with the plaintiffs' proposal, the injunction sets a \$5,000 minimum for the deferred compensation granted through a trust fund payable on the student-athlete's graduation or expiration of eligibility. *Id.* The injunction also precludes the NCAA from prohibiting additional stipends for athletes' publicity rights up to the full cost of attendance in addition to a grant-in-aid financial aid package. *Id.* at 2.

⁵⁴ See *Bd. of Regents*, 468 U.S. at 101–02 (stating that in order to preserve the NCAA's "product," athletes should be required to attend class and must not be paid); *In re NCAA Student-Athlete Name & Likeness Litigation*, 990 F. Supp. 2d 996, 1001 (N.D. Cal. 2013) (noting the amateurism defense arguments made by the NCAA on its motion to dismiss in *O'Bannon*).

⁵⁵ See 468 U.S. at 101–02. This case involved a Sherman Act claim surrounding the NCAA's plan to limit the number of college football games televised. *Id.* at 85. The Court noted the NCAA

Prior to *O'Bannon*, the U.S. Supreme Court's dicta in *Board of Regents* solidified a policy of judicial deference that the NCAA relied on to evade antitrust liability.⁵⁶ Both before and after *Board of Regents*, courts generally allowed the NCAA to impose restraints that maintained its amateurism fundamentals.⁵⁷ Some courts even held that NCAA eligibility rules were not subject to antitrust scrutiny at all.⁵⁸

The *O'Bannon* court construed the dicta in *Board of Regents* narrowly, reasoning that a ban on compensation was not the focus of the case, and therefore the U.S. Supreme Court never analyzed whether it had any procompetitive effects.⁵⁹ The *O'Bannon* court's narrowing of the *Board of Regents* dicta aligns with the decisions of a handful of courts beginning to shift away from deference to the NCAA amateurism model.⁶⁰ Although the NCAA has continued to maintain that its restraints are necessary in order to preserve the

sought to market a "particular brand" that is tied to "an academic tradition" and amateurism. *See id.*

⁵⁶ See Lindsay J. Rosenthal, Comment, *From Regulating Organization to Multi-Billion Dollar Business: The NCAA Is Commercializing the Amateur Competition It Has Taken Almost a Century to Create*, 13 SETON HALL J. SPORT L. 321, 330 (2003) (discussing how few have succeeded against the NCAA in antitrust litigation); *infra* notes 57–58 and accompanying text (discussing cases that granted deference to the NCAA).

⁵⁷ *See, e.g.,* McCormack v. NCAA, 845 F.2d 1338, 1344–45 (5th Cir. 1988) (relying on *Board of Regents* in holding that a ban on compensation is necessary for the NCAA product to survive in the face of commercializing pressures); Jones v. NCAA, 392 F. Supp. 295, 303 (D. Mass. 1975) (holding that the eligibility rule was designed to uphold the amateurism model of the NCAA, and thus is valid); Coll. Athletic Placement Serv., Inc. v. NCAA, No. 74-1144, 1974 WL 998, at *3 (D.N.J. Aug. 22, 1974) (holding that the NCAA is structured to promote amateurism and education, and any effect it may have on third parties is "at best indirect").

⁵⁸ *See* Gaines v. NCAA, 746 F. Supp. 738, 744–45 (M.D. Tenn. 1990) (concluding that eligibility rules designed to preserve amateurism are not subject to antitrust liability); Jones, 392 F. Supp. at 303 ("A threshold question is whether the Sherman Act reaches the actions of the NCAA members in setting eligibility standards On the basis of the existing record, this court concludes that it does not."). *But see* Justice v. NCAA, 577 F. Supp. 356, 383 (D. Ariz. 1983) (stating that NCAA rulemaking that is accompanied by a discernable economic purpose should be subject to antitrust scrutiny).

⁵⁹ *In re NCAA Student-Athlete Name & Likeness Litigation*, 990 F. Supp. 2d at 1002 (discussing the Supreme Court's dicta on the motion to dismiss in *O'Bannon*).

⁶⁰ *See Bd. of Regents*, 468 U.S. at 101–02; *O'Bannon*, 7 F. Supp. 3d at 999; White v. NCAA, No. CV 06-999, 2006 WL 8066802, at *4 (C.D. Cal. Sept. 21, 2006) (denying NCAA's motion to dismiss a class action claim regarding the limits placed on athletic financial aid); *In re NCAA I-A Walk-On Football Players Litigation*, 398 F. Supp. 2d 1144, 1146–47 (W.D. Wash. 2005) (alleging that the NCAA's restriction on the number of football scholarships granted prevented the plaintiffs from receiving financial aid). This shift has resulted in courts beginning to recognize specific restrained markets for student-athletes. *See White*, 2006 WL 8066802, at *2; *In re NCAA I-A Walk-On Football Players Litigation*, 398 F. Supp. 2d at 1150. In these cases, the plaintiffs sufficiently alleged a relevant market of NCAA member schools that compete for skilled prospective athletes. *See White*, 2006 WL 8066802, at *3; *In re NCAA I-A Walk-On Football Players Litigation*, 398 F. Supp. 2d at 1150.

amateur product of intercollegiate sports,⁶¹ this shift away from judicial deference may persist as the NCAA continues to face allegations of antitrust violations for its financial aid restraints.⁶²

III. NCAA'S MODERN ECONOMICS REFLECTED IN *O'BANNON* HOLDING

On appeal, the U.S. Court of Appeals for the Ninth Circuit should uphold the 2014 decision of the U.S. District Court for the Northern District of California in *O'Bannon v. NCAA* because it reflects the current economic landscape of the NCAA.⁶³ For one, the distinction between amateur- and commerce-driven NCAA bylaws has diminished.⁶⁴ The NCAA has longed enjoyed limited antitrust liability when enacting rules to protect amateurism because such rules have primarily “noncommercial objectives.”⁶⁵ Recruiting elite high school athletes has become a commercial investment with the possibility of generating millions of dollars for schools.⁶⁶ The NCAA manipulates its amateurism model to deprive student-athletes of their publicity rights

⁶¹ See *Agnew v. NCAA*, No. 1:11-cv-JMS-MJD, 2011 WL 3878200, at *5 (S.D. Ind. Sept. 1, 2011), *aff'd*, 683 F.3d 328 (7th Cir. 2012) (hearing an NCAA argument that one year scholarship rules take “potential abuse” out of recruiting, which promotes amateurism); *In re NCAA I-A Walk-On Football Players Litigation*, 398 F. Supp. 2d at 1148. The NCAA attempted to characterize *In re NCAA I-A Walk-On Football Players Litigation* as a challenge to its protection of amateurism in “big-time college football.” See 398 F. Supp. 2d at 1148.

⁶² See Consolidated Amended Complaint at 4, *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*, No. 4:14-md-2541-CW (N.D. Cal. July 11, 2014). *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation* is a consolidation of Sherman Act antitrust claims alleging the NCAA and its major conferences have unlawfully capped grant-in-aid below the full cost of attending school. *Id.* at 1. The NCAA has moved to dismiss the case, and claims that the restrictions help maintain the collegiate amateurism model. See Notice of Motion to Dismiss at 10, *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litigation*, No. 14-cv-02758-CW (N.D. Cal. Sept. 4, 2014).

⁶³ *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 1002 (N.D. Cal. 2014) (describing the college recruiting process that has been referred to an “arms race”); see *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (holding that the Sherman Act’s prohibitions on restraining trade “evolve to meet the dynamics of present economic conditions”); see also Edelman, *supra* note 9, at 1031 (“Today, the total value of the college sports enterprise is estimated at more than \$11 billion.”).

⁶⁴ See *Agnew v. NCAA*, 683 F.3d 328, 341 (7th Cir. 2012) (“[T]he transactions between NCAA schools and student-athletes are, to some degree, commercial in nature, and therefore take place in a relevant market with respect to the Sherman Act.”). The modern definition of commerce is “almost every activity from which [an] actor anticipates economic gain.” See *id.* at 340 (quoting *AREEDA & HOVENKAMP*, *supra* note 34, at 250).

⁶⁵ See *Gaines v. NCAA*, 746 F. Supp. 738, 743–44 (M.D. Tenn. 1990) (quoting *McCormack v. NCAA*, 845 F.2d 1338, 1343 (5th Cir. 1988)); see also *Justice v. NCAA*, 577 F. Supp. 356, 383 (D. Ariz. 1983) (identifying the two distinct rule making activities of the NCAA—rules concerned with protecting amateurism and rules with a discernable economic purpose).

⁶⁶ See *Agnew*, 683 F.3d at 340 (“No knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought after high school football players do not anticipate economic gain from a successful recruiting program.”).

and to assume all benefits resulting from their skills and effort.⁶⁷ Although the NCAA maintains its position as regulator of an amateur organization, in fact it utilizes student-athletes to sell a very lucrative product.⁶⁸

Further, using amateurism as a means to ban compensation for the use of players' names, images, and likenesses is a denial of the modern commercial realities of the NCAA.⁶⁹ From 2012 to 2013, the NCAA realized total revenue of \$912 million.⁷⁰ This vast revenue is largely due to the NCAA's lucrative broadcasting deals driven by the hard work and success of student-athletes.⁷¹ The NCAA claims its amateurism principle protects student-athletes from commercial exploitation, however revenues reported at the University of Alabama alone are greater than the annual revenues of twenty-five professional NBA teams and all thirty NHL teams.⁷² As the NCAA continues to maintain its fundamentals of amateurism in the face of such lucrative "commercializing pressures," student-athletes deserve a marginal slice of the revenues they effectively create.⁷³

Finally, the alternatives suggested by the *O'Bannon* plaintiffs expose how amateurism is an invalid excuse to the unlawful restraints enacted by the

⁶⁷ See Leslie E. Wong, Comment, *Our Blood, Our Sweat, Their Profit: Ed O'Bannon Takes on the NCAA for Infringing on the Former Student-Athlete's Right of Publicity*, 42 TEX. TECH L. REV. 1069, 1094 (2010) (describing how the NCAA maintains perpetual control of licensing players' images to "protect" student athletes from commercial exploitation).

⁶⁸ See *NCAA v. Miller*, 795 F. Supp. 1476, 1482 (D. Nev. 1992) (stating that while the athletes may be amateurs, intercollegiate athletics is clearly a big business); Rosenthal, *supra* note 56, at 335–36 ("At the same time the NCAA exposes itself to the market commerce, it is trying to maintain its status as an amateur sports organization . . .").

⁶⁹ See Cronk, *supra* note 10, at 137–38 (describing how the NCAA fails to acknowledge the changing commercialization of intercollegiate athletics); Wong, *supra* note 67, at 1086–87 (discussing commercial gains by the NCAA and schools that are driven by the student-athletes).

⁷⁰ NATIONAL COLLEGIATE ATHLETIC ASSOCIATION AND SUBSIDIARIES, CONSOLIDATED FINANCIAL STATEMENT 2012–13, at 4, available at http://www.ncaa.org/sites/default/files/NCAA_FS_2012-13_V1%20DOC1006715.pdf, archived at <http://perma.cc/E439-8EBC>.

⁷¹ See Wong, *supra* note 67, at 1086 (describing how student-athletes drive the success of the NCAA's profitable broadcasts). The NCAA currently has a fourteen-year, \$10.8 billion multimedia deal for NCAA basketball with Turner Broadcasting and CBS Sports. Cronk, *supra* note 10, at 146–47. This contract is solely for the Men's Division I "March Madness" Basketball Tournament, which lasts for three weeks. *Id.* From 2008 to 2013, broadcaster ESPN spent \$10 billion for NCAA television rights. James Miller & Richard Sandomir, *College Football's Most Dominant Player? ESPN*, N.Y. TIMES, Aug. 25, 2013, at A1, available at <http://www.nytimes.com/2013/08/25/sports/ncaaf/college-football-most-dominant-player-its-espn.html>, archived at <https://perma.cc/2ZHM-NCBM?type=pdf>.

⁷² Edelman, *supra* note 9, at 1031 (describing commercial success of NCAA); see NCAA DIVISION I MANUAL, *supra* note 10, art 2.9, at 4 (2014) (asserting that the principle of amateurism protects students from commercial exploitation).

⁷³ See *McCormack*, 845 F.2d at 1344–45; Cronk, *supra* note 10, at 146 (explaining how the current NCAA television deals illustrate the profitability of student-athletes' names, images, and likenesses in promoting NCAA events).

NCAA.⁷⁴ Compensating student-athletes up to the cost of attendance or after eligibility expires maintains the same amateur principles that existed before *O'Bannon*.⁷⁵ The NCAA still has the power to set a cap on payments derived from licensing revenues, which prevents student-athletes from receiving large salaries.⁷⁶ Schools competing with limited revenue compensation will result in recruits having the best possible options to pursue higher education.⁷⁷ This will only bolster the "vital part of the educational system," namely that athletic programs play within the NCAA's fundamental policies.⁷⁸

The Ninth Circuit should uphold the *O'Bannon* district court decision and thus acknowledge the present economic realities of the NCAA.⁷⁹ Moreover, other courts should follow the example of *O'Bannon's* analysis of the legal merits and economic implications of the NCAA's amateurism policies, and continue the trend away from blind deference to the NCAA.⁸⁰

CONCLUSION

The NCAA should no longer be permitted to use its concept of amateurism to internalize its growing profitability. In 2014, in *O'Bannon v. National Collegiate Athletic Association*, the U.S. District Court for the Northern District of California correctly held that the NCAA's refusal to compensate student-athletes for their publicity rights unlawfully restrains the college education market. In so holding, the district court concluded that the NCAA's restriction on compensating student-athletes for the use of their names, images, and likenesses violated the Sherman Act. The stipend and trust payment alternatives proposed by the plaintiffs in *O'Bannon* illustrate that amateurism can co-exist with additional student-athlete benefits. More importantly, the *O'Bannon* decision recognized the inherent contradiction between the

⁷⁴ See *O'Bannon*, 7 F. Supp. 3d at 982–84 (explaining how the plaintiffs' alternatives provide a less restrictive means of achieving the NCAA's goals); *supra* notes 49–52 and accompanying text (describing plaintiffs' less restrictive alternatives); see also Sam Cooper, *Judge Rules Against NCAA in Ed O'Bannon Case*, YAHOO, (Aug. 8, 2014, 7:53 PM), <https://sports.yahoo.com/blogs/ncaaf-dr-saturday/judge-rules-against-ncaa-in-ed-o-bannon-case-235317575.html>, archived at <http://perma.cc/W532-XJAV?type=pdf> ("[The court] noted that the NCAA's key goals could be still accomplished without restrictive economic measures.").

⁷⁵ See *O'Bannon*, 7 F. Supp. 3d at 982–83.

⁷⁶ See *id.* at 980, 1007 (noting that the NCAA asserted that compensating players could result in student-athletes being paid more than their professors).

⁷⁷ *Id.* at 991–92 ("In the absence of this restraint, schools would compete against one another offering to pay more for the best recruits' athletic services and . . . they would engage in price competition.").

⁷⁸ See NCAA DIVISION I MANUAL, *supra* note 10, art 1.3.1, at 1 (2014) ("[A]thletics programs of member institutions are designed to be a vital part of the educational system.").

⁷⁹ See *supra* notes 63–78 and accompanying text.

⁸⁰ See *supra* notes 60–62 and accompanying text.

NCAA's amateurism principle and the billions of dollars profited off student-athletes' names, images, and likenesses.

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